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GLEICHGESCHLECHTLICHE PARTNERSCHAFTEN

Stellungnahme für die von der Bundesministerin für Justiz und der Bundesministerin für Gesundheit, Familie und Jugend eingesetzte

Arbeitsgruppe „Gleichgeschlechtliche Partnerschaften“

20.08.2007

Die Bundesministerin für Justiz und die Bundesministerin für Gesundheit, Familie und Jugend haben mit Billigung der Bundesregierung (Ministerrat) eine Arbeitsgruppe „*Gleichgeschlechtliche Partnerschaften*“ eingerichtet, die unter Bedachtnahme auf die Rechtsprechung des Europäischen Gerichtshofes für Menschenrechte und die Rechtsentwicklung in anderen europäischen Staaten, die verschiedenen Formen der rechtlichen Anerkennung darstellen und prüfen soll. In der konstituierenden Sitzung dieser Arbeitsgruppe am 24.07.2007 wurden Stellungnahmen sämtlicher Teilnehmerorganisationen erbeten.

A. Geschichtliche Entwicklung

Homosexuelle Beziehungen zwischen Frauen und zwischen Männern waren in Österreich bis 1971 zur Gänze verboten und strafbar. Die sog. „Unzucht wider die Natur mit Personen desselben Geschlechts“ wurde nach den §§ 129 und 130 StG des Strafgesetzbuchs 1852 mit schwerem Kerker von einem bis zu fünf Jahren bedroht.

Die kleine Strafrechtsreform ersetzte 1971 dieses Totalverbot der Homosexualität durch vier neue Bestimmungen, von denen eine - nämlich das Verbot der männlichen homosexuellen Prostitution (§ 210 StGB) - im Jahre 1989 und zwei - nämlich das Verbot der „Werbung für Unzucht mit Personen des gleichen Geschlechts“ (§ 220 StGB) und das Verbot von „Verbindungen zur Begünstigung gleichgeschlechtlicher Unzucht“ (§ 221 StGB) - im März 1997 aufgehoben wurden.

Die vierte Sonderstrafbestimmung, § 209 StGB („Gleichgeschlechtliche Unzucht mit Personen unter 18 Jahren“), setzte das Mindestalter für Beziehungen zwischen Männern bei 18 Jahren fest, während es für Beziehungen unter Frauen bzw. Frauen und Männern bei 14 Jahren lag (§§ 206f StGB). § 209 wurde durch den Verfassungsgerichtshof als gleichheitswidrig aufgehoben (VfGH 21.06.2002, G 6/02) und ist am 14.08.2002 außer Kraft getreten (Art. I Z. 19b, IX StRÄG 2002, BGBl I 134/2002).

Der Europäische Menschenrechtsgerichtshof hat wiederholt festgehalten, daß die Aufhebung des § 209 im Sommer 2002 an der Diskriminierung nichts geändert hat, weil Österreich nicht anerkannt hat, dass § 209 und die darauf gegründete strafrechtliche Verfolgung homo- und bisexueller Männer eine Menschenrechtsverletzung war und die Opfer dieser Verfolgung nicht entschädigt hat.[1] Auch der österreichische

[1] *L. & V. v. Austria* (39392/98, 39829/98), judg. 09.01.2003; *S.L. v. Austria* (45330/99), judg. 09.01.2003; *Woditschka & Wilfling vs. Austria* (69756/01, 6306/02), judg. 21.10.2004, par. 29f; *Ladner vs. Austria* (18297/03), judg. 03.02.2005, par. 24f; *Thomas Wolfmeyer vs. Austria* (5263/03), judg. 26.05.2005; *G.B. & H.G. vs. Austria* (11084/02 and 15306/02), judg. 02.06.2005; *R.H. vs. Austria* (7336/03), judg. 19.01.2006.

Verfassungsgerichtshof habe die Verstöße gegen die Europäische Menschenrechtskonvention weder anerkannt noch bereinigt.[2]

Zwar hat der Oberste Gerichtshof entschieden, dass Übertretungen des § 209 StGB heute auch nach seiner Ersatzbestimmung, dem § 207b StGB, nicht mehr bestraft werden dürfen (§ 207b also auch bei männlich-homosexuellen Kontakten nicht auf die Zeit vor seinem Inkrafttreten zurückwirken darf).[3] Und sowohl Verfassungs- als auch Verwaltungsgerichtshof haben erkannt, dass die auf Grund des § 209 ermittelten Polizeidaten aus den (automationsunterstützt oder manuell geführten) Dateien zu löschen sind.[4] Bereits zuvor hatte der Bundesminister für Inneres zum einen per Erlaß die Löschung sämtlicher Vormerkungen nach § 209 im österreichweiten polizeilichen EDV-Datenbank EKIS angeordnet[5] und zum anderen mit Verordnung sämtliche erkennungsdienstlichen Daten (Fingerabdrücke, Fotos, Gendaten etc.) der § 209-Opfer vernichten lassen.[6]

Dennoch verweigern auch diese beiden Gerichtshöfe des öffentlichen Rechts die Vernichtung der polizeilichen Erhebungsakten selbst.[7] Und in vielen Fällen sind Verurteilungen nach § 209 immer noch im österreichweiten Strafregister eingetragen, ohne dass die § 209-Opfer die Möglichkeit hätten, etwas gegen diese perpetuierte Stigmatisierung zu unternehmen, weder durch eine Löschung der Vorstrafen aus dem Strafregister[8] noch durch eine Aufhebung der Verurteilung.[9] [10]

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[2] Ebendort. Der Verfassungsgerichtshof hat § 209 deshalb als verfassungswidrig aufgehoben, weil sich bei Paaren mit weniger als fünf Jahren Altersunterschied ergeben konnte, dass eine bereits legale Beziehung (mit Erreichen des 19. Lebensjahres durch den älteren Partner) wieder kriminell wird. Das erkannte der Verfassungsgerichtshof als grob unsachlich. Zur Frage der Verletzung des Rechts auf Achtung des Privatlebens oder Ungleichbehandlung (männlich) homosexueller Kontakte äußerte er sich nicht (VfGH 21.06.2002, G 6/02).

[3] OGH 11.11.2003 (11 Os 101/03); OGH 26.07.2005 (11 Os 44/05p); OGH 03.11.2005 (15 Os 109/05a); OGH 13.09.2006 (13 Os 51/06h)

[4] VfGH 11.06.2007 (B 1386/06); VfGH 07.03.2007 (B 3517/05); VfGH 26.01.2006 (B 1581/03); VfGH 15.12.2005, B 1590/03); VwGH 19.12.2005 (2005/06/0065)

[5] Erlaß der Generaldirektion für die öffentliche Sicherheit vom 10.04.2003, 8181/421-II/BK/1/03

[6] VO vom 12.08.2003 (BGBl II 361/2003)

[7] VfGH 07.03.2007 (B 1708/06); VfGH 15.12.2005 (B 1590/03); VwGH 27.06.2006 (2005/06/0366); VwGH 19.12.2005 (2005/06/0065); VwGH 21.10.2004 (2004/06/0086)

[8] VfGH 04.10.2006 (B 742/06); VwGH 21.03.2007 (2006/05/0076)

[9] OGH 01.08.2007 (13 Os 135/06m)

[10] Eine erste Beschwerde gegen die fortgesetzte Speicherung der § 209-Verurteilungen im Strafregister ist bereits vor dem EGMR anhängig (*E.B. vs. Austria,* appl. 31913/07).

B. Innerstaatliches Recht

1. Strafrecht

§ 209 StGB ist nicht ersatzlos aufgehoben worden. Seine heftig umstrittene Ersatzbestimmung, § 207b StGB, unterscheidet vom Wortlaut her nicht mehr auf Grund sexueller Orientierung, wird aber unverhältnismäßig oft gegen gleichgeschlechtliche Kontakte angewendet. Zwischen 30 und 100% aller neu eingeleiteten Gerichtsverfahren nach dieser Bestimmung liegen homo- oder bisexuelle Sachverhalte zu Grunde.[11] Das europäische Parlament hat deshalb Österreich aufgefordert, diese Diskriminierung in der Vollziehung des § 207b zu beenden.[12] Der von Österreichs Kinderschutzexperten erarbeitete „Nationale Aktionsplan (NAP) Kinder- und Jugendrechte“[13] beinhaltet die einstimmige Forderung nach einer Evaluation des § 207b nach 5 Jahren seines Bestehens, um festzustellen, ob diese Bestimmung das Selbstbestimmungsrecht (homosexueller) Jugendlicher schützt oder aber beschneidet.

2. Diskriminierungsschutz

Bis vor kurzem kannte die österreichische Rechtsordnung nur zwei bundesrechtliche Bestimmungen, die vor Diskriminierung auf Grund von „sexueller Orientierung“ schützen. § 5 (1) der *Richtlinienverordnung zum Sicherheitspolizeigesetz* gebietet es (seit 1993) Organen des öffentlichen Sicherheitsdienstes, bei der Erfüllung ihrer Aufgaben, alles zu unterlassen, was geeignet ist, als Diskriminierung auf Grund der sexuellen Orientierung empfunden zu werden.[14] Und § 4 Z. 2 des *Datenschutzgesetzes 2000*[15] klassifiziert – in Umsetzung der Datenschutzrichtlinie der EU - Daten über das „Sexualleben“ von Personen als „besonders schutzwürdig“ („sensibel“), wodurch diese Daten einer erhöhten Geheimhaltungs- und Sicherungspflicht unterliegen.

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[11] Justizministerin Mag. Karin Gastinger, *Parlamentarische Anfragebeantwortung*, 28. August 2006, XXII. GP.-NR 4442/AB; Justizministerin Mag. Karin Gastinger, *Parlamentarische Anfragebeantwortung*, 23. Jänner 2006, XXII. GP.-NR 3590/AB; Justizministerin Mag. Karin Gastinger, *Parlamentarische Anfragebeantwortung*, 20. Juli 2005, XXII. GP.-NR 3064/AB; Justizministerin Mag. Karin Miklautsch, *Parlamentarische Anfragebeantwortung*, 06.09.2004, XXII. GP-NR 2020/AB; Justizministerin Mag. Karin Miklautsch, *Parlamentarische Anfragebeantwortung*, 01.07.2004, XXII. GP-NR 1696/AB; Justizminister Dr. Dieter Böhmdorfer, *Parlamentarische Anfragebeantwortung*, 02.09.2003, XXII. GP-NR 660/AB; Justizminister Dr. Dieter Böhmdorfer, *Parlamentarische Anfragebeantwortung*, 03.04.2003, XXII. GP-NR 21/AB; www.parlament.gv.at

[12] Europäisches Parlament, Entschließung zur Lage der Grundrechte in der Europäischen Union (2002), 04.09.2003 (par. 79)

[13] www.yap.at; www.univie.ac.at/bim; www.euro.centre.org

[14] BGBl 1993/266

[15] BGBl. I 1999/165

Auf Landesebene verbietet es das *Wiener Jugendschutzgesetz 2002*[16] unter 18jährigen Medien zugänglich zu machen, deren Inhalt Menschen auf Grund ihrer sexuellen Orientierung diskriminieren (§ 10 Abs. 1 Z. 2). Mit der Oö. Landes-Verfassungsgesetz-Novelle 2001 wurde der *oö Landesverfassung* ein Bekenntnis „zum Verbot jeglicher Diskriminierung im Sinn der Europäischen Menschenrechtskonvention" einverleibt (Art. 9 Abs. 4), welches Bekenntnis sich insb. auch auf das Verbot von Diskriminierung auf Grund „sexueller Orientierung" bezieht.[17]

Ein generelles Verbot von Diskriminierung auf Grund sexueller Orientierung sehen nunmehr jene Gesetze vor, die in Umsetzung der Richtlinie 2000/78/EG[18] erlassen wurden. Es sind dies auf Bundesebene das *Gleichbehandlungsgesetz*[19] und das *Bundes-Gleichbehandlungsgesetz*[20] und auf Landesebene die entsprechenden Landesgesetze.[21] Dabei beschränken 7 der 9 Bundesländer (Burgenland, Wien, Kärnten, Oberösterreich, Steiermark, Salzburg und Tirol) das Diskriminierungsverbot, anders als das Gleichbehandlungsgesetz und Bundes-Gleichbehandlungsgesetz nicht auf die Arbeitswelt sondern schützen in allen Zuständigkeitsbereichen des Landes (in allen Ländern ausser Steiermark und Kärnten auch unter Privaten). Das Steirische und das Salzburger Landes-Gleichbehandlungsgesetz verbieten ausdrücklich auch Diskriminierungen unter Bezugnahme auf den Familienstand.[22]

3. Partnerschaften

Gleichgeschlechtliche Partner sind im österreichischen Recht immer noch erheblich benachteiligt. Die augenfälligsten dieser Benachteiligungen sind in der Anlage beispielhaft dargestellt.

Zum einen werden gleichgeschlechtlichen Paaren zum Teil sogar jene Rechte vorenthalten, die verschiedengeschlechtlichen Paaren zukommen,

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[16] LGBl 17/2002 (16.05.2002), http://www.wien.gv.at/recht/landesrecht-wien/landesgesetzblatt/index.htm

[17] so Ausschussbericht AB 914/2000 GP XXV (Seite 5)

[18] Siehe unten C.2.

[19] BGBl I 66/2004

[20] BGBl I 65/2004

[21] *Burgenland:* Burgenländisches Antidiskriminierungsgesetz (LGBl 84/2005)
Niederösterreich: Nö Gleichbehandlungsgesetz (2060/00 idF 65/2004); Nö Antidiskriminierungsgesetz (LGBl 45/2005)
Kärnten: Kärntner Antidiskriminierungsgesetz (LGBl 63/2004)
Oberösterreich: Oö. Antidiskriminierungsgesetz (LGBl 50/2005)
Salzburg: Salzburger Gleichbehandlungsgesetz (LGBl 31/2006)
Steiermark: Landes-Gleichbehandlungsgesetz (LGBl 66/2004)
Tirol: Landes-Gleichbehandlungsgesetz (LGBl 1/2005); Tiroler Antidiskriminierungsgesetz (LGBl 25/2005)
Wien: Antidiskriminierungsnovelle (LGBl 36/2004), Wiener Antidiskriminierungsgesetz (LGBl 35/2004);
Vorarlberg: Antidiskriminierungsgesetz (LGBl 17/2005)

[22] § 7 Z. 2 stmk.L-GBG; § 5 Abs. 1 Z. 2 S.GBG

auch wenn sie nicht verheiratet sind. Zum anderen besteht dort, wo alle nicht-ehelichen Lebensgemeinschaften gegenüber der Ehe benachteiligt sind, die Diskriminierung der gleichgeschlechtlichen Partner darin, daß sie die Benachteiligungen - im Gegensatz zu den verschiedengeschlechtlichen Partnern - nicht durch Eheschließung vermeiden können.

Erst in ganz jüngster Zeit wurden gleichgeschlechtliche Partnerschaften durch die österreichische Rechtsordnung punktuell anerkannt.

In der Steiermark wurden Landesbedienstete mit gleichgeschlechtlichen LebenspartnerInnen 1998 in der Verwaltungspraxis hinsichtlich der Pflegefreistellung gem. § 55 Abs. 1 Dienstpragmatik 1914 und § 29d (1) Vertragsbedienstetengesetz 1948 gleichgestellt (Anfragebeantwortung des Landesrats Hirschmann vom Juli 1998; vgl. apa OTS 208, 1998-07-07).

Die Stadt Wien hat 1997 erklärt, daß sie bei Gemeindewohnungen das Eintrittsrecht im Todesfall auch gleichgeschlechtlichen LebensgefährtInnen gewährt und bei der Vergabe von Gemeindewohnungen gleichgeschlechtliche Lebensgemeinschaften wie verschiedengeschlechtliche behandle. Auch die gemeindeeigene Wohnbaugenossenschaft „Sozialbau“ hat erklärt, daß sie gleichgeschlechtliche PartnerInnen so wie Ehepartner behandelt.[23] Seit 2003 ist diese Gleichbehandlung rechtsverbindlich auch im Gesetz festgeschrieben.[24]

Auf Bundesebene wurden mit dem Strafrechtsänderungsgesetz 1998 (BGBl 153/1998; NR: GP XX RV 1230 AB 1359 S. 137. BR: AB 5777 S. 643) gleichgeschlechtliche Partnerschaften mit Wirkung vom 01.10.1998 im materiellen und formellen Strafrecht nichtehelichen verschiedengeschlechtlichen Lebensgemeinschaften gleichgestellt. 2002[25] wurden gleichgeschlechtliche LebensgefährtInnen auch in den Angehörigenbegriff der Bundesabgabenordnung (BAO) einbezogen, wodurch ihnen insb. ein Aussageverweigerungsrecht im Abgaben verfahren (§ 171 BAO) und im Finanzstrafverfahren (§ 104 FinStrG) zukommt.[26]

Seit der Entscheidung des EGMR im Fall *Karner gg. Österreich* (2003) (siehe dazu unten C.1.) dürfen gleichgeschlechtliche unverheiratete Paare nicht mehr gegenüber verschiedengeschlechtlichen unverheirateten Paaren benachteiligt werden (so auch VfGH 1410.2005, B 47/05, B 48/05).

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[23] Ius Amandi 1/97, 4; 1/98, 1f, www.RKLambda.at
[24] § 2 Z. 11 WWFSG 1989 idF LBGBl 2003/11 (Art. I Z. 3)
[25] Art. II Z. 1 BGBl 97/2002 (Abgaben-Rechtsmittel-Reformgesetz)
[26] Darüber hinaus ist die Angehörigeneigenschaft für die Frage der Befangenheit relevant (§§ 76 BAO, § 72 FinStrG).

Rechtsvorschriften sind grundrechtskonform anzuwenden. Da der Terminus „Lebensgefährte“ oder „Lebensgemeinschaft“ zuallermeist geschlechtsneutral gehalten ist, kann die Gleichbehandlung durch grundrechtskonforme Interpretation des Gesetzes erreicht werden (so bereits OGH 16.05.2006, 5 Ob 70/06i [Eintrittsrecht Mietvertrag]).

In drei Bereichen finden sich jedoch gesetzlich festgeschriebene Benachteiligungen gleichgeschlechtlicher unverheirateter Paare gegenüber verschiedengeschlechtlichen unverheirateten Paaren: (a) bei der Stiefkindadoption,[27] (b) bei der medizinisch unterstützten Fortpflanzung und (c) bei der Anspruchsberechtigung von Angehörigen in der Krankenversicherung[28] (Details in der Liste der Benachteiligungen im Anhang).

C. Europäisches Recht

1. Grundrechtliche Anforderungen

Gleichgeschlechtlich l(i)ebende Menschen sind, wie es die Parlamentarische Versammlung des Europarates formulierte, Opfer jahrhundertealter Vorurteile.[29] Die Aufhebung sämtlicher diskriminierender Bestimmungen ist eine Voraussetzung für die Aufnahme neuer Mitglieder in den Europarat[30] sowie in die Europäische Union[31], und die Parlamentarische Versammlung des Europarates hat Diskriminierung auf Grund sexueller Orientierung wiederholt als „besonders abscheulich“ und als „eine der abscheulichsten Formen von Diskriminierung“ verurteilt.[32]

Nach der heute ständigen Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte ist die sexuelle Selbstbestimmung ein

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[27] Anhängig vor dem EGMR: *S., K. & J. vs. Austria* (appl. 19010/07) (aus OGH 24.10.2006, 9 Ob 62/06t)

[28] Anhängig vor dem EGMR: *Dietz & Suttasom vs. Austria* (appl. 34062/06) (aus VfGH 1410.2005, B 47/05, B 48/05)

[29] Parlamentarische Versammlung des Europarates, *Empfehlung 924 (1981)* (par. 3)

[30] *Parliamentary Assembly of the Council of Europe*: Written Declaration No. 227, Febr. 1993; Halonen-Resolution (Order 488 [1993]); Opinion No. 176 (1993); Opinion 221 (2000); http://assembly.coe.int

[30] Opinion 216 (2000); Rec. 1474 (2000) (par. 7)

[31] *European Parliament*: Urgency Resolution on the Rights of Lesbians and Gays in the European Union (B4-0824, 0852/98; par. J), 17.09.1998; Resolution on the Respect of Human Rights within the European Union in 1997 ((A4-0468/98; par. 10), 17.12.1998; Resolution on the Respect of Human Rights within the European Union in 1998/99 (A5-0050/00; par. 76, 77), 16.03.2000; http://www.europarl.eu.int/plenary/default_en.htm

[32] Opinion 216 (2000); Rec. 1474 (2000) (par. 7) ; Im September 2001 hat das *Ministerkomitee des Europarates* der Versammlung versichert “that it will continue to follow the issue of discrimination based on sexual orientation with close attention” (Doc 9217, 21.09.2001).

zentrales Schutzgut der Europäischen Menschenrechtskonvention[33] und Diskriminierung auf Grund sexueller Orientierung inakzeptabel.[34]

Der Gerichtshof erachtet solche Diskriminierung als ebenso schwerwiegend wie Diskriminierung auf Grund des Geschlechts, der Religion, der Rasse, Hautfarbe oder der ethnischen Herkunft[35] und verlangt für die Rechtfertigung von Differenzierungen auf Grund der sexuellen Orientierung dementsprechend besonders schwerwiegende Gründe.[36]

Unterschiedliche Regelungen für gleichgeschlechtliche Lebenssachverhalte einerseits und verschiedengeschlechtliche andererseits müssen für die Erfüllung eines legitimen Zieles notwendig sein, bloße Plausibilität, Vernünftigkeit, Sachlichkeit oder die bloße Eignung das Ziel zu erreichen, genügen nicht. Unterscheidungen sind, wie bei Geschlecht, der Religion, der Rasse, Hautfarbe und ethnischer Herkunft nur zulässig, wenn diese Unterscheidungen wirklich notwendig („necessary“) sind, insb. wenn es um ungleiche Behandlung homo- und heterosexueller Lebensgemeinschaften geht.[37]

Vorurteile einer heterosexuellen Mehrheit gegenüber einer homosexuellen Minderheiten können, wie der Gerichtshof wiederholt festgestellt hat, ebensowenig eine ausreichende Begründung für Eingriffe in die Rechte homo- und bisexueller Menschen bieten, wie ähnlich negative

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[33] *L. & V. v. Austria* (39392/98, 39829/98), judg. 09.01.2003, par. 36 (« most intimate aspect of private life »); *S.L. v. Austria* (45330/99), judg. 09.01.2003, par. 29 (« most intimate aspect of private life »); *Woditschka & Wilfling vs. Austria* (69756/01, 6306/02), judg. 21.10.2004, par. 29f; *Ladner vs. Austria* (18297/03), judg. 03.02.2005, par. 24f; *Dudgeon vs. UK* (7525/76), judg. 22.10.1981, par. 41, 52; *Norris vs. Ireland* (10581/83), judg. 26.10.1988 (par. 35ff); *Modinos vs. Cyprus* (15070/89), judg. 22.04.1993 (par. 17ff); *Laskey, Brown & Jaggard sv. UK* (21627/93; 21826/93; 21974/93) 19.02.1997, par. 36; *Lustig-Prean & Beckett vs. UK* (31417/96; 32377/96) (par. 82), 27.09. 1999; *Smith & Grady vs. UK* (33985/96; 33986/96), judg. 27.09.1999 (par. 90); *A.D.T. vs. UK* (35765/97), judg. 31.07.2000 (par. 21ff); *Fretté vs. France* (36515/97), judg. 26.02.2002 (par. 32); European Commission of Human Rights: *Sutherland vs. UK 1997* (25185/94), dec. 01.07.1997 (par. 57: "most intimate aspect of effected individuals 'private life'", also par. 36: "private life (which includes his sexual life)"

[34] *Salgueiro da Silva Mouta vs. Portugal* (33290/96), judg. 21.12.1999 (par. 36)

[35] *Lustig-Prean & Beckett vs. UK* (31417/96; 32377/96), judg. 27.09. 1999 (par. 90); *Smith & Grady vs. UK* (33985/96; 33986/96), judg. 27.09.1999 (par. 97); *Salgueiro da Silva Mouta vs. Portugal* (33290/96), judg. 21.12.1999 (par. 36); *L. & V. v. Austria* (39392/98, 39829/98), judg. 09.01.2003 (par. 45, 52); *S.L. v. Austria* (45330/99), judg. 09.01.2003 (par. 37, 44); *Woditschka & Wilfling vs. Austria* (69756/01, 6306/02), judg. 21.10.2004, par. 29f; *Ladner vs. Austria* (18297/03), judg. 03.02.2005, par. 24f; *Karner vs. Austria*, appl. 40016/98 (par. 37);

[36] *L. & V. v. Austria* (39392/98, 39829/98), judg. 09.01.2003 (par. 45); *S.L. v. Austria* (45330/99), judg. 09.01.2003 (par. 37); *Woditschka & Wilfling vs. Austria* (69756/01, 6306/02), judg. 21.10.2004, par. 29f; *Ladner vs. Austria* (18297/03), judg. 03.02.2005, par. 24f;

[37] *Karner vs. Austria*, appl. 40016/98 (par. 41)

Einstellungen gegenüber Menschen anderer Rasse, Herkunft oder Hautfarbe.[38]

In diesem Sinne hat der Gerichtshof nicht nur Totalverbote homosexueller Kontakte für menschenrechtswidrig erklärt[39] sondern auch strafrechtliche Verbote von homosexuellem Mehrverkehr[40] sowie Sonderaltersgrenzen für gleichgeschlechtliche Beziehungen.[41] Einem 17jährigen Jugendlichen erkannte er Schadenersatz dafür zu, dass er, der sich stets für ältere Partner interessierte, von seinem 14. bis zu seinem 18. Geburtstag von § 209 öStGB davon abgehalten worden ist, erfüllende intime Beziehungen einzugehen, die seiner Neigung (zu erwachsenen Männern) entsprachen.[42] Auch im Ausschluss homosexueller Frauen und Männer vom Dienst in den Streitkräften sah der Gerichtshof eine Verletzung der EMRK (Art. 8).[43] Ebenso wie im Verbot von Gay-Pride-Paraden.[44] Auch ein Verbot homosexueller Pornografie verletzt die Europäische Menschenrechtskonvention.[45]

Entscheidungen im Kindschaftsrecht, die (teilweise) auf der Homosexualität eines Elternteiles beruhen, qualifizierte der Gerichtshof als ungerechtfertigte Diskriminierung auf Grund sexueller Orientierung.[46] Auch die Ungleichbehandlung von unverheirateten gleichgeschlechtlichen Paaren gegenüber unverheirateten verschiedengeschlechtlichen Paaren beim Eintrittsrecht in den Mietvertrag des verstorbenen Partners hat der Gerichtshof als ungerechtfertigt angesehen.[47] Das von der österreichischen

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[38] *Lustig-Prean & Beckett vs. UK* (31417/96; 32377/96), judg. 27.09. 1999 (par. 90); *Smith & Grady vs. UK* (33985/96; 33986/96), judg. 27.09.1999 (par. 97); *L. & V. v. Austria* (39392/98, 39829/98), judg. 09.01.2003 (par. 52); *S.L. v. Austria* (45330/99), judg. 09.01.2003 (par. 44); *Woditschka & Wilfling vs. Austria* (69756/01, 6306/02), judg. 21.10.2004, par. 29f; *Ladner vs. Austria* (18297/03), judg. 03.02.2005, par. 24f;

[39] *Dudgeon vs. UK* (7525/76), judg. 22.10.1981; *Norris vs. Ireland* (10581/83), judg. 26.10.1988; *Modinos vs. Cyprus* (15070/89), judg. 22.04.1993;

[40] *A.D.T. vs. UK* (35765/97), judg. 31.07.2000

[41] *L. & V. v. Austria* (39392/98, 39829/98), judg. 09.01.2003; *S.L. v. Austria* (45330/99), judg. 09.01.2003; *Woditschka & Wilfling vs. Austria* (69756/01, 6306/02), judg. 21.10.2004; *Ladner vs. Austria* (18297/03), judg. 03.02.2005; *Thomas Wolfmeyer vs. Austria* (5263/03), judg. 26.05.2005; *G.B. & H.G. vs. Austria* (11084/02 and 15306/02), judg. 02.06.2005; *R.H. vs. Austria* (7336/03), judg. 19.01.2006.

[42] *S.L. v. Austria* (45330/99), judg. 09.01.2003 (par. 49, 52);

[43] *Lustig-Prean & Beckett vs. UK* (31417/96; 32377/96), judg. 27.09. 1999; *Smith & Grady vs. UK* (33985/96; 33986/96), judg. 27.09.1999.

[44] *Baczkowski vs. PL,* judg. 03.05.2007

[45] EKMR: *S vs Ch*, 14.01.1993

[46] *Salgueiro da Silva Mouta vs. Portugal* (33290/96), judg. 21.12.1999. Fälle, die den gesetzlichen Ausschluß homosexueller Menschen von der Möglichkeit, Blut zu spenden, zum Gegenstand hatten ,wurden von der Liste gestrichen, nachdem das entsprechende Gesetz geändert worden ist (*Tosto vs. Italy* (49821/99), dec. 15.10.2002; *Crescimone vs. Italy*, 49824/99, dec. 15.10.2002; *Faranda vs. Italy*, 51467/99, dec. 15.10.2002)

[47] *Karner vs. Austria* (40016/98), judg. 24.07.2003. Da der Beschwerdeführer selbst nach Einbringung seiner Beschwerde verstorben ist, hatte der Gerichtshof zu entscheiden, ob er den Fall von der Liste streicht oder ob er die Prüfung des Falles fortsetzt; er hat die Prüfung fortgesetzt und und dies damit begründet, dass die gegenständliche Frage eine „wichtige Frage von allgemeiner Bedeutung nicht nur für Österreich ist sondern auch für

Regierung vorgetragene Argument, die Bevorzugung heterosexueller Paare diene dem Schutz der traditionellen Familie ließ der Gerichtshof nicht gelten. [48]

2002 schließlich hat der Gerichtshof ausgesprochen, daß der Wesensgehalt des *Rechts auf Eheschließung* verletzt wird, wenn einer post-operativen transsexuellen Person nicht die Eheschließung mit einem Angehörigen ihres früheren Geschlechts ermöglicht wird.[49] Der Gerichtshof hat damit das Recht anerkannt, eine Person des gleichen biologischen Geschlechts zu ehelichen. Hievon ist es kein allzu großer Schritt mehr, auch das Recht zu gewähren, eine Person zu heiraten, die nicht nur biologisch sondern auch genital und sozial vom gleichen Geschlecht ist, zumal die Begründung des Gerichtshof eins zu eins auch auf solche Ehen übertragbar ist.

So hat der Gerichtshof den bedeutenden sozialen Wandel der Institution Ehe seit der Unterzeichnung der Europäischen Menschenrechtskonvention ebenso betont wie die dramatischen Änderungen durch die Entwicklung von Medizin und Wissenschaft;[50] und er hat das Argument als künstlich zurückgewiesen, dass post-operative Transsexuelle nicht ihres Rechts auf eine Eheschließung beraubt worden seien, weil sie ja weiterhin eine Person ihres früheren Gegengeschlechts heiraten können. Der Gerichtshof verwies darauf, dass die Beschwerdeführerin als Frau lebe und nur einen Mann zu heiraten wünsche; da ihr diese Möglichkeit verwehrt wurde, sei der Wesensgehalt des Rechts auf Eheschließung verletzt worden.[51] Auch im Hinblick auf die (voll) gleichgeschlechtliche Ehe trifft es zu, dass die Ehe bedeutende soziale Änderungen erfahren hat, und die medizinischen und wissenschaftlichen Erkenntnisse dramatische Änderungen erfahren haben. Ebenso künstlich ist das (oft gehörte) Argument, Homosexuelle würden vom Recht auf Eheschließung ausgeschlossen, weil sie ja ohnehin eine Person des andern Geschlechts heiraten könnten. Entsprechend der Argumentationslinie des

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andere Mitgliedstaaten“ (par. 27). Der Fall *Karner* betrifft Ungleichbehandlungen von unverheirateten gleichgeschlechtlichen Paaren gegenüber unverheirateten verschiedengeschlechtlichen Paaren. In *Saucedo Gomez v. Spain* (Appl. 37784/97), dec. 26.01.1999, und in *Nylynd v. Finland* (Application No. 27110/95), dec. 29.06.1999, hat der Gerichtshof Ungleichbehandlung von verheirateten Paaren auf der einen Seite und unverheirateten (verschiedengeschlechtlichen) Paaren als innerhalb des Ermessenspielraums der Staaten gesehen. Über die Diskriminierung gleichgeschlechtlicher unverheirateter Paare (denen eine Eheschliessung verboten ist) gegenüber verschiedengeschlechtlichen Ehepaaren hat der Gerichtshof noch nicht entschieden. Ein solcher Fall liegt ihm aktuell in *M.W. vs. UK (appl. 11313/02)* vor (Hinterbliebenenpension).

[48] *Karner vs. Austria* (40016/98), judg. 24.07.2003 (§ 41).

[49] *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC]; *I. vs. UK* (25680/94), judg. 11.07.2002 [GC]

[50] *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC] (par. 100); *I. vs. UK* (25680/94), judg. 11.07.2002 [GC] (par. 80)

[51] *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC] (par. 101); *I. vs. UK* (25680/94), judg. 11.07.2002 [GC] (par. 81)

Gerichtshofs in den Transsexuellenfällen leben Homosexuelle mit Partnern des gleichen Geschlechts und wünschen, nur eine Person des gleichen Geschlechts zu heiraten, wenn sie diese Möglichkeit nicht haben, erscheint der Wesensgehalt des Rechts auf Eingehung einer Ehe verletzt.

Der Gerichtshof unterstrich, daß die Unfähigkeit eines Paares, Kinder zu zeugen oder Eltern von Kindern zu sein, nicht per se ihr Recht auf Eingehung einer Ehe beseitigen kann.[52] Und er verwies darauf, dass Artikel 9 der EU-Grundrechtecharta, ohne Zweifel mit Absicht, insofern vom Wortlaut des Art. 12 der Europäischen Menschenrechtskonvention (EMRK) abgegangen ist, als die Bezugnahme auf Frauen und Männer gestrichen wurde.[53]

In Ungarn hat der *Verfassungsgerichtshof* entschieden, daß die gesetzlichen Bestimmungen, die Paaren, die in ständiger Wohn- und Geschlechtsgemeinschaft leben, (in bestimmten Rechtsbereichen) dieselben Rechte und Pflichten wie Ehepartnern gewähren, auch für gleichgeschlechtliche Paare zu öffnen sind.[54] Und das deutsche *Bundesverfassungsgericht* hat das Gesetz über die Lebenspartnerschaft gleichgeschlechtlicher Paare bestätigt und ausgesprochen, daß die rechtliche Anerkennung gleichgeschlechtlicher Partnerschaften den besonderen verfassungsgesetzlichen Schutz der Ehe (Art. 6 Grundgesetz) nicht beeinträchtigt und daß gleichgeschlechtliche Paare von verfassungs wegen auch vollständig mit verschiedengeschlechtlichen Ehepaaren rechtlich gleichgestellt werden dürfen.[55]

In Österreich hat der Verfassungsgerichtshof festgehalten, dass Privilegierungen von Ehepaaren gegenüber unverheirateten Paaren eine unzulässige Diskriminierung von gleichgeschlechtlichen Lebensgemeinschaften darstellen können, denen die Ehe ja noch verboten ist.[56]

In Frühjahr 2007 hat der EGMR die Bundesregierung aufgefordert, den Ausschluss gleichgeschlechtlicher Paare von der Zivilehe (Art. 12 EMRK) bzw. das Fehlen eines vergleichbaren Rechtsinstituts (Art. 8, 14 EMRK) zu rechtfertigen.[57]

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[52] *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC] (par. 100); *I. vs. UK* (25680/94), judg. 11.07.2002 [GC] (par. 80)

[53] *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC] (par. 98); *I. vs. UK* (25680/94), judg. 11.07.2002 [GC] (par. 78) ; vgl. auch Europäischer Gerichtshof: *K.B. gegen National Health Service Pensions Agency und Secretary of State for Health*, Case C-117/01 (07.01.2004) (http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=DE&numdoc=62001J0117&model=guichett).

[54] Beschluß 14/1995 (13.03.95).

[55] Urteil vom 17. Juli 2002 (1 BvF 1/01)

[56] VfGH 12.12.2003 (B 777/03)

[57] *Schalk & Kopf vs. Austria* (appl. 30141/04) (aus VfGH 12.12.2003, B 777/03)

Exkurs:

Auch auf globaler Ebene werden das Recht auf sexuelle Selbstbestimmung und das Recht auf Gleichbehandlung auf Grund sexueller Orientierung zunehmend anerkannt. So erklärte der *Menschenrechtsausschuß der Vereinten Nationen* ein Totalverbot homosexueller Beziehungen zwischen Männern als Verletzung des Rechts auf Privatheit[58] und erachtete die Beschränkung von Hinterbliebenenpensionen auf verschiedengeschlechtliche Partner als gleichheitswidrig. [59]

Zahlreiche nationale Höchstgerichte haben die Ungleichbehandlung unverheirateter gleich- und verschiedengeschlechtlicher Paare als Menschenrechtsverletzung erkannt.[60]

Die *Höchstgerichte* der US-Bundesstaaten Hawaii[61] und Massachussetts[62], der kanadischen Provinzen British Columbia,[63] Ontario[64] und Quebec[65] sowie der Republik Südafrika[66] haben zudem die Beschränkung der Zivilehe auf verschiedengeschlechtliche Paare als Verletzung des Gleichbehandlungsgrundsatzes erkannt. Die Höchstgerichte

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[58] *Toonen vs. Australia* (CCPR/C50/D/488/1992, views of 31.03.1994);
[59] *Young vs. Australia* (CCPR/C/78/D/941/2000, views of 29August 2003); *X. vs. Colombia* (1361/05, views of 27. May 2007);
[60] *El Al Airlines Ltd.* v. *Danilowitz* (30 Nov. 1994), High Court of Justice 721/94, 48(5) *Piskei-Din* (Supreme Court Reports) 749 (1994) (Supreme Court of Israel), http://www.tau.ac.il/law/aeyalgross/legal_materials.htm (English); Constitutional Court of Hungary (13 March 1995), 14/1995 (III.13.) AB *határozat*; see László Sólyom & Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor, Univ. of Michigan Press, 2000), at 316-21 (English); *M.* v. *H.*, [1999] 2 S.C.R. 3 (Supreme Court of Canada), http://www.lexum.umontreal.ca/csc-scc/en/index.html; *Ghaidan* v. *Godin-Mendoza*, [2004] 3 All England Reports 411 (House of Lords); *Snetsinger* v. *Montana University System*, 104 P.3d 445 (Supreme Court of Montana 2004); Constitutional Court of Colombia, *Sentencia* (Judgment) C-075/07, 7 February 2007, http://www.constitucional.gov.co (*Relatoria*, *Busqueda*, "*pareja*").
[61] Hawaii Supreme Court: *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44; 74 Haw. 650, 875 P.2d 225 (1993); First Circuit Court: *Baehr vs. Miike* 1996 W.L. 694235; 23 Fam. L. Rptr. 2001 (Haw. Cir. Ct. 1st Cir., 03.12.1996); Hawaii Supreme Court: *Baehr vs. Miike*, HawSC No. 20371, Civ. No. 91-1394-05 (12.09.1999), 1999 Hae LEXIS 391
[62] Supreme Judicial Court of the Commonwealth of Massachussetts: *Hillary GOODRIDGE & others [FN1] vs. DEPARTMENT OF PUBLIC HEALTH & another*. SJC-08860, March 4, 2003. - November 18, 2003; Supreme Judicial Court of the Commonwealth of Massachussetts: *Opinions of Justices to the Senate* (03.02.2004).
[63] Court of Appeal for British Columbia: *Barbeau v. British Columbia (Attorney General)* (01.05.2003)
[64] Court of Appeal for Ontario: Halpern et al v. Attorney General of Canada et al (10.06.2003);
[65] Cour Supérieur von Quebec: Michael Hendricks & René Leboeuf vs. Le procurateur général du Quebec et. al. (06.09.2002)
[66] The Supreme Court of Appeal of South Africa: *Marié Adriaana Fourie & Cecelia Johanna Bonthuys vs. Minister of Home Affairs & Director.-General of Home Affairs* (232/03) (30.11.2004); Constitutional Court of South Africa: *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* (CT 60/04, CT 10705) (01.12.2005)

der US-Bundesstaaten New Jersey und Vermont haben entschieden, dass gleichgeschlechtliche Paare ein Recht auf denselben sozialen Schutz und dieselben sozialen Leistungen haben wie sie verschiedengeschlechtlichen Paaren durch die Ehe zukommen.[67]

Der *Verfassungsgerichtshof der Republik Südafrika* hat überdies das Verbot der Adoption von Kindern durch gleichgeschlechtliche Paare für gleichheitswidrig erklärt.[68]

2. Gemeinschaftsrecht

Das Gemeinschaftsrecht bringt an mehrfacher Stelle das Prinzip der Gleichbehandlung (auch) auf Grund sexueller Orientierung zum Ausdruck.[69]

EG-Vertrag. Mit dem am 01.05.1999 in Kraft getretenen Vertrag von Amsterdam wurde in den EG-Vertrag eine Ermächtigung für den Rat eingefügt, im Zuständigkeitsbereich der EG einstimmig und auf Vorschlag der Kommission Maßnahmen gegen Diskriminierung auf Grund „sexueller Orientierung" zu setzen (Art. 13 EG).

Freizügigkeits-Richtlinie. Die Richtlinie 2004/38/EG über das Recht der Unionsbürger und ihrer Familienangehörigen, sich im Hoheitsgebiet der Mitgliedstaaten frei zu bewegen und aufzuhalten, vom 29.04.2004 (ABl. L 229/35, 29.06.2004) gewährt das Mitzugsrecht als Familienangehöriger auch dem Lebenspartner, mit dem der Unionsbürger auf der Grundlage der Rechtsvorschriften eines Mitgliedstaats eine eingetragene Partnerschaft eingegangen ist, sofern nach den Rechtsvorschriften des Aufnahmemitgliedstaats die eingetragene Partnerschaft der Ehe gleichgestellt ist (Art. 2 Z. 2 lit. b). Beim Mitzugsrecht von Ehepartnern unterscheidet die Richtlinie, bei deren Erlaß bereits zwei Mitgliedstaaten die gleichgeschlechtliche Zivilehe eingeführt hatten, nicht zwischen gleich- und verschiedengeschlechtlichen Ehepartnern (Art. 2 Z. 2 lit. a).

Asyl-Aufnahme-Richtlinie. Die Richtlinie zur Festlegung von Mindestnormen für die Aufnahme von Asylbewerbern in den Mitgliedstaaten vom 27.01.2003 (ABl. L 31/18, 06.02.2003) stellt

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[67] Vermont Supreme Court: *Baker v. State* (98-032) (20.12.1999)
New Jersey Supreme Court: *Lewis v. Harris* (25.10.2006) (drei der sieben Richter, darunter der Präsident des Gerichtshofs, erachteten auch eine eingetragene Partnerschaft mit gleichen Rechten und Pflichten wie die Ehe, wegen des getrennten Rechts, als grundrechtswidrig).

[68] Constitutional Court of South Africa: Du Toi & De Vos vs. The Minister of Welfare and Population Development and others (CCT40/01) (10.09.2002); High Court of South Africa: Du Toi & De Vos vs. The Minister of Welfare and Population Development and others (Case 23704/2001 [Transvaal Provincial Division]) (28.09.2001)

[69] Die folgende Listung stellt eine Auswahl dar. Für weitere Rechtsakte siehe http://europa.eu.int/eur-lex/en/search/search_lif.html (Suche mit „sexual orientation" bzw. „sexueller Ausrichtung")

unverheiratete Paare (unabhängig vom Geschlecht der Partner) Ehepartnern (für die Zwecke der Richtlinie) völlig gleich, wenn die Partner eine dauerhafte Beziehung führen und in den Rechtsvorschriften oder nach der Praxis des betreffenden Mitgliedstaats nicht verheiratete Paare ausländerrechtlich ähnlich wie verheiratete Paare behandelt werden (Art. 2 (d) (i)).

Europäischer Haftbefehl. Der Rahmenbeschluß über den Europäischen Haftbefehl vom 13.06.2002 (ABl L 190/1, 18.07.2002) sieht die Möglichkeit vor, einem Europäischen Haftbefehl wegen Gefahr der Verfolgung, Bestrafung oder Diskriminierung (ua.) auf Grund sexueller Ausrichtung nicht zu entsprechen (Erwägung Nr. 12).

Beschäftigungsrichtlinie. In Ausführung des Art. 13 EGV verabschiedete der Ministerrat am 27.11.2000 die RL 2000/78/EG (ABl L 303/16), mit der unionsweit in der Arbeitswelt umfassende Maßnahmen gegen Diskriminierung u.a. auf Grund „sexueller Ausrichtung" vorgeschrieben werden. Der Gemeinschaftsgesetzgeber hat damit die praktischen Auswirkungen des Urteils des Europäischen Gerichtshofs im Fall C-249/96, *Grant* v. *South-West Trains*, [1998] ECR I-621, umgekehrt, in dem der EuGH Diskriminierungen auf Grund sexueller Orientierung hinsichtlich des Entgelts eines Arbeitnehmers, inkl. Freifahrtvergünstigungen für Partner, als mit dem Gemeinschaftsrecht vereinbar erkannt hatte.

EG-Personalstatut. Das am 15.04.98 vom Ministerrat verabschiedete Personalstatut (VO EG 781/98 = ABl L 113/4) untersagt unmittelbare und mittelbare Diskriminierung auf Grund sexueller Orientierung. Diese Antidiskriminierungsbestimmung im Personalstatut war die erste rechtsverbindliche Vorschrift im Gemeinschaftsrecht, die Diskriminierung auf Grund sexueller Orientierung untersagte, jedoch noch einen Vorbehalt bezüglich Ungleichbehandlungen vorsah, die sich aus einem bestimmten Personenstand ergaben.[70] 2004 wurde dann durch die Verordnung des Rates 723/2004/EG Art. 1d Abs. 1 in das EG-Personalstatut eingefügt, der festlegt, dass urkundlich staatlich anerkannte (insbesondere registrierte) nichteheliche Partnerschaften grundsätzlich wie Ehen behandelt [werden]. Der Gemeinschaftsgesetzgeber hat damit die praktischen Auswirkungen des Urteils des Europäischen Gerichtshofs im Fall C-122/99 P, C-125/99 P, *D. & Sweden* v. *Council*, [2001] ECR 4319, umgekehrt, mit dem der EuGH

[70] „Unbeschadet der einschlägigen Statusbestimmungen, die einen bestimmten Personenstand voraussetzen, haben die Beamten in den Fällen, in denen das Statut Anwendung findet, Recht auf Gleichbehandlung ohne unmittelbare oder mittelbare Diskriminierung aufgrund der Rasse, ihrer politischen, philosophischen oder religiösen Überzeugung, ihres Geschlechts und ihrer sexuellen Orientierung" (Art. 1 a EG-Personalstatut, VO EG 781/98, Abl L 113/4). Siehe auch: „Die Beamten werden ohne Rücksicht auf Rasse, politische, philosophische und religiöse Überzeugung, Geschlecht und sexuelle Orientierung und ungeachtet ihres Personenstandes und ihrer familiären Verhältnisse ausgewählt" (Art. 27 Abs. 2 EG-Personalstatut idF VO EG 781/98, Abl L 113/4). Ebenso Art. 12 Abs. 1 subpar. 2, in dem es um die Auswahl von Beamten auf Zeit geht.

ausgesprochen hatte, dass registrierten Partner kein Anspruch auf die (für Ehepartner vorgesehene) Haushaltszulage zukommt.

Elternurlaubsrichtlinie. Die Richtlinie über die Gewährung von Elternurlaub (96/34/EC) sieht ein Recht auf unbezahlte Karenz vor, wenn dringende Familienangelegenheiten in Fällen von Krankheit oder Unfall die Anwesenheit des Arbeitnehmers unerläßlich machen. In den Protokollen der Beratungen im Ministerrat ist festgehalten, daß diese Richtlinie ohne jede Diskriminierung u.a. aufgrund sexueller Orientierung umgesetzt werden soll.

Datenschutzrichtlinie. Die (EG) Datenschutzrichtlinie (RL 95/46/EG) gewährt speziellen Schutz bei Daten, die sich auf das Sexualleben eines Menschen beziehen (Art. 8) (Euroletter 62, 3).

Social Charter. Die Community Charter of the Fundamental Social Rights of Workers aus 1989 legt in ihrer Präambel fest, daß es im Interesse der Gleichbehandlung wichtig ist, jede Form von Diskriminierung zu bekämpfen (Euroletter 62, 4).

Die *Charta der Grundrechte der Europäischen Union* aus 2000 und der (am 29.10.2004 unterzeichnete) *EU-Verfassungsentwurf* untersagen Diskriminierung auf Grund sexueller Orientierung (Art. 21 Abs. 1 bzw. Art. II-81 Abs. 1) und verbinden nicht mehr Eheschliessung und Familiengründung miteinander. Sie garantieren „[d]as Recht, eine Ehe einzugehen ... nach den einzelstaatlichen Gesetzen“, ohne auf „Männer und Frauen“ Bezug zu nehmen (Art. 9 der Charta und Art. II-69 der Verfassung), wie es die Europäische Menschenrechtskonvention (EMRK) noch getan hat (Art. 12). Der Europäische Menschenrechtsgerichtshof hat ausdrücklich darauf hingewiesen, dass diese Abweichungen der EU-Grundrechtecharta von der EMRK „ohne Zweifel mit Absicht“ vorgenommen worden sind.[71]

Im Februar 1994 verabschiedete das Europäische Parlament die „*Resolution über gleiche Rechte von homosexuellen Frauen und Männern in der EG*“[72]. Es bekräftigt darin seine Überzeugung, daß „alle Bürger gleich behandelt werden [müßten] ungeachtet ihrer sexuellen Orientierung“ und fordert die umfassende Gleichberechtigung und die Beendigung jeder Diskriminierung homosexueller Menschen. Neben der Gleichstellung in anderen Rechtsbereichen wird auch der Zugang zur „Ehe oder vergleichbaren rechtlichen Regelungen“, die „die vollen Rechte und Vorteile der Ehe garantieren“, sowie der Gleichbehandlung im Pflegschafts- und Adoptionsrecht gefordert.[73] In seinen *Menschenrechtsberichten* für die Jahre 1994[74], 1995[75] , 1996[76], 1997[77] 1998/99[78], 2000[79], 2001[80] und 2002[81]

[71] Ausführlich unter oben 1.
[72] Dok. A3-0028/94 (8.2.1994)
[73] Pkt. 5 bis 15 der Resolution.
[74] 15.09.96; Euroletter 45, 6
[75] Entschließung vom 08.04.1997 (A4-0112/97; Pkt. 135, 136, 137, 140)

sowie in seiner Entschliessung gegen Homophobie in Europa (2006)[82] bekräftigte das Parlament seinen Appell zur Beendigung jeder Diskriminierung auf Grund sexueller Orientierung und zur gesetzlichen Anerkennung gleichgeschlechtlicher Paare.

D. Ausländische Rechtsordnungen

1. Strafrecht

Kein europäischer Staat kennt heute noch ein Totalverbot homosexueller Handlungen und nahezu keine Rechtsordnung Europas behandelt noch homosexuelle Kontakte im Strafrecht anders als heterosexuelle.[83]

2. Diskriminierungsschutz

Zumindest in den 15 alten Mitgliedstaaten der Europäischen Union ist heute ein gesetzlicher Schutz vor Diskriminierung auf Grund sexueller Orientierung, auch außerhalb der Arbeitswelt, Standard.[84] Die am 01.01.2000 in Kraft getretene Verfassung der Schweiz sieht (als vierter Staat der Welt)[85] den Schutz gleichgeschlechtlicher Lebensweisen sogar im Verfassungsrang vor.[86] Auch Portugal[87] und die deutschen Bundesländer

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[76] Entschließung vom 17.02.1998 (A4-0034/98; Pkt. E., 65-69,
[77] Entschließung vom 17.12.1998 (A4-0468/98; Pkt. 10, 51-54, 73, 82)
[78] Entschließung vom 16.03.2000 (A5-0050/00; Pkt. 56-60, 76, 77)
[79] Entschließung vom 05.07.2001 (A5-0223/01, Pkt. 77ff)
[80] Entschließung vom 15.01.2002 (A5-0451/02, Pkt. 65, 99ff)
[81] Entschließung zur Lage der Grundrechte in der Europäischen Union (2002), 04.09.2003
[82] P6_TA(2006)0018 (18.01.2006)
[83] Eingehend Helmut Graupner: *Sexual Consent – The Criminal Law in Europe and Outside of Europe*, in Graupner, Helmut & Bullough, Vern (Hrsg.): Adolescence, Sexuality and the Criminal Law, New York: Haworth Press (2005); siehe auch die Europakarte auf www.RKLambda.at (Rechtsvergleich)
[84] Eingehend Helmut Graupner, K*eine Liebe zweiter Klasse – Diskriminierugnsschutz und Partnerschaft für gleichgeschlechtlich L(i)ebende*, Wien: Rechtskomitee LAMBDA (2004), www.RKLambda.at (Publikationen); siehe auch die Europakarte auf www.RKLambda.at (Rechtsvergleich)
[85] nach Südafrika (1996), Fiji (1998) und Ecuador (1998); auch die am 19.08.2007 in einem Referendum angenommene neue thailändische Verfassung beinhaltet ein Verbot der Diskriminierung auf Grund „anderer sexueller Identitäten".
[86] Art. 8 Rechtsgleichheit
Alle Menschen sind vor dem Gesetz gleich.
Niemand darf diskriminiert werden, namentlich nicht wegen der Herkunft, der Rasse, des Geschlechts, des Alters, der Sprache, der sozialen Stellung, der Lebensform, der religiösen, weltanschaulichen oder politischen Überzeugung oder wegen einer körperlichen, geistigen oder psychischen Behinderung.
...
...
(BBl 1999 973 1623, 1997 I 1, 1999 5986; AS 1999 2556)

Brandenburg, Berlin, Bremen und Thüringen haben in ihre *Verfassungen* ein Gleichbehandlungsgebot aufgenommen, das auch die Kategorie „sexuelle Orientierung“, und den Schutz nicht-ehelicher Lebensgemeinschaften enthält.[88]

3. Partnerschaften

Der Trend in der innerstaatlichen Gesetzgebung der Mitgliedstaaten der Europäischen Union geht in Richtung Gleichbehandlung verschieden- und gleichgeschlechtlicher Paare.[89]

1994 hatten, von den 27 heutigen Mitgliedstaaten, nur 4 Mitgliedstaaten (Dänemark, die Niederlande, Spanien und Schweden) in irgendeiner Form gesetzliche Gleichbehandlung in zumindest einem Bereich vorgesehen. Seit 1. Dezember 2004 sind es zumindest 14 Mitgliedstaaten (mit etwa zwei Drittel der Bevölkerung der EU), die eine solche Gesetzgebung haben (über die von RL 2000/78/EG ohnehin vorgeschriebene Gleichbehandlung in der Arbeitswelt hinaus): Belgien, Dänemark, Deutschland, Finnland, Frankreich, Luxemburg, die

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[87] „1. Alle Bürger haben die gleiche soziale Stellung und sind vor dem Gesetz gleich.
2. Niemand darf privilegiert, bevorzugt oder diskriminiert werden und niemandem darf ein Recht vorenthalten und niemand von einer Pflicht befreit werden, auf Grundlage seiner oder ihrer Abstammung, Geschlecht, Rasse, Sprache, Herkunftsland, Religion, politischer oder ideologischer Überzeugung, Erziehung, wirtschaftlichen Situation, sozialen Umstände oder sexuellen Orientierung.“
("Diário da República" [official gazette], no. 173, of July 24, 2004)

[88] Art. 12 (2) Verfassung des Landes Brandenburg (BbgVerf) „Niemand darf wegen […] seiner sexuellen Identität […] bevorzugt oder benachteiligt werden“
Art. 26 BbgVerf „(1) Ehe und Familie sind durch das Gemeinwesen zu schützen und zu fördern […] (2) Die Schutzbedürftigkeit anderer auf Dauer angelegter Lebensgemeinschaften wird anerkannt“.
Art. 2 (3) Verfassung des Landes Thüringen (VerfThür) „Niemand darf wegen […] seiner sexuellen Orientierung […] bevorzugt oder benachteiligt werden“
(zitiert nach Beck‘sche Textausgabe, *Gesetze des Landes Brandenburg*, Verlag C.H.Beck, München, Loseblattsammlung und Beck‘sche Textausgabe, *Gesetze des Landes Thüringen,* Verlag C.H.Beck, München, Loseblattsammlung)
Art. 10 (2) VvB „Niemand darf wegen ... seiner sexuellen Identität ... benachteiligt oder bevorzugt werden.“
Art. 12 VvB: (1) Ehe und Familie stehen unter dem besonderen Schutz der staatlichen Ordnung
(2) Andere auf Dauer angelegte Lebensgemeinschaften haben Anspruch auf Schutz vor Diskriminierung“
(zit. nach: Landeszentrale für politische Bildungsarbeit Berlin, *Die Verfassung von Berlin und das Grundgesetz für die Bundesrepublik Deutschland*, Berlin (1996)
Art. 2 Abs. 2 Landesverfassung der Freien Hansestadt Bremen: „Niemand darf wegen ... seiner sexuellen Identität ... bevorzugt oder benachteiligt werden“ (GBl. 2001, Nr. 43, S. 279, 13.09.2001)

[89] Für Nachweise siehe eingehend Eingehend Helmut Graupner, *Keine Liebe zweiter Klasse – Diskriminierungsschutz und Partnerschaft für gleichgeschlechtlich L(i)ebende* , Wien: Rechtskomitee LAMBDA (2004), www.RKLambda.at (Publikationen); vgl. auch die Europakarte auf www.RKLambda.at (Rechtsvergleich)

Niederlande, Portugal, Slowenien, Spanien, Schweden, Tschechien, Ungarn und das Vereinte Königreich. Auch Österreich ist zu diesen Ländern zu zählen (vgl. oben B.3.), sodaß sich die Gesamtzahl auf 15 erhöht.

17 europäische Länder (darunter 12 Mitgliedstaaten der EU) sind über solche punktuellen Gleichstellungen hinausgegangen und haben gleichgeschlechtliche Partnerschaften formell rechtlich institutionalisiert anerkannt, wobei dafür in den verschiedenen Rechtsordnungen drei Modelle zu unterscheiden sind.

Im *skandinavischen Modell* wird für homosexuelle Paare ein neues familienrechtliches Institut geschaffen, die eingetragene Partnerschaft, für die grundsätzlich die gleichen Regelungen gelten wie für die Ehe. Anfangs sahen die skandinavischen Staaten einige wenige Ausnahmen von diesem Grundsatz vor (hinsichtlich Partnerschaften mit Auslandsbezug und hinsichtlich Adoption), die aber in letzter Zeit sukzessive aufgehoben werden. Dieses Modell haben die folgenden Staaten gewählt: Dänemark, Grönland, Schweden, Norwegen, Island, Finnland, Großbritannien, Slowenien, Tschechien, die Schweiz und Deutschland.

Auch das *französische Modell* sieht die Schaffung des neuen familienrechtlichen Instituts der eingetragenen Partnerschaft vor, beschränkt diese Partnerschaft aber nicht auf gleichgeschlechtliche Paare sondern ermöglicht sie auch verschiedengeschlechtlichen Paaren. Dementsprechend wird die eingetragene Partnerschaft (in Frankreich „PACS“ genannt), im Gegensatz zum skandinavischen Modell, mit deutlich weniger Rechten und Pflichten ausgestattet als die Ehe. Die eingetragene Partnerschaft wird bei diesem Modell auch nicht, wie die Ehe, am Standesamt geschlossen. Die Inferiorität der eingetragenen Partnerschaft bei diesem Modell zeigt sich auch daran, dass verheiratete Personen eine solche nicht eingehen können, eine aufrechte eingetragene Partnerschaft aber (anders als im skandinavischen Modell) kein Ehehindernis darstellt. Jeder der eingetragenen Partner kann jederzeit eine dritte Person heiraten, wobei die Eheschließung die eingetragene Partnerschaft ex lege auflöst. Das französische Modell haben neben Frankreich noch Luxemburg und Andorra gewählt.

Das dritte Modell schließlich stellt eine umfassende Gleichbehandlung gleichgeschlechtlicher Paare her durch die Aufhebung des Ehehindernisses der Gleichgeschlechtlichkeit und der Öffnung der *Zivilehe* auch für gleichgeschlechtliche Paare. Diesen Weg haben in Europa bislang die Niederlande, Belgien und Spanien beschritten (ausserhalb Europas Kanada, die Republik Südafrika und der US-Bundesstaat Massachussetts). In Schweden steht die Öffnung der Zivilehe und die Abschaffung der eingetragenen Partnerschaft bevor.[90]

[90] Sonderbeauftragter der Schwedischen Regierung, Bericht, März 2007, SOU 2007:17)

Die *gemeinsame Annahme eines Wahlkindes* („Adoption“) durch gleichgeschlechtliche Partner ermöglichen in Europa bisher Spanien,[91] England & Wales[92], Schottland[93], die Niederlande[94], Belgien[95], Schweden[96], Dänemark[97], Island[98], Norwegen[99] und Deutschland[100].

E. Mögliche Partnerschaftsmodelle

Auch für Österreich bieten sich sohin die oben angeführten drei Modelle an. Hinsichtlich der Verwirklichung des Gleichbehandlungsgrundsatzes stellen sie sich wie folgt dar.

Das *französische Modell* schafft neben der Ehe ein weiteres familienrechtliches Institut und erhöht damit die Wahlfreiheit von Paaren, die eine formalisierte Partnerschaft eingehen wollen. Weil dieses neue Institut jedoch auch verschiedengeschlechtlichen Paaren offen steht und die Ehe gleichgeschlechtlichen Paaren verschlossen bleibt, bewirkt dieses Modell keine Gleichstellung von homosexuellen Paaren mit heterosexuellen. Denn während verschiedengeschlechtlichen Paaren (statt bisher zwei) dann drei Optionen offen stehen (Ehe - eingetragene Partnerschaft – formlose Lebensgemeinschaft), sind es für gleichgeschlechtliche Paare weiterhin weniger, nämlich (statt bisher einer) nun zwei (eingetragene Partnerschaft – formlose Lebensgemeinschaft). Hinzu kommt die deutliche inhaltliche Inferiorität der eingetragenen Partnerschaft gegenüber der Ehe.

Das *skandinavische Modell* bietet homosexuellen Paaren zwar gleich viele Alternativen wie heterosexuellen Paaren (Heterosexuelle: Ehe – formlose Lebensgemeinschaft; Homosexuelle: eingetragene Partnerschaft - formlose Lebensgemeinschaft). Allerdings erscheint dieses Modell auch dann nicht in vollem Maße dem Gleichbehandlungsgrundsatz zu entsprechen, wenn inhaltlich (hinsichtlich Rechtswirkungen und Verfahren)

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[91] Ley 13/2005, de 1 de julio, por la que se modifica el Codígo Civil en materia de derecho a contraer matrimonio, *Boletín Oficial del Estado* no. 157, 2 July 2005, pp. 23632-23634, http://www.boe.es/boe/dias/2005-07-02/pdfs/A23632-23634.pdf (in Kraft seit 3. Juli 2005).

[92] Adoption and Children Act 2002 (in Kraft seit 07.11.2002; http://www.hmso.gov.uk/acts/acts2002.htm)

[93] Adoption and Children (Scotland) Act 2007, s. 29(3) (Gesetzesvorschlag für Nordirland: "Adopting the Future", http://www.dhsspsni.gov.uk/adopting_the_future-3.pdf, Juni 2006).

[94] Gesetz vom 21.12.2000 (Staatsblad 2001 nr. 10 11.01.2001)

[95] Loi du 18 mai 2006 modifiant certaines dispositions du Code civil en vue de permettre l'adoption par des personnes de même, *Moniteur belge*, 20 June 2006, Edition 2, p. 31128 (in Kraft seit 30. November 2006).

[96] Parlamentsbeschluß vom 5. Juni 2002; Euroletter 98 (http://www.steff.suite.dk/eurolet/eur_98.pdf)

[97] nur die Stiefkindadoption (also die Annahme des leiblichen Kindes des Partners)

[98] Law No. 65/2006 (in force 27 June 2006), amending Law No. 130/1999, art. 2.

[99] nur die Stiefkindadoption

[100] Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts (15.12.2005, BGBl 2004 I Nr. 69 S. 3396)

keinerlei Unterschiede zwischen Ehe und eingetragener Partnerschaft gemacht werden. Es bleibt der Umstand bestehen, dass gleichgeschlechtliche Paare keine Ehe und verschiedengeschlechtliche Paare keine eingetragene Partnerschaft eingehen können. Derart (auf Grund des Geschlechts und der sexuellen Orientierung) getrenntes Recht (bzw. Sonderrecht) steht in einem Spannungsverhältnis mit dem Gleichheitssatz.

In diesem Sinne erklärten es jene Höchstgerichte, die den Ausschluß gleichgeschlechtlicher Paare von der Zivilehe als gleichheitswidrig erkannten (oben C.1.Exkurs), für unzulässig, dass in einer Rechtsordnung für verschiedene Gruppen von Menschen unterschiedliche (wenn auch inhaltlich gleiche) rechtliche Regime herrschen. Diese Höchstgerichte lehnen im Bereich von auf Grund des Geschlechts und der sexuellen Orientierung getrennten Rechts die „separate but equal"-Doktrin[101] ebenso ab wie im Bereich von auf Grund rassischer Merkmale getrennten Rechts. Dementsprechend wird der Ausschluß gleichgeschlechtlicher Paare von der Ehe ebensowenig deshalb als gleichheitskonform angesehen, weil verschiedengeschlechtliche Paare ihrerseits von der eingetragenen Partnerschaft ausgeschlossen sind, wie wenig der Ausschluß Schwarzer von Schulen für Weisse deswegen gleichheitskonform ist, weil Weisse ihrerseits keine Schulen für Schwarze besuchen dürfen.

Ein konsequentes Verständnis des Gleichheitssatzes erfordert, dass jene (familien)rechtlichen Institute, die die Rechtsordnung Paaren anbietet, unabhängig von Geschlecht und sexueller Orientierung zugänglich sind. In Österreich wäre also dementsprechend das Institut der Zivilehe auch gleichgeschlechtlichen Paaren zu eröffnen.

In diesem Zusammenhang erscheint es auch von Bedeutung, dass getrenntes Recht der Gesellschaft beständig mangelnde Gleichwertigkeit signalisiert und damit Diskriminierungen homo- und bisexueller Menschen Vorschub leistet.

Schließlich sprechen auch praktische Erwägungen für die *Öffnung der Zivilehe*. Es wird nicht nur den Rechtsanwendern für den Umgang mit gleichgeschlechtlichen Paaren ein bestens vertrautes rechtliches Instrumentarium an die Hand gegeben und kann der Gesetzestext kurz, deutlich und prägnant gehalten werden (vgl. Gesetzentwurf im Anhang), sondern es wird auch die Anerkennung der Partnerschaften im Ausland deutlich vereinfacht. Alle Rechtsordnungen kennen Anerkennungsregeln

[101] Mit der „separate-but-equal"-Doktrin erklärte der US.-Supreme Court über nahezu ein Jahrhundert hinweg die Rassentrennung trotz Gleichheitssatz für verfassungskonform. Im Sinne dieser Doktrin war es etwa nicht gleichheitswidrig, dass Schwarze nicht in Bussen für Weisse fahren durften, wenn umgekehrt auch Weisse keine Busse benutzen durften, die Schwarzen vorbehalten waren.. Erst in den 50iger und 60iger Jahren des 20. Jahrhunderts hat das US-Höchstgericht diese Doktrin nach und nach aufgegeben (vgl. *Brown* v. *Board of Education,* 349 U. S. 294 (1955); *Loving* v. *Virginia,* 388 U. S. 1 (1967)).

für im Ausland geschlossene Ehen, jedoch nur die wenigsten für eingetragene Partnerschaften.

Auf Grund der Kompetenz des Bundes zur Definition und Ausgestaltung der Ehe (Art. 10 Abs. 1 Z. 6 B-VG „Zivilrechtswesen“) wirkt die Aufhebung des Eheverbotes auch auf Landesebene und bringt auch dort Gleichbehandlung. Überall dort wo *Landesvorschriften* (man denke etwa an die bedeutenden Bereiche der Wohnbauförderung und der Landes- und Gemeindebediensteten) auf „Ehe“ oder „Ehepartner“ abstellen sind dann auch gleichgeschlechtliche Ehepartner erfasst. Eine eingetragene Partnerschaft kann der Bund zwar auch auf Grund seiner Zivilrechtskompetenz zwar schaffen, es wäre aber an den jeweiligen Landesgesetzgebern, in ihren Kompetenzbereichen an eine eingetragene Partnerschaft (ein bisher unbekanntes, neu geschaffenes Institut) die gleichen Rechte und Pflichten zu knüpfen wie an die Ehe. Der Bundesgesetzgeber könnte eingetragene Partner nur im Bereich der Bundeskompetenz mit Ehepartnern gleichstellen. Die Folge wären 10 verschiedene Legislativen, die jeweils darüber entscheiden, ob und in welchem Ausmass eingetragene Partner mit Ehepartnern gleichgestellt werden. 10 Legislativen, die nicht alle und vor allem nicht in gleicher Weise handeln werden. Die Gefahr einer unerträglichen Zersplitterung der Rechtslage und des Gleichbehandlungsstandards in den verschiedenen Bundesländern ist evident. Deutschland gibt hierbei ein abschreckendes Beispiel: seit der Einführung der eingetragenen Lebenspartnerschaft vor 6 Jahren haben bis heute erst sieben[102] der 16 Bundesländer überhaupt Landesanpassungsgesetze erlassen, die die eingetragene Lebenspartnerschaft auf Landesebene in irgendeiner Form rechtlich wahrnehmen.

Die analoge Problematik findet sich im *kollektiven Arbeitsrecht* wieder (Kollektivverträge und Betriebsvereinbarungen) sowie im Bereich der *betrieblichen Altervorsorge* (Pensionskassen). Während einem Verweis auf eine Ehe und das Eherecht Änderungen in der Ausgestaltung des Rechtsinstituts der Zivilehe durch künftige Eherechtsreformen implizit ist, erscheint es fraglich, ob die gesetzliche Anordnung der Erstreckung von Rechten und Pflichten, die Vertragsparteien an das Vorliegen einer Ehe geknüpft haben, auch auf das völlig neue Institut einer eingetragenen Partnerschaft verfassungsgesetzlich zulässig wäre.

Eine *umfassende Gleichbehandlung auf allen Ebenen des Staates und in allen (bedeutenden) Lebensbereichen* kann *nur die Aufhebung des Eheverbotes* garantieren.

Die *österreichische Rechtsordnung* kennt auch bereits jetzt *gültige gleichgeschlechtliche Ehen*. Zum einen bleibt eine verschiedengeschlechtlich eingegangene Ehe dann rechtsgültig (als

[102] Berlin, Bremen, Hamburg, Mecklenburg-Vorpommern, Nordrhein-Westfalen, Sachsen-Anhalt, Schleswig-Holstein (siehe www.lsvd.de)

gleichgeschlechtliche Ehe) bestehen, wenn einer der beiden Ehepartner das Geschlecht wechselt.[103] Zum anderen sind gleichgeschlechtliche Ehen rechtsgültig, wenn das Heimatrecht beider Partner eine solche Ehe zulässt, und sind gleichgeschlechtliche Verlobte aus solchen Ländern auch in Österreich ehefähig ((§ 17 Abs. 1 IPRG). Hinzu kommt, dass die EU-Freizügigkeitsrichtlinie (2004/38/EG) beim Mitzugsrecht des Ehepartners nicht zwischen verschieden- und gleichgeschlechtlichen Ehen unterscheidet,[104] und das gemeinschaftsrechtliche Prinzip der gegenseitigen Anerkennung die Anerkennung von in anderen EU-Mitgliedstaaten gültig geschlossenen Ehen verlangt.[105]

Eine seriöse Abschätzung der mit einer Gleichstellung homosexueller Partnerschaften verbundenen Mehrkosten für die öffentliche Hand liefert im übrigen die im Auftrag des Ludwig-Boltzmann-Institutes zur Analyse wirtschaftspolitischer Aktivitäten erstellte Studie *„Was wäre wenn? Eingetragene Partnerschaften von Lesben und Schwulen in Österreich“*.[106] Demnach würde die Einführung gleicher Rechte und Pflichten für gleichgeschlechtliche Paare die öffentlichen Haushalte in den ersten Jahren sogar entlasten. Danach ergäben sich auf Grund der Begünstigungen bei der Erbschafts- und Schenkungssteuer und der Hinterbliebenenversorgung in der Sozialversicherung Mehrkosten, die jedoch minimal ausfielen. Im Bereich der größten Kostenbelastung, der Hinterbliebenenversorgung in der Pensionsversicherung, wird eine Ausgabensteigerung in der Höhe von lediglich 0,8% prognostiziert, und auch das erst 50 Jahre nach der Einführung.[107] Selbst diese Minimalststeigerung wird noch dadurch deutlich reduziert, dass mittlerweile die Hinterbliebenenpensionen nicht mehr zwischen 40% und 60% sondern zwischen 0% und 60% ausmachen (SozialRÄG 2000) und die Erbschafts- und Schenkungssteuer ohnehin entfallen soll.

F. Schlußfolgerung

In konsequentem Verständnis des Gleichheitssatzes und aus praktischen Erwägungen sollte gleichgeschlechtlichen Paaren ebenso die Zivilehe ermöglicht werden wie verschiedengeschlechtlichen Paaren.

Eine eingetragene Partnerschaft ist, selbst dann, wenn sie inhaltlich mit den gleichen Rechten und Pflichten ausgestattet wäre und für sie das gleiche formelle Regime gälte wie bei der Zivilehe, nur die zweitbeste

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[103] *Hopf/Kathrein*, Eherecht[2] § 44 Anm 4; *Stabentheiner* in *Rummel*[3], § 44 Rz 2; *Schwimann/Ferrari* in *Schwimann*, ABGB3 I, § 44 Rz 2; VfGH 08.06.2006 (V 4/06)

[104] Zum Zeitpunkt der Annahme der Richtlinie haben bereits zwei Mitgliedstaaten das Eheverbot aufgehoben (die Niederlande und Belgien).

[105] vgl. Art. 12, 18, 39 EG; EuGH: *Garcia Avello* 2003, C-148/02

[106] Pirolt, Karin / Weingand, Hans P / Zernig, Kurt: *Was wäre wenn? Eingetragene Partnerschaften von Lesben und Schwulen in Österreich*, Im Auftrag des Ludwig Boltzmann Institutes zur Analyse wirtschaftspolitischer Aktivitäten, Graz 2000 (ISBN 3-902080-00-0)

[107] Eingehend Pirolt/Weingand/Zernig, 114

Möglichkeit mit erheblichen Defiziten und einer Perpetuierung der sexuellen Apartheid.

In jedem Fall muss der Ort der Schliessung der gleichgeschlechtlichen Zivilehe oder der eingetragenen Partnerschaft vor derselben Behörde stattfinden, vor der auch die verschiedengeschlechtliche Zivilehe geschlossen wird. Dies folgt bereits aus dem verfassungsgesetzlichen Gleichheitsgrundsatz, wird doch gleichgeschlechtlichen Paaren andernfalls bereits bei der Schliessung ihrer Partnerschaft vor Augen geführt, dass sie es nicht (einmal) wert sind, ihre Partnerschaft am selben Ort zu schliessen wie verschiedengeschlechtliche Paare. Hinzu kommt die erhebliche Verwaltungsaufblähung durch zwei verschiedene Behördenzuständigkeiten, zumal gewünscht sein wird, dass eine Person stets nur Partner in *einer* rechtlich anerkannten Partnerschaft sein kann.

Auch bezüglich der Adoption von Kindern sollen keine Ausnahmen vom Gleichheitsgrundsatz gemacht werden, sind doch homo- und bisexuelle Frauen und Männer keine schlechteren Eltern als heterosexuelle und entwickeln sich Kinder in gleichgeschlechtlichen Familien nicht schlechter als in verschiedengeschlechtlichen (siehe Studienliste Regenbogenfamilien im Anhang). Es ist nicht im Interesse des Kindeswohls, dem Kind die Statuierung von Rechtsansprüchen (wie auf Umgang, Pflege und Erziehung, Unterhalt und Erbrecht) zu verweigern. Eine (Stief- oder Fremdkind)Adoption ist im übrigen – ausser in krassen Ausnahmefällen von „Raben“-Eltern - ohnehin nur mit Zustimmung der leiblichen Eltern(teile) möglich (§ 181 ABGB).

Die mögliche (durchaus jedoch im Ausmass überschätzte) Diskriminierung von in Regenbogenfamilien lebenden Kindern durch ihre Umwelt kann die Verweigerung der Adoptionsmöglichkeit keinesfalls rechtfertigen. Denn es liefe dem Grundanliegen des Menschenrechtsschutzes zuwider, könnten gesellschaftliche Vorurteile gesetzliche Diskriminierungen rechtfertigen. In diesem Sinne hielt der U.S.-Supreme Court – gerade im Zusammenhang mit dem Kindeswohl - so treffend fest:

> „the reality of private biases and the possible injury they might inflict are [not] permissible considerations. ... ... The Constitution cannot control such biases, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." (*Palmore vs. Sidoti* 1984)

Oder wie es der Oberste Gerichtshof Süd-Afrikas – seinerseits den Obersten Gerichtshof Israels zitierend - pointiert formulierte:

> “Findings of discrimination cannot be dependent on the discriminator's way of thinking and desires.” (High Court of South-Africa: Case *Satchwell* (26289/01) (judg. Sept. 2001)

A N H A N G

1. Benachteiligungen gleichgeschlechtlicher Partnerschaften in der österreichischen Rechtsordnung
2. Homosexuellen-Gleichstellungs-Gesetz (Entwurf)
3. Europakarten Strafrecht, Diskriminierungsschutz, Partnerschaften (Rechtsvergleich)
4. EG-Vertrag, EU-Grundrechtecharta, EU-Verfassung
5. Richtlinie 2000/78/EG
6. Europäisches Parlament: Resolution on the Rights of Gays and Lesbians in the EC (08.02.1994)
7. Council of Europe – Parliamentary Assembly: Situation of lesbians and gays in Council of Europe member states (Rec. 1474/00)
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13. Hawaii Supreme Court: *Baehr v. Lewin* (1993)
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15. Hawaii Supreme Court: *Baehr vs. Miike* (1999)
16. Vermont Supreme Court: *Baker v. State* (1999)
17. Supreme Judicial Court of the Commonwealth of Massachussetts: *Hillary GOODRIDGE & others [FN1] vs. DEPARTMENT OF PUBLIC HEALTH & another* (2003)
18. Supreme Judicial Court of the Commonwealth of Massachussetts: *Opinions of Justices to the Senate* (2004).
19. New Jersey Supreme Court: *Lewis v. Harris* (25.10.2006)

20. Court of Appeal for British Columbia: *Barbeau v. British Columbia (Attorney General)* (2003)
21. Court of Appeal for Ontario: Halpern et al v. Attorney General of Canada et al (2003);
22. Constitutional Court of South Africa: *Du Toi & De Vos vs. The Minister of Welfare and Population Development and others* (2002)
23. High Court of South Africa: *Du Toi & De Vos vs. The Minister of Welfare and Population Development and others* (2001)
24. The Supreme Court of Appeal of South Africa: *Marié Adriaana Fourie & Cecelia Johanna Bonthuys vs. Minister of Home Affairs & Director.-General of Home Affairs* (2004)
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Benachteiligungen gleichgeschlechtlicher Partnerschaften in der österreichischen Rechtsordnung

I. Benachteiligungen gegenüber Ehe und heterosexueller Lebensgemeinschaft

Gemäss der Judikatur des Europäischen Menschenrechtsgerichtshofs dürfen gleichgeschlechtliche unverheiratete Paare gegenüber verschiedengeschlechtlichen unverheirateten Paaren nicht benachteiligt werden (*Karner gg. Österreich* 2003).

Rechtsvorschriften sind grundrechtskonform anzuwenden. Da der Terminus „Lebensgefährte“ oder „Lebensgemeinschaft“ zuallermeist geschlechtsneutral gehalten ist, kann die Gleichbehandlung durch grundrechtskonforme Interpretation des Gesetzes erreicht werden (so bereits OGH 16.05.2006, 5 Ob 70/06i [Eintrittsrecht Mietvertrag]).

Gesetzlich festgeschriebene Benachteiligungen gleichgeschlechtlicher unverheirateter Paare gegenüber verschiedengeschlechtlichen unverheirateten Paaren finden sich jedoch in drei Bereichen:

(1) Stiefkindadoption

Gleichgeschlechtlichen Paaren ist eine sinnvolle Stiefkindadoption verwehrt, die verschiedengeschlechtlichen unverheirateten Paaren möglich ist (§ 182 Abs. 2 2. Satz ABGB) (grundrechtskonforme Interpretation laut VfGH 14.06.2005, G 23/05, denkbar, von OGH 24.10.2006, 9 Ob 62/06t, jedoch nicht vorgenommen).

(2) Medizinisch unterstützte Fortpflanzung

Medizinisch unterstützte Fortpflanzung ist nur bei verschiedengeschlechtlichen (Ehen und) nichtehelichen Lebensgemeinschaften zulässig (§ 3 Abs. 1, 2 FortpflanzungsmedizinG).

(3) Sozialversicherung

Die Anspruchsberechtigung („Mitversicherung“) in der Krankenversicherung kommt sämtlichen am 01.08.2006 bereits bestandenen heterosexuellen Lebensgemeinschaften auch dann zu, wenn sie keine Kinder erziehen (oder erzogen haben) und kein/e der PartnerInnen pflegebedürftig ist.

Homosexuelle Lebensgemeinschaften sind hingegen stets von der Mitversicherung ausgeschlossen, wenn sie keine Kinder erziehen (oder erzogen haben) und kein/e der PartnerInnen pflegebedürftig ist; auch dann wenn die Lebensgemeinschaft am 01.08.2006 bereits bestanden hat.

(§ 628 Abs. 3a, 3b ASVG; § 314 Abs. 3, 4 GSVG; § 304 Abs. 3, 4 B-SVG; § 216 Abs. 2, 3 B-KUVG)

II. Benachteiligungen gegenüber der Ehe:

Dort wo alle Lebensgemeinschaften gegenüber der Ehe benachteiligt sind, besteht die Diskriminierung der gleichgeschlechtlichen Partner darin, daß sie die Benachteiligungen - im Gegensatz zu den verschiedengeschlechtlichen - nicht durch Eheschließung vermeiden können. Einige dieser Benachteiligungen seien hier schlagwortartig aufgezählt:

(a) **Zeugnisverweigerungsrecht** im Zivilprozeß (§ 320 ZPO) und im Verwaltungs(straf)verfahren (§ 49 AVG)
(b) kein **gesetzliches Erbrecht** (§ 757ff ABGB)[1]
(c) kein Recht, den **Mietvertrag** abzutreten (§ 12 MRG) und Eintrittsrecht im Todesfall erst nach 3jähriger Haushaltsgemeinschaft (§ 14 Abs. 3 MRG)
(d) kein Schutz gegen (unvermittelte) **Räumungsbegehren** des Lebenspartners, der Eigentümer oder Mieter der gemeinsam bewohnten Wohnung ist (§ 97 ABGB).
(e) **Familienzusammenführung im Fremdenrecht** gar nicht (§ 46 NAG [PartnerInnen von Drittstaatsangehörigen]) oder nur unter sehr erschwerten Bedingungen (§ 47 Abs. 2, 3 Z. 2, § 52 Z. 1, 4, § 54, § 56, § 57 NAG [PartnerInnen von EU-Bürgern und Schweizer Bürgern])
(f) erschwerter Erwerb der **Staatsbürgerschaft** (§ 11a StbG)
(g) wesentlich höhere **Erbschafts- und Schenkungssteuer**: das 4 bis 7fache (§§ 7f ErbStG).
(h) keine **Bezugsberechtigung bei Tod des versicherten Partners** zwischen Fälligkeit und Auszahlung einer Leistung (§ 108 ASVG, § 77 GSVG, § 3 FSVG i.V.m. 77 GSVG, § 73 BSVG, § 39 N-VG, § 50 B-KUVG)
(i) keinerlei **Hinterbliebenenversorgung** in der Sozialversicherung (zB § 258 ASVG)
(j) keine **bedingungslose Mitversicherung in der Krankenversicherung** (§ 123 Abs. 2 Z. 1, Abs. 7a ASVG; § 83 Abs. 2 Z. 1, Abs. 8 GSVG; § 78 Abs. 2 Z. 1, Abs. 6a BSVG; § 56 Abs. 2 Z. 1, Abs. 6a B-KUVG)
(k) Keine **Schadenersatzforderung** gegen den Schädiger bei **Tötung des unterhaltsleistenden Partners** (§ 1327 ABGB).
(l) Steuervergünstigungen im **Einkommenssteuerrecht** nur bei Kindererziehung (§ 106 Abs. 3 EStG)[2]
(m) In den **Bestattungsordnungen** verschiedener Bundesländer ist für den Fall mangelnder Verfügung des Verstorbenen die Berechtigung der Verwandten des Verstorbenen festgehalten, das Begräbnis auszurichten (unter Ausschluß des nicht-ehelichen Lebensgefährten)
(n) Im **Konkurs** keine Berücksichtigung des Lebensgefährten bei der Beurteilung welche Wohnräume für den Gemeinschuldner und seine Angehörigen unentbehrlich sind (§ 5 Abs. 4 KO).
(o) Das Recht des überlebenden Partners, von **Abbildungen** seines **verstorbenen Partners** zeit seines Lebens Lichtbilder herstellen zu lassen, ohne durch Urheber- oder Leistungsschutzrechte eingeschränkt zu sein, kommt nur Ehegatten zu (§§ 55, 75 UrhG); ebenso das lebenslange Recht, sich (bei Verletzung berechtigter Interessen) der (öffentlichen) **Verbreitung von Bildnissen** des verstorbenen Partners zu widersetzen (§ 78 UrhG).
(p) Zahlreiche (formelle und materielle) **strafrechtliche Begünstigungen** (§§ 88, 136, 141, 150, 166, 286, 290, 299 StGB, § 152 StPO) gelten nur dem Lebensgefährten sowie seinen Kindern und Enkelkindern gegenüber, nicht aber (wie bei Eheleuten) gegenüber den anderen Angehörigen des Partners (wie Eltern, Geschwistern etc.) (§ 72 Abs. 1 StGB).
(q) Keine Möglichkeit der Führung eines **Doppelnamens** aus dem eigenen und dem Namen des/der PartnerIn (§ 3 Abs. 1 Z. 4, Abs. 2 Z. 1 lit. b NÄG)
(r) **Gesetzliche Vertretungsbefugnis** bei Handlungsunfähigkeit erst nach 3jähriger Haushaltsgemeinschaft (§ 284c Abs. 1 ABGB)
(s) Kein Zugang zum wechselseitigen **Rechte- und Pflichtenkatalog von EhepartnerInnen** (Unterhalt, anständige Begegnung, Treue, gemeinsames Wohnen, Schutz der Wohnung, Bindung der Auflösung an bestimmte Gründe oder Einvernehmen, formalisierte Auflösung, Vermögensaufteilung bei Trennung).
(t) Keine gemeinsame **Adoption** (§ 179 Abs. 2 ABGB)

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[1] Auch kein gesetzliches Vorausvermächtnis wie dies Ehegatten zukommt. Diese haben das Recht, lebenslänglich in der Ehewohnung weiter zu wohnen und erhalten jedenfalls die zum ehelichen Haushalt gehörenden beweglichen Sachen soweit sie zu dessen Fortführung entsprechend den bisherigen Lebensverhältnissen erforderlich sind (§ 758 ABGB).
Darüberhinaus erhalten gesetzliche Erben, zu deren Unterhalt ein/e verstorbene/r ArbeitnehmerIn gesetzlich verpflichtet war, die Hälfte der gesetzlichen Abfertigung (§ 23 Abs. 6 AngG, § 2 ArbAbfG). Da LebensgefährtInnen kein gesetzliches Erbrecht haben, kommt ihnen auch dieser Anspruch nicht zu.

[2] § 106 (3) EStG bezieht nur Lebensgemeinschaften mit Kindern in den Familienbegriff ein, nicht aber kinderlose. Das EStG knüpft an das Vorliegen einer Familie zahlreiche Steuerbegünstigungen: **Alleinverdienerabsetzbetrag** (§ 33 [4] Z. 1 EStG), Absetzbarkeit von **Sonderausgaben für den Partner** (§ 18 [1] Z. 2, 3 und 5 iVm § 18 [3] Z. 1 EStG), **Unterhaltsabsetzbetrag** (§ 33 [4] Z. 3 lit. b EStG), Qualifikation von **Umzugskostenvergütungen** als nicht versteuerbare Einnahmen (§ 26 Z. 6 EStG), Verminderung des Selbstbehalts bei der **außergewöhnlichen Belastung** (§ 34 [4] EStG), Freibetrag bei **Behinderung des Partners** (§ 35 EStG), bei **Bausparen** Erhöhung der Bemessungsgrundlage für die Erstattung der Einkommenssteuer (§ 108 [2] EStG).

Bundesgesetz zur Gleichstellung von homosexuellen Frauen und Männern
(Homosexuellengleichstellungs-Gesetz — HG-G 200.)

Der Nationalrat hat beschlossen:

I. Teil (Variante 1)
Ehe

Das **Allgemeine Bürgerliche Gesetzbuch**, JGS Nr. 946, zuletzt geändert durch das Bundesgesetz BGBl. .../.., wird wie folgt geändert:

1. § 44 zweiter Satz lautet neu wie folgt:
„In dem Ehevertrage erklären zwei Personen gesetzmäßig ihren Willen, in unzertrennlicher Gemeinschaft zu leben und einander gegenseitig Beistand zu leisten.“
2. In § 90 entfällt Absatz 2 sowie die Absatzbezeichnung des Absatz 1.
2. § 93 Absatz 1 dritter Satz lautet neu wie folgt:
„Mangels einer solchen Bestimmung führt jeder Ehegatte seinen bisherigen Familiennamen weiter; In diesem Fall haben die Verlobten den Familiennamen der aus der Ehe stammenden Kinder zu bestimmen (§ 139 Abs. 2 ABGB).“
3. § 93 Absatz 3 entfällt.
4. § 139 Absatz 3 lautet neu wie folgt:
„Mangels einer Bestimmung nach Abs. 2 wird der Familienname des Kindes durch Los unter den Familiennamen der Elternteile bestimmt.“
1. In § 186a wird nach dem ersten Absatz der folgende neue Absatz 2a eingefügt:
„Kommt einem Pflegeelternteil die Obsorge im Sinne des Absatz 1 (ganz oder teilweise) gemeinsam mit einem anderen Pflegelternteil oder mit einem leiblichen Elternteil zu, so ist § 177a Abs. 2 entsprechend anzuwenden.“

I. Teil (Variante 2)
Lebenspartnerschaft

Artikel I

Lebenspartnerschaft

§ 1. Zwei Personen des gleichen Geschlechts können ihre Partnerschaft registrieren lassen (Lebenspartnerschaft).

Rechtswirkungen

§ 2. Rechtsvorschriften, die die Schließung, die Rechtswirkungen oder die Auflösung einer Ehe regeln oder die an das Vorliegen einer Ehe Rechtsfolgen knüpfen, gelten sinngemäß auch für Lebenspartnerschaften.

Verfahren

§ 3. Die näheren Bestimmungen für das Verfahren bei der Eintragung von Lebenspartnerschaften erläßt der Bundesminister für Justiz durch Verordnung. Abweichungen vom Verfahren bei der Eheschließung sind nur zulässig, soweit sie zur wirkungsvollen Vollziehung dieses Gesetzes unerläßlich sind.

Artikel II

Das **Strafgesetzbuch**, BGBl. 60/1974, zuletzt geändert durch das Bundesgesetz BGBl. .../.., wird wie folgt geändert:

1. § 106 Absatz 1 Ziffer 3 lautet neu wie folgt:

„die genötigte Person zur Eheschließung, zur Schliessung einer Lebenspartnerschaft, zur Prostitution oder zur Mitwirkung an einer pornographischen Darbietung (§ 215a Abs. 3) oder sonst zu einer Handlung, Duldung oder Unterlassung veranlasst, die besonders wichtige Interessen der genötigten oder einer dritten Person verletzt,“

2. Die §§ 192 und 193 lauten neu wie folgt:

„§ 192. Mehrfache Ehe oder Lebenspartnerschaft. Wer eine neue Ehe oder eine neue Lebenspartnerschaft eingeht, obwohl er verheiratet oder Partner in einer Eingetragenen Partnerschaft ist, oder wer mit einer verheirateten oder einer Person, die bereits Partner in einer Lebenspartnerschaft ist, eine Ehe oder eine Lebenspartnerschaft eingeht, ist mit Freiheitsstrafe bis zu drei Jahren zu bestrafen.

§ 193. Täuschung bei Eingehen einer Ehe oder einer Lebenspartnerschaft. (1) Wer bei Eingehung einer Ehe oder einer Lebenspartnerschaft dem anderen Teil eine Tatsache verschweigt, die die Ehe oder die Lebenspartnerschaft nichtig macht, ist mit Freiheitsstrafe bis zu einem Jahr zu bestrafen.

(2) Ebenso ist zu bestrafen, wer einen anderen durch Täuschung über Tatsachen, derentwegen die Aufhebung der Ehe oder der Lebenspartnerschaft begehrt werden kann, verleitet, mit ihm eine Ehe oder eine Lebenspartnerschaft zu schliessen.

(3) Der Täter ist nur dann zu bestrafen, wenn die Ehe oder die Lebenspartnerschaft wegen der verschwiegenen Tatsache für nichtig erklärt oder wegen der Täuschung aufgehoben worden ist. Auch ist er nur auf Verlangen des Verletzten zu verfolgen.“

Artikel III

Das **Allgemeine Bürgerliche Gesetzbuch**, JGS Nr. 946, zuletzt geändert durch das Bundesgesetz BGBl. .../.., wird wie folgt geändert:

1. In § 90 entfällt Absatz 2 sowie die Absatzbezeichnung des Absatz 1.
2. § 93 Absatz 1 dritter Satz lautet neu wie folgt:

„Mangels einer solchen Bestimmung führt jeder Ehegatte seinen bisherigen Familiennamen weiter; In diesem Fall haben die Verlobten den Familiennamen der aus der Ehe stammenden Kinder zu bestimmen (§ 139 Abs. 2 ABGB).“

3. § 93 Absatz 3 entfällt.

4. § 139 Absatz 3 lautet neu wie folgt:

„Mangels einer Bestimmung nach Abs. 2 wird der Familienname des Kindes durch Los unter den Familiennamen der Elternteile bestimmt.“

2. In § 186a wird nach dem ersten Absatz der folgende neue Absatz 2a eingefügt:

„Kommt einem Pflegeelternteil die Obsorge im Sinne des Absatz 1 (ganz oder teilweise) gemeinsam mit einem anderen Pflegelternteil oder mit einem leiblichen Elternteil zu, so ist § 177a Abs. 2 entsprechend anzuwenden.“

II. Teil (Variante 1)
Eheähnliche Lebensgemeinschaft

Rechtsvorschriften, die die Eingehung, die Rechtswirkungen oder die Auflösung einer außerehelichen (eheähnlichen) Lebensgemeinschaft regeln oder die an das Vorliegen einer solchen Lebensgemeinschaft, an deren Eingehen oder Auflösung Rechtsfolgen knüpfen, gelten sinngemäß auch für Partner des gleichen Geschlechts, die, ohne miteinander eine Ehe eingegangen zu sein, in einer eheähnlichen Gemeinschaft leben. Dies gilt auch dann, wenn sich eine solche Rechtsvorschrift ausdrücklich nur auf verschiedengeschlechtliche Partner (Lebensgemeinschaften) bezieht.

II. Teil (Variante 2)
Eheähnliche Lebensgemeinschaft

Rechtsvorschriften, die die Eingehung, die Rechtswirkungen oder die Auflösung einer außerehelichen (eheähnlichen) Lebensgemeinschaft regeln oder die an das Vorliegen einer solchen Lebensgemeinschaft, an deren Eingehen oder Auflösung Rechtsfolgen knüpfen, gelten sinngemäß auch für Partner des gleichen Geschlechts, die, ohne miteinander eine Lebenspartnerschaft (im Sinne des I. Teils dieses Gesetzes) eingegangen zu sein, in einer eheähnlichen Gemeinschaft leben. Dies gilt auch dann, wenn sich eine solche Rechtsvorschrift ausdrücklich nur auf verschiedengeschlechtliche Partner (Lebensgemeinschaften) bezieht.

III. Teil
Diskriminierungsschutz

Artikel I
(Verfassungsbestimmung)

Das **Bundes-Verfassungsgesetz**, BGBl. 1/1930, zuletzt geändert durch das Bundesgesetz BGBl. .../..., wird wie folgt geändert:
1. In Art. 7 Abs. 1 lautet der erste Satz neu wie folgt:
„**Art. 7.** (1) Alle Staatsbürger sind vor dem Gesetz gleich. Vorrechte der Geburt, des Geschlechts, der sexuellen Orientierung, des Standes, der Klasse und des Bekenntnissses sind ausgeschlossen.“
2. In Art. 14 Abs. 6 lautet der vierte Satz neu wie folgt:
„ Öffentliche Schulen sind allgemein ohne Unterschied der Geburt, des Geschlechts, der sexuellen Orientierung, der Rasse, des Standes, der Klasse, der Sprache und des Bekenntnisses, im Übrigen im Rahmen der gesetzlichen Voraussetzungen zugänglich.“

Artikel II

Das **Strafgesetzbuch**, BGBl. 60/1974, zuletzt geändert durch das Bundesgesetz BGBl. .../.., wird wie folgt geändert:
1. In § 33 lautet die Ziffer 5 neu wie folgt:
„5. Aus rassistischen, fremdenfeindlichen, homosexuellenfeindlichen oder anderen besonders verwerflichen Beweggründen gehandelt hat;“
2. § 207b entfällt.
3. § 283 Abs. 1 lautet neu wie folgt:
§ 283. Verhetzung. (1) Wer öffentlich zu einer feindseligen Haltung gegen eine im Inland bestehende Kirche oder Religionsgesellschaft oder gegen eine durch ihre Zugehörigkeit oder Nichtzugehörigkeit zu einer solchen Kirche oder Religionsgesellschaft, zu einer Rasse, zu einem Volk, einem Volksstamm, einem Staat, zu einem Geschlecht oder zu einer sexuellen Orientierung oder wegen des Vorliegens einer Behinderung bestimmte Gruppe auffordert oder aufreizt, ist mit Freiheitsstrafe bis zu drei Jahren zu bestrafen.“
4. Nach § 283 wird der folgende neue § 283a StGB eingefügt:
„§ 283a. Diskriminierung. Wer Personen auf Grund ihrer Rasse, ihrer Hautfarbe, ihrer nationalen oder ethnischen Herkunft, ihres Geschlechts, ihrer sexuellen Orientierung, ihres religiösen Bekenntnisses oder ihrer Behinderung ungerechtfertigt benachteiligt oder sie hindert, allgemein zugängliche Orte zu betreten oder allgemein angebotene Güter zu erwerben oder zu benutzen oder allgemein angebotene Dienstleistungen in Anspruch zu nehmen, ist mit Freiheitsstrafe bis zu zwei Jahren zu bestrafen.“

Artikel III

Das **Einführungsgesetz zu den Verwaltungsverfahrensgesetzen**, BGBl. 50/1991, zuletzt geändert durch das Bundesgesetz BGBl. .../.., wird wie folgt geändert:
Art. IX Abs. 1 Z. 3 entfällt.

Artikel IIIa

Die **Gewerbeordnung**, BGBl. 50/1991, zuletzt geändert durch das Bundesgesetz BGBl. .../.., wird wie folgt geändert:
§ 87 Abs. 1 letzter Satz lautet:
„Schutzinteressen gemäß Z. 3 sind insbesondere die Hintanhaltung der illegalen Beschäftigung, der Kinderpornographie, des Suchtgiftkonsums, des Suchtgiftverkehrs, der illegalen Prostitution sowie der Diskriminierung von Personen auf Grund ihrer Rasse, ihrer Hautfarbe, ihrer nationalen oder ethnischen Herkunft, ihres Geschlechts, ihrer sexuellen Orientierung, ihres religiösen Bekenntnisses oder einer Behinderung (§ 283a StGB).“

Artikel IV

Das **Bundesgesetz über den Österreichischen Rundfunk (ORF-Gesetz, ORF-G)**, BGBl. 379/1984, zuletzt geändert durch das Bundesgesetz BGBl. .../.., wird wie folgt geändert:
1. § 10 Abs. 2 lautet neu wie folgt:
„Die Sendungen dürfen nicht zu Hass auf Grund von Rasse, Geschlecht, Alter, sexueller Orientierung, Behinderung, Religion und Nationalität aufreizen.“
2. § 14 Abs. 1 Z. 2 lautet neu:
„Diskriminierungen nach Rasse, Geschlecht, Alter, sexueller Orientierung, Behinderung, Religion oder Nationalität enthalten.“

Artikel V

Das **Gleichbehandlungsgesetz**, BGBl. I 66/2004, zuletzt geändert durch das Bundesgesetz BGBl. .../.., wird wie folgt geändert:
1. Im III. Teil lautet die Überschrift vor dem 1. Abschnitt neu wie folgt:
   „**Gleichbehandlung ohne Unterschied des Geschlechts, der ethnischen Zugehörigkeit, der Religion oder Weltanschauung, des Alters oder der sexuellen Orientierung in sonstigen Bereichen (Antidiskriminierung)**“
4. In § 31 Abs. 1 wird die Wortfolge „Auf Grund der ethnischen Zugehörigkeit“ durch die Wortfolge „Auf Grund des Geschlechts, der ethnischen Zugehörigkeit, der Religion oder Weltanschauung, des Alters oder der sexuellen Orientierung“ ersetzt.
5. In § 31 Abs. 1 wird die Wortfolge „Auf Grund ihrer ethnischen Zugehörigkeit“ durch die Wortfolge „Auf Grund eines in § 31 genannten Grundes“ ersetzt.
6. In § 31 Abs. 2 wird die Wortfolge „die einer ethnischen Gruppe angehören“ durch die Wortfolge „die einer ethnischen Gruppe angehören, oder Personen mit einer bestimmten Religion oder Weltanschauung, eines bestimmten Alters oder mit

einer bestimmten sexuellen Orientierung oder eines bestimmten Geschlechts“ ersetzt.

7. In § 33 wird die Wortfolge „aufgrund der ethnischen Zugehörigkeit“ durch die Wortfolge „aufgrund eines in § 31 genannten Grundes“ ersetzt.
8. In § 34 Abs. 1 wird die Wortfolge „der ethnischen Zugehörigkeit einer Person“ durch die Wortfolge „einem in § 31 genannten Grund“ ersetzt.
9. Im III. Teil lautet die Überschrift nach der Wortfolge „2. Abschnitt“ neu wie folgt:
   „**Grundsätze für die Regelung der Gleichbehandlung ohne Unterschied des Geschlechts, der ethnischen Zugehörigkeit, der Religion oder Weltanschauung, des Alters oder der sexuellen Orientierung in sonstigen Bereichen**“
10. Im III. Teil wird im Satz vor § 38 die Wortfolge „der ethnischen Zugehörigkeit“ durch die Wortfolge „des Geschlechts, der ethnischen Zugehörigkeit, der Religion oder Weltanschauung, des Alters oder der sexuellen Orientierung“ ersetzt.

In § 40 wird die Wortfolge „der ethnischen Zugehörigkeit“ durch die Wortfolge „des Geschlechts, der ethnischen Zugehörigkeit, der Religion oder Weltanschauung, des Alters oder der sexuellen Orientierung“ ersetzt.

Artikel VI

Das **Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft**, BGBl. 108/1979, zuletzt geändert durch das Bundesgesetz BGBl. .../.., wird wie folgt geändert:

3. In § 1 Abs. 2 Z. 3 wird die Wortfolge „der ethnischen Zugehörigkeit“ durch die Wortfolge „des Geschlechts, der ethnischen Zugehörigkeit, der Religion oder Weltanschauung, des Alters oder der sexuellen Orientierung“ ersetzt.
4. In § 3 Abs. 2 Z. 3 wird die Wortfolge „der ethnischen Zugehörigkeit“ durch die Wortfolge „des Geschlechts, der ethnischen Zugehörigkeit, der Religion oder Weltanschauung, des Alters oder der sexuellen Orientierung“ ersetzt.
5. In § 1 Abs. 6 wird die Wortfolge „ohne Unterschied der ethnischen Zugehörigkeit in sonstigen Bereichen“ durch die Wortfolge „ohne Unterschied des Geschlechts, der ethnischen Zugehörigkeit, der Religion oder Weltanschauung, des Alters oder der sexuellen Orientierung in sonstigen Bereichen“ ersetzt.
6. In § 1 Abs. 9 wird die Wortfolge „ohne Unterschied der ethnischen Zugehörigkeit in sonstigen Bereichen“ durch die Wortfolge „ohne Unterschied des Geschlechts, der ethnischen Zugehörigkeit, der Religion oder Weltanschauung, des Alters oder der sexuellen Orientierung in sonstigen Bereichen“ ersetzt.
7. Die Überschrift vor § 6 lautet neu wie folgt:
   „**Anwalt/Anwältin für die Gleichbehandlung ohne Unterschied des Geschlechts, der ethnischen Zugehörigkeit, der Religion oder Weltanschauung, des Alters oder der sexuellen Orientierung in sonstigen Bereichen**“
6. In § 6 Abs. 1 wird die Wortfolge „ohne Unterschied der ethnischen Zugehörigkeit in sonstigen Bereichen“ durch die Wortfolge „ohne Unterschied des Geschlechts, der ethnischen Zugehörigkeit, der Religion oder Weltanschauung, des Alters oder der sexuellen Orientierung in sonstigen Bereichen“ ersetzt.

Artikel VII
(Verfassungsbestimmung)

Das **Datenschutzgesetz 2000**, BGBl. I Nr. 165/1999, zuletzt geändert durch das Bundesgesetz BGBl. .../.., wird wie folgt geändert:
In Art. 1 (Verfassungsbestimmung) lautet in § 1 Abs. 2 der zweite Satz neu: „Die Verwendung von Daten, die ihrer Art nach besonders schutzwürdig sind, ist, sofern der Betroffene nicht eingewilligt hat, nur auf Grund eines Gesetzes und nur dann zulässig, wenn dies der Sache nach zur Wahrung besonderer öffentlicher Interessen unverzichtbar geboten ist und durch Gesetz gleichzeitig angemessene Garantien für den Schutz der Geheimhaltungsinteressen der Betroffenen festgelegt sind."

Artikel VIII

Das **Sicherheitspolizeigesetz**, BGBl. 1991/566, zuletzt geändert durch das Bundesgesetz BGBl. .../.., wird wie folgt geändert:
In § 54 wird nach dem Absatz 5 der folgende neue Absatz eingefügt: „(6) Die Erhebung, Verarbeitung und Nutzung personenbezogener Daten über das Sexualleben ist nur dann zulässig, wenn dies der Sache nach unverzichtbar geboten ist, oder wenn der Betroffene eingewilligt hat."

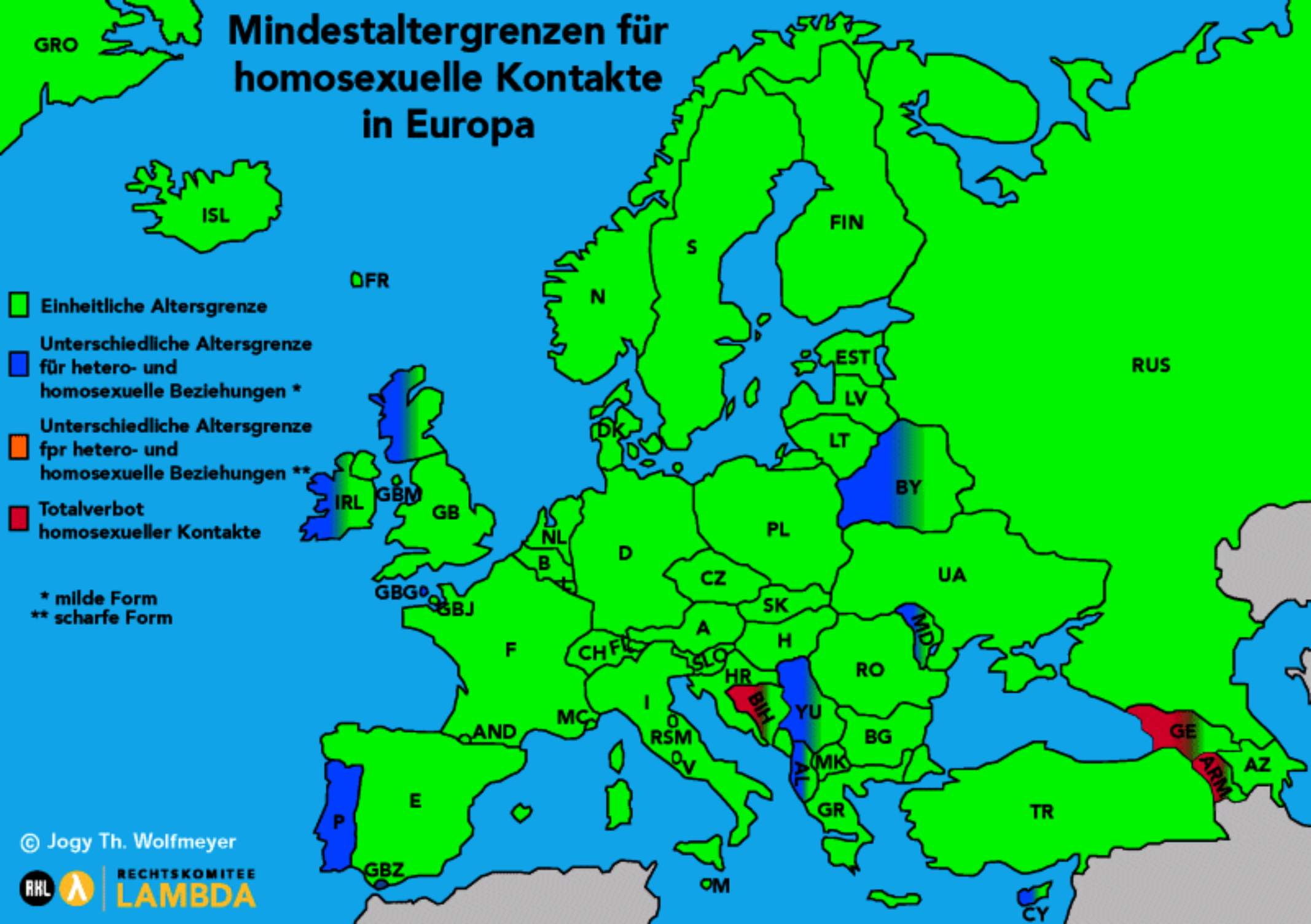
IV. Teil
Inkrafttreten und Schlußbestimmungen

(1) Dieses Bundesgesetz tritt mit ..... in Kraft.

(2) Verweisungen in diesem Bundesgesetz auf andere Rechtsvorschriften sind als Verweisung auf die jeweils gültige Fassung zu verstehen. Wird in anderen Bundesgesetzen auf Bestimmungen verwiesen, an deren Stelle mit dem Inkrafttreten dieses Bundesgesetzes neue Bestimmungen wirksam werden, so sind diese Verweisungen auf die entsprechenden neuen Bestimmungen zu beziehen.

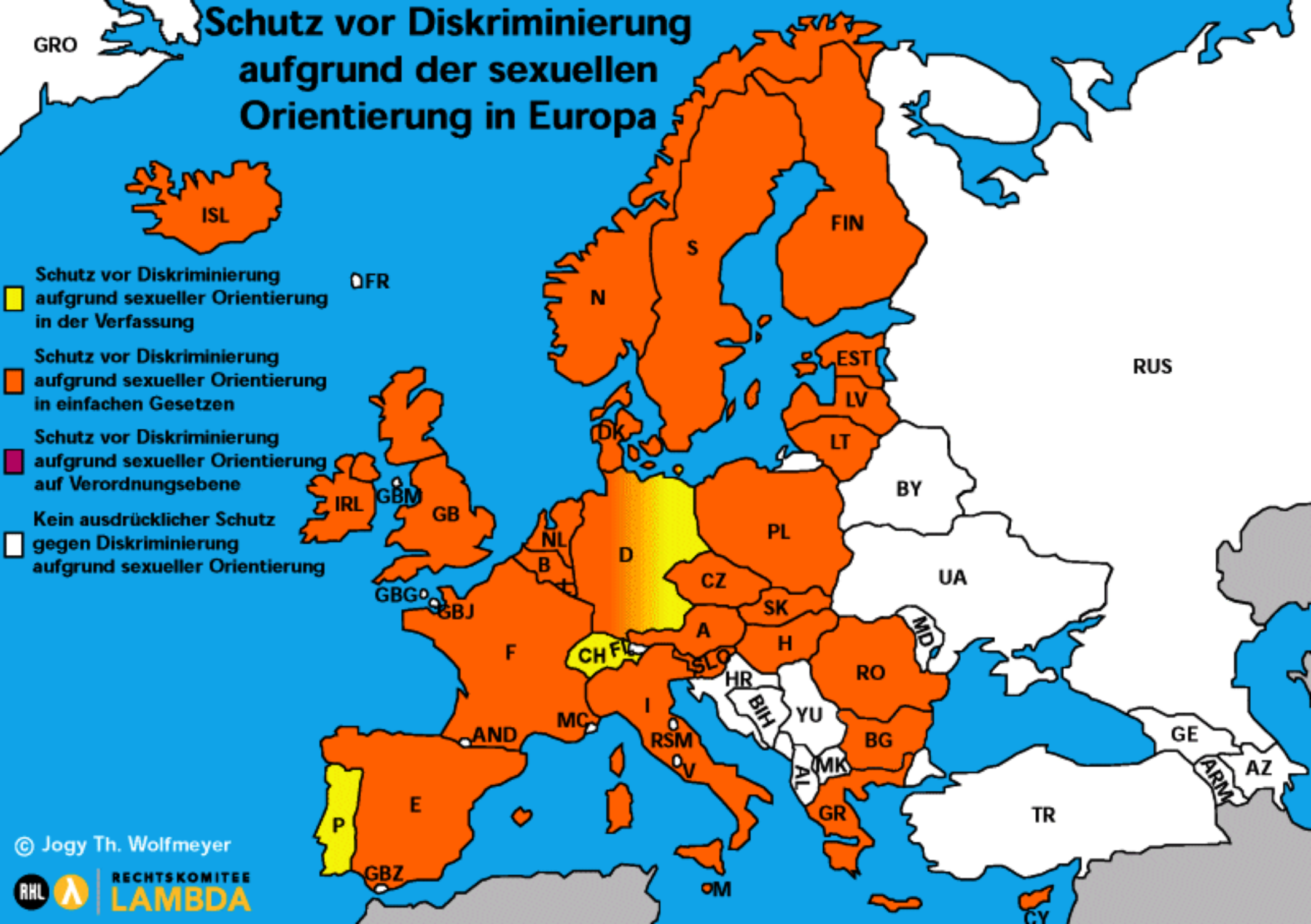
[Vollzugsklausel]

Mindestaltergrenzen für homosexuelle Kontakte in Europa



RECHTSKOMITEE LAMBDA

Schutz vor Diskriminierung aufgrund der sexuellen Orientierung in Europa



Schutz vor Diskriminierung aufgrund sexueller Orientierung in der Verfassung

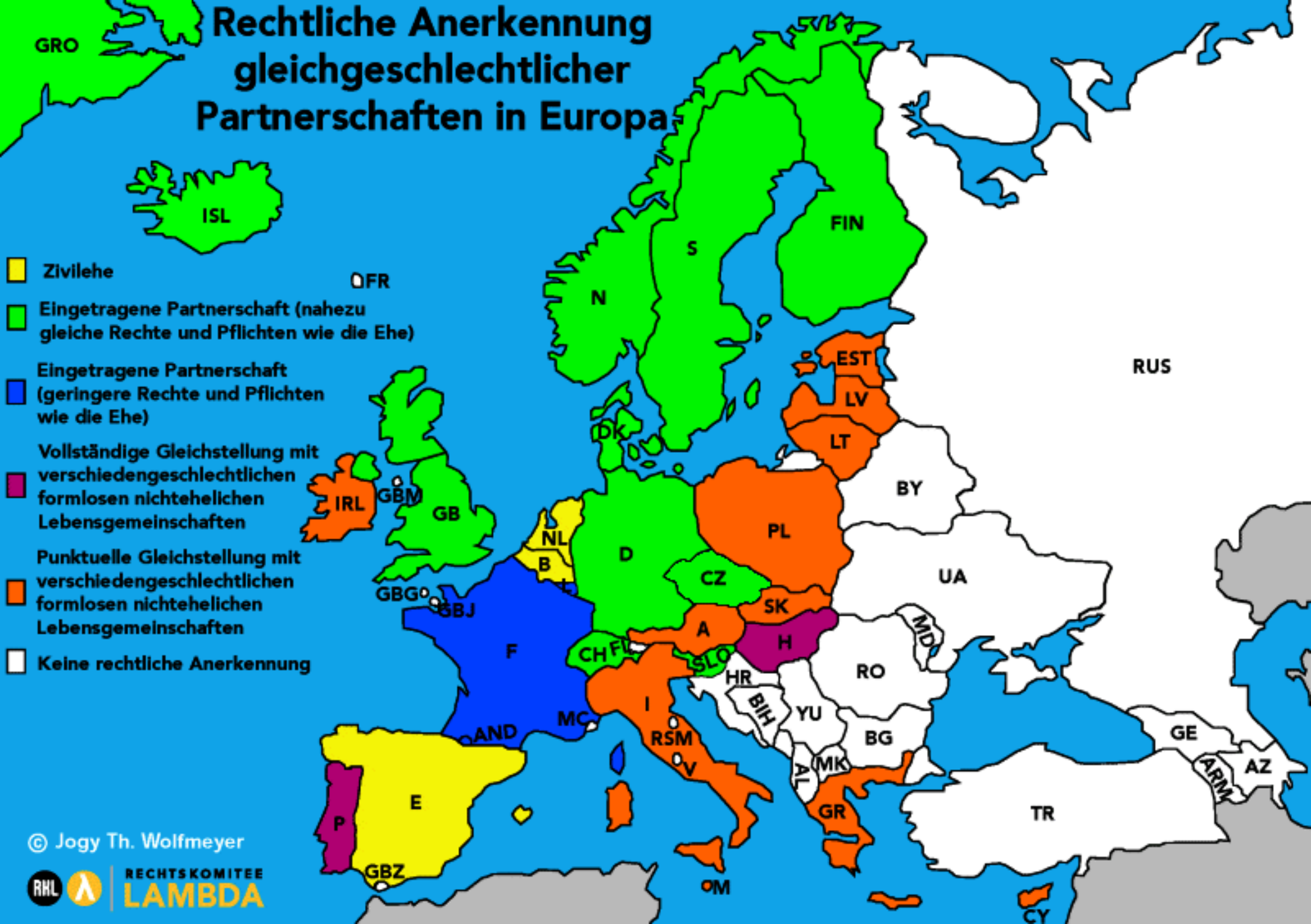
Schutz vor Diskriminierung aufgrund sexueller Orientierung in einfachen Gesetzen

Schutz vor Diskriminierung aufgrund sexueller Orientierung auf Verordnungsebene

Kein ausdrücklicher Schutz gegen Diskriminierung aufgrund sexueller Orientierung

RECHTSKOMITEE LAMBDA

Rechtliche Anerkennung gleichgeschlechtlicher Partnerschaften in Europa



RECHTSKOMITEE LAMBDA

EG-Vertrag

Art. 13
„Unbeschadet der sonstigen Bestimmungen dieses Vertrags kann der Rat im Rahmen der durch den Vertrag auf die Gemeinschaft übertragenen Zuständigkeiten auf Vorschlag der Kommission und nach Anhörung des Europäischen Parlaments einstimmig geeignete Vorkehrungen treffen, um Diskriminierungen aus Gründen des Geschlechts, der Rasse, der ethnischen Herkunft, der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung zu bekämpfen."

Charta der Grundrechte der Europäischen Union

Artikel 9 Recht, eine Ehe einzugehen und eine Familie zu gründen
Das Recht, eine Ehe einzugehen, und das Recht, eine Familie zu gründen, werden nach den einzelstaatlichen Gesetzen gewährleistet, welche die Ausübung dieser Rechte regeln.

Art. 21 Nichtdiskriminierung
(1) Diskriminierungen insbesondere wegen des Geschlechts, der Rasse, der Hautfarbe, der ethnischen oder sozialen Herkunft, der genetischen Merkmale, der Sprache, der Religion oder der Weltanschauung, der politischen oder sonstigen Anschauung, der Zugehörigkeit zu einer nationalen Minderheit, des Vermögens, der Geburt, einer Behinderung, des Alters oder der sexuellen Ausrichtung sind verboten.

Vertrag über eine Verfassung für Europa

Artikel II-69 Recht, eine Ehe einzugehen und eine Familie zu gründen
Das Recht, eine Ehe einzugehen, und das Recht, eine Familie zu gründen, werden nach den einzelstaatlichen Gesetzen gewährleistet, welche die Ausübung dieser Rechte regeln.
16.12.2004 DE Amtsblatt der Europäischen Union C 310/43

Artikel II-81 Nichtdiskriminierung
(1) Diskriminierungen insbesondere wegen des Geschlechts, der Rasse, der Hautfarbe, der ethnischen oder sozialen Herkunft, der genetischen Merkmale, der Sprache, der Religion oder der Weltanschauung, der politischen oder sonstigen Anschauung, der Zugehörigkeit zu einer nationalen Minderheit, des Vermögens, der Geburt, einer Behinderung, des Alters oder der sexuellen Ausrichtung sind verboten.
(2) Unbeschadet besonderer Bestimmungen der Verfassung ist in ihrem Anwendungsbereich jede Diskriminierung aus Gründen der Staatsangehörigkeit verboten.

RICHTLINIE 2000/78/EG DES RATES

vom 27. November 2000

zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf

DER RAT DER EUROPÄISCHEN UNION —

gestützt auf den Vertrag zur Gründung der Europäischen Gemeinschaft, insbesondere auf Artikel 13,

auf Vorschlag der Kommission ([1]),

nach Stellungnahme des Europäischen Parlaments ([2]),

nach Stellungnahme des Wirtschafts- und Sozialausschusses ([3]),

nach Stellungnahme des Ausschusses der Regionen ([4]),

in Erwägung nachstehender Gründe:

(1) Nach Artikel 6 Absatz 2 des Vertrags über die Europäische Union beruht die Europäische Union auf den Grundsätzen der Freiheit, der Demokratie, der Achtung der Menschenrechte und Grundfreiheiten sowie der Rechtsstaatlichkeit; diese Grundsätze sind allen Mitgliedstaaten gemeinsam. Die Union achtet die Grundrechte, wie sie in der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten gewährleistet sind und wie sie sich aus den gemeinsamen Verfassungsüberlieferungen der Mitgliedstaaten als allgemeine Grundsätze des Gemeinschaftsrechts ergeben.

(2) Der Grundsatz der Gleichbehandlung von Männern und Frauen wurde in zahlreichen Rechtsakten der Gemeinschaft fest verankert, insbesondere in der Richtlinie 76/207/EWG des Rates vom 9. Februar 1976 zur Verwirklichung des Grundsatzes der Gleichbehandlung von Männern und Frauen hinsichtlich des Zugangs zur Beschäftigung, zur Berufsbildung und zum beruflichen Aufstieg sowie in Bezug auf die Arbeitsbedingungen ([5]).

(3) Bei der Anwendung des Grundsatzes der Gleichbehandlung ist die Gemeinschaft gemäß Artikel 3 Absatz 2 des EG-Vertrags bemüht, Ungleichheiten zu beseitigen und die Gleichstellung von Männern und Frauen zu fördern, zumal Frauen häufig Opfer mehrfacher Diskriminierung sind.

(4) Die Gleichheit aller Menschen vor dem Gesetz und der Schutz vor Diskriminierung ist ein allgemeines Menschenrecht; dieses Recht wurde in der Allgemeinen Erklärung der Menschenrechte, im VN-Übereinkommen zur Beseitigung aller Formen der Diskriminierung von Frauen, im Internationalen Pakt der VN über bürgerliche und politische Rechte, im Internationalen Pakt der VN über wirtschaftliche, soziale und kulturelle Rechte sowie in der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten anerkannt, die von allen Mitgliedstaaten unterzeichnet wurden. Das Übereinkommen 111 der Internationalen Arbeitsorganisation untersagt Diskriminierungen in Beschäftigung und Beruf.

(5) Es ist wichtig, dass diese Grundrechte und Grundfreiheiten geachtet werden. Diese Richtlinie berührt nicht die Vereinigungsfreiheit, was das Recht jeder Person umfasst, zum Schutze ihrer Interessen Gewerkschaften zu gründen und Gewerkschaften beizutreten.

(6) In der Gemeinschaftscharta der sozialen Grundrechte der Arbeitnehmer wird anerkannt, wie wichtig die Bekämpfung jeder Art von Diskriminierung und geeignete Maßnahmen zur sozialen und wirtschaftlichen Eingliederung älterer Menschen und von Menschen mit Behinderung sind.

(7) Der EG-Vertrag nennt als eines der Ziele der Gemeinschaft die Förderung der Koordinierung der Beschäftigungspolitiken der Mitgliedstaaten. Zu diesem Zweck wurde in den EG-Vertrag ein neues Beschäftigungskapitel eingefügt, das die Grundlage bildet für die Entwicklung einer koordinierten Beschäftigungsstrategie und für die Förderung der Qualifizierung, Ausbildung und Anpassungsfähigkeit der Arbeitnehmer.

(8) In den vom Europäischen Rat auf seiner Tagung am 10. und 11. Dezember 1999 in Helsinki vereinbarten beschäftigungspolitischen Leitlinien für 2000 wird die Notwendigkeit unterstrichen, einen Arbeitsmarkt zu schaffen, der die soziale Eingliederung fördert, indem ein ganzes Bündel aufeinander abgestimmter Maßnahmen getroffen wird, die darauf abstellen, die Diskriminierung von benachteiligten Gruppen, wie den Menschen mit Behinderung, zu bekämpfen. Ferner wird betont, dass der Unterstützung älterer Arbeitnehmer mit dem Ziel der Erhöhung ihres Anteils an der Erwerbsbevölkerung besondere Aufmerksamkeit gebührt.

(9) Beschäftigung und Beruf sind Bereiche, die für die Gewährleistung gleicher Chancen für alle und für eine volle Teilhabe der Bürger am wirtschaftlichen, kulturellen und sozialen Leben sowie für die individuelle Entfaltung von entscheidender Bedeutung sind.

(10) Der Rat hat am 29. Juni 2000 die Richtlinie 2000/43/EG ([6]) zur Anwendung des Gleichbehandlungsgrundsatzes ohne Unterschied der Rasse oder der ethnischen Herkunft angenommen, die bereits einen Schutz vor solchen Diskriminierungen in Beschäftigung und Beruf gewährleistet.

(11) Diskriminierungen wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung können die Verwirklichung der im EG-Vertrag festgelegten Ziele unterminieren, insbesondere die Erreichung eines hohen Beschäftigungsniveaus

([1]) ABl. C 177 E vom 27.6.2000, S. 42.
([2]) Stellungnahme vom 12. Oktober 2000 (noch nicht im Amtsblatt veröffentlicht).
([3]) ABl. C 204 vom 18.7.2000, S. 82.
([4]) ABl. C 226 vom 8.8.2000, S. 1.
([5]) ABl. L 39 vom 14.2.1976, S. 40.
([6]) ABl. L 180 vom 19.7.2000, S. 22.

und eines hohen Maßes an sozialem Schutz, die Hebung des Lebensstandards und der Lebensqualität, den wirtschaftlichen und sozialen Zusammenhalt, die Solidarität sowie die Freizügigkeit.

(12) Daher sollte jede unmittelbare oder mittelbare Diskriminierung wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung in den von der Richtlinie abgedeckten Bereichen gemeinschaftsweit untersagt werden. Dieses Diskriminierungsverbot sollte auch für Staatsangehörige dritter Länder gelten, betrifft jedoch nicht die Ungleichbehandlungen aus Gründen der Staatsangehörigkeit und lässt die Vorschriften über die Einreise und den Aufenthalt von Staatsangehörigen dritter Länder und ihren Zugang zu Beschäftigung und Beruf unberührt.

(13) Diese Richtlinie findet weder Anwendung auf die Sozialversicherungs- und Sozialschutzsysteme, deren Leistungen nicht einem Arbeitsentgelt in dem Sinne gleichgestellt werden, der diesem Begriff für die Anwendung des Artikels 141 des EG-Vertrags gegeben wurde, noch auf Vergütungen jeder Art seitens des Staates, die den Zugang zu einer Beschäftigung oder die Aufrechterhaltung eines Beschäftigungsverhältnisses zum Ziel haben.

(14) Diese Richtlinie berührt nicht die einzelstaatlichen Bestimmungen über die Festsetzung der Altersgrenzen für den Eintritt in den Ruhestand.

(15) Die Beurteilung von Tatbeständen, die auf eine unmittelbare oder mittelbare Diskriminierung schließen lassen, obliegt den einzelstaatlichen gerichtlichen Instanzen oder anderen zuständigen Stellen nach den einzelstaatlichen Rechtsvorschriften oder Gepflogenheiten; in diesen einzelstaatlichen Vorschriften kann insbesondere vorgesehen sein, dass mittelbare Diskriminierung mit allen Mitteln, einschließlich statistischer Beweise, festzustellen ist.

(16) Maßnahmen, die darauf abstellen, den Bedürfnissen von Menschen mit Behinderung am Arbeitsplatz Rechnung zu tragen, spielen eine wichtige Rolle bei der Bekämpfung von Diskriminierungen wegen einer Behinderung.

(17) Mit dieser Richtlinie wird unbeschadet der Verpflichtung, für Menschen mit Behinderung angemessene Vorkehrungen zu treffen, nicht die Einstellung, der berufliche Aufstieg, die Weiterbeschäftigung oder die Teilnahme an Aus- und Weiterbildungsmaßnahmen einer Person vorgeschrieben, wenn diese Person für die Erfüllung der wesentlichen Funktionen des Arbeitsplatzes oder zur Absolvierung einer bestimmten Ausbildung nicht kompetent, fähig oder verfügbar ist.

(18) Insbesondere darf mit dieser Richtlinie den Streitkräften sowie der Polizei, den Haftanstalten oder den Notfalldiensten unter Berücksichtigung des rechtmäßigen Ziels, die Einsatzbereitschaft dieser Dienste zu wahren, nicht zur Auflage gemacht werden, Personen einzustellen oder weiter zu beschäftigen, die nicht den jeweiligen Anforderungen entsprechen, um sämtliche Aufgaben zu erfüllen, die ihnen übertragen werden können.

(19) Ferner können die Mitgliedstaaten zur Sicherung der Schlagkraft ihrer Streitkräfte sich dafür entscheiden, dass die eine Behinderung und das Alter betreffenden Bestimmungen dieser Richtlinie auf alle Streitkräfte oder einen Teil ihrer Streitkräfte keine Anwendung finden. Die Mitgliedstaaten, die eine derartige Entscheidung treffen, müssen den Anwendungsbereich dieser Ausnahmeregelung festlegen.

(20) Es sollten geeignete Maßnahmen vorgesehen werden, d. h. wirksame und praktikable Maßnahmen, um den Arbeitsplatz der Behinderung entsprechend einzurichten, z. B. durch eine entsprechende Gestaltung der Räumlichkeiten oder eine Anpassung des Arbeitsgeräts, des Arbeitsrhythmus, der Aufgabenverteilung oder des Angebots an Ausbildungs- und Einarbeitungsmaßnahmen.

(21) Bei der Prüfung der Frage, ob diese Maßnahmen zu übermäßigen Belastungen führen, sollten insbesondere der mit ihnen verbundene finanzielle und sonstige Aufwand sowie die Größe, die finanziellen Ressourcen und der Gesamtumsatz der Organisation oder des Unternehmens und die Verfügbarkeit von öffentlichen Mitteln oder anderen Unterstützungsmöglichkeiten berücksichtigt werden.

(22) Diese Richtlinie lässt die einzelstaatlichen Rechtsvorschriften über den Familienstand und davon abhängige Leistungen unberührt.

(23) Unter sehr begrenzten Bedingungen kann eine unterschiedliche Behandlung gerechtfertigt sein, wenn ein Merkmal, das mit der Religion oder Weltanschauung, einer Behinderung, dem Alter oder der sexuellen Ausrichtung zusammenhängt, eine wesentliche und entscheidende berufliche Anforderung darstellt, sofern es sich um einen rechtmäßigen Zweck und eine angemessene Anforderung handelt. Diese Bedingungen sollten in die Informationen aufgenommen werden, die die Mitgliedstaaten der Kommission übermitteln.

(24) Die Europäische Union hat in ihrer der Schlussakte zum Vertrag von Amsterdam beigefügten Erklärung Nr. 11 zum Status der Kirchen und weltanschaulichen Gemeinschaften ausdrücklich anerkannt, dass sie den Status, den Kirchen und religiöse Vereinigungen oder Gemeinschaften in den Mitgliedstaaten nach deren Rechtsvorschriften genießen, achtet und ihn nicht beeinträchtigt und dass dies in gleicher Weise für den Status von weltanschaulichen Gemeinschaften gilt. Die Mitgliedstaaten können in dieser Hinsicht spezifische Bestimmungen über die wesentlichen, rechtmäßigen und gerechtfertigten beruflichen Anforderungen beibehalten oder vorsehen, die Voraussetzung für die Ausübung einer diesbezüglichen beruflichen Tätigkeit sein können.

(25) Das Verbot der Diskriminierung wegen des Alters stellt ein wesentliches Element zur Erreichung der Ziele der beschäftigungspolitischen Leitlinien und zur Förderung der Vielfalt im Bereich der Beschäftigung dar. Ungleichbehandlungen wegen des Alters können unter bestimmten Umständen jedoch gerechtfertigt sein und erfordern daher besondere Bestimmungen, die je nach der Situation der Mitgliedstaaten unterschiedlich sein können. Es ist daher unbedingt zu unterscheiden zwischen einer Ungleichbehandlung, die insbesondere durch rechtmäßige Ziele im Bereich der Beschäftigungspolitik, des Arbeitsmarktes und der beruflichen Bildung gerechtfertigt ist, und einer Diskriminierung, die zu verbieten ist.

(26) Das Diskriminierungsverbot sollte nicht der Beibehaltung oder dem Erlass von Maßnahmen entgegenstehen, mit denen bezweckt wird, Benachteiligungen von Personen mit einer bestimmten Religion oder Weltanschauung, einer bestimmten Behinderung, einem bestimmten Alter oder einer bestimmten sexuellen Ausrichtung zu verhindern oder auszugleichen, und diese Maßnahmen können die Einrichtung und Beibehaltung von Organisationen von Personen mit einer bestimmten Religion oder Weltanschauung, einer bestimmten Behinderung, einem bestimmten Alter oder einer bestimmten sexuellen Ausrichtung zulassen, wenn deren Zweck hauptsächlich darin besteht, die besonderen Bedürfnisse dieser Personen zu fördern.

(27) Der Rat hat in seiner Empfehlung 86/379/EWG vom 24. Juli 1986 [1] zur Beschäftigung von Behinderten in der Gemeinschaft einen Orientierungsrahmen festgelegt, der Beispiele für positive Aktionen für die Beschäftigung und Berufsbildung von Menschen mit Behinderung anführt; in seiner Entschließung vom 17. Juni 1999 betreffend gleiche Beschäftigungschancen für behinderte Menschen [2] hat er bekräftigt, dass es wichtig ist, insbesondere der Einstellung, der Aufrechterhaltung des Beschäftigungsverhältnisses sowie der beruflichen Bildung und dem lebensbegleitenden Lernen von Menschen mit Behinderung besondere Aufmerksamkeit zu widmen.

(28) In dieser Richtlinie werden Mindestanforderungen festgelegt; es steht den Mitgliedstaaten somit frei, günstigere Vorschriften einzuführen oder beizubehalten. Die Umsetzung dieser Richtlinie darf nicht eine Absenkung des in den Mitgliedstaaten bereits bestehenden Schutzniveaus rechtfertigen.

(29) Opfer von Diskriminierungen wegen der Religion oder Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung sollten über einen angemessenen Rechtsschutz verfügen. Um einen effektiveren Schutz zu gewährleisten, sollte auch die Möglichkeit bestehen, dass sich Verbände oder andere juristische Personen unbeschadet der nationalen Verfahrensordnung bezüglich der Vertretung und Verteidigung vor Gericht bei einem entsprechenden Beschluss der Mitgliedstaaten im Namen eines Opfers oder zu seiner Unterstützung an einem Verfahren beteiligen.

(30) Die effektive Anwendung des Gleichheitsgrundsatzes erfordert einen angemessenen Schutz vor Viktimisierung.

(31) Eine Änderung der Regeln für die Beweislast ist geboten, wenn ein glaubhafter Anschein einer Diskriminierung besteht. Zur wirksamen Anwendung des Gleichbehandlungsgrundsatzes ist eine Verlagerung der Beweislast auf die beklagte Partei erforderlich, wenn eine solche Diskriminierung nachgewiesen ist. Allerdings obliegt es dem Beklagten nicht, nachzuweisen, dass der Kläger einer bestimmten Religion angehört, eine bestimmte Weltanschauung hat, eine bestimmte Behinderung aufweist, ein bestimmtes Alter oder eine bestimmte sexuelle Ausrichtung hat.

(32) Die Mitgliedstaaten können davon absehen, die Regeln für die Beweislastverteilung auf Verfahren anzuwenden, in denen die Ermittlung des Sachverhalts dem Gericht oder der zuständigen Stelle obliegt. Dies betrifft Verfahren, in denen die klagende Partei den Beweis des Sachverhalts, dessen Ermittlung dem Gericht oder der zuständigen Stelle obliegt, nicht anzutreten braucht.

(33) Die Mitgliedstaaten sollten den Dialog zwischen den Sozialpartnern und im Rahmen der einzelstaatlichen Gepflogenheiten mit Nichtregierungsorganisationen mit dem Ziel fördern, gegen die verschiedenen Formen von Diskriminierung am Arbeitsplatz anzugehen und diese zu bekämpfen.

(34) In Anbetracht der Notwendigkeit, den Frieden und die Aussöhnung zwischen den wichtigsten Gemeinschaften in Nordirland zu fördern, sollten in diese Richtlinie besondere Bestimmungen aufgenommen werden.

(35) Die Mitgliedstaaten sollten wirksame, verhältnismäßige und abschreckende Sanktionen für den Fall vorsehen, dass gegen die aus dieser Richtlinie erwachsenden Verpflichtungen verstoßen wird.

(36) Die Mitgliedstaaten können den Sozialpartnern auf deren gemeinsamen Antrag die Durchführung der Bestimmungen dieser Richtlinie übertragen, die in den Anwendungsbereich von Tarifverträgen fallen, sofern sie alle erforderlichen Maßnahmen treffen, um jederzeit gewährleisten zu können, dass die durch diese Richtlinie vorgeschriebenen Ergebnisse erzielt werden.

(37) Im Einklang mit dem Subsidiaritätsprinzip nach Artikel 5 des EG-Vertrags kann das Ziel dieser Richtlinie, nämlich die Schaffung gleicher Ausgangsbedingungen in der Gemeinschaft bezüglich der Gleichbehandlung in Beschäftigung und Beruf, auf der Ebene der Mitgliedstaaten nicht ausreichend erreicht werden und kann daher wegen des Umfangs und der Wirkung der Maßnahme besser auf Gemeinschaftsebene verwirklicht werden. Im Einklang mit dem Verhältnismäßigkeitsprinzip nach jenem Artikel geht diese Richtlinie nicht über das für die Erreichung dieses Ziels erforderliche Maß hinaus —

HAT FOLGENDE RICHTLINIE ERLASSEN:

KAPITEL I

ALLGEMEINE BESTIMMUNGEN

Artikel 1

Zweck

Zweck dieser Richtlinie ist die Schaffung eines allgemeinen Rahmens zur Bekämpfung der Diskriminierung wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung in Beschäftigung und Beruf im Hinblick auf die Verwirklichung des Grundsatzes der Gleichbehandlung in den Mitgliedstaaten.

Artikel 2

Der Begriff „Diskriminierung"

(1) Im Sinne dieser Richtlinie bedeutet „Gleichbehandlungsgrundsatz", dass es keine unmittelbare oder mittelbare Diskriminierung wegen eines der in Artikel 1 genannten Gründe geben darf.

(2) Im Sinne des Absatzes 1

a) liegt eine unmittelbare Diskriminierung vor, wenn eine Person wegen eines der in Artikel 1 genannten Gründe in einer vergleichbaren Situation eine weniger günstige Behandlung erfährt, als eine andere Person erfährt, erfahren hat oder erfahren würde;

b) liegt eine mittelbare Diskriminierung vor, wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren Personen mit einer bestimmten Religion oder Weltanschauung, einer bestimmten Behinderung, eines bestimmten Alters oder mit einer bestimmten sexuellen Ausrichtung gegenüber anderen Personen in besonderer Weise benachteiligen können, es sei denn:

   i) diese Vorschriften, Kriterien oder Verfahren sind durch ein rechtmäßiges Ziel sachlich gerechtfertigt, und die Mittel sind zur Erreichung dieses Ziels angemessen und erforderlich, oder

[1] ABl. L 225 vom 12.8.1986, S. 43.
[2] ABl. C 186 vom 2.7.1999, S. 3.

ii) der Arbeitgeber oder jede Person oder Organisation, auf die diese Richtlinie Anwendung findet, ist im Falle von Personen mit einer bestimmten Behinderung aufgrund des einzelstaatlichen Rechts verpflichtet, geeignete Maßnahmen entsprechend den in Artikel 5 enthaltenen Grundsätzen vorzusehen, um die sich durch diese Vorschrift, dieses Kriterium oder dieses Verfahren ergebenden Nachteile zu beseitigen.

(3) Unerwünschte Verhaltensweisen, die mit einem der Gründe nach Artikel 1 in Zusammenhang stehen und bezwekken oder bewirken, dass die Würde der betreffenden Person verletzt und ein von Einschüchterungen, Anfeindungen, Erniedrigungen, Entwürdigungen oder Beleidigungen gekennzeichnetes Umfeld geschaffen wird, sind Belästigungen, die als Diskriminierung im Sinne von Absatz 1 gelten. In diesem Zusammenhang können die Mitgliedstaaten den Begriff „Belästigung" im Einklang mit den einzelstaatlichen Rechtsvorschriften und Gepflogenheiten definieren.

(4) Die Anweisung zur Diskriminierung einer Person wegen eines der Gründe nach Artikel 1 gilt als Diskriminierung im Sinne des Absatzes 1.

(5) Diese Richtlinie berührt nicht die im einzelstaatlichen Recht vorgesehenen Maßnahmen, die in einer demokratischen Gesellschaft für die Gewährleistung der öffentlichen Sicherheit, die Verteidigung der Ordnung und die Verhütung von Straftaten, zum Schutz der Gesundheit und zum Schutz der Rechte und Freiheiten anderer notwendig sind.

Artikel 3

Geltungsbereich

(1) Im Rahmen der auf die Gemeinschaft übertragenen Zuständigkeiten gilt diese Richtlinie für alle Personen in öffentlichen und privaten Bereichen, einschließlich öffentlicher Stellen, in Bezug auf

a) die Bedingungen — einschließlich Auswahlkriterien und Einstellungsbedingungen — für den Zugang zu unselbständiger und selbständiger Erwerbstätigkeit, unabhängig von Tätigkeitsfeld und beruflicher Position, einschließlich des beruflichen Aufstiegs;

b) den Zugang zu allen Formen und allen Ebenen der Berufsberatung, der Berufsausbildung, der beruflichen Weiterbildung und der Umschulung, einschließlich der praktischen Berufserfahrung;

c) die Beschäftigungs- und Arbeitsbedingungen, einschließlich der Entlassungsbedingungen und des Arbeitsentgelts;

d) die Mitgliedschaft und Mitwirkung in einer Arbeitnehmer- oder Arbeitgeberorganisation oder einer Organisation, deren Mitglieder einer bestimmten Berufsgruppe angehören, einschließlich der Inanspruchnahme der Leistungen solcher Organisationen.

(2) Diese Richtlinie betrifft nicht unterschiedliche Behandlungen aus Gründen der Staatsangehörigkeit und berührt nicht die Vorschriften und Bedingungen für die Einreise von Staatsangehörigen dritter Länder oder staatenlosen Personen in das Hoheitsgebiet der Mitgliedstaaten oder deren Aufenthalt in diesem Hoheitsgebiet sowie eine Behandlung, die sich aus der Rechtsstellung von Staatsangehörigen dritter Länder oder staatenlosen Personen ergibt.

(3) Diese Richtlinie gilt nicht für Leistungen jeder Art seitens der staatlichen Systeme oder der damit gleichgestellten Systeme einschließlich der staatlichen Systeme der sozialen Sicherheit oder des sozialen Schutzes.

(4) Die Mitgliedstaaten können vorsehen, dass diese Richtlinie hinsichtlich von Diskriminierungen wegen einer Behinderung und des Alters nicht für die Streitkräfte gilt.

Artikel 4

Berufliche Anforderungen

(1) Ungeachtet des Artikels 2 Absätze 1 und 2 können die Mitgliedstaaten vorsehen, dass eine Ungleichbehandlung wegen eines Merkmals, das im Zusammenhang mit einem der in Artikel 1 genannten Diskriminierungsgründe steht, keine Diskriminierung darstellt, wenn das betreffende Merkmal aufgrund der Art einer bestimmten beruflichen Tätigkeit oder der Bedingungen ihrer Ausübung eine wesentliche und entscheidende berufliche Anforderung darstellt, sofern es sich um einen rechtmäßigen Zweck und eine angemessene Anforderung handelt.

(2) Die Mitgliedstaaten können in Bezug auf berufliche Tätigkeiten innerhalb von Kirchen und anderen öffentlichen oder privaten Organisationen, deren Ethos auf religiösen Grundsätzen oder Weltanschauungen beruht, Bestimmungen in ihren zum Zeitpunkt der Annahme dieser Richtlinie geltenden Rechtsvorschriften beibehalten oder in künftigen Rechtsvorschriften Bestimmungen vorsehen, die zum Zeitpunkt der Annahme dieser Richtlinie bestehende einzelstaatliche Gepflogenheiten widerspiegeln und wonach eine Ungleichbehandlung wegen der Religion oder Weltanschauung einer Person keine Diskriminierung darstellt, wenn die Religion oder die Weltanschauung dieser Person nach der Art dieser Tätigkeiten oder der Umstände ihrer Ausübung eine wesentliche, rechtmäßige und gerechtfertigte berufliche Anforderung angesichts des Ethos der Organisation darstellt. Eine solche Ungleichbehandlung muss die verfassungsrechtlichen Bestimmungen und Grundsätze der Mitgliedstaaten sowie die allgemeinen Grundsätze des Gemeinschaftsrechts beachten und rechtfertigt keine Diskriminierung aus einem anderen Grund.

Sofern die Bestimmungen dieser Richtlinie im übrigen eingehalten werden, können die Kirchen und anderen öffentlichen oder privaten Organisationen, deren Ethos auf religiösen Grundsätzen oder Weltanschauungen beruht, im Einklang mit den einzelstaatlichen verfassungsrechtlichen Bestimmungen und Rechtsvorschriften von den für sie arbeitenden Personen verlangen, dass sie sich loyal und aufrichtig im Sinne des Ethos der Organisation verhalten.

Artikel 5

Angemessene Vorkehrungen für Menschen mit Behinderung

Um die Anwendung des Gleichbehandlungsgrundsatzes auf Menschen mit Behinderung zu gewährleisten, sind angemessene Vorkehrungen zu treffen. Das bedeutet, dass der Arbeitgeber die geeigneten und im konkreten Fall erforderlichen Maßnahmen ergreift, um den Menschen mit Behinderung den Zugang zur Beschäftigung, die Ausübung eines Berufes, den beruflichen Aufstieg und die Teilnahme an Aus- und Weiterbildungsmaßnahmen zu ermöglichen, es sei denn, diese Maßnahmen würden den Arbeitgeber unverhältnismäßig belasten. Diese Belastung ist nicht unverhältnismäßig, wenn sie durch geltende Maßnahmen im Rahmen der Behindertenpolitik des Mitgliedstaates ausreichend kompensiert wird.

Artikel 6

Gerechtfertigte Ungleichbehandlung wegen des Alters

(1) Ungeachtet des Artikels 2 Absatz 2 können die Mitgliedstaaten vorsehen, dass Ungleichbehandlungen wegen des Alters keine Diskriminierung darstellen, sofern sie objektiv und ange-

messen sind und im Rahmen des nationalen Rechts durch ein legitimes Ziel, worunter insbesondere rechtmäßige Ziele aus den Bereichen Beschäftigungspolitik, Arbeitsmarkt und berufliche Bildung zu verstehen sind, gerechtfertigt sind und die Mittel zur Erreichung dieses Ziels angemessen und erforderlich sind.

Derartige Ungleichbehandlungen können insbesondere Folgendes einschließen:

a) die Festlegung besonderer Bedingungen für den Zugang zur Beschäftigung und zur beruflichen Bildung sowie besonderer Beschäftigungs- und Arbeitsbedingungen, einschließlich der Bedingungen für Entlassung und Entlohnung, um die berufliche Eingliederung von Jugendlichen, älteren Arbeitnehmern und Personen mit Fürsorgepflichten zu fördern oder ihren Schutz sicherzustellen;

b) die Festlegung von Mindestanforderungen an das Alter, die Berufserfahrung oder das Dienstalter für den Zugang zur Beschäftigung oder für bestimmte mit der Beschäftigung verbundene Vorteile;

c) die Festsetzung eines Höchstalters für die Einstellung aufgrund der spezifischen Ausbildungsanforderungen eines bestimmten Arbeitsplatzes oder aufgrund der Notwendigkeit einer angemessenen Beschäftigungszeit vor dem Eintritt in den Ruhestand.

(2) Ungeachtet des Artikels 2 Absatz 2 können die Mitgliedstaaten vorsehen, dass bei den betrieblichen Systemen der sozialen Sicherheit die Festsetzung von Altersgrenzen als Voraussetzung für die Mitgliedschaft oder den Bezug von Altersrente oder von Leistungen bei Invalidität einschließlich der Festsetzung unterschiedlicher Altersgrenzen im Rahmen dieser Systeme für bestimmte Beschäftigte oder Gruppen bzw. Kategorien von Beschäftigten und die Verwendung im Rahmen dieser Systeme von Alterskriterien für versicherungsmathematische Berechnungen keine Diskriminierung wegen des Alters darstellt, solange dies nicht zu Diskriminierungen wegen des Geschlechts führt.

Artikel 7

Positive und spezifische Maßnahmen

(1) Der Gleichbehandlungsgrundsatz hindert die Mitgliedstaaten nicht daran, zur Gewährleistung der völligen Gleichstellung im Berufsleben spezifische Maßnahmen beizubehalten oder einzuführen, mit denen Benachteiligungen wegen eines in Artikel 1 genannten Diskriminierungsgrunds verhindert oder ausgeglichen werden.

(2) Im Falle von Menschen mit Behinderung steht der Gleichbehandlungsgrundsatz weder dem Recht der Mitgliedstaaten entgegen, Bestimmungen zum Schutz der Gesundheit und der Sicherheit am Arbeitsplatz beizubehalten oder zu erlassen, noch steht er Maßnahmen entgegen, mit denen Bestimmungen oder Vorkehrungen eingeführt oder beibehalten werden sollen, die einer Eingliederung von Menschen mit Behinderung in die Arbeitswelt dienen oder diese Eingliederung fördern.

Artikel 8

Mindestanforderungen

(1) Die Mitgliedstaaten können Vorschriften einführen oder beibehalten, die im Hinblick auf die Wahrung des Gleichbehandlungsgrundsatzes günstiger als die in dieser Richtlinie vorgesehenen Vorschriften sind.

(2) Die Umsetzung dieser Richtlinie darf keinesfalls als Rechtfertigung für eine Absenkung des von den Mitgliedstaaten bereits garantierten allgemeinen Schutzniveaus in Bezug auf Diskriminierungen in den von der Richtlinie abgedeckten Bereichen benutzt werden.

KAPITEL II

RECHTSBEHELFE UND RECHTSDURCHSETZUNG

Artikel 9

Rechtsschutz

(1) Die Mitgliedstaaten stellen sicher, dass alle Personen, die sich durch die Nichtanwendung des Gleichbehandlungsgrundsatzes in ihren Rechten für verletzt halten, ihre Ansprüche aus dieser Richtlinie auf dem Gerichts- und/oder Verwaltungsweg sowie, wenn die Mitgliedstaaten es für angezeigt halten, in Schlichtungsverfahren geltend machen können, selbst wenn das Verhältnis, während dessen die Diskriminierung vorgekommen sein soll, bereits beendet ist.

(2) Die Mitgliedstaaten stellen sicher, dass Verbände, Organisationen oder andere juristische Personen, die gemäß den in ihrem einzelstaatlichen Recht festgelegten Kriterien ein rechtmäßiges Interesse daran haben, für die Einhaltung der Bestimmungen dieser Richtlinie zu sorgen, sich entweder im Namen der beschwerten Person oder zu deren Unterstützung und mit deren Einwilligung an den in dieser Richtlinie zur Durchsetzung der Ansprüche vorgesehenen Gerichts- und/oder Verwaltungsverfahren beteiligen können.

(3) Die Absätze 1 und 2 lassen einzelstaatliche Regelungen über Fristen für die Rechtsverfolgung betreffend den Gleichbehandlungsgrundsatz unberührt.

Artikel 10

Beweislast

(1) Die Mitgliedstaaten ergreifen im Einklang mit ihrem nationalen Gerichtswesen die erforderlichen Maßnahmen, um zu gewährleisten, dass immer dann, wenn Personen, die sich durch die Nichtanwendung des Gleichbehandlungsgrundsatzes für verletzt halten und bei einem Gericht oder einer anderen zuständigen Stelle Tatsachen glaubhaft machen, die das Vorliegen einer unmittelbaren oder mittelbaren Diskriminierung vermuten lassen, es dem Beklagten obliegt zu beweisen, dass keine Verletzung des Gleichbehandlungsgrundsatzes vorgelegen hat.

(2) Absatz 1 lässt das Recht der Mitgliedstaaten, eine für den Kläger günstigere Beweislastregelung vorzusehen, unberührt.

(3) Absatz 1 gilt nicht für Strafverfahren.

(4) Die Absätze 1, 2 und 3 gelten auch für Verfahren gemäß Artikel 9 Absatz 2.

(5) Die Mitgliedstaaten können davon absehen, Absatz 1 auf Verfahren anzuwenden, in denen die Ermittlung des Sachverhalts dem Gericht oder der zuständigen Stelle obliegt.

Artikel 11

Viktimisierung

Die Mitgliedstaaten treffen im Rahmen ihrer nationalen Rechtsordnung die erforderlichen Maßnahmen, um die Arbeitnehmer vor Entlassung oder anderen Benachteiligungen durch den Arbeitgeber zu schützen, die als Reaktion auf eine Beschwerde innerhalb des betreffenden Unternehmens oder auf die Einleitung eines Verfahrens zur Durchsetzung des Gleichbehandlungsgrundsatzes erfolgen.

Artikel 12

Unterrichtung

Die Mitgliedstaaten tragen dafür Sorge, dass die gemäß dieser Richtlinie getroffenen Maßnahmen sowie die bereits geltenden einschlägigen Vorschriften allen Betroffenen in geeigneter Form, zum Beispiel am Arbeitsplatz, in ihrem Hoheitsgebiet bekannt gemacht werden.

Artikel 13

Sozialer Dialog

(1) Die Mitgliedstaaten treffen im Einklang mit den einzelstaatlichen Gepflogenheiten und Verfahren geeignete Maßnahmen zur Förderung des sozialen Dialogs zwischen Arbeitgebern und Arbeitnehmern mit dem Ziel, die Verwirklichung des Gleichbehandlungsgrundsatzes durch Überwachung der betrieblichen Praxis, durch Tarifverträge, Verhaltenskodizes, Forschungsarbeiten oder durch einen Austausch von Erfahrungen und bewährten Verfahren, voranzubringen.

(2) Soweit vereinbar mit den einzelstaatlichen Gepflogenheiten und Verfahren, fordern die Mitgliedstaaten Arbeitgeber und Arbeitnehmer ohne Eingriff in deren Autonomie auf, auf geeigneter Ebene Antidiskriminierungsvereinbarungen zu schließen, die die in Artikel 3 genannten Bereiche betreffen, soweit diese in den Verantwortungsbereich der Tarifparteien fallen. Die Vereinbarungen müssen den in dieser Richtlinie sowie den in den einschlägigen nationalen Durchführungsbestimmungen festgelegten Mindestanforderungen entsprechen.

Artikel 14

Dialog mit Nichtregierungsorganisationen

Die Mitgliedstaaten fördern den Dialog mit den jeweiligen Nichtregierungsorganisationen, die gemäß den einzelstaatlichen Rechtsvorschriften und Gepflogenheiten ein rechtmäßiges Interesse daran haben, sich an der Bekämpfung von Diskriminierung wegen eines der in Artikel 1 genannten Gründe zu beteiligen, um die Einhaltung des Grundsatzes der Gleichbehandlung zu fördern.

KAPITEL III

BESONDERE BESTIMMUNGEN

Artikel 15

Nordirland

(1) Angesichts des Problems, dass eine der wichtigsten Religionsgemeinschaften Nordirlands im dortigen Polizeidienst unterrepräsentiert ist, gilt die unterschiedliche Behandlung bei der Einstellung der Bediensteten dieses Dienstes — auch von Hilfspersonal — nicht als Diskriminierung, sofern diese unterschiedliche Behandlung gemäß den einzelstaatlichen Rechtsvorschriften ausdrücklich gestattet ist.

(2) Um eine Ausgewogenheit der Beschäftigungsmöglichkeiten für Lehrkräfte in Nordirland zu gewährleisten und zugleich einen Beitrag zur Überwindung der historischen Gegensätze zwischen den wichtigsten Religionsgemeinschaften Nordirlands zu leisten, finden die Bestimmungen dieser Richtlinie über Religion oder Weltanschauung keine Anwendung auf die Einstellung von Lehrkräften in Schulen Nordirlands, sofern dies gemäß den einzelstaatlichen Rechtsvorschriften ausdrücklich gestattet ist.

KAPITEL IV

SCHLUSSBESTIMMUNGEN

Artikel 16

Einhaltung

Die Mitgliedstaaten treffen die erforderlichen Maßnahmen, um sicherzustellen, dass

a) die Rechts- und Verwaltungsvorschriften, die dem Gleichbehandlungsgrundsatz zuwiderlaufen, aufgehoben werden;

b) die mit dem Gleichbehandlungsgrundsatz nicht zu vereinbarenden Bestimmungen in Arbeits- und Tarifverträgen, Betriebsordnungen und Statuten der freien Berufe und der Arbeitgeber- und Arbeitnehmerorganisationen für nichtig erklärt werden oder erklärt werden können oder geändert werden.

Artikel 17

Sanktionen

Die Mitgliedstaaten legen die Sanktionen fest, die bei einem Verstoß gegen die einzelstaatlichen Vorschriften zur Anwendung dieser Richtlinie zu verhängen sind, und treffen alle erforderlichen Maßnahmen, um deren Durchführung zu gewährleisten. Die Sanktionen, die auch Schadenersatzleistungen an die Opfer umfassen können, müssen wirksam, verhältnismäßig und abschreckend sein. Die Mitgliedstaaten teilen diese Bestimmungen der Kommission spätestens am 2. Dezember 2003 mit und melden alle sie betreffenden späteren Änderungen unverzüglich.

Artikel 18

Umsetzung der Richtlinie

Die Mitgliedstaaten erlassen die erforderlichen Rechts- und Verwaltungsvorschriften, um dieser Richtlinie spätestens zum 2. Dezember 2003 nachzukommen, oder können den Sozialpartnern auf deren gemeinsamen Antrag die Durchführung der Bestimmungen dieser Richtlinie übertragen, die in den Anwendungsbereich von Tarifverträgen fallen. In diesem Fall gewährleisten die Mitgliedstaaten, dass die Sozialpartner spätestens zum 2. Dezember 2003 im Weg einer Vereinbarung die erforderlichen Maßnahmen getroffen haben; dabei haben die Mitgliedstaaten alle erforderlichen Maßnahmen zu treffen, um jederzeit gewährleisten zu können, dass die durch diese Richtlinie vorgeschriebenen Ergebnisse erzielt werden. Sie setzen die Kommission unverzüglich davon in Kenntnis.

Um besonderen Bedingungen Rechnung zu tragen, können die Mitgliedstaaten erforderlichenfalls eine Zusatzfrist von drei Jahren ab dem 2. Dezember 2003, d. h. insgesamt sechs Jahre, in Anspruch nehmen, um die Bestimmungen dieser Richtlinie über die Diskriminierung wegen des Alters und einer Behinderung umzusetzen. In diesem Fall setzen sie die Kommission unverzüglich davon in Kenntnis. Ein Mitgliedstaat, der die Inanspruchnahme dieser Zusatzfrist beschließt, erstattet der Kommission jährlich Bericht über die von ihm ergriffenen Maßnahmen zur Bekämpfung der Diskriminierung wegen des Alters und einer Behinderung und über die Fortschritte, die bei der Umsetzung der Richtlinie erzielt werden konnten. Die Kommission erstattet dem Rat jährlich Bericht.

Wenn die Mitgliedstaaten derartige Vorschriften erlassen, nehmen sie in den Vorschriften selbst oder durch einen Hinweis bei der amtlichen Veröffentlichung auf diese Richtlinie Bezug. Die Mitgliedstaaten regeln die Einzelheiten der Bezugnahme.

Artikel 19

Bericht

(1) Bis zum 2. Dezember 2005 und in der Folge alle fünf Jahre übermitteln die Mitgliedstaaten der Kommission sämtliche Informationen, die diese für die Erstellung eines dem Europäischen Parlament und dem Rat vorzulegenden Berichts über die Anwendung dieser Richtlinie benötigt.

(2) Die Kommission berücksichtigt in ihrem Bericht in angemessener Weise die Standpunkte der Sozialpartner und der einschlägigen Nichtregierungsorganisationen. Im Einklang mit dem Grundsatz der systematischen Berücksichtigung geschlechterspezifischer Fragen wird ferner in dem Bericht die Auswirkung der Maßnahmen auf Frauen und Männer bewertet. Unter Berücksichtigung der übermittelten Informationen enthält der Bericht erforderlichenfalls auch Vorschläge für eine Änderung und Aktualisierung dieser Richtlinie.

Artikel 20

Inkrafttreten

Diese Richtlinie tritt am Tag ihrer Veröffentlichung im *Amtsblatt der Europäischen Gemeinschaften* in Kraft.

Artikel 21

Adressaten

Diese Richtlinie ist an die Mitgliedstaaten gerichtet.

Geschehen zu Brüssel am 27. November 2000.

Im Namen des Rates

Der Präsident

É. GUIGOU

FEB. 1994

EUROPEAN PARLIAMENT

Resolution on equal rights for homosexuals and lesbians in the EC
(A3-0028/94)

The European Parliament,

- having regard to the motions for resolutions by:
  (a) Mr Blak and Mrs Jensen, on discrimination in relation to freedom of movement (B3-0884/92),
  (b) Mr Bettini and others, on recognition of civil unions for couples consisting of persons of the same sex (B3-1079/92),
  (c) Mr Lomas, on civil rights for homosexuals and lesbians (B3-1186/93),
- having regard to its resolution of 13 March 1984 on sex discrimination at work,
- having regard to its resolution of 13 March 1991 on a plan of action in the context of the 1991-1992 'Europe against AIDS' programme,
- having regard to its recommendations on sexual harassment at work and the corresponding provisions on protection for lesbians and homosexuals,
- having regard to the Commission report, 'Homosexuality, a Community Issue', on the impact on lesbians and homosexuals of the completion of the European internal market,
- having regard to its resolution of 8 july 1992 on a European Charter of children's rights,
- having regard to the legal discrimination against lesbians and homosexuals which still exists in a number of Member States,
- having regard to the draft directive on combating discrimination on the basis of sexual orientation at work and in other legal areas, drawn up by the German Gay Union (SVD),
- having regard to the law on registered partnerships in Denmark and other anti-discrimination laws for homosexual people,
- having regard to Clause 28 of the Local Government Bill in the United Kingdom,
- having regard to Rule 45 of its Rules of procedure,
- having regard to the report of the Committee on Civil Liberties and Internal Affairs (A3-0028/94),

A. having regard to its action in support of equal treatment for all citizens, irrespective of their sexual orientation,

B. having regard to the greater public visibility of lesbians and homosexuals and the growing pluralization of lifestyles,

C. whereas lesbians and homosexuals are still exposed, nonetheless, to ridicule, intimidation, discrimination and violent attacks in many social spheres, often from their earliest youth,

D. whereas social change in many Member States calls for a corresponding adjustment of the civil, penal and administrative provisions in force, to end discrimination on the basis of sexual orientation, and whereas such adjustments have already been made in a number of Member States,

E. whereas the application of discriminatory provisions by Member States in a number of fields covered by EC legislation amounts to a violation of the fundamental principles of the EC Treaties and the Single European Act, particularly where freedom of movement, pursuant to Article 3 of the EEC Treaty, is concerned,

F. having regard to the European Community's special responsibility to ensure equal treatment for all citizens, irrespective of their sexual orientation, within the framework of its activities and areas of responsibility,

General considerations

1. Affirms its conviction that all citizens must be treated equally, irrespective of their sexual orientation;

2. Considers that the European Community is under the obligation to apply the fundamental principle of equal treatment, irrespective of each individual's sexual orientation, in all legal provisions already adopted or which may be adopted in future;

3. Believes, furthermore, that the EC Treaties must make stronger provision for the defence of human rights, and therefore calls on the Community institutions to make preparations, in the context of the institutional reform scheduled for 1996, for setting up a European institution able to ensure equal treatment, without reference to nationality, religious faith, colour, sex, sexual orientation or other differences;

4. Calls on the Commission and Council to accede to the European Convention on Human Rights, provided for in the Community's 1990 programme, as a first step towards more vigorous protection for human rights;

To the Member States

5. Calls on the Member States to abolish all legal provisions which criminalize and discriminate against sexual activities between persons of the same sex;

6. Calls for the same age of consent to apply to homosexual and heterosexual activities alike;

7. Calls for an end to the unequal treatment of persons with a homosexual orientation under the legal and administrative provisions of the social security system and where social benefits, adoption law, laws on inheritance and housing and criminal law and all related legal provisions are concerned;

8. Calls on the United Kingdom to abolish its discriminatory provisions to stem the supposed propagation of homosexuality and thus to restore freedom of opinion, the press, information, science and art for homosexual citizens and in relation to the subject of homosexuality and calls upon all Member States to respect such rights to freedom of opinion in the future;

9. Calls on the Member States, together with the national lesbian and homosexual organizations, to take measures and initiate campaigns against the increasing acts of violence perpetrated against homosexuals and to ensure prosecution of the perpetrators of these acts of violence;

10. Calls upon the Member States, together with the national lesbian and homosexual organizations, to take measures and initiate campaigns to combat all forms of social discrimination against homosexuals;

11. Recommends that Member State take steps to ensure that homosexual women's and men's social and cultural organizations have access to national funds on the same basis as other social and cultural organizations, that applications are judged according to the same criteria as applications from other organizations and that they are not disadvantaged by the fact that they are organizations for homosexual women or men;

To the Commission of the European Community

12. Calls on the Commission to present a draft Recommendation on equal rights for lesbians and homosexuals;

13. Considers that the basis of the Recommendation should be equal treatment for all Community citizens regardless of their sexual orientation and the ending off all forms of legal discrimination on the grounds of sexual orientation; calls on the Commission to submit a report to parliament at five-yearly intervals on the situation of homosexual men and women in the Community;

14. Believes that the Recommendation should as a minimum seek to end:
    - different and discriminatory ages of consent for homosexual and heterosexual acts,
    - prosecution of homosexuality as a public nuisance or gross indecency,
    - all forms of discrimination in labour and public service law and discrimination in criminal, civil, contract and commercial law,
    - the electronic storage of data concerning the sexual orientation of an individual without her or his knowledge and consent, or the unauthorised disclosure or improper use of this data,
    - the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework, and should guarantee the full rights and benefits of marriage, allowing the registration of partnerships,
    - any restriction on the right of lesbians and homosexuals to be parents or to adopt or foster children.

15. Calls on the Commission, in line with the Parliament's opinion of 19 November 1993 on the proposal for a regulation amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities in respect of equal treatment of men and women to undertake to combat any discrimination on the basis of sexual orientation in its own staffing policy;

16. Instructs its President to forward this resolution to the Council, the Commission and the governments and parliaments of the Member States and the states which have applied for membership.

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Assemblée parlementaire
Parliamentary Assembly

Recommendation 1474 (2000)[1][1]

Situation of lesbians and gays in Council of Europe member states

(Extract from the OffICE database of the Council of Europe - September 2000)

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1. Nearly twenty years ago, in its Recommendation 924 (1981) on discrimination against homosexuals, the Assembly condemned the various forms of discrimination suffered by homosexuals in certain Council of Europe member states.
2. Nowadays, homosexuals are still all too often subjected to discrimination or violence, for example, at school or in the street. They are perceived as a threat to the rest of society, as though there were a danger of homosexuality spreading once it became recognised. Indeed, where there is little evidence of homosexuality in a country, this is merely a blatant indication of the oppression of homosexuals.
3. This form of homophobia is sometimes propagated by certain politicians or religious leaders, who use it to justify the continued existence of discriminatory laws and, above all, aggressive or contemptuous attitudes.
4. Under the accession procedure for new member states, the Assembly ensures that, as a prerequisite for membership, homosexual acts between consenting adults are no longer classified as a criminal offence.
5. The Assembly notes that homosexuality is still a criminal offence in some Council of Europe member states and that discrimination between homosexuals and heterosexuals exists in a great many others with regard to the age of consent.

6. The Assembly welcomes the fact that, as early as 1981, the European Court of Human Rights, in its *Dudgeon* v. *United Kingdom* judgment held that the prohibition of sexual acts between consenting male adults infringed Article 8 of the European Convention on Human Rights, and that more recently, in 1999, it expressed its opposition to all discrimination of a sexual nature in its *Lustig-Prean and Beckett* v. *United Kingdom* and *Smith and Grady* v. *United Kingdom* judgments.
7. The Assembly refers to its Opinion No. 216 (2000) on draft Protocol No. 12 to the European Convention on Human Rights, in which it recommended that the Committee of Ministers include sexual orientation among the prohibited grounds for discrimination, considering it to be one of the most odious forms of discrimination.
8. While laws on employment do not explicitly provide for restrictions concerning homosexuals, in practice homosexuals are sometimes excluded from employment and there are unjustified restrictions on their access to the armed forces.
9. The Assembly is pleased to note, however, that some countries have not only abolished all forms of discrimination but have also passed laws recognising homosexual partnerships, or recognising homosexuality as a ground for granting asylum where there is a risk of persecution on the basis of sexual orientation.
10. It is none the less aware that recognition of these rights is currently hampered by people's attitudes, which still need to change.
11. The Assembly therefore recommends that the Committee of Ministers:

i. add sexual orientation to the grounds for discrimination prohibited by the European Convention on Human Rights, as requested in the Assembly's Opinion No. 216 (2000);
ii. extend the terms of reference of the European Commission against Racism and Intolerance (ECRI) to cover homophobia founded on sexual orientation, and add to the staff of the European Commissioner for Human Rights an individual with special responsibility for questions of discrimination on grounds of sexual orientation;
iii. call upon member states:

a. to include sexual orientation among the prohibited grounds for discrimination in their national legislation;
b. to revoke all legislative provisions rendering homosexual acts between consenting adults liable to criminal prosecution;
c. to release with immediate effect anyone imprisoned for sexual acts between consenting homosexual adults;

d. to apply the same minimum age of consent for homosexual and heterosexual acts;
e. to take positive measures to combat homophobic attitudes, particularly in schools, the medical profession, the armed forces, the police, the judiciary and the Bar, as well as in sport, by means of basic and further education and training;
f. to co-ordinate efforts with a view to simultaneously launching a vast public information campaign in as many member states as possible;
g. to take disciplinary action against anyone discriminating against homosexuals;

h. to ensure equal treatment for homosexuals with regard to employment;
i. to adopt legislation which makes provision for registered partnerships;
j. to recognise persecution against homosexuals as a ground for granting asylum;
k. to include in existing fundamental rights protection and mediation structures, or establish an expert on, discrimination on grounds of sexual orientation.

2[1] *Assembly debate* on 30 June 2000 (24th Sitting). See Doc. 8755, report of the Committee on Legal Affairs and Human Rights (rapporteur: Mr Tabajdi).
Text adopted by the Assembly on 26 September 2000 (27th Sitting).

In the **Dudgeon** case,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges:

Mr. R. RYSSDAL, President,

Mr. M. ZEKIA,

Mr. J. CREMONA,

Mr. THÓR VILHJÁLMSSON,

Mr. W. GANSHOF VAN DER MEERSCH,

Mrs. D. BINDSCHEDLER-ROBERT,

Mr. D. EVRIGENIS,

Mr. G. LAGERGREN,

Mr. L. LIESCH,

Mr. F. GÖLCÜKLÜ,

Mr. F. MATSCHER,

Mr. J. PINHEIRO FARINHA,

Mr. E. GARCIA DE ENTERRIA,

Mr. L.-E. PETTITI,

Mr. B. WALSH,

Sir Vincent EVANS,

Mr. R. MACDONALD,

Mr. C. RUSSO,

Mr. R. BERNHARDT,

and also Mr. M.-A. EISSEN, Registrar, and Mr. H. PETZOLD, Deputy Registrar,

Having deliberated in private on 24 and 25 April and from 21 to 23 September 1981,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The **Dudgeon** case was referred to the Court by the European Commission of Human Rights ("the Commission"). The case originated in an application against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission on 22 May 1976 under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom

citizen, Mr. Jeffrey **Dudgeon**.

2. The Commission's request was lodged with the registry of the Court on 18 July 1980, within the period of three months laid down by Articles 32 par. 1 and 47 (art. 32-1, art. 47). The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration made by the United Kingdom recognising the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the Commission's request is to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Article 8 (art. 8) of the Convention, taken alone or in conjunction with Article 14 (art. 14+8).

3. The Chamber of seven judges to be constituted included, as ex officio members, Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr. G. Balladore Pallieri, the President of the Court (Rule 21 par. 3 (b) of the Rules of Court). On 30 September 1980, the President drew by lot, in the presence of the Registrar, the names of the five other members of the Chamber, nameley Mr. G. Wiarda, Mr. D. Evrigenis, Mr. G. Lagergren, Mr. L. Liesch and Mr. J. Pinheiro Farinha (Article 43 in fine of the Convention and Rule 21 par. 4) (art. 43).

4. Mr. Balladore Pallieri assumed the office of President of the Chamber (Rule 21 par. 5). He ascertained, through the Registrar, the views of the Agent of the Government of the United Kingdom ("the Government") and the Delegates of the Commission as regards the procedure to be followed. On 24 October 1980, he directed that the Agent of the Government should have until 24 December to file a memorial and that the Delegates should be entitled to file a memorial in reply within two months from the date of the transmission to them by the Registrar of the Government's memorial. On 20 December, Mr. Wiarda, the Vice-President of the Court, who had replaced Mr. Balladore Pallieri as President of the Chamber following the latter's death (Rule 21 par. 5), agreed to extend the first of these time-limits until 6 February 1981.

5. On 30 January 1981, the Chamber decided under Rule 48 of the Rules of Court to relinquish jurisdiction forthwith in favour of the plenary Court.

6. The Government's memorial was received at the registry on 6 February and that of the Commission on 1 April; appended to the Commission's memorial were the applicant's observations on the Government's memorial.

7. After consulting through the Registrar, the Agent of the Government and the Delegates of the Commission, Mr. Wiarda, who had in the meantime been elected President of the Court, directed on 2 April 1981 that the oral proceedings should open on 23 April 1981.

8. On 3 April, the applicant invited the Court to hear expert evidence from Dr. Dannacker, Assistant Professor at the University of Frankfurt. In a letter received at the registry on 15 April, the Delegates of the Commission stated that they left it to the Court to decide whether such evidence was necessary.

9. A document was filed by the Government on 14 April 1981.

10. The oral hearings were held in public at the Human Rights Building, Strasbourg, on 23 April 1981. Immediately before their opening, the Court had held a preparatory meeting and decided not to hear expert evidence.

There appeared before the Court:

- for the Government:

Mrs. A. GLOVER, Legal Adviser, Foreign and Commonwealth Office, Agent,

Mr. N. BRATZA, Barrister-at-law,

Mr. B. KERR, Barrister-at-law, Counsel,

Mr. R. TOMLINSON, Home Office,

Mr. D. CHESTERTON, Northern Ireland Office,

Mr. N. BRIDGES, Northern Ireland Office, Advisers;

- for the Commission:

Mr. J. FAWCETT,

Mr. G. TENEKIDES, Delegates,

Lord GIFFORD, Barrister-at-law,

Mr. T. MUNYARD, Barrister-at-law,

Mr. P. CRANE, Solicitor, assisting the Delegates under Rule 29 par. 1, second sentence, of the Rules of Court.

The Court heard addresses by the Delegates and Lord Gifford for the Commission, and by Mr. Kerr and Mr. Bratza for the Government. Lord Gifford submitted various documents through the Delegates of the Commission.

11. On 11 and 12 May, respectively, the Registrar received from the Agent of the Government and from the Commission's Delegates and those assisting them their written replies to certain questions put by the Court and/or their written observations on the documents filed before and during the hearings.

12. In September 1981, Mr. Wiarda was prevented from taking part in the consideration of the case; Mr. Ryssdal, as Vice-President of the Court, thereafter presided over the Court.

AS TO THE FACTS

13. Mr. Jeffrey **Dudgeon**, who is 35 years of age, is a shipping clerk resident in Belfast, Northern Ireland.

Mr. **Dudgeon** is a homosexual and his complaints are directed primarily against the existence in Northern Ireland of laws which have the effect of making certain homosexual acts between consenting adult males criminal offences.

A. The relevant law in Northern Ireland

14. The relevant provisions currently in force in Northern Ireland are contained in the Offences against the Person Act 1861 ("the 1861 Act"), the Criminal Law Amendment Act 1885 ("the 1855 Act") and the common law.

Under sections 61 and 62 of the 1861 Act, committing and attempting to commit buggery are made offences punishable with maximum sentences of life imprisonment and ten years' imprisonment, respectively. Buggery consists of sexual intercourse per anum by a man with a man or a woman, or per anum or per vaginam by a man or a woman with an animal.

By section 11 of the 1885 Act, it is an offence, punishable with a maximum of two years' imprisonment, for any male person, in public or in private, to commit an act of "gross indecency" with another male. "Gross indecency" is not statutorily defined but relates to any act involving sexual indecency between male persons; according to the evidence submitted to the Wolfenden Committee (see paragraph 17 below), it usually takes the form of mutual masturbation, inter-crural contact or oral-genital contact. At common law, an attempt to commit an offence is itself an offence and, accordingly, it is an offence to attempt to commit an act proscribed by section 11 of the 1885 Act. An attempt is in theory punishable in Northern Ireland by an unlimited sentence (but as to this, see paragraph 31 below).

Consent is no defence to any of these offences and no distinction regarding age is made in the text of the Acts.

An account of how the law is applied in practice is given below at paragraphs 29 to 31.

15. Acts of homosexuality between females are not, and have never been, criminal offences, although the offence of indecent assault may be committed by one woman on another under the age of 17.

As regards heterosexual relations, it is an offence, subject to certain exceptions, for a man to have sexual intercourse with a girl under the age of 17. Until 1950 the age of consent of a girl to sexual intercourse was 16 in both England and Wales and in Northern Ireland, but by legislation introduced in that year the age of consent was increased to 17 in Northern Ireland. While in relation to the corresponding offence in England and Wales it is a defence for a man under the age of 24 to show that he believed with reasonable cause the girl to be over 16 years of age, no such defence is available under Northern Ireland law.

B. The law and reform of the law in the rest of the United Kingdom

16. The 1861 and 1885 Acts were passed by the United Kingdom Parliament. When enacted, they applied to England and Wales, to all Ireland, then unpartitioned and an integral part of the United Kingdom, and also, in the case of the 1885 Act, to Scotland.

1. England and Wales

17. In England and Wales the current law on male homosexual acts is contained in the Sexual Offences Act 1956 ("the 1956 Act") as amended by the Sexual Offences Act 1967 ("the 1967 Act").

The 1956 Act, an Act consolidating the existing statute law, made it an offence for any person to commit buggery with another person or an animal (section 12) and an offence for a man te commit an act of "gross indecency" with another man (section 13).

The 1967 Act, which was introduced into Parliament as a Private Member's Bill, was passed to give effect to the recommendations

concerning homosexuality made in 1957 in the report of the Departmental Committee on Homosexual Offences and Prostitution established under the chairmanship of Sir John Wolfenden (the "Wolfenden Committee" and "Wolfenden report"). The Wolfenden Committee regarded the function of the criminal law in this field as

"to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official, or economic dependence",

but not

"to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined".

The Wolfenden Committee concluded that homosexual behaviour between consenting adults in private was part of the "realm of private morality and immorality which is, in brief and crude terms, not the law's business" and should no longer be criminal.

The 1967 Act qualified sections 12 and 13 of the 1956 Act by providing that, subject to certain exceptions concerning mental patients, members of the armed forces and merchant seamen, buggery and acts of gross indecency in private between consenting males aged 21 years or over should not be criminal offences. It remains a crime to commit a homosexual act, of the kind referred to in these sections, with a person aged less than 21 in any circumstances.

The age of majority for certain purposes, including capacity to marry without parental consent and to enter into contractual relations, was reduced from 21 to 18 by the Family Law Reform Act 1969. The voting age and the minimum age for jury service were likewise reduced to 18 by the Representation of the People Act 1969 and the Criminal Justice Act 1972, respectively.

In 1977, the House of Lords rejected a Bill aimed at reducing the age of consent for private homosexual act to 18. Subsequently, in a report published in April 1981, a committee established by the Home Office, namely the Policy Advisory Committee on Sexual Offences, recommended that the minimum age for homosexual relations between males should be reduced to 18. A minority of five members favoured a reduction to 16.

2. Scotland

18. When the applicant lodged his complaint in 1976, the relevant law applicable was substantially similar to that currently in force in Northern Ireland. Section 7 of the Sexual Offences (Scotland) Act 1976, a consolidating provision re-enacting section 11 of the 1885 Act, provided for the offence of gross indecency; the offence of sodomy existed at common law. However, successive Lord Advocates had stated in Parliament that their policy was not to prosecute in respect of acts which would not have been punishable if the 1967 Act had applied in Scotland. The Criminal Justice (Scotland) Act 1980 ("the 1980 Act") formally brought Scottish law into line with that of England and Wales. As in the case of the 1967 Act, the change in the law originated in amendments introduced in Parliament by a Private Member.

C. Constitutional position of Northern Ireland

19. Under an Act of the United Kingdom Parliament, the Government of Ireland Act 1920, a separate Parliament for Northern Ireland was established with power to legislate on all matters devolved by that Act, including criminal and social law. An executive known as the Government of Northern Ireland was also established with Ministers responsible for the different areas of the devolved powers. By convention, during the life of the Northern Ireland Parliament (1921-9172) the United Kingdom Parliament rarely, if ever, legislated for Northern Ireland in respect of the devolved matters - in particular social matters - falling within the former Parliament's legislative competence.

20. In March 1972, the Northern Ireland Parliament was prorogued and Northern Ireland was made subject to "direct rule" from Westminster (see the judgment of 18 January 1978 in the case of Ireland v. the United Kingdom, Series A no. 25, pp. 10 and 20-21, par. 19 and 49). Since that date, except for a period of five months in 1974 when certain legislative and executive powers were devolved to a Northern Ireland Assembly and Executive, legislation for Northern Ireland in all fields has been the responsibility of the United Kingdom Parliament. There are 12 members of the United Kingdom House of Commons, out of a total of 635, who represent constituencies in Northern Ireland.

Under the provisions currently in force, power is conferred on Her Majesty to legislate for Northern Ireland by Order in Council. Save where there are reasons of urgency, no recommendation may be made to Her Majesty to make an Order in Council under these provisions unless a draft of the Order has been approved by each House of Parliament. It is the responsibility of the Government to prepare a draft Order and to lay it before Parliament for approval. A draft can only be approved or rejected in toto by Parliament, but not amended. The function of the Queen in Council in making an Order once it has been approved by Parliament is purely formal. In practice, much legislation for Northern Ireland is effected in this form rather than by means of an Act of Parliament.

D. Proposals for reform in Northern Ireland

21. No measures comparable to the 1967 Act were ever introduced into the Northern Ireland Parliament either by the Government of Northern Ireland or by any Private Member.

22. In July 1976, following the failure of the Northern Ireland Constitutional Convention to work out a satisfactory form of devolved government for Northern Ireland, the then Secretary of State for Northern Ireland announced in Parliament that the United Kingdom Government would thenceforth by looking closely at the need for legislation in fields which it had previously been thought appropriate to leave to a future devolved government, in particular with a view to bringing Northern Ireland law more closely into harmony with laws in other parts of the country. He cited homosexuality and divorce as possible areas for action. However, recognising the difficulties about such subjects in Northern Ireland, he indicated that he would welcome the views of the local people, including those of the Standing Advisory Commission on Human Rights ("the Advisory Commission") and of Members of Parliament representing Northern Ireland constituencies.

23. The Advisory Commission, which is an independent statutory body, was accordingly invited to consider the matter. As regards

homosexual offences, the Advisory Commission received evidence from a number of persons and organisations, religious and secular. No representations were made by the Roman Catholic Church in Northern Ireland or by any of the 12 Northern Ireland Members of the United Kingdom House of Commons.

The Advisory Commission published its report in April 1977. The Advisory Commission concluded that most people did not regard it as satisfactory to retain the existing differences in the law with regard to homosexuality and that few only would be strongly opposed to changes bringing Northern Ireland law into conformity with that in England and Wales. On the other hand, it did not consider that there would be support for legislation which went further, in particular by lowering the age of consent. Its recommendations were that the law of Northern Ireland should be brought into line with the 1967 Act, but that future amendments to the 1967 Act should not automatically apply to Northern Ireland.

24. On 27 July 1978, the Government published a proposal for a draft Homosexual Offences (Northern Ireland) Order 1978, the effect of which would have been to bring Northern Ireland law on the matter broadly into line with that of England and Wales. In particular, homosexual acts in private between two consenting male adults over the age of 21 would no longer have been punishable.

In a foreword to the proposal, the responsible Minister stated that "the Government had always recognised that homosexuality is an issue about which some people in Northern Ireland hold strong conscientious or religious opinions". He summarised the main arguments for and against reform as follows:

"In brief, there are two differing viewpoints. One, based on an interpretation of religious principles, holds that homosexual acts under any circumstances are immoral and that the criminal law should be used, by treating them as crimes, to enforce moral behaviour. The other view distinguishes between, on the one hand that area of private morality within which a homosexual individual can (as a matter of civil liberty) exercise his private right of conscience and, on the other hand, the area of public concern where the State ought and must use the law for the protection of society and in particular for the protection of children, those who are mentally retarded and others who are incapable of valid personal consent.

I have during my discussions with religious and other groups heard both these viewpoints expressed with sincerity and I understand the convictions that underlie both points of view. There are in addition other considerations which must be taken into account. For example it has been pointed out that the present law is difficult to enforce, that fear of exposure can make a homosexual particularly vulnerable to blackmail and that this fear of exposure can cause unhappiness not only for the homosexual himself but also for his family and friends.

While recognising these differing viewpoints I believe we should not overlook the common ground. Most people will agree that the young must be given special protection; and most people will also agree that law should be capable of being enforced. Moreover those who are against reform have compassion and respect for individual rights just as much as those in favour of reform have concern for the welfare of society. For the individuals in society, as for Government, there is thus a difficult balance of judgment to be arrived at."

Public comment on the proposed amendment to the law was invited.

25. The numerous comments received by the Government in response to their invitation, during and after the formal period of consultation, revealed a substantial division of opinion. On a simple count of heads, there was a large majority of individuals and institutions against the proposal for a draft Order.

Those opposed to reform included a number of senior judges, District Councils, Orange Lodges and other organisations, generally of a religious character and in some cases engaged in youth activities. A petition to "Save Ulster from Sodomy" organised by the Democratic Unionist Party led by Mr. Ian Paisley, a Member of the United Kingdom House of Commons, collected nearly 70.000 signatures. The strongest opposition came from certain religious groups. In particular, the Roman Catholic Bishops saw the proposal as an invitation to Northern Irish society to change radically its moral code in a manner liable to bring about more serious problems than anything attributable to the present law. The Roman Catholic Bishops argued that such a change in the law would lead to a further decline in moral standards and to a climate of moral laxity which would endanger and put undesirable pressures on those most vulnerable, namely the young. Similarly, the Presbyterian Church in Ireland, whilst understanding the arguments for the change, made the point that the removal from the purview of the criminal law of private homosexual acts between consenting adult males might be taken by the public as an implicit licence if not approval for such practices and as a change in public policy towards a further relaxation of moral standards.

The strongest support for change came from organisations representing homosexuals and social work agencies. They claimed that the existing law was unnecessary and that it created hardship and distress for a substantial minority of persons affected by it. It was urged that the sphere of morality should be kept distinct from that of the criminal law and that considerations of the personal freedom of the individual should in such matters be paramount. For its part, the Standing Committee of the General Synod of the Church of Ireland accepted that homosexual acts in private between consenting adults aged 21 and over should be removed from the realm of criminal offence, but in amplification commented that this did not mean that the Church considered homosexuality to be an acceptable norm.

Press reports indicated that most of the political formations had expressed favourable views. However, none of the 12 Northern Ireland Members of Parliament publicly supported the proposed reform and several of them openly opposed it. An opinion poll conducted in Northern Ireland in January 1978 indicated that the people interviewed were evenly divided on the global question of the desirability of reforming the law on divorce and homosexuality so as to bring it into line with that of England and Wales.

26. On 2 July 1979, the then Secretary of State for Northern Ireland, in announcing to Parliament that the Government did not intend to pursue the proposed reform, stated:

"Consultation showed that strong views are held in Northern Ireland, both for and against in the existing law. Although it is not possible to say with certainty what is the feeling of the majority of people in the province, it is clear that is substantial body of opinion there (embracing a wide range of religious as well as political opinion) is opposed to the proposed change ... [T]he Government have [also] taken into account ... the fact that

legislation on an issue such as the one dealt with in the draft order has traditionally been a matter for the initiative of a Private Member rather than for Government. At present, therefore, the Government propose to take no further action ..., but we would be prepared to reconsider the matter if there were any developments in the future which were relevant."

27. In its annual report for 1979-1980, the Advisory Commission reiterated its view that law should be reformed. It believed that there was a danger that the volume of opposition might be exaggerated.

28. Since the Northern Ireland Parliament was prorogued in 1972 (see paragraph 20 above), there has been no initiative of any kind for legislation to amend the 1861 and 1885 Acts from any of the mainstream political organisations or movements in Northern Ireland.

E. Enforcement of the law in Northern Ireland

29. In accordance with the general law, anyone, including a private person, may bring a prosecution for a homosexual offence, subject to the Director of Public Prosecutions' power to assume the conduct of the proceedings and, if he thinks fit, discontinue them. The evidence as to prosecutions for homosexual offences between 1972 and 1981 reveals that none has been brought by a private person during that time.

30. During the period from January 1972 to October 1980 there were 62 prosecutions for homosexual offences in Northern Ireland. The large majority of these cases involved minors, that is persons under 18; a few involved persons aged 18 to 21 or mental patients or prisoners. So far as the Government are aware from investigation of the records, no one was prosecuted in Northern Ireland during the period in question for an act which would clearly not have been an offence if committed in England or Wales. There is, however, no stated policy not to prosecute in respect of such acts. As was explained to the Court by the Government, instructions operative within the office of the Director of Public Prosecutions reserve the decision on whether to prosecute in each individual case to the Director personally, in consultation with the Attorney General, the sole criterion being whether, on all the facts and circumstances of that case, a prosecution would be in the public interest.

31. According to the Government, the maximum sentences prescribed by the 1861 and 1885 Acts are appropriate only for the most grave instances of the relevant offence and in practice no court would ever contemplate imposing the maximum sentence for offences committed between consenting parties, whether in private or in public. Furthermore, although liable to an unlimited sentence, a man convicted of an attempt to commit gross indecency would in practice never receive a sentence greater than that appropriate if the offence had been completed; in general, the sentence would be significantly less. In all cases of homosexual offences the actual penalty imposed will depend on the particular circumstances.

F. The personal circumstances of the applicant

32. The applicant has, on his own evidence, been consciously homosexual from the age of 14. For some time he and others have been conducting a campaign aimed at bringing the law in Northern Ireland into line with that in force in England and Wales and, if possible, achieving a minimum age of consent lower than 21 years.

33. On 21 January 1976, the police went to Mr. **Dudgeon**'s address to execute a warrant under the Misuse of Drugs Act 1971. During the search of the house a quantity of cannabis was found which subsequently led to another person being charged with drug offences. Personal papers, including correspondence and diaries, belonging to the applicant in which were described homosexual activities were also found and seized. As a result, he was asked to go to a police station where for about four and a half hours he was questioned, on the basis of these papers, about his sexual life. The police investigation file was sent to the Director of Prosecutions. It was considered with a view to instituting proceedings for the offence of gross indecency between males. The Director, in consultation with the Attorney General, decided that it would not be in the public interest for proceedings to be brought. Mr. **Dudgeon** was so informed in February 1977 and his papers, with annotations marked over them, were returned to him.

PROCEEDINGS BEFORE THE COMMISSION

34. In his application, lodged with the Commission on 22 May 1976, Mr. **Dudgeon** claimed that:

- the existence, in the criminal law in force in Northern Ireland, of various offences capable of relating to male homosexual conduct and the police investigation in January 1976 constituted an unjustified interference with his right to respect for his private life, in breach of Article 8 (art. 8) of the Convention;

- he had suffered discrimination, within the meaning of Article 14 (art. 14) of the Convention, on grounds of sex, sexuality and residence.

The applicant also claimed compensation.

35. By decision of 3 March 1978, the Commission declared admissible the applicant's complaints concerning the laws in force in Northern Ireland prohibiting homosexual acts between males (or attempts at such acts), but inadmissible as being manifestly ill-founded his complaints concerning the existence in Northern Ireland of certain common law offences.

In its report adopted on 13 March 1980 (Article 31 of the Convention) (art. 31), the Commission expressed the opinion that:

- the legal prohibition of private consensual homosexual acts involving male persons under 21 years of age was not in breach of the applicant's rights either under Article 8 (art. 8) (eight votes to two) or under Article 14 read in conjunction with Article 8 (art. 14+8) (eight votes to one, with one abstention);

- the legal prohibition of such acts between male persons over 21 years of age breached the applicant's right to respect for his private life under Article 8 (art. 8) (nine votes to one);

- it was not necessarry to examine the question whether the last-mentioned prohibition also violated Article 14 read in conjunction with Article 8 (art. 14+8) (nine votes to one).

The report contains one separate opinion.

FINAL SUBMISSIONS MADE TO THE COURT

36. At the hearing on 23 April 1981, the Government maintained the

submissions set out in their memorial, whereby they requested the Court:

"(1) With regard to Article 8 (art. 8)

To decide and declare that the present laws in Northern Ireland relating to homosexual acts do not give rise to a breach of Article 8 (art. 8) of the Convention, in that the laws are necessary in a democratic society for the protection of morals and for the protection of the rights of other for the purposes of paragraph 2 of Article 8 (art. 8-2).

(2) With regard to Article 14, in conjunction with Article 8 (art. 14+8)

(i) To decide and declare that the facts disclose no breach of Article 14, read in conjunction with Article 8 (art. 14+8) of the Convention;

alternatively, if and in so far as a breach of Article 8 (art. 8) of the Convention is found

(ii) To decide and declare that it is unneccessary to examine the question whether the laws in Northern Ireland relating to homosexual acts give rise to a separate breach of Article 14, read in conjunction with Article 8 (art. 14+8) of the Convention".

AS TO THE LAW

I. THE ALLEGED BREACH OF ARTICLE 8 (art. 8)

A. Introduction

37. The applicant complained that under the law in force in Northern Ireland he is liable to criminal prosecution on account of his homosexual conduct and that he has experienced fear, suffering and psychological distress directly caused by the very existence of the laws in question - including fear of harassment and blackmail. He further complained that, following the search of his house in January 1976, he was questioned by the police about certain homosexual activities and that personal papers belonging to him were seized during the search and not returned until more than a year later.

He alleged that, in breach of Article 8 (art. 8) of the Convention, he has thereby suffered, and continues to suffer, an unjustified interference with his right to respect for his private life.

38. Article 8 (art. 8) provides as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

39. Although it is not homosexuality itself which is prohibited but the particular acts of gross indecency between males and buggery (see

paragraph 14 above), there can be no doubt but that male homosexual practices whose prohibition is the subject of the applicant's complaints come within the scope of the offences punishable under the impugned legislation; it is on that basis that the case has been argued by the Government, the applicant and the Commission. Furthermore, the offences are committed whether the act takes place in public or in private, whatever the age or relationship of the participants involved, and whether or not the participants are consenting. It is evident from Mr. **Dudgeon**'s submissions, however, that his complaint was in essence directed against the fact that homosexual acts which he might commit in private with other males capable of valid consent are criminal offences under the law of Northern Ireland.

B. The existence of an interference with an Article 8 (art. 8) right

40. The Commission saw no reason to doubt the general truth of the applicant's allegations concerning the fear and distress that he has suffered in consequence of the existence of the laws in question. The Commission unanimously conluded that "the legislation complained of interferes with the applicant's right to respect for his private life guaranteed by Article 8 par. 1 (art. 8-1), in so far as it prohibits homosexual acts committed in private between consenting males" (see paragraphs 94 and 97 of the Commission's report).

The Government, without conceding the point, did not dispute that Mr. **Dudgeon** is directly affected by the laws and entitled to claim to be a "victim" thereof under Article 25 (art. 25) of the Convention. Nor did the Government contest the Commission's above-quoted conclusion.

41. The Court sees no reason to differ from the views of the Commission: the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 par. 1 (art. 8-1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life (see, mutatis mutandis, the Marckx judgment of 13 June 1979, Series A no. 31, p. 13, par. 27): either he respects the law and refrains from engaging - even in private with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.

It cannot be said that the law in question is a dead letter in this sphere. It was, and still is, applied so as to prosecute persons with regard to private consensual homosexual acts involving males under 21 years of age (see paragraph 30 above). Although no proceedings seem to have been brought in recent years with regard to such acts involving only males over 21 years of age, apart from mental patients, there is no stated policy on the part of the authorities not to enforce the law in this respect (ibid). Furthermore, apart from prosecution by the Director of Public Prosection, there always remains the possibility of a private prosecution (see paragraph 29 above).

Moreover, the police investigation in January 1976 was, in relation to the legislation in question, a specific measure of implementation - albeit short of actual prosecution - which directly affected the applicant in the enjoyment of his right to respect for his private life (see paragraph 33 above). As such, it showed that the threat hanging over him was real.

C. The existence of a justification for the interference found by the Court

42. In the Government's submission, the law in Northern Ireland relating to homosexual acts does not give rise to a breach of Article 8 (art. 8), in that it is justified by the terms of paragraph 2 of the Article (art. 8-2). This contention was disputed by both the applicant and the Commission.

43. An interference with the exercise of an Article 8 (art. 8) right will not be compatible with paragraph 2 (art. 8-2) unless it is "in accordance with the law", has an aim or aims that is or are legitimate under that paragraph and is "necessary in a democratic society" for the aforesaid aim or aims (see, mutatis, mutandis, the Young, James and Webster judgment of 13 August 1981, Series A no. 44, p. 24, par. 59).

44. It has not been contested that the first of these three conditions was met. As the Commission pointed out in paragraph 99 of its report, the interference is plainly "in accordance with the law" since it results from the existence of certain provisions in the 1861 and 1885 Acts and the common law (see paragraph 14 above).

45. It next falls to be determined whether the interference is aimed at "the protection of morals" or "the protection of the rights and freedoms of others", the two purposes relied on by the Government.

46. The 1861 and 1885 Acts were passed in order to enforce the then prevailing conception of sexual morality. Originally they applied to England and Wales, to all Ireland, then unpartitioned, and also, in the case of the 1885 Act, to Scotland (see paragraph 16 above). In recent years the scope of the legislation has been restricted in England and Wales (with the 1967 Act) and subsequently in Scotland (with the 1980 Act): with certain exceptions it is no longer a criminal offence for two consenting males over 21 years of age to commit homosexual acts in private (see paragraphs 17 and 18 above). In Northern Ireland, in contrast, the law has remained unchanged. The decision announced in July 1979 to take no further action in relation to the proposal to amend the existing law was, the Court accepts, prompted by what the United Kingdom Government judged to be the strength of feeling in Northern Ireland against the proposed change, and in particular the strength of the view that it would be seriously damaging to the moral fabric of Northern Irish society (see paragraphs 25 and 26 above). This being so, the general aim pursued by the legislation remains the protection of morals in the sense of moral standards obtaining in Northern Ireland.

47. Both the Commission and the Government took the view that, in so far as the legislation seeks to safeguard young persons from undesirable and harmful pressures and attentions, it is also aimed at "the protection of the rights and freedoms of others". The Court recognises that one of the purposes of the legislation is to afford safeguards for vulnerable members of society, such as the young, against the consequences of homosexual practices. However, it is somewhat artificial in this context to draw a rigid distinction between "protection of the rights and freedoms of others" and "protection of morals". The latter may imply safeguarding the moral ethos or moral standards of a society as a whole (see paragraph 108 of the Commission's report), but may also, as the Government pointed out, cover protection of the moral interests and welfare of a particular section of society, for example schoolchildren (see the Handyside judgment of 7 December 1976,

Series A no. 24, p. 25, par. 52 in fine - in relation to Article 10 par. 2 (art. 10-2) of the Convention). Thus, "protection of the rights and freedoms of others", when meaning the safeguarding of the moral interests and welfare of certain individuals or classes of individuals who are in need of special protection for reasons such as lack of maturity, mental disability or state of dependence, amounts to one aspect of "protection of morals" (see, mutatis mutandis, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 34, par. 56). The Court will therefore take account of the two aims on this basis.

48. As the Commission rightly observed in its report (at paragraph 101), the cardinal issue arising under Article 8 (art. 8) in this case is to what extent, if at all, the maintenance in force of the legislation is "necessary in a democratic society" for these aims.

49. There can be no denial that some degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, by means of the criminal law can be justified as "necessary in a democratic society". The overall function served by the criminal law in this field is, in the words of the Wolfenden report (see paragraph 17 above), "to preserve public order and decency [and] to protect the citizen from what is offensive or injurious". Furthermore, this necessity for some degree of control may even extend to consensual acts committed in private, notably where there is call - to quote the Wolfenden report once more - "to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence". In practice there is legislation on the matter in all the member States of the Council of Europe, but what distinguishes the law in Northern Ireland from that existing in the great majority of the member States is that it prohibits generally gross indecency between males and buggery whatever the circumstances. It being accepted that some form of legislation is "necessary" to protect particular sections of society as well as the moral ethos of society as a whole, the question in the present case is whether the contested provisions of the law of Northern Ireland and their enforcement remain within the bounds of what, in a democratic society, may be regarded as necessary in order to accomplish those aims.

50. A number of principles relevant to the assessment of the "necessity", "in a democratic society", of a measure taken in furtherance of an aim that is legitimate under the Convention have been stated by the Court in previous judgments.

51. Firstly, "necessary" in this context does not have the flexibility of such expressions as "useful", "reasonable", or "desirable", but implies the existence of a "pressing social need" for the interference in question (see the above-mentioned Handyside judgment, p. 22, par. 48).

52. In the second place, it is for the national authorities to make the initial assessment of the pressing social need in each case; accordingly, a margin of appreciation is left to them (ibid). However, their decision remains subject to review by the Court (ibid., p. 23, par. 49).

As was illustrated by the Sunday Times judgment, the scope of the margin of appreciation is not identical in respect of each of the aims justifying restrictions on a right (p. 36, par. 59). The Government inferred from the Handyside judgment that the margin of

appreciation will be more extensive where the protection of morals is in issue. It is an indisputable fact, as the Court stated in the Handyside judgment, that "the view taken ... of the requirements of morals varies from time to time and from place to place, especially in our era," and that "by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements" (p. 22, par. 48).

However, not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of Article 8 (art. 8-2).

53. Finally, in Article 8 (art. 8) as in several other Articles of the Convention, the notion of "necessity" is linked to that of a "democratic society". According to the Court's case-law, a restriction on a Convention right cannot be regarded as "necessary in a democratic society" - two hallmarks of which are tolerance and broadmindedness - unless, amongst other things, it is proportionate to the legitimate aim pursued (see the above-mentioned Handyside judgment, p. 23, par. 49, and the above-mentioned Young, James and Webster judgment, p. 25, par. 63).

54. The Court's task is to determine on the basis of the aforestated principles whether the reasons purporting to justify the "interference" in question are relevant and sufficient under Article 8 par. 2 (art. 8-2) (see the above-mentioned Handyside judgment, pp. 23-24, par. 50). The Court is not concerned with making any value-judgment as to the morality of homosexual relations between adult males.

55. It is convenient to begin by examining the reasons set out by the Government in their arguments contesting the Commission's conclusion that the penal prohibition of private consensual homosexual acts involving male persons over 21 years of age is not justified under Article 8 par. 2 (art. 8-2) (see paragraph 35 above).

56. In the first place, the Government drew attention to what they described as profound differences of attitude and public opinion between Northern Ireland and Great Britain in relation to questions of morality. Northern Irish society was said to be more conservative and to place greater emphasis on religious factors, as was illustrated by more restrictive laws even in the field of heterosexual conduct (see paragraph 15 above).

Although the applicant qualified this account of the facts as grossly exaggerated, the Court acknowledges that such differences do exist to a certain extent and are a relevant factor. As the Government and the Commission both emphasised, in assessing the requirements of the protection of morals in Northern Ireland, the contested measures must be seen in the context of Northern Irish society.

The fact that similar measures are not considered necessary in other parts of the United Kingdom or in other member States of the Council of Europe does not mean that they cannot be necessary in Northern Ireland (see, mutatis mutandis, the above-mentioned Sunday Times judgment, pp. 37-38, par. 61; cf. also the above-mentioned Handyside

judgment, pp. 26-28, par. 54 and 57). Where there are disparate cultural communities residing within the same State, it may well be that different requirements, both moral and social, will face the governing authorities.

57. As the Government correctly submitted, it follows that the moral climate in Northern Ireland in sexual matters, in particular as evidenced by the opposition to the proposed legislative change, is one of the matters which the national authorities may legitimately take into account in exercising their discretion. There is, the Court accepts, a strong body of opposition stemming from a genuine and sincere conviction shared by a large number of responsible members of the Northern Irish community that a change in the law would be seriously damaging to the moral fabric of society (see paragraph 25 above). This opposition reflects - as do in another way the recommendations made in 1977 by the Advisory Commission (see paragraph 23 above - a view both of the requirements of morals in Northern Ireland and of the measures thought within the community to be necessary to preserve prevailing moral standards.

Whether this point of view be right or wrong, and although it may be out of line with current attitudes in other communities, its existence among an important sector of Northern Irish society is certainly relevant for the purposes of Article 8 par. 2 (art. 8-2).

58. The Government argued that this conclusion is further strengthened by the special constitutional circumstances of Northern Ireland (described above at paragraphs 19 and 20). In the period between 1921 (when the Northern Ireland Parliament first met) and 1972 (when it last sat), legislation in the social field was regarded as a devolved matter within the exclusive domain of that Parliament. As a result of the introduction of "direct rule" from Westminster, the United Kingdom Government, it was said, had a special responsibility to take full account of the wishes of the people of Northern Ireland before legislating on such matters.

In the present circumstances of direct rule, the need for caution and for sensitivity to public opinion in Northern Ireland is evident. However, the Court does not consider it conclusive in assessing the "necessity", for the purposes of the Convention, of maintaining the impugned legislation that the decision was taken, not by the former Northern Ireland Government and Parliament, but by the United Kingdom authorities during what they hope to be an interim period of direct rule.

59. Without any doubt, faced with these various considerations, the United Kingdom Government acted carefully and in good faith; what is more, they made every effort to arrive at a balanced judgment between the differing viewpoints before reaching the conclusion that such a substantial body of opinion in Northern Ireland was opposed to a change in the law that no further action should be taken (see, for example, paragraphs 24 and 26 above). Nevertheless, this cannot of itself be decisive as to the necessity for the interference with the applicant's private life resulting from the measures being challenged (see the above-mentioned Sunday Times judgment, p. 36, par. 59). Notwithstanding the margin of appreciation left to the national authorities, it is for the Court to make the final evaluation as to whether the reasons it has found to be relevant were sufficient in the circumstances, in particular whether the interference complained of was proportionate to the social need claimed for it (see paragraph 53 above).

60. The Government right affected by the impugned legislation

protects an essentially private manifestation of the human personality (see paragraph 52, third sub-paragraph, above).

As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States (see, mutatis mutandis, the above-mentioned Marckx judgment, p. 19, par. 41, and the Tyrer judgment of 25 April 1978, Series A no. 26, pp. 15-16, par. 31). In Northern Ireland itself, the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years capable of valid consent (see paragraph 30 above). No evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law.

It cannot be maintained in these circumstances that there is a "pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public. On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.

61. Accordingly, the reasons given by the Government, although relevant, are not sufficient to justify the maintenance in force of the impugned legislation in so far as it has the general effect of criminalising private homosexual relations between adult males capable of valid consent. In particular, the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private life to such an extent. "Decriminalisation" does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features.

To sum up, the restriction imposed on Mr. **Dudgeon** under Northern Ireland law, by reason of its breadth and absolute character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved.

62. In the opinion of the Commission, the interference complained of by the applicant can, in so far as he is prevented from having sexual relations with young males under 21 years of age, be justified as necessary for the protection of the rights of others (see especially paragraphs 105 and 116 of the report). This conclusion was accepted and adopted by the Government, but disputed by the applicant who submitted that the age of consent for male homosexual relations should be the same as that for heterosexual and female homosexual relations,

that is, 17 years under current Northern Ireland law (see paragraph 15 above).

The Court has already acknowledged the legitimate necessity in a democratic society for some degree of control over homosexual conduct notably in order to provide safeguards against the exploitation and corruption of those who are specially vulnerable by reason, for example, of their youth (see paragraph 49 above). However, it falls in the first instance to the national authorities to decide on the appropriate safeguards of this kind required for the defence of morals in their society and, in particular, to fix the age under which young people should have the protection of the criminal law (see paragraph 52 above).

D. Conclusion

63. Mr. **Dudgeon** has suffered and continues to suffer an unjustified interference with his right to respect for his private life. There is accordingly a breach of Article 8 (art. 8).

II. THE ALLEGED BREACH OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 8 (art. 14+8)

64. Article 14 (art. 14) reads as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association, with a national minority, property, birth or other status."

65. The applicant claimed to be a victim of discrimination in breach of Article 14 taken in conjunction with Article 8 (art. 14+8), in that he is subject under the criminal law complained of to greater interference with his private life than are male homosexuals in other parts of the United Kingdom and heterosexuals and female homosexuals in Northern Ireland itself. In particular, in his submission Article 14 (art. 14) requires that the age of consent should be the same for all forms of sexual relations.

66. When dealing with the issues under Article 14 (art. 14), the Commission and likewise the Government distinguished between male homosexual acts involving those under and those over 21 years of age.

The Court has already held in relation to Article 8 (art. 8) that it falls in the first instance to the national authorities to fix the age under which young people should have the protection of the criminal law (see paragraph 62 above). The current law in Northern Ireland is silent in this respect as regards the male homosexual acts which it prohibits. It is only once this age has been fixed that an issue under Article 14 (art. 14) might arise; it is not for the Court to pronounce upon an issue which does not arise at the present moment.

67. Where a substantive Article of the Convention has been invoked both on its own and together with Article 14 (art. 14) and a separate breach has been found of the substantive Article, it is not generally necessary for the Court also to examine the case under Article 14 (art. 14), though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case (see the Airey judgment of 9 October 1979, Series A no. 32 p. 16, par. 30).

68. This latter condition is not fulfilled as regards the alleged

discrimination resulting from the existence of different laws concerning male homosexual acts in various parts of the United Kingdom (see paragraphs 14, 17 and 18 above). Moreover, Mr. **Dudgeon** himself conceded that, if the Court were to find a breach of Article 8 (art. 8), then this particular question would cease to have the same importance.

69. According to the applicant, the essential aspect of his complaint under Article 14 (art. 14) is that in Northern Ireland male homosexual acts, in contrast to heterosexual and female homosexual acts, are the object of criminal sanctions even when committed in private between consenting adults.

The central issue in the present case does indeed reside in the existence in Northern Ireland of legislation which makes certain homosexual acts punishable under the criminal law in all circumstances. Nevertheless, this aspect of the applicant's complaint under Article 14 (art. 14) amounts in effect to the same complaint, albeit seen from a different angle, that the Court has already considered in relation to Article 8 (art. 8); there is no call to rule on the merits of a particular issue which is part of and absorbed by a wider issue (see, mutatis mutandis, the Deweer judgment of 27 February 1980, Series A no. 35, pp. 30-31, par. 56 in fine). Once it has been held that the restriction on the applicant's right to respect for his private sexual life give rise to a breach of Article 8 (art. 8) by reason of its breadth and absolute character (see paragraph 61 in fine above), there is no useful legal purpose to be served in determining whether he has in addition suffered discrimination as compared with other persons who are subject to lesser limitations on the same right. This being so, it cannot be said that a clear inequality of treatment remains a fundamental aspect of the case.

70. The Court accordingly does not deem it necessary to examine the case under Article 14 (art. 14) as well.

III. THE APPLICATION OF ARTICLE 50 (art. 50)

71. Counsel for the applicant stated that, should the Court find the Convention to have been violated, his client would seek just satisfaction under Article 50 (art. 50) in respect of three matters: firstly, the distress, suffering and anxiety resulting from the police investigation in January 1976; secondly, the general fear and distress suffered by Mr. **Dudgeon** since he was 17 years of age; and finally, legal and other expenses. Counsel put forward figures of 5,000 pounds under the first head, 10,000 pounds under the second and 5,000 pounds under the third.

The Government, for their part, asked the Court to reserve the question.

72. Consequently, although it was raised under Rule 47 bis of the Rules of Court, this question is not ready for decision and must be reserved; in the circumstances of the case, the Court considers that the matter should be referred back to the Chamber in accordance with Rule 50 par. 4 of the Rules of Court.

FOR THE REASONS, THE COURT

1. Holds by fifteen votes to four that there is a breach of Article 8 (art. 8) of the Convention;

2. Holds by fourteen votes to five that it is not necessary also to

examine the case under Article 14 taken in conjunction with Article 8 (art. 14+8);

3. Holds unanimously that the question of the application of Article 50 (art. 50) is not ready for decision;

(a) accordingly reserves the whole of the said question;

(b) refers the said question back to the Chamber under Rule 50 par. 4 of the Rules of Court.

Done in English and in French, the English text being authentic, at the Human Rights Building, Strasbourg, this twenty-second day of October, one thousand nine hundred and eighty-one.

For the President
Signed: John CREMONA
Judge

Signed: Marc-André EISSEN
Registrar

The following separate opinions are annexed to the present judgment in accordance with Article 51 par. 2 (art. 51-2) of the Convention and Rule 50 par. 2 of the Rules of Court :

- dissenting opinion of Mr. Zekia;

- dissenting opinion of Mr. Evrigenis and Mr. García de Enterría;

- dissenting opinion of Mr. Matscher;

- dissenting opinion of Mr. Pinheiro Farinha;

- partially dissenting opinion of Mr. Walsh.

Initialled: J. C.

Initialled: M.-A.E.

DISSENTING OPINION OF JUDGE ZEKIA

I am dealing only with the crucial point which led the Court to find a breach of Article 8 § 1 (art. 8-1) of the Convention by the respondent Government.

The Acts of 1861 and 1885 still in force in Northern Ireland prohibit gross indecency between males and buggery. These enactments in their unamended form are found to interfere with the right to respect for the private life of the applicant, admittedly a homosexual.

The decisive central issue in this case is therefore whether the provisions of the aforesaid laws criminalising homosexual relations were necessary in a democratic society for the protection of morals and for the protection of the rights and freedoms of others, such a necessity being a prerequisite for the validity of the enactment under Article 8 § 2 (art. 8-2) of the Convention.

After taking all relevant facts and submissions made in this case into consideration, I have arrived at a conclusion opposite to the one of the majority. I proceed to give my reasons as briefly as possible for finding no violation on the part of the respondent Government in this case.

1. Christian and Moslem religions are all united in the condemnation of homosexual relations and of sodomy. Moral conceptions to a great degree are rooted in religious beliefs.

2. All civilised countries until recent years penalised sodomy and buggery and akin unnatural practices.

In Cyprus criminal provisions similar to those embodied in the Acts of 1861 and 1885 in the North of Ireland are in force. Section 171 of the Cyprus Criminal Code, Cap. 154, which was enacted in 1929, reads:

"Any person who (a) has carnal knowledge of any person against the order of nature, or
(b) permits a male person to have carnal knowledge of him against the order of nature
is guilty of a felony and is liable to imprisonment for five years."

Under section 173, anyone who attempts to commit such an offence is liable to 3 years' imprisonment.

While on the one hand I may be thought biased for being a Cypriot Judge, on the other hand I may be considered to be in a better position in forecasting the public outcry and the turmoil which would ensue if such laws are repealed or amended in favour of homosexuals either in Cyprus or in Northern Ireland. Both countries are religious-minded and adhere to moral standards which are centuries' old.

3. While considering the respect due to the private life of a homosexual under Article 8 § 1 (art. 8-1), we must not forget and must bear in mind that respect is also due to the people holding the opposite view, especially in a country populated by a great majority of such people who are completely against unnatural immoral practices. Surely the majority in a democratic society are also entitled under Articles 8, 9 and 10 (art. 8, art. 9, art. 10) of the Convention and Article 2 of Protocol No. 1 (P1-2) to respect for their religious and moral beliefs and entitled to teach and bring up their children consistently with their own religious and philosophical convictions.

A democratic society is governed by the rule of the majority. It seems to me somewhat odd and perplexing, in considering the necessity of respect for one's private life, to underestimate the necessity of keeping a law in force for the protection of morals held in high esteem by the majority of people.

A change of the law so as to legalise homosexual activities in private by adults is very likely to cause many disturbances in the country in question. The respondent Government were justified in finding it necessary to keep the relevant Acts on the statute book for the protection of morals as well as for the preservation of public peace.

4. If a homosexual claims to be a sufferer because of physiological, psychological or other reasons and the law ignores such circumstances, his case might then be one of exculpation or mitigation if his tendencies are curable or incurable. Neither of these arguments has been put forward or contested. Had the applicant done so, then his domestic remedies ought to have been exhausted. In fact he has not been prosecuted for any offence.

From the proceedings in this case it is evident that what the

applicant is claiming by virtue of Article 8 §§ 1 and 2 (art. 8-1, art. 8-2) of the European Convention is to be free to indulge privately into homosexual relations.

Much has been said about the scarcity of cases coming to court under the prohibitive provisions of the Acts we are discussing. It was contended that this fact indicates the indifference of the people in Northern Ireland to the non-prosecution of homosexual offences committed. The same fact, however, might indicate the rarity of homosexual offences having been perpetrated an d also the unnecessariness and the inexpediency of changing the law.

5. In ascertaining the nature and scope of morals and the degree of the necessity commensurate to the protection of such morals in relation to a national law, adverted to in Articles 8, 9 and 10 (art. 8, art. 9, art. 10) of the European Convention on Human Rights, the jurisprudence of this Court has already provided us with guidelines:

"A" The conception of morals changes from time to time and from place to place. There is no uniform European conception of morals. State authorities of each country are in a better position than an international judge to give an opinion as to the prevailing standards of morals in their country. (Handyside judgment of 7 December 1976, Series A no. 24, p. 22, § 48)

It cannot be disputed that the moral climate obtaining in Northern Ireland is against the alteration of the law under consideration, the effect of which alteration, if made, would be in some way or other to license immorality.

"B" State authorities likewise are in a better position to assess the extent to which the national legislation should necessarily go in restricting, for the protection of morals and of the rights of others, rights secured under the relevant Articles of the Convention.

The legislative assembly competent to alter the laws under review refrained to do so, believing it to be necessary to maintain them for the protection of morals prevailing in the region and for keeping the peace. The Contracting States are entitled to a margin of appreciation, although undoubtedly not an unlimited one.

Taking account of all relevant facts and points of law and the underlying principles for an overall assessment of the situation under consideration, I fail to find that the keeping in force in Northern Ireland of Acts - which date from the last century - prohibiting gross indecency and buggery between male adults has become unnecessary for the protection of morals and of the rights of others in that country. I have come to the conclusion therefore that the respondent Government did not violate the Convention.

DISSENTING OPINION OF JUDGES EVRIGENIS AND GARCIA DE ENTERRIA

(Translation)

Being of the opinion that the case should also have been examined under Article 14 read in conjunction with Article 8 (art. 14+8), but without prejudging our position on the merits of the matter, we have felt compelled to vote against point no. 2 in the operative provisions of the judgment for the following reasons:

At least the difference of treatment in Northern Ireland between male homosexuals and female homosexuals and between male homosexuals and heterosexuals (see paragraphs 65 and 69 of the judgment) - a difference in treatment relied on in argument by the applicant - ought to have been examined under Article 14 read in conjunction with Article 8 (art. 14+8). Even accepting the restrictive formula enunciated by the Court in the Airey judgment and applied in the judgment in the present case (at paragraph 67: "a clear inequality of treatment" being "a fundamental aspect of the case"), it would be difficult to assert that these conditions were not plainly satisfied in the circumstances. In any event, to interpret Article 14 (art. 14) in the restrictive manner heralded in the Airey judgment deprives this fundamental provision in great part of its substance and function in the system of substantive rules established under the Convention.

DISSENTING OPINION OF JUDGE MATSCHER

(Translation)

I. As concerns the alleged interference with an Article 8 (art. 8) right

Although I agree with the general tenor of the Court's reasoning, I take a somewhat different view of the facts of the case. As a result, I am unable to concur with the conclusions of the judgment on the issue of a violation of Article 8 (art. 8) of the Convention. I will therefore endeavour to set out my views below.

Article 8 (art. 8) does not at all require that the State should consider homosexuality - in whatever form it may be manifested - as an alternative that is equivalent to heterosexuality and that, in consequence, its laws should treat each of them on the same footing. Indeed, the judgment quite rightly adverts to this point on several occasions.

On the other hand, it does not follow from the above that the criminal prosecution of homosexual acts committed in private between consenting adults (leaving aside certain special situations as, for example, where there has been abuse of a state of dependence or where the acts occur in certain contexts of communal living such as a boarding school, barracks, etc.) is "necessary", within the meaning of Article 8 § 2 (art. 8-2), for the protection of those values which a given society legitimately (likewise for the purposes of the Convention) wishes to preserve. I therefore agree with the general tenor of the reasoning in the judgment as regards the interpretation to be given to Article 8 (art. 8), and in particular to paragraph 2 of that Article (art. 8-2), in the present case.

In this connection, however, there are two arguments to which I cannot subscribe.

At paragraph 51, it is said that the adjective "necessary" implies the existence of a "pressing social need" for the interference in question (reference to the Handyside judgment of 7 December 1976, Series A no. 24, § 48). To my mind, however, once it has been granted that an aim is legitimate for the purposes of Article 8 § 2 (art. 8-2), any measure directed towards the accomplishment of that aim is necessary if failure to take the measure would create a risk that that aim would not be achieved. It is only in this context that one can examine the necessity for a certain measure and, adding a further factor, the proportionality between the value attaching to the aim and the seriousness of the measure (see paragraphs 54 and 60 in

fine). Since the adjective "necessary" thus refers solely to the measures (that is, the means), it does not permit an assessment whether the aim itself is legitimate, something that the judgment appears to do when it links "necessary" with "pressing social need".

Furthermore, according to paragraph 60, second sub-paragraph, no evidence has been adduced to show that the attitude of tolerance adopted in practice by the Northern Ireland authorities has been injurious to moral standards in the region. I cannot but regard this as a purely speculative argument, devoid of any foundation and which thus has no probative value whatsoever.

My disagreement relates in the first place to the evaluation made of the legal provisions and the measures of implementation of which the applicant complains to have been a victim in concreto and to be still a potential victim by reason of the existence of the impugned legislation.

(a) The Government asserted that for a long time (to be precise, between 1972 and 1980) there have been no criminal prosecutions in circumstances corresponding to those of the present case. No one contradicted this assertion which, moreover, would more than appear to be a correct statement of the reality. It is true that at common law a prosecution could also be brought by a private individual, subject to the Director of Public Prosecutions' power to discontinue the proceedings. However, here again there have been no examples of prosecutions of this kind during the period in question (paragraphs 29-30).

I conclude from this that in practice there are no prosecutions for homosexual acts committed in private between consenting adults. The absence of any form of persecution seems to be well established by the existence of a number of associations (the Commission lists at least five in paragraph 30 of its report) - the applicant being the Secretary of one of them - which pursue their activities hardly in secret but more or less without any constraint and are, amongst other things, engaged in conducting a campaign for the legalisation of homosexuality, and some of whose members, if not the majority, openly profess - it may be supposed - homosexual tendencies.

In these circumstances, the existence of "fear, suffering and psychological distress" experienced by the applicant as a direct result of the laws in force - something which the Commission and the Court saw no reason to doubt (paragraphs 40-41) - seems to me, on the contrary, to be extremely unlikely.

To sum up, I believe that it is not the letter of the law that has to be taken into account, but the actual situation obtaining in Northern Ireland, that is to say, the attitude in fact adopted for at least ten years by the competent authorities in respect of male homosexuality.

The situation is therefore fundamentally different from that in the Marckx case (paragraph 27 of the judgment of 13 June 1979, Series A no. 31) to which the present judgment refers (in paragraph 41): in the former case, the provisions of Belgian civil law complained of applied directly to the applicant who suffered their consequences in her family life; in the instant case, the legislation complained of is formally in force but as a matter of fact it is not applied as regards those of its aspects which are being attacked. This being so, the applicant and those like him can organise their private life as they choose without any interference on the part of the authorities.

Of course, the applicant and the orgnisations behing him are seeking more: they are seeking the express and formal repeal of the laws in force, that is to say a "charter" declaring homosexuality to be an alternative equivalent to heterosexuality, with all the consequences that that would entail (for example, as regards sex education). However, this is in no way required by Article 8 (art. 8) of the Convention.

(b) The police action on 21 January 1976 (paragraphs 30-31) against the applicant can also be seen in a different light: in the particular circumstances, the police were executing a warrant under the Misuse of Drugs Act 1971. During the search, the police found papers providing evidence of his homosexual tendencies. The reason why the police pursued their enquiries was probably also to investigate whether the applicant did not have homosexual relations with minors as well. Indeed, it is well known that this is a widespread tendency in homosexual circles and the fact that the applicant himself was engaged in a campaign for the lowering of the legal age of consent points in the same direction; furthermore, the enquiries in question took place in the context of a more extensive operation on the part of the police, the purpose of which was to trace a minor who was missing from home and believed to be associating with homosexuals (see on this point the reply of the Government to question 8, document Cour (81) 32). Furthermore, the file on the case was closed by the competent judicial authorities.

This overall evaluation of the facts leads me to the view that the applicant cannot claim to be the victim of an interference with his private life. For this reason I conclude that there has not been a violation of Article 8 (art. 8) of the Convention in the present case.

II. As concerns the alleged breach of Article 14 read in conjunction with Article 8 (art. 14+8)

The applicant alleged a breach of Article 14 read in conjunction with Article 8 (art. 14+8) on three (or even four) counts: (a) the existence of different laws in the different parts of the United Kingdom; (b) distinctions drawn in respect of the age of consent; (c) and (d) differences of treatment under the criminal law between male homosexuality and female homosexuality and between homosexuality and heterosexuality.

As far as the age of consent is concerned ((b)), the Court rightly notes (at paragraph 66, second sub-paragraph) that this is a matter to be fixed in the first instance by the national authorities. The reasoning of the majority of the Court runs as follows: male homosexuality is made punishable under the criminal law in Northern Ireland without any distinction as to the age of the persons involved; consequently, it is only once this age has been fixed that an issue under Article 14 (art. 14) might arise. This reasoning is coherent and there is nothing to add.

To my mind, the competent authorities do in fact draw a distinction according to age and exhibit tolerance only in relation to homosexuality between consenting adults. I find that, for reasons whose obviousness renders any explanation superfluous, this differentiation is perfectly legitimate for the purposes of Article 14 (art. 14) and thus gives rise to no discrimination.

As regards the other complaints ((a), (c) and (d)), the majority of the Court state that when a separate breach of a substantive

Article of the Convention has been found, there is generally no need for the Court also to examine the case under Article 14 (art. 14); the position is otherwise only if a clear inequality of treatment in the enjoyment of the right at issue is a fundamental aspect of the case (reference to the Airey judgment of 9 October 1979, Series A no. 32, paragraph 30). This latter condition is said not be be fulfilled in the circumstances. Furthermore, the judgment continues, there is no call to rule on the merits of a particular issue which is part of and absorbed by a wider issue (reference to the Deweer judgment of 27 February 1980, Series A no. 35, paragraph 56 in fine), this being the position in the present case. In these conditions, there appeared to the majority to be no useful legal purpose to be served in determining whether the applicant has in addition suffered discrimination as compared with other persons subject to lesser limitations on the same right.

I regret that I do not feel able to agree with this line of reasoning. In my view, when the Court is called on to rule on a breach of the Convention which has been alleged by the applicant and contested by the respondent Government, it is the Court's duty, provided that the application is admissible, to decide the point by giving an answer on the merits of the issue that has been raised. The Court cannot escape this responsibility by employing formulas that are liable to limit excessively the scope of Article 14 (art. 14) to the point of depriving it of all practical value.

Admittedly, there are extreme situations where an existing difference of treatment is so minimal that it entails no real prejudice, physical or moral, for the persons concerned. In that event, no discrimination within the meaning of Article 14 (art. 14) could be discerned, even if on occasions it might be difficult to produce an objective and rational explanation for the difference of treatment. It is only in such conditions that, in my opinion, the maxim "de minimis non curat praetor" would be admissible (see, mutatis mutandis, my separate opinion appended to the Marckx judgment, p. 58). I do not, however, find these conditions satisfied in the present case, with the result that a definite position must be taken regarding the alleged violation of Article 14 (art. 14) in relation to the complaints made by the applicant.

(a) The diversity of domestic laws, which is characteristic of a federal State, can in itself never constitute a discrimination, and there is no necessity to justify diversity of this kind. To claim the contrary would be to disregard totally the very essence of federalism.

(c) and (d) The difference of character between homosexual conduct and heterosexual conduct seems obvious, and the moral and social problems to which they give rise are not at all the same. Similarly, there exists a genuine difference, of character as well as of degree, between the moral and social problems raised by the two forms of homosexuality, male and female. The differing treatment given to them under the criminal law is thus founded, to my mind, on clearly objective justifications.

Accordingly, I come to the conclusion that there has been no breach of Article 14 read in conjunction with Article 8 (art. 14+8) in respect of any of the heads of complaint relied on by the applicant.

DISSENTING OPINION OF JUDGE PINHEIRO FARINHA

(Translation)

I am unable to agree with the views and conclusions expressed in the present case by my eminent colleagues as regards the breach by the United Kingdom of Article 8 (art. 8) of the Convention.

In my opinion, there was no victim and the Court does not have jurisdiction to take cognisance of a breach alleged by someone who is not a victim.

The action by the police was decided on (paragraph 33) in implementation of the Misuse of Drugs Act 1971 and not with a view to taking action under the criminal law against homosexuality.

The police investigation "took place in the context of a more extensive operation on the part of the police, the object of which was to trace a minor who was missing from home and believed to be associating with homosexuals" (dissenting opinion of Judge Matscher) and it did not lead to any criminal prosecution being brought (paragraph 41).

The file on the case was closed by the prosecuting authorities, despite the fact that the applicant was the secretary of an organisation campaigning for the legalisation of homosexuality and notwithstanding the proof of his homosexual tendencies.

I come to the conclusion that because the legislation was not enforced against him and is applicable not directly but only after a concrete decision by the authorities, the applicant was not a victim.

There being no victim, the conclusion must be that there was no breach of Article 8 (art. 8) or of Article 14 taken together with Article 8 (art. 14+8).

I would further emphasise that "there can be no denial that some degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, can be justified as 'necessary in a democratic society'", and that "this necessity for some degree of control may even extend to consensual acts committed in private" (paragraph 49).

PARTIALLY DISSENTING OPINION OF JUDGE WALSH

Is the applicant a "victim" within the meaning of Article 25 (art. 25)?

1. The law of Nothern Ireland does not make homosexuality a crime nor does it make all homosexual activities criminal. The 1885 Act is the only one of the two legislative provisions attacked in these present proceedings that can be described as dealing solely with homosexual activities. The Act of 1885 makes criminal the commission of acts of gross indecency between male persons whether in private or in public. The provisions of the Act of 1861 which is also impugned by the applicant applies equally to heterosexual activities and homosexual activities. The applicant's complaint is directed only towards the application of the provision of the 1861 Act to homosexual activities of the type mentioned in the section impugned. Of these, the Court is in reality concerned with but one, namely sodomy between male persons.

2. The Act of 1885 does not specifically designate any particular acts of gross indecency but simply prohibits "gross indecency". Acts of indecency between male persons are not per se criminal offences but only such of them as amount to "gross indecency". What particular

acts in any given case may be held to amount to gross indecency is a matter for the court, which means in effect the jury, to decide on the particular facts of each case.

3. The applicant did not claim that he had at any time indulged in any of the activities prohibited either by the law of 1861 or by the law of 1885, nor has he stated that he desires to indulge in them or that he intends to do so. In effect his case is that if he should choose to engage in any of the prohibited activities the effect of the law, if enforced, would be to violate the protection of his private life which is guaranteed by Article 8 (art. 8) of the Convention. In fact no action has been taken against him by the authorities under either of the legislative provisions referred to.

4. It is true that the police displayed an interest in the question of whether or not he had indulged in homosexual activities. It is not known to the Court whether or not the activities in question constituted offences under either of the impugned legislative provisions. The documentary material which gave rise to this police interest came to light during the execution by the police of a search warrant issued pursuant to the laws which prohibit the misuse of drugs. The applicant was requested to accompany the police to the police station for the purpose, inter alia, of continuing inquiries into his suspected homosexual activities. The applicant voluntarily agreed to go to the police station. If he had been brought there against his will solely for the purpose of being interrogated about his alleged homosexual activities, he would have been the victim of false imprisonment and under the law of Northern Ireland he would have had an action for damages in the ordinary civil courts. So far as is disclosed by the evidence in the application, no such action has ever been brought or contemplated and it has not been suggested that the applicant's visit to the police station was other than purely voluntary. It is common case that at the police station he was informed by the police that he was under no obligation to answer any questions or to make any statement. Notwithstanding this, the applicant voluntarily made a statement the contents of which have not been disclosed to the Court. The Court does not know whether the statement was incriminatory or exculpatory. No prosecution was ever instituted against the applicant either by the police or by the Director of Public Prosecutions in respect of any alleged illegal homosexual activities.

No question of the privacy of the applicant's home being invaded arises as the entry to his house was carried out under a valid search warrant dealing with the abuse of drugs and no complaint has been made about the warrant or the entry. Some personal papers, including correspondence and diaries belonging to the applicant in which were described homosexual activities, were taken away by the police. The Court has not been informed whether the papers were irrelevant to the suspected drug offences being investigated and in respect of which there has been no complaint.

5. It is clear that the applicant's case is more in the nature of a "class action". In so far as he is personally concerned, it scarcely amounts to a quia timet action. Having suffered no prosecution himself he is in effect asking the Court to strike down two legislative provisions of a member State. The Court has no jurisdiction of a declaratory character in this area unrelated to an injury actually suffered or alleged to have been suffered by the applicant. In my view, if the Court were to undertake any such competence in cases where the applicant has neither been a

victim nor is imminently to be a victim, the consequences would be far-reaching in every member State.

6. In my opinion the applicant has not established that he is a victim within the meaning of Article 25 (art. 25) of the Convention and he is therefore not entitled to the ruling he seeks.

Alleged breach of Article 8 (art. 8)

7. If the applicant is to be regarded as being a victim within the meaning of Article 25 (art. 25), then the applicability of Article 8 (art. 8) to his case falls to be considered.

Paragraph 1 of Article 8 (art. 8-1) provides that "everyone has the right to respect for his private and family life, his home and his correspondence". There is no suggestion that any point relating to family life arises in this case. Therefore the complaint is in reality one to a claim of right to indulge in any homosexual activities in the course of his private life and, presumably, in private.

8. The first matter to consider is the meaning of paragraph 1 of Article 8 (art. 8-1). Perhaps the best and most succinct legal definition of privacy is that given by Warren and Brandeis - it is "the right to be let alone". The question is whether under Article 8 § 1 (art. 8-1), the right to respect for one's private life is to be construed as being an absolute right irrespective of the nature of the activity which is carried on as part of the private life and no interference with this right under any circumstances is permitted save within the terms of paragraph 2 of Article 8 (art. 8-2). This appears to be the interpretation put upon it by the Court in its judgment.

It is not essentially different to describe the "private life" protected by Article 8 § 1 (art. 8-1) as being confined to the private manifestation of the human personality. In any given case the human personality in question may in private life manifest dangerous or evil tendencies calculated to produce ill-effects upon himself or upon others. The Court does not appear to consider as a material factor that the manifestation in question may involve more than one person or participation by more than one person provided the manifestation can be characterised as an act of private life. If for the purposes of this case this assumption is to be accepted, one proceeds to the question of whether or not the interference complained of can be justified under paragraph 2 (art. 8-2). This in turn begs the question that under Article 8 (art. 8) the inseparable social dimensions of private life or "private morality" are limited to the confines of paragraph 2 of Article 8 (art. 8-2). It is beyond question that the interference, if there was such, was in accordance with the law. The question posed by paragraph 2 (art. 8-2) is whether the interference permitted by the law is necessary in a democratic society in the interests of the protection of health or morals or the rights and freedoms of others.

9. This raises the age-old philosophical question of what is the purpose of law. Is there a realm of morality which is not the law's business or is the law properly concerned with moral principles? In the context of United Kingdom jurisprudence and the true philosophy of law this debate in modern times has been between Professor H. L. A. Hart and Lord Devlin. Generally speaking the former accepts the philosophy propounded in the last century by John Stuart Mill while the latter contends that morality is properly the concern of the law. Lord Devlin argues that as

the law exists for the protection of society it must not only protect the individual from injury, corruption and exploitation but it

"must protect also the institutions and the community of ideas, political and moral, without which people cannot live together. Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies".

He claims that the criminal law of England not only "has from the very first concerned itself with moral principles but continues to concern itself with moral principles". Among the offences which he pointed to as having been brought within the criminal law on the basis of moral principle, notwithstanding that it could be argued that they do not endanger the public, were euthanasia, the killing of another at his own request, suicide pacts, duelling, abortion, incest between brother and sister. These are acts which he viewed as ones which could be done in private and without offence to others and need not involve the corruption or exploitation of others. Yet, as he pointed out, no one has gone so far as to suggest that they should all be left outside the criminal law as matters of private morality.

10. It would appear that the United Kingdom does claim that in principle it can legislate against immorality. In modern United Kingdom legislation a number of penal statutes appear to be based upon moral principles and the function of these penal sanctions is to enforce moral principles. Cruelty to animals is illegal because of a moral condemnation of enjoyment derived from the infliction of pain upon sentient creatures. The laws restricting or preventing gambling are concerned with the ethical significance of gambling which is confined to the effect that it may have on the character of the gambler as a member of society. The legislation against racial discrimination has as its object the shaping of people's moral thinking by legal sanctions and the changing of human behaviour by having the authority to punish.

11. The opposite view, traceable in English jurisprudence to John Stuart Mill, is that the law should not intervene in matters of private moral conduct more than necessary to preserve public order and to protect citizens against what is injurious and offensive and that there is a sphere of moral conduct which is best left to individual conscience just as if it were equatable to liberty of thought or belief. The recommendations of the Wolfenden Committee relied partly upon this view to favour the non-intervention of the law in case of homosexual activities between consenting adult males. On this aspect of the matter the Wolfenden Committee stated:

"There remains one additional counter-argument which we believe to be decisive, namely, the importance which society and the law ought to give to individual freeedom of choice in action in matters of private morality. Unless a deliberate attempt is to be made by society, acting 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. To say this is not to condone or encourage private immorality."

This aspect of the Wofenden Committee's report apparently commends itself to the Court (see paragraphs 60 and 61 of the judgment).

12. The Court also agrees with the conclusion in the Wolfenden Report to the effect that there is a necessity for some degree

of control even in respect of consensual acts committed in private notably where there is a call "to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence" (paragraph 49 of the judgment). Furthermore, the Court accepts that some form of legislation is necessary to protect not only particular sections of society but also the moral ethos of society as a whole (ibid.). However, experience has shown that exploitation and corruption of others is not confined to persons who are young, weak in body or mind or inexperienced or in a state of physical, moral or economic dependence.

13. The fact that a person consents to take part in the commission of homosexual acts is not proof that such person is sexually orientated by nature in that direction. A distinction must be drawn between homosexuals who are such beacause of some kind of innate instinct or pathological constitution judged to be incurable and those whose tendency comes from a lack of normal sexual development or from habit or from experience or from other similar causes but whose tendency is not incurable. So far as the incurable category is concerned, the activities must be regarded as abnormalities or even as handicaps and treated with the compassion and tolerance which is required to prevent those persons from being victimised in respect of tendencies over which they have no control and for which they are not personally responsible. However, other considerations are raised when these tendencies are translated into activities. The corruption for which the Court acknowledges need for control and the protection of the moral ethos of the community referred to by the Court may be closely associated with the translation of such tendencies into activities. Even assuming one of the two persons involved has the incurable tendency, the other may not. It is known that many male persons who are heterosexual or pansexual indulge in these activities not because of any incurable tendency but for sexual excitement. However, it is to be acknowledged that the case for the applicant was argued on the basis of the position of a male person who is by nature homosexually predisposed or orientated. The Court, in the absence of evidence to the contrary, has accepted this as the basis of the applicant's case and in its judgment rules only in respect of males who are so homosexually orientated (see, for example, paragraphs 32, 41 and 60 of the judgment).

14. If it is accepted that the State has a valid interest in the prevention of corruption and in the preservation of the moral ethos of its society, then the State has a right to enact such laws as it may reasonably think necessary to achieve these objects. The rule of law itself depends on a moral consensus in the community and in a democracy the law cannot afford to ignore the moral consensus of the community, whether by being either too far below it or too far above it, the law is brought into contempt. Virtue cannot be legislated into existence but non-virtue can be if the legislation renders excessively difficult the struggle after virtue. Such a situation can have an eroding effect on the moral ethos of the community in question. The ultimate justification of law is that it serves moral ends. It is true that many forms of immorality which can have a corrupting effect are not the subject of prohibitory or penal legislation. However such omissions do not imply a denial of the possibility of corruption or of the erosion of the moral ethos of the community but acknowledge the practical impossibility of legislating effectively for every area of immorality. Where such legislation is enacted it is a reflection of the concern of

the "prudent legislator".

Moreover, it must not be overlooked that much of the basis of the Wolfenden Committee's recommendation that homosexual relations between adult males should be decriminalised was the belief that the law was difficult to enforce and that when enforced was likely to do more harm than good by encouraging other evils such as blackmail. This is obviously not necessarily of universal validity. The relevant conditions may vary from one community to another. Experience also shows that certain sexual activities which are not in themselves contraventions of the criminal law can also be fruitful subjects for blackmail when they offend the moral ethos of the community, e.g. adultery, female homosexuality and, even, where it is not illegal, male homosexuality.

15. Sexual morality is only one part of the total area of morality and a question which cannot be avoided is whether sexual morality is "only private morality" or whether it has an inseparable social dimension. Sexual behaviour is determined more by cultural influences than by instinctive needs. Cultural trends and expectations can create drives mistakenly thought to be intrinsic instinctual urges. The legal arrangement and prescriptions set up to regulate sexual behaviour are very important formative factors in the shaping of cultural and social institutions.

16. In my view, the Court's reference to the fact that in most countries in the Council of Europe homosexual acts in private between adults are no longer criminal (paragraph 60 of the judgment) does not really advance the argument. The twenty-one countries making up the Council of Europe extend geographically from Turkey to Iceland and from the Mediterranean to the Arctic Circle and encompass considerable diversities of culture and moral values. The Court states that it cannot overlook the marked changes which have occurred in the laws regarding homosexual behaviour throughout the member States (ibid.) It would be unfortunate if this should lead to the erroneous inference that a Euro-norm in the law concerning homosexual practices has been or can be evolved.

17. Religious beliefs in Northern Ireland are very firmly held and directly influence the views and outlook of the vast majority of persons in Northern Ireland on questions of sexual morality. In so far as male homosexuality is concerned, and in particular sodomy, this attitude to sexual morality may appear to set the people of Northern Ireland apart from many people in other communities in Europe, but whether that fact constitutes a failing is, to say the least, debatable. Such views on unnatural sexual practices do not differ materially from those which throughout history conditioned the moral ethos of the Jewish, Christian and Muslim cultures.

18. The criminal law at no time has been uniform throughout the several legal systems within the United Kingdom. The Court recognises that where there are disparate cultural communities residing within the same State it may well be that different requirements, both moral and social, will face the governing authorities (paragraph 56 of the judgment). The Court also recognises that the contested measures must be seen in the context of Northern Ireland society (ibid.) The United Kingdom Government, having responsibility for statutory changes in any of the legal systems which operate within the United Kingdom, sounded out opinion in Northern Ireland on this question of changing the law in respect of homosexual offences. While it is possible that the United Kingdom Government may have been mistaken in its assessment of the effect the sought-after change in

the law would have on the community in Northern Ireland, nevertheless it is in as good, if not a better, position than is the Court to assess that situation. Criminal sanctions may not be the most desirable way of dealing with the situation but again that has to be assessed in the light of the conditions actually prevailing in Northern Ireland. In all cultures matters of sexual morality are particularly sensitive ones and the effects of certain forms of sexual immorality are not as susceptible of the same precise objective assessment that is possible in matters such as torture or degrading and inhuman treatment. To that extent the Court's reference in its judgment (paragraph 60) to Tyrer's case is not really persuasive in the present case. It is respectfully suggested that the Marckx judgment is not really relevant in the present case as that concerned the position of an illegitimate child whose own actions were not in any way in question.

19. Even if it should be thought, and I do not so think, that the people of Northern Ireland are more "backward" than the other societies within the Council of Europe because of their attitude towards homosexual practices, that is very much a value judgment which depends totally upon the initial premise. It is difficult to gauge what would be the effect on society in Northern Ireland if the law were now to permit (even with safeguards for young people and people in need of protection) homosexual practices of the type at present forbidden by law. I venture the view that the Government concerned, having examined the position, is in a better position to evaluate that than this Court, particularly as the Court admits the competence of the State to legislate in this matter but queries the proportionality of the consequences of the legislation in force.

20. The law has a role in influencing moral attitudes and if the respondent Government is of the opinion that the change sought in the legislation would have a damaging effect on moral attitudes then in my view it is entiled to maintain the legislation it has. The judgment of the Court does not constitute a declaration to the effect that the particular homosexual practices which are subject to penalty by the legislation in question virtually amount to fundamental human rights. However, that will not prevent it being hailed as such by those who seek to blur the essential difference between homosexual and heterosexual activities.

21. Even the Wolfenden Report felt that one of the functions of the criminal law was to preserve public order and decency and to provide sufficient safeguards against the exploitation and corruption of others and therefore recommended that it should continue to be an offence "for a third party to procure or attempt to procure an act of gross indecency between male persons whether or not the act to be procured constitutes a criminal offence". Adults, even consenting adults, can be corrupted and may be exploited by reason of their own weaknesses. In my view this is an area in which the legislature has a wide discretion or margin of appreciation which should not be encroached upon save where it is clear beyond doubt that the legislation is such that no reasonable community could enact. In my view no such proof has been established in this case.

22. In the United States of America there has been considerable litigation concerning the question of privacy and the guarantees as to privacy enshrined in the Constitution of the United States. The United States Supreme Court and other United States courts have upheld the right of privacy of married couples against legislation which sought to control sexual activities within marriage, including sodomy. However, these courts have refused to extend the constitutional guarantee of privacy which is available to married

couples to homosexual activities or to heterosexual sodomy outside marriage. The effect of this is that the public policy upholds as virtually absolute privacy within marriage and privacy of sexual activity within the marriage.

It is a valid approach to hold that, as the family is the fundamental unit group of society, the interests of marital privacy would normally be superior to the State's interest in the pursuit of certain sexual activities which would in themselves be regarded as immoral and calculated to corrupt. Outside marriage there is no such compelling interest of privacy which by its nature ought to prevail in respect of such activities.

23. It is to be noted that Article 8 § 1 (art. 8-1) of the Convention speaks of "private and family life". If the ejusdem generis rule is to be applied, then the provision should be interpreted as relating to private life in that context as, for example, the right to raise one's children according to one's own philosophical and religious tenets and generally to pursue without interference the activities which are akin to those pursued in the privacy of family life and as such are in the course of ordinary human and fundamental rights. No such claim can be made for homosexual practices.

24. In my opinion there has been no breach of Article 8 (art. 8) of the Convention.

Article 14 (art. 14)

25. I agree with the judgment of the Court in respect of Article 14 (art. 14).

In the **Norris** case*,

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* Note by the registry: The case is numbered 6/1987/129/180. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

The European Court of Human Rights, taking its decision in plenary session pursuant to Rule 50 of the Rules of Court and composed of the following judges:

Mr R. Ryssdal, President,
Mr J. Cremona,
Mr Thór Vilhjálmsson,
Mr F. Gölcüklü,
Mr F. Matscher,
Mr L.-E. Pettiti,
Mr B. Walsh,
Sir Vincent Evans,
Mr C. Russo,
Mr R. Bernhardt,
Mr A. Spielmann,
Mr J. De Meyer,
Mr J.A. Carrillo Salcedo,
Mr N. Valticos,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,

Having deliberated in private on 29 April and 29 September 1988,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 14 May 1987, within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 10581/83) against Ireland lodged with the Commission under Article 25 (art. 25) by Mr David **Norris**, an Irish citizen, on 5 October 1983.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) of the Convention and to the declaration whereby Ireland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). It sought a decision from the Court as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 (art. 8) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr B. Walsh, the elected judge of Irish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 23 May 1987, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr Thór Vilhjálmsson, Mr G. Lagergren, Mr F. Matscher, Mr J. Q. Pinheiro Farinha and Mr R. Bernhardt (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal, who had assumed the office of President of the Chamber (Rule 21 para. 5), consulted - through the Registrar - the Agent of the Irish Government ("the Government"), the Delegate of the Commission and the lawyer of the applicant on the need for a written procedure (Rule 37 para. 1). In accordance with his orders, the following documents were received by the registry:

- the Government's memorial, on 26 October 1987;

- the applicant's memorial, on 2 November 1987;

- supplementary memorial by the Government, on 25 April 1988.

In a letter received by the Registrar on 11 December 1987, the Secretary to the Commission indicated that the Delegate would submit her observations at the hearing.

5. On 30 November 1987, the Chamber decided to relinquish jurisdiction in favour of the plenary Court (Rule 50).

6. Having consulted - through the Registrar - those who would be appearing before the Court, the President directed on 16 December 1987 that the oral proceedings should commence on 25 April 1988 (Rule 38).

7. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

(a) for the Government

Mr P.E. Smyth, Agent,

Mr E. Comyn, Senior Counsel,

Mr D. Gleeson, Senior Counsel,

Mr J. O'Reilly, Barrister-at-Law, Counsel,

Mr J. Hamilton, Office of the Attorney General, Adviser;

(b) for the Commission

Mrs G.H. Thune, Delegate;

(c) for the applicant

Senator M. Robinson, Senior Counsel, Counsel,

Mr J. Jay, Solicitor of the Supreme Court, Adviser.

The Court heard addresses by Mrs Thune for the Commission, by Senator Robinson for the applicant and by Mr Comyn and Mr Gleeson for

the Government, as well as their replies to its questions.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

8. Mr David **Norris** was born in 1944. He is an Irish citizen. He is now, and has been since 1967, a lecturer in English at Trinity College, Dublin. At present he sits in the second chamber (Seanad Eireann) of the Irish Parliament, being one of the three Senators elected by the graduates of Dublin University.

9. Mr **Norris** is an active homosexual and has been a campaigner for homosexual rights in Ireland since 1971; in 1974 he became a founder member and chairman of the Irish Gay Rights Movement. His complaints are directed against the existence in Ireland of laws which make certain homosexual practices between consenting adult men criminal offences.

10. In November 1977 the applicant instituted proceedings in the High Court (see paragraphs 21-24 below) claiming that the impugned laws were no longer in force by reason of the effect of Article 50 of the Constitution of Ireland, which declared that laws passed before the Constitution but which were inconsistent with it did not continue to be in force. Evidence was given of the extent to which the applicant had been affected by that legislation and had suffered interference with his right to respect for private life. Salient points in this evidence were summarised as follows:

(i) The applicant gave evidence of having suffered deep depression and loneliness on realising that he was irreversibly homosexual and that any overt expression of his sexuality would expose him to criminal prosecution.

(ii) The applicant claimed that his health had been affected when in 1969 he fainted at a Dublin restaurant and was sent to Baggot Street Hospital for tests which resulted in his being referred to a psychiatrist. He was under the psychiatric care of Dr. McCracken for a period in excess of six months. Dr. McCracken's advice to the applicant was that, if he wished to avoid anxiety attacks of this kind, he should leave Ireland and live in a country where the laws relating to homosexual behaviour had been reformed. Dr. McCracken stated in evidence that the applicant was in a normal condition at the time of the first consultation. He did not recall being made aware of a history of collapse.

(iii) No attempt had been made to institute a prosecution against the applicant or the organisation of which the applicant was then the chairman (see paragraph 9 above). The applicant informed the police authorities of his organisation's activities but met with a sympathetic response and was never subjected to police questioning.

(iv) The applicant had participated in a television programme on RTE, the State broadcasting company, in or about July 1975. The programme consisted of an interview with him in the course of which he admitted to being a homosexual but denied that this was an illness or that it would prevent him from functioning as a normal member of society. A complaint was lodged against that programme. The Broadcasting Complaints Advisory Committee's report referred to the existing law criminalising homosexual activity and upheld the complaint on the ground that the programme was in breach of the Current/Public Affairs Broadcasting Code in that it could be interpreted as advocacy of homosexual practices.

(v) The applicant gave evidence of suffering verbal abuse and threats of violence subsequent to the interview with him on RTE, which he attributed in some degree to the criminalising of homosexual activity. He also alleged in evidence that in the past his mail was opened by the postal authorities.

(vi) The applicant admitted to having a physical relationship with another man and that he feared that he or the person with whom he had the relationship, who normally lived outside Ireland, could face prosecution.

(vii) The applicant also claimed to have suffered what Mr Justice Henchy in a dissenting judgment in the Supreme Court (see paragraph 22 below) alluded to as follows:

"... fear of prosecution or of social obloquy has restricted him in his social and other relations with male colleagues and friends: and in a number of subtle but insidiously intrusive and wounding ways he has been restricted in or thwarted from engaging in activities which heterosexuals take for granted as aspects of the necessary expression of their human personality and as ordinary incidents of their citizenship."

11. It is common ground that at no time before or since the court proceedings brought by the applicant has he been charged with any offence in relation to his admitted homosexual activities. However, he remains legally at risk of being so prosecuted, either by the Director of Public Prosecutions or by way of a private prosecution initiated by a common informer up to the stage of return for trial (see paragraphs 15-19 below).

II. THE RELEVANT LAW IN IRELAND

A. The impugned statutory provisions

12. Irish law does not make homosexuality as such a crime. But certain statutory provisions in force in Ireland penalise certain homosexual activities. Some of these are penalised by the Offences against the Person Act, 1861 ("the 1861 Act") and the Criminal Law Amendment Act, 1885 ("the 1885 Act").

The provisions relevant to the present case are sections 61 and 62 of the 1861 Act. Section 61 of the 1861 Act, as amended in 1892, provides that:

"Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be kept in penal servitude for life."

Section 62 of the 1861 Act, as similarly amended, provides that:

"Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon a male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding ten years."

The offences of buggery or of an attempt to commit the same may be committed by male or female persons.

Section 11 of the 1885 Act deals only with male persons. It provides

that:

"Any male person who, in public or in private, commits, or is a party to 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 guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour."

13. Sections 61 and 62 of the 1861 Act should be read in conjunction with the provisions of the Penal Servitude Act 1891, section 1, by virtue of which the court is empowered to impose a lesser sentence of penal servitude than that mentioned in the 1861 Act or, in lieu thereof, a sentence of imprisonment for a term not exceeding two years or a fine. The provisions of the 1861 Act and of the 1885 Act are also subject to the power given to the court by section 1(2) of the Probation of Offenders Act 1907, to apply, by way of substitution, certain more lenient measures.

The terms "hard labour" and "penal servitude" no longer have any practical significance, since anyone now sentenced to "hard labour" or "penal servitude" will, in practice, serve an ordinary prison sentence.

14. The 1885 Act is the only one of the legislative provisions attacked in the instant case that can be described as dealing solely with homosexual activities. What particular acts in any given case may be held to amount to gross indecency is a matter which is not statutorily defined and is therefore for the courts to decide on the particular facts of each case.

B. The enforcement of the relevant statutory provisions

15. The right to prosecute persons before a court other than a court of summary jurisdiction is governed by Article 30, section 3 of the Constitution which is as follows:

"All crimes and offences prosecuted in any court constituted under Article 34 of this Constitution other than a court of summary jurisdiction shall be prosecuted in the name of the People and at the suit of the Attorney General or some other person authorised in accordance with law to act for that purpose."

Section 9 of the Criminal Justice (Administration) Act, 1924, as adapted by the Constitution (Consequential Provisions) Act, 1937, provides that:

"All criminal charges prosecuted upon indictment in any court shall be prosecuted at the suit of the Attorney General of Ireland."

16. The provisions of the Prosecution of Offences Act 1974 extended to the Director of Public Prosecutions most of the prosecuting functions exercised by the Attorney General. The Director of Public Prosecutions (an office created by that Act) is independent of the Government and a permanent official in the Civil Service of the State as distinct from the Civil Service of the Government.

17. Any member of the public, whether an Irish citizen or not, has the right as a "common informer" to bring a private prosecution. He need not have any direct interest in the alleged offence or be personally affected by it. A private prosecutor's rights are limited in respect of offences which are not triable summarily. In The State

(Ennis) v. Farrell [1966] Irish Reports 107, it was held by the Supreme Court that the effect of section 9 of the Criminal Justice (Administration) Act 1924 was that a private prosecutor may conduct a prosecution up to the point where the judge of the District Court decides that the evidence is sufficient to warrant a committal for trial in cases of indictable offences i.e. triable with a jury. Thereafter the Attorney General, or now also the Director of Public Prosecutions, becomes dominus litis and must then consider whether or not he should present an indictment against the accused who has been returned by the District Court for trial with a jury.

18. The offences which are at issue in the present case, namely those set out in sections 61 and 62 of the 1861 Act and in section 11 of the 1885 Act, are indictable offences. Indictable offences are only triable summarily in the District Court if the judge of the District Court is of the opinion that the facts constitute a minor offence and the accused, on being informed of his right to trial by jury, expressly waives that right. This availability of summary trial is provided for by the Criminal Justice Act 1951 and is limited to those indictable offences set out in the Schedule to that Act. This does not include the offences under sections 61 and 62 of the 1861 Act. The summary trial procedure is available in respect of an offence under section 11 of the 1885 Act where the accused is over the age of sixteen years and the person with whom the act is alleged to have been committed is legally unable to consent for being under the age of sixteen years or an idiot, an imbecile or a feeble-minded person. Thus a summary trial can never be had in cases involving consenting adults and, save where the accused pleads guilty, the case can be heard only with a jury whether the prosecution was commenced by a private prosecutor or by the Director of Public Prosecutions.

Moreover, the Criminal Procedure Act 1967 permits a person charged with any indictable offence (save an offence under the Treason Act, 1939, murder, attempt to murder, conspiracy to murder, piracy or an offence under section 3 (1) (i) of the Geneva Conventions Act, 1962) to plead guilty in the District Court. If the Director of Public Prosecutions, or the Attorney General, as the case may be, consents, the case may be disposed of summarily in that Court. If sentence is imposed by the District Court, it cannot exceed twelve months' imprisonment. If the judge of the District Court is of opinion that the offence warrants a greater penalty, he may send the accused forward to the Circuit Court for sentence. In such a case an accused may change his plea to one of "not guilty" and the case will then be tried with a jury. The Circuit Court has a discretion to impose any sentence up to the limit permitted by the relevant statutory provision.

19. Therefore, while a private prosecution may be initiated by a common informer, a prosecution brought under one of the impugned provisions cannot proceed to trial before a jury unless an indictment is laid by the Director of Public Prosecutions. According to the Office of the Director of Public Prosecutions there have not been any private prosecutions arising out of the homosexual activity in private of consenting male adults since the inception of the Office in 1974.

20. The following statement was made by the Office of the Director of Public Prosecutions in September 1984, in reply to a question asked by the Commission:

"The Director has no stated prosecution policy on any branch of the criminal law. He has no unstated policy not to enforce any offence. Each case is treated on its merits."

The Government's statistics show that no public prosecutions, in respect of homosexual activities, were brought during the relevant period except where minors were involved or the acts were committed in public or without consent.

III. THE PROCEEDINGS BEFORE THE NATIONAL COURTS

21. In November 1977 the applicant brought proceedings in the Irish High Court seeking a declaration that sections 61 and 62 of the 1861 Act and section 11 of the 1885 Act were not continued in force since the enactment of the Constitution of Ireland (see paragraph 10 above) and therefore did not form part of Irish law.
Mr Justice McWilliam, in his judgment of 10 October 1980, found, among other facts, that "One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow from that unfortunate disease". However, he dismissed Mr **Norris**'s action on legal grounds.

22. On appeal, the Supreme Court, by a three-to-two majority decision of 22 April 1983, upheld the judgment of the High Court. The Supreme Court was satisfied that the applicant had locus standi to bring an action for a declaration even though he had not been prosecuted for any of the offences in question. The majority held that "as long as the legislation stands and continues to proclaim as criminal the conduct which the plaintiff asserts he has a right to engage in, such right, if it exists, is threatened, and the plaintiff has standing to seek the protection of the court".

23. In the course of these proceedings it was contended on behalf of the applicant that the judgment of 22 October 1981 of the European Court of Human Rights in the Dudgeon case (Series A no. 45) should be followed. In support of this plea, it was argued that, since Ireland had ratified the European Convention on Human Rights, there arose a presumption that the Constitution was compatible with the Convention and that, in considering a question as to inconsistency under Article 50 of the Constitution, regard should be had to whether the laws being considered are consistent with the Convention itself.

In rejecting these submissions, Chief Justice O'Higgins, in the majority judgment, stated that "the Convention is an international agreement" which "does not and cannot form part of [Ireland's] domestic law nor affect in any way questions which arise thereunder". The Chief Justice said: "This is made quite clear by Article 29, section 6, of the Constitution which declares: - 'No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.'"

In fact, the European Court of Human Rights already noted in its judgment of 1 July 1961 in the Lawless case (Series A no. 3, pp. 40-41, para. 25) that the Oireachtas had not introduced legislation to make the Convention on Human Rights part of the municipal law of Ireland.

24. The Supreme Court considered the laws making homosexual conduct criminal to be consistent with the Constitution and that no right of privacy encompassing consensual homosexual activity could be derived from "the Christian and democratic nature of the Irish State" so as to prevail against the operation of such sanctions. In its majority decision, the Supreme Court based itself, inter alia, on the following considerations:

"(1) Homosexuality has always been condemned in Christian teaching as being morally wrong. It has equally been regarded by society for many centuries as an offence against nature and a very serious crime.

(2) Exclusive homosexuality, whether the condition be congenital or acquired, can result in great distress and unhappiness for the individual and can lead to depression, despair and suicide.

(3) The homosexually oriented can be importuned into a homosexual lifestyle which can become habitual.

(4) Male homosexual conduct has resulted, in other countries, in the spread of all forms of venereal disease and this has now become a significant public health problem in England.

(5) Homosexual conduct can be inimical to marriage and is per se harmful to it as an institution."

The Supreme Court, however, awarded the applicant his costs, both of the proceedings before the High Court and of the appeal to the Supreme Court.

PROCEEDINGS BEFORE THE COMMISSION

25. Mr **Norris** applied to the Commission on 5 October 1983 (application no. 10581/83). He complained of the existence in Ireland of legislation which prohibits male homosexual activity (sections 61 and 62 of the 1861 Act and section 11 of the 1885 Act). Mr **Norris** alleged that the prohibition on male homosexual activity constitutes a continuing interference with his right to respect for private life (including sexual life), contrary to Article 8 (art. 8) of the Convention. The National Gay Federation joined with the applicant in the application to the Commission and both made other claims under Articles 1 and 13 (art. 1, art. 13) of the Convention.

26. By decision of 16 May 1985, the Commission declared the application admissible in respect of the alleged interference with Mr **Norris**'s private life. The claims made under Articles 1 and 13 (art. 1, art. 13) were declared inadmissible, as were the aforesaid Federation's entire complaints.

In its report adopted on 12 March 1987 (Article 31 of the Convention) (art. 31), the Commission expressed the opinion, by six votes to five, that there had been a violation of Article 8 (art. 8) of the Convention.

The full text of the Commission's opinion and the joint dissenting opinion contained in the report is reproduced as an annex to this judgment.

FINAL SUBMISSIONS MADE TO THE COURT

27. At the hearing the Government maintained the final submissions in their memorial of 23 October 1987, in which they requested the Court:

"(1) to decide and declare that the applicant is not a 'victim' within the meaning of Article 25 (art. 25) of the European Convention on Human Rights and therefore that there has been no breach of the Convention in this case; or, in the alternative

(2) to decide and declare that the present laws in Ireland relating to homosexual acts do not give rise to a breach of Article 8 (art. 8) of the Convention in that the laws are necessary in a

democratic society for the protection of morals and for the protection of the rights of others for the purposes of paragraph 2 of Article 8 (art. 8-2) of the Convention."

AS TO THE LAW

I. WHETHER THE APPLICANT IS ENTITLED TO CLAIM TO BE A VICTIM UNDER ARTICLE 25 PARA. 1 (art. 25-1)

28. The Government asked the Court - and had made the same plea before the Commission - to hold that the applicant could not claim to be a "victim" within the meaning of Article 25 para. 1 (art. 25-1) of the Convention which, so far as is relevant, provides that:

"The Commission may receive petitions ... from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the] Convention ..."

The Government submitted that, since the legislation complained of had never been enforced against the applicant (see paragraphs 11-14 above), his claim was more in the nature of an actio popularis by means of which he sought a review in abstracto of the contested legislation in the light of the Convention.

29. The Commission considered that Mr **Norris** could claim to be a victim. In this connection, it referred to certain earlier decisions of the Court, namely the Klass and Others judgment of 6 September 1978, the Marckx judgment of 13 June 1979 and the Dudgeon judgment of 22 October 1981 (Series A nos. 28, 31 and 45).

In the Commission's view, although the applicant has not been prosecuted or subjected to any criminal investigation, he is directly affected by the laws of which he complains because he is predisposed to commit prohibited sexual acts with consenting adult men by reason of his homosexual orientation.

30. The Court recalls that, whilst Article 24 (art. 24) of the Convention permits a Contracting State to refer to the Commission "any alleged breach" of the Convention by another Contracting State, Article 25 (art. 25) requires that an individual applicant should be able to claim to be actually affected by the measure of which he complains. Article 25 (art. 25) may not be used to found an action in the nature of an actio popularis; nor may it form the basis of a claim made in abstracto that a law contravenes the Convention (see the Klass and Others judgment, previously cited, Series A no. 28, pp. 17-18, para. 33).

31. The Court further agrees with the Government that the conditions governing individual applications under Article 25 (art. 25) of the Convention are not necessarily the same as national criteria relating to locus standi. National rules in this respect may serve purposes different from those contemplated by Article 25 (art. 25) and, whilst those purposes may sometimes be analogous, they need not always be so (ibid., p. 19, para. 36).

Be that as it may, the Court has held that Article 25 (art. 25) of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it (see the Johnston and Others judgment of 18 December 1986, Series A no. 112, p. 21, para. 42, and the Marckx judgment, previously cited, Series A no. 31, p. 13, para. 27).

32. In the Court's view, Mr **Norris** is in substantially the same position as the applicant in the Dudgeon case, which concerned identical legislation then in force in Northern Ireland. As was held in that case, "either [he] respects the law and refrains from engaging - even in private and with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution" (Series A no. 45, p. 18, para. 41).

33. Admittedly, it appears that there have been no prosecutions under the Irish legislation in question during the relevant period except where minors were involved or the acts were committed in public or without consent. It may be inferred from this that, at the present time, the risk of prosecution in the applicant's case is minimal. However, there is no stated policy on the part of the prosecuting authorities not to enforce the law in this respect (see paragraph 20 above). A law which remains on the statute book, even though it is not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time, if for example there is a change of policy. The applicant can therefore be said to "run the risk of being directly affected" by the legislation in question. This conclusion is further supported by the High Court's judgment of 10 October 1980, in which Mr Justice McWilliam, on the witnesses' evidence, found, inter alia, that "One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow from that unfortunate disease" (see paragraph 21 above).

34. On the basis of the foregoing considerations, the Court finds that the applicant can claim to be the victim of a violation of the Convention within the meaning of Article 25 para. 1 (art. 25-1) thereof.

That being so, the Court does not consider it necessary to examine further the applicant's allegations with regard to, inter alia, threats of prosecution, claims of interference with his mail, the upholding of a complaint against a television programme on which he appeared and the evidence he gave before the High Court of Ireland of his psychiatric problems (see paragraph 10 above).

II. THE ALLEGED BREACH OF ARTICLE 8 (art. 8)

A. The existence of an interference

35. Mr **Norris** complained that under the law in force in Ireland he is liable to criminal prosecution on account of his homosexual conduct. He alleged that he has thereby suffered, and continues to suffer, an unjustified interference with his right to respect for his private life, in breach of Article 8 (art. 8) which provides that:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

36. The Commission (at paragraph 55 of its report) considered that "One of the main purposes of penal legislation is to deter the

proscribed behaviour, and citizens are deemed to conduct themselves, or modify their behaviour, in such a way as not to contravene the criminal law. It cannot be said, therefore, that the applicant runs no risk of prosecution or that he can wholly ignore the legislation in question."

The Commission, therefore, found that the legislation complained of interferes with the applicant's right to respect for his private life, guaranteed by Article 8 para. 1 (art. 8-1) of the Convention, in so far as it
prohibits the homosexual activities in question even when committed in private between consenting adult men.

37. The Government, on the other hand, contended that it was not possible to conclude that there had been any lack of respect for the applicant's rights under the Convention. In support of their contention, the Government relied on the fact that the applicant had been able to maintain an active public life side by side with a private life free from any interference on the part of the State or its agents. They further submitted that no derogation from the applicant's fundamental rights occurs by virtue of the mere existence of laws restricting homosexual behaviour under pain of legal sanction.

38. The Court agrees with the Commission that, with regard to the interference with an Article 8 (art. 8) right, the present case is indistinguishable from the Dudgeon case. The laws in question are applied so as to prosecute persons in respect of homosexual acts committed in the circumstances mentioned in the first sentence of paragraph 33. Above all, and quite apart from those circumstances, enforcement of the legislation is a matter for the Director of Public Prosecutions who may not fetter his discretion with regard to each individual case by making a general statement of his policy in advance (see paragraph 20). A prosecution may, in any event, be initiated by a member of the public acting as a common informer (see paragraphs 15-19 above).

It is true that, unlike Mr Dudgeon, Mr **Norris** was not the subject of any police investigation. However, the Court's finding in the Dudgeon case that there was an interference with the applicant's right to respect for his private life was not dependent upon this additional factor. As was held in that case, "the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life ... within the meaning of Article 8 para. 1 (art. 8-1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life ..." (Series A no. 45, p. 18, para. 41).

The Court therefore finds that the impugned legislation interferes with Mr **Norris**'s right to respect for his private life under Article 8 para. 1 (art. 8-1).

B. The existence of a justification for the interference

39. The interference found by the Court does not satisfy the conditions of paragraph 2 of Article 8 (art. 8-2) unless it is "in accordance with the law", has an aim which is legitimate under this paragraph and is "necessary in a democratic society" for the aforesaid aim (see, as the most recent authority, the Olsson judgment of 24 March 1988, Series A no. 130, p. 29, para. 59).

40. It is common ground that the first two conditions are satisfied. As the Commission pointed out in paragraph 58 of its report, the interference is plainly "in accordance with the law" since

it arises from the very existence of the impugned legislation. Neither was it contested that the interference has a legitimate aim, namely the protection of morals.

41. It remains to be determined whether the maintenance in force of the impugned legislation is "necessary in a democratic society" for the aforesaid aim. According to the Court's case-law, this will not be so unless, inter alia, the interference in question answers a pressing social need and in particular is proportionate to the legitimate aim pursued (see, amongst many other authorities, the above-mentioned Olsson judgment, Series A no. 130, p. 31, para. 67).

42. In this respect, the Commission again was of the opinion that the present case was indistinguishable from that of Mr Dudgeon. At paragraph 62 of its report it quoted extensively from those paragraphs of the Dudgeon judgment (paragraphs 48-63) in which this question was discussed. In that judgment it was accepted that, since "some form of legislation is 'necessary' to protect particular sections of society as well as the moral ethos of society as a whole, the question in the present case is whether the contested provisions of the law ... and their enforcement remain within the bounds of what, in a democratic society, may be regarded as necessary in order to accomplish those aims" (Series A no. 45, p. 21, para. 49).

It was not contended before the Commission that there is a large body of opinion in Ireland which is hostile or intolerant towards homosexual acts committed in private between consenting adults. Nor was it argued that Irish society had a special need to be protected from such activity. In these circumstances, the Commission concluded that the restriction imposed on the applicant under Irish law, by reason of its breadth and absolute character, is disproportionate to the aims sought to be achieved and therefore is not necessary for one of the reasons laid down in Article 8 para. 2 (art. 8-2) of the Convention.

43. At the oral hearing, the Government argued that, whilst the criteria of pressing social need and proportionality were valid yardsticks for testing restrictions imposed in the interests of national security, public order or the protection of public health, they could not be applied to determine whether an interference is "necessary in a democratic society" for the protection of morals; and that further a wider view of necessity should be taken in an area in which the Contracting States enjoy a wide margin of appreciation.

In the Government's opinion, the application of these criteria emptied the "moral exception" of meaning. In their view, the identification of "necessity" with "pressing social need" in the context of moral values is too restrictive and produces a distorting result, while the test of proportionality involves the evaluation of a moral issue and this is something that the Court should avoid if possible. Within broad parameters the moral fibre of a democratic nation is a matter for its own institutions and the Government should be allowed a degree of tolerance in their compliance with Article 8 (art. 8), that is to say, a margin of appreciation that would allow the democratic legislature to deal with this problem in the manner which it sees best.

44. The Court is not convinced by this line of argument. As early as 1976, the Court declared in its Handyside judgment of 7 December 1976 that, in investigating whether the protection of morals necessitated the various measures taken, it had to make an "assessment of the reality of the pressing social need implied by the

notion of 'necessity' in this context" and stated that "every 'restriction' imposed in this sphere must be proportionate to the legitimate aim pursued" (Series A no. 24, pp. 21-23, paras. 46, 48 and 49). It confirmed this approach in its Dudgeon judgment (Series A no. 45, pp. 20-22, paras. 48 et seq.).

The more recent case of Müller and Others demonstrates that, in the context of the protection of morals, the Court continues to apply the same tests for determining what is "necessary in a democratic society". In that case, the Court, in reaching its decision, examined whether the contested measures, which pursued the legitimate aim of protecting morals, both answered a pressing social need and complied with the principle of proportionality (see the judgment of 24 May 1988, Series A no. 133, pp. 21-23, paras. 31-37 and pp. 24-25, paras. 40-44).

The Court sees no reason to depart from the approach which emerges from its settled case-law and, although of the three aforementioned judgments two related to Article 10 (art. 10) of the Convention, it sees no cause to apply different criteria in the context of Article 8 (art. 8).

45. Moreover, in making their submission that the definition of "necessity" should be given a wider interpretation, the Government in effect put forward no viable tests of their own to replace or complement those mentioned above. The Government's contention would therefore appear to be that the State's discretion in the field of the protection of morals is unfettered.

Whilst national authorities - as the Court acknowledges - do enjoy a wide margin of appreciation in matters of morals, this is not unlimited. It is for the Court, in this field also, to give a ruling on whether an interference is compatible with the Convention (see the previously cited Handyside judgment, Series A no. 24, p. 23, para. 49).

The Government are in effect saying that the Court is precluded from reviewing Ireland's observance of its obligation not to exceed what is necessary in a democratic society when the contested interference with an Article 8 (art. 8) right is in the interests of the "protection of morals". The Court cannot accept such an interpretation. To do so would run counter to the terms of Article 19 (art. 19) of the Convention, under which the Court was set up in order "to ensure the observance of the engagements undertaken by the High Contracting Parties ...".

46. As in the Dudgeon case, "... not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate for the purposes of paragraph 2 of Article 8 (art. 8-2)" (Series A no. 45, p. 21, para. 52).

Yet the Government have adduced no evidence which would point to the existence of factors justifying the retention of the impugned laws which are additional to or are of greater weight than those present in the aforementioned Dudgeon case. At paragraph 60 of its judgment of 22 October 1981 (ibid., pp. 23-24), the Court noted that "As compared with the era when [the] legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to

be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States". It was clear that "the authorities [had] refrained in recent years from enforcing the law in respect of private homosexual acts between consenting [adult] males ... capable of valid consent". There was no evidence to show that this "[had] been injurious to moral standards in Northern Ireland or that there [had] been any public demand for stricter enforcement of the law".

Applying the same tests to the present case, the Court considers that, as regards Ireland, it cannot be maintained that there is a "pressing social need" to make such acts criminal offences. On the specific issue of proportionality, the Court is of the opinion that "such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved" (ibid., p. 24, para. 60).

47. The Court therefore finds that the reasons put forward as justifying the interference found are not sufficient to satisfy the requirements of paragraph 2 of Article 8 (art. 8-2). There is accordingly a breach of that Article (art. 8).

III. THE APPLICATION OF ARTICLE 50 (art. 50)

48. Under Article 50 (art. 50) of the Convention:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The applicant seeks compensation for damage and reimbursement of legal costs and expenses.

A. Damage

49. The applicant requested the Court to fix such amount by way of damages as would recognise the extent to which he has suffered from the maintenance in force of the legislation.

The Government submitted that the Court should follow its decision of 24 February 1983 in the Dudgeon case on this point (see Series A no. 59) in which it held that a finding of a breach of Article 8 (art. 8) in itself constituted just satisfaction.

50. In reaching the aforementioned decision, the Court took into account the change in the law which had been effected with regard to Northern Ireland in compliance with the Court's judgment of 22 October 1981 (Series A no. 59, pp. 7-8, paras. 11-14). No similar reform has been carried out in Ireland.

As in the Marckx case, it is inevitable that the Court's decision will

have effects extending beyond the confines of this particular case, especially since the violation found stems directly from the contested provisions and not from individual measures of implementation. It will be for Ireland to take the necessary measures in its domestic legal system to ensure the performance of its obligation under Article 53 (art. 53) (Series A no. 31, p. 25, para. 58).

For this reason and notwithstanding the different situation in the present case as compared with the Dudgeon case, the Court is of the opinion that its finding of a breach of Article 8 (art. 8) constitutes adequate just satisfaction for the purposes of Article 50 (art. 50) of the Convention and therefore rejects this head of claim.

B. Costs and expenses

51. In respect of the proceedings before the national courts, the Supreme Court awarded the applicant taxed costs in the amount of IR£75,762.12 (see paragraph 24 above). He submitted that this amount did not in fact fully cover the actual expenditure incurred.

The Court cannot accept this head of claim. The costs having been assessed by a Taxing Master in accordance with the law of Ireland, it is not the Court's role to reassess them.

52. The applicant also sought an amount of IR£14,962.49 for costs and expenses, details of which he furnished, in respect of the proceedings conducted before the Convention institutions.

Whilst not contesting that the applicant had incurred additional liabilities over and above the amounts received by him by way of legal aid, the Government claimed that the legal costs sought by him were not reasonable as to quantum and required reassessment. The Court notes, however, that the Government made no counter-proposal as to what might constitute a reasonable amount.

The Court considers that the amount claimed satisfies the criteria laid down in its case-law (see among other authorities the Belilos judgment of 29 April 1988, Series A no. 132, pp. 27-28, para. 79) and awards to the applicant, in respect of costs and expenses, IR£14,962.49 less 7,390 French francs already paid in legal aid.

FOR THESE REASONS, THE COURT

1. Holds by eight votes to six that the applicant can claim to be a victim within the meaning of Article 25 (art. 25) of the Convention;

2. Holds by eight votes to six that there is a breach of Article 8 (art. 8) of the Convention;

3. Holds unanimously that Ireland shall pay to the applicant, in respect of legal costs and expenses, the amount of IR£14,962.49 (fourteen thousand nine hundred and sixty-two Irish pounds and forty nine pence) less 7,390 (seven thousand three hundred and ninety) French francs to be converted into Irish pounds at the rate applicable on the date of delivery of this judgment;

4. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 October 1988.

Signed: Rolv RYSSDAL

President

Signed: Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, the dissenting opinion of Mr Valticos, joined by Mr Gölcüklü, Mr Matscher, Mr Walsh, Mr Bernhardt and Mr Carrillo Salcedo concurred, is annexed to the present judgment.

Initialled: R.R.

Initialled: M-A.E.

DISSENTING OPINION OF JUDGE VALTICOS APPROVED BY JUDGES GÖLCÜKLÜ, MATSCHER, WALSH, BERNHARDT AND CARRILLO SALCEDO

(Translation)

I find myself unable to concur with the majority of the Court which held that the applicant must be considered a "victim", within the meaning of Article 25 (art. 25) of the Convention, of a breach of rights guaranteed by Article 8 (art. 8).

In fact, the applicant was not subjected to any action, penalty or other measure by his country's authorities in respect of any homosexual acts committed by him. The criminal law in this matter in Ireland was not enforced against him and, more generally, no prosecutions for homosexual activities in private between consenting adult men have been instituted for a number of years. The various minor difficulties of which the applicant complains were not caused by the authorities. Nor, moreover, has the applicant encountered any problems on account of the campaign which he has been overtly conducting since 1971 in favour of homosexual rights.

This case does, indeed, bear great similarities to the Dudgeon case in which the Court considered that there had been a breach of the Convention. However, an appreciable and, in my view, decisive difference between the two cases lies in the fact that, in the Dudgeon case, the applicant had been subjected by the police to certain intrusions into his private life whilst, in this case, no action was taken against the applicant by the authorities.

The natural meaning of the word precludes a person from being regarded as a "victim" of a legal provision if that person has not been subjected to any penal or other measure based on the legislation in question. The fear of prosecution which the applicant may have experienced and the psychological problems which may have been thereby occasioned do not in themselves suffice for a finding that the applicant is a victim. Moreover, the likelihood of the applicant's being prosecuted seems minimal regard being had to the aforementioned practice of the authorities and to the fact that the applicant has spoken out publicly on the subject of his proclivities and activities for a number of years without attracting any prosecution.

Certainly, it can never be ruled out that a law regarded as having fallen into desuetude may one day be implemented anew. But that is not the issue here. The case turns rather on whether the applicant was in fact personally a victim. It cannot really be said that that has been, or is likely to be, the case.

The system of the Convention, as a whole, is precise and, on this point, gives rise to no ambiguity or latitude. Unlike the provision in Article 24 (art. 24) relating to complaints lodged by Contracting Parties, an application under Article 25 (art. 25) by a natural person is admissible only if an applicant can claim to be the victim of a violation by a Contracting Party of the rights secured by the Convention. For the reasons which have been stated, it cannot be said that this condition is satisfied in this case.

To interpret too widely the word "victim" would risk appreciably altering the system laid down by the Convention. The Court might thus be led, even in respect of complaints from individuals, to adjudicate on the compatibility of national laws with the Convention irrespective of whether those laws have in fact been applied to an applicant whose status as a victim would be no more than very potential and contingent. An actio popularis would then not be far off.

I would add that this opinion in no wise seeks to call in question the authority of the Dudgeon judgment as to the merits.

In the case of **Modinos** v. Cyprus*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")** and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr F. Matscher,
Mr R. Bernhardt,
Mr A. Spielmann,
Mr I. Foighel,
Mr F. Bigi,
Sir John Freeland,
Mr A.B. Baka,
Mr G. Pikis, ad hoc judge,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,

Having deliberated in private on 31 October 1992 and 25 March 1993,

Delivers the following judgment, which was adopted on the last-mentioned date:

Notes by the Registrar

* The case is numbered 7/1992/352/426. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

PROCEDURE

1. The case was referred to the Court on 21 February 1992 by the European Commission of Human Rights ("the Commission"), within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 15070/89) against Cyprus lodged with the Commission under Article 25 (art. 25) on 25 May 1989 by Mr Alecos **Modinos**, a Cypriot citizen.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Cyprus recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 (art. 8) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the

lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr A.N. Loizou, the elected judge of Cypriot nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). In a letter to the President of 10 March 1992, Mr Loizou stated that he wished to withdraw pursuant to Rule 24 para. 3 as he had been a member of the Supreme Court of Cyprus in a case where comparable issues had been examined (see paragraph 11 below). On 10 April 1992 the Agent of the Government of Cyprus ("the Government") informed the Registrar that Mr Justice Georghios Pikis had been appointed as ad hoc judge (Article 43 of the Convention and Rule 23) (art. 43).

On 25 March 1992 the President had drawn by lot, in the presence of the Registrar, the names of the seven other members of the Chamber, namely Mr F. Matscher, Mr R. Bernhardt, Mr A. Spielmann, Mr I. Foighel, Mr F. Bigi, Sir John Freeland and Mr A.B. Baka (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. On 10 April 1992 the International Lesbian and Gay Association sought leave under Rule 37 para. 2 to submit written comments. On 12 May 1992 the President decided not to grant leave.

5. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the applicant's representative on the organisation of the procedure (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received, on 17 June 1992, the applicant's and the Government's memorials. On 30 June the Secretary to the Commission informed him that the Delegate would submit his observations at the hearing.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 27 October 1992. The Court had held a preparatory meeting beforehand. Prior to the hearing the applicant had filed a supplementary claim for costs.

There appeared before the Court:

(a) for the Government

Mr R. Gavrielides, Senior Counsel, Deputy Agent,
Mrs L. Koursoumba, Senior Counsel, Counsel;

(b) for the Commission

Mr L. Loucaides, Delegate;

(c) for the applicant

Mr A. Demetriades, Barrister-at-law, Counsel.

The Court heard addresses by Mr Gavrielides for the Government, by Mr Loucaides for the Commission and by Mr Demetriades for the applicant. During the hearing various documents were filed by the applicant.

AS TO THE FACTS

7. The applicant is a homosexual who is currently involved in a sexual relationship with another male adult. He is the President of the "Liberation Movement of Homosexuals in Cyprus". He states that he suffers great strain, apprehension and fear of prosecution by reason of the legal provisions which criminalise certain homosexual acts.

A. Criminal Code

8. Sections 171, 172 and 173 of the Criminal Code of Cyprus, which predates the Constitution, provide as follows:

"171. Any person who -

(a) has carnal knowledge of any person against the order of nature; or
(b) permits a male person to have carnal knowledge of him against the order of nature, is guilty of a felony and is liable to imprisonment for five years.

172. Any person who with violence commits either of the offences specified in the last preceding Section is guilty of a felony and liable to imprisonment for fourteen years.

173. Any person who attempts to commit either of the offences specified in Section 171 is guilty of a felony and is liable to imprisonment for three years, and if the attempt is accompanied with violence he is liable to imprisonment for seven years."

9. Various Ministers of Justice had indicated in statements to newspapers dated 11 May 1986, 16 June 1988 and 29 July 1990, that they were not in favour of introducing legislation to amend the law relating to homosexuality. In a statement to a newspaper on 25 October 1992 the Minister of the Interior stated, inter alia, that although the law was not being enforced he did not support its abolition.

B. Constitutional provisions

10. The relevant provisions of the Constitution of the Republic of Cyprus, which came into force on 16 August 1960, read as follows:

Article 15

"1. Every person has the right to respect for his private and family life.

2. There shall be no interference with the exercise of this right except such as is in accordance with the law and is necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the rights and liberties guaranteed by this Constitution to any person."

Article 169

"1. ...

2. ...

3. Treaties, conventions and agreements concluded in accordance with the foregoing provisions of this Article shall have, as from their publication in the Official Gazette of the Republic, superior force to any municipal law on condition that such treaties, conventions and agreements are applied by the other party thereto."

Article 179

"1. This Constitution shall be the supreme law of the Republic.

2. No law or decision of the House of Representatives or of any of the Communal Chambers and no act or decision of any organ, authority or person in the Republic exercising executive power or any administrative function shall in any way be repugnant to, or inconsistent with, any of the provisions of this Constitution."

Article 188

"1. Subject to the provisions of this Constitution and to the following provisions of this Article, all laws in force on the date of the coming into operation of this Constitution shall, until amended, whether by way of variation, addition or repeal, by any law or communal law, as the case may be, made under this Constitution, continue in force on or after that date, and shall, as from that date be construed and applied with such modification as may be necessary to bring them into conformity with this Constitution.

2. ...

3. ...

4. Any court in the Republic applying the provisions of any such law which continues in force under paragraph 1 of this Article, shall apply it in relation to any such period, with such modification as may be necessary to bring it into accord with the provisions of the Constitution including the Transitional Provisions thereof.

5. In this Article -

'law' includes any public instrument made before the date of the coming into operation of this Constitution by virtue of such law;

'modification' includes amendment, adaptation and repeal."

C. Case-law

11. In the case of Costa v. The Republic (2 Cyprus Law Reports, pp. 120-133 [1982]) the accused - a 19 year-old soldier - was convicted of the offence of permitting another male person to have carnal knowledge of him contrary to section 171(b) of the Criminal Code. The offence was committed in a tent within the sight of another soldier using the same tent. The accused had contended that section 171(b) was contrary to Article 15 of the Constitution and/or Article 8 (art. 8) of the European Convention on Human Rights. In its judgment of 8 June 1982 the Supreme Court noted that, since the offence was not committed in private and since the accused was a soldier who was 19 years of age at the time, the constitutional and legal issues raised by the case fell outside the ambit of the construction given to Article 8 (art. 8) by the European Court of Human Rights in its Dudgeon v. the United Kingdom judgment of 22 October 1981 (Series A no. 45). The Supreme Court, nevertheless, added that it could not follow the majority view of the Court in the Dudgeon case and adopted the dissenting opinion of Judge Zekia. The court stated as follows:

> "By adopting the dissenting opinion of Judge Zekia this Court should not be taken as departing from its declared attitude that, for the interpretation of provisions of the Convention, domestic tribunals should turn to the interpretation given by the international organs entrusted with the supervision of its application, namely, the European Court and the European Commission of Human Rights ...
>
> In ascertaining the nature and scope of morals and the degree of the necessity commensurate to their protection, the jurisprudence of the European Court and the European Commission of Human Rights has already held that the conception of morals changes from time to time and from place to place, and that there is no uniform European conception of morals; that, furthermore, it has been held that state authorities of each country are in a better position than an international judge to give an opinion as to the prevailing standards of morals in their country; in view of these principles this Court has decided not to follow the majority view in the Dudgeon case, but to adopt the dissenting opinion of Judge Zekia, because it is convinced that it is entitled to apply the Convention and interpret the corresponding provisions of the Constitution in the light of its assessment of the present social and moral standards in this country; therefore, in the light of the aforesaid principles and viewing the Cypriot realities, this Court is not prepared to come to the conclusion that Section 171(b) of our Criminal Code, as it stands, violates either the Convention or the Constitution, and that it is unnecessary for the protection of morals in our country."

D. The prosecution policy of the Attorney-General

12. There had been prosecutions and convictions in Cyprus for homosexual conduct in private between consenting adults up until the 1981 judgment of the European Court in the Dudgeon case (loc. cit.). When this case was pending before the European Court the Attorney-General requested the police not to continue with a

prosecution under section 171 because of apparent conflict between that provision and Article 8 (art. 8) of the Convention. Since that date the Attorney-General's office has not allowed or instituted any prosecution which conflicts with either Article 8 (art. 8) of the Convention or Article 15 of the Constitution, in so far as they relate to homosexual behaviour in private between consenting adults.

Under Article 113 of the Constitution of Cyprus the Attorney-General is vested with competence to institute and discontinue criminal proceedings in the public interest. Although he could not prevent a private prosecution from being brought he can intervene to discontinue it.

PROCEEDINGS BEFORE THE COMMISSION

13. In his application before the Commission (no. 15070/89) lodged on 22 May 1989, the applicant complained that the prohibition on male homosexual activity constituted a continuing interference with his right to respect for private life in breach of Article 8 (art. 8) of the Convention.

14. On 6 December 1990 the Commission declared the application admissible. In its report of 3 December 1991, drawn up under Article 31 (art. 31) of the Convention, it concluded unanimously that there had been a breach of Article 8 (art. 8).

The full text of the Commission's opinion is reproduced as an annex to this judgment*.

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* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 259 of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

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FINAL SUBMISSIONS MADE BY THE GOVERNMENT

15. At the hearing on 27 October 1992 the Government requested the Court to find that there had been no breach of Article 8 (art. 8).

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

16. The applicant complained that the maintenance in force of provisions of the Cypriot Criminal Code (see paragraph 8 above) which criminalise private homosexual relations constitutes an unjustified interference with his right to respect for private life under Article 8 (art. 8) of the Convention which reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of

the rights and freedoms of others."

A. The existence of an interference

17. The Government submitted that neither the applicant nor any other person in his situation could be lawfully prosecuted under sections 171, 172 and 173 of the Cypriot Criminal Code, since, to the extent that these provisions concerned homosexual relations in private between consenting male adults, they are in conflict with Article 15 of the Cypriot Constitution (see paragraph 10 above) and Article 8 (art. 8) of the Convention. To that extent the prohibition of such relations is in fact no longer in force. Moreover, since 1981 the Attorney-General, who has exclusive competence to institute and discontinue criminal proceedings, has not brought or permitted a prosecution in respect of such homosexual conduct (see paragraph 12 above). Accordingly, there being no risk of prosecution, there is no interference with the applicant's rights under Article 8 (art. 8).

18. The applicant disagreed. In his view, the impugned provisions are still in force. He pointed to the statements of various Government ministers who, by objecting to the amendment of the law, had implicitly acknowledged its validity (see paragraph 9 above). Moreover, the policy of the Attorney-General not to prosecute could change at any time and a member of the public could bring a private prosecution against the applicant. There is thus no guarantee that he will not be prosecuted.

19. For the Commission, the applicant's fear of prosecution could not be regarded as unfounded.

20. The Court first observes that the prohibition of male homosexual conduct in private between adults still remains on the statute book (see paragraph 8 above). Moreover, the Supreme Court of Cyprus in the case of Costa v. The Republic considered that the relevant provisions of the Criminal Code violated neither the Convention nor the Constitution notwithstanding the European Court's Dudgeon v. the United Kingdom judgment of 22 October 1981 (Series A no. 45) (see paragraph 11 above).

21. The Government, however, have maintained that this case was decided by the Supreme Court in June 1982, prior to the Norris v. Ireland judgment of 26 October 1988 (Series A no. 142) and before the implications of the Dudgeon decision were properly understood; and further that since the Costa case did not concern private homosexual relations between adults the Supreme Court's remarks concerning the Dudgeon judgment were obiter dicta.

22. In the Court's view, whatever the status in domestic law of these remarks, it cannot fail to take into account such a statement from the highest court of the land on matters so pertinent to the issue before it (see, mutatis mutandis, the Pine Valley Developments Ltd and Others v. Ireland judgment of 29 November 1991, Series A no. 222, pp. 23-24, para. 52).

23. It is true that since the Dudgeon judgment the Attorney-General, who is vested with the power to institute or discontinue prosecutions in the public interest, has followed a consistent policy of not bringing criminal proceedings in respect of private homosexual conduct on the basis that the relevant law is a dead letter.

Nevertheless, it is apparent that this policy provides no guarantee that action will not be taken by a future Attorney-General to enforce the law, particularly when regard is had to statements by Government ministers which appear to suggest that the relevant provisions of the Criminal Code are still in force (see paragraph 9 above). Moreover, it cannot be excluded, as matters stand, that the applicant's private behaviour may be the subject of investigation by the police or that an attempt may be made to bring a private prosecution against him.

24. Against this background, the Court considers that the existence of the prohibition continuously and directly affects the applicant's private life. There is therefore an interference (see the above-mentioned Dudgeon and Norris judgments, Series A nos. 45 and 142, pp. 18-19, paras. 40-41, and pp. 17-18, paras. 35-38).

B. The existence of a justification under Article 8 para. 2 (art. 8-2)

25. The Government have limited their submissions to maintaining that there is no interference with the applicant's rights and have not sought to argue that there exists a justification under paragraph 2 of Article 8 (art. 8-2) for the impugned legal provisions. In the light of this concession and having regard to the Court's case-law (see the above-mentioned Dudgeon and Norris judgments, pp. 19-25, paras. 42-62, and pp. 18-21, paras. 39-47), a re-examination of this question is not called for.

C. Conclusion

26. Accordingly, there is a breach of Article 8 (art. 8) in the present case.

II. APPLICATION OF ARTICLE 50 (art. 50)

27. Under Article 50 (art. 50) of the Convention:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

28. The applicant first submitted that he should be awarded a sum to compensate him for the amount of time he has lost from his work as a self-employed architect by participating in the Strasbourg proceedings as well as an amount for mental stress and suffering.

29. Both the Government and the Delegate of the Commission considered that no award should be made.

30. The Court considers that, in the circumstances of the case, the finding of a breach of Article 8 (art. 8) constitutes sufficient just satisfaction under this head for the purposes of

Article 50 (art. 50).

B. Costs and expenses

31. The applicant also claimed 7,730 Cyprus pounds in respect of legal fees and 2,836 Cyprus pounds by way of travelling, subsistence and other out-of-pocket expenses connected with the Strasbourg proceedings.

32. The Government considered that it would be fair and reasonable to limit the award of costs to 1,000 Cyprus pounds but had no objection to awarding the full amount claimed for expenses.

33. Taking its decision on an equitable basis, as required by Article 50 (art. 50), and applying the criteria laid down in its case-law, the Court holds that the applicant should be awarded 4,000 Cyprus pounds in respect of fees together with the full amount claimed by way of expenses.

FOR THESE REASONS, THE COURT

1. Holds by eight votes to one that there is a breach of Article 8 (art. 8) of the Convention;

2. Holds unanimously that Cyprus is to pay the applicant, within three months, the sum of 6,836 (six thousand, eight hundred and thirty-six) Cyprus pounds in respect of costs and expenses;

3. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 April 1993.

Signed: Rolv RYSSDAL
President

Signed: Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Matscher;

(b) dissenting opinion of Mr Pikis.

Initialled: R.R.

Initialled: M.-A.E.

CONCURRING OPINION OF JUDGE MATSCHER

(Translation)

In this case I voted with the majority for a violation because - in contrast to the position in the cases of Dudgeon v. the United Kingdom (Series A no. 45, dissenting opinion, p. 33) and Norris v. Ireland (Series A no. 142, dissenting

opinion, p. 24) - the applicant can claim to be a victim within the meaning of Article 25 (art. 25).

However, in order to dispel any misunderstanding which might arise from the reference in the present judgment to the case of Costa v. The Republic (at paragraph 20 in the "As to the law" part), which dealt with a different situation (correctly described at paragraph 11 in the "As to the facts" part), I wish to make clear how I interpret the Court's case-law in this area (see the two cases cited above). In my view, Article 8 (art. 8) will be infringed only where the law makes it a criminal offence for consenting adults to commit homosexual acts in private - and I would exclude from that rule a number of specific situations, for instance the abuse of a relationship in which one party is dependent on the other or carrying out such acts within a closed community, such as a boarding-school or a barracks, etc.

DISSENTING OPINION OF JUDGE PIKIS

The foremost issue in these proceedings, made clear in the judgment of the majority, is the state of Cyprus law respecting the criminalisation of homosexual acts between consenting male adults in private. That we had conflicting statements from the parties concerning the effect of Cyprus law on the subject is in itself indicative of the complexity of the issue and a reflection of the difficulties inherent in the identification and definition of the domestic law of Cyprus following the introduction of the Constitution, coincidentally upon the proclamation of its independence.

The Constitution of Cyprus ("the Constitution") came into force simultaneously with the declaration of the country as an independent State in 1960. Article 179 established the Constitution to be the supreme law of the Republic and prohibited the enactment of any law or decision repugnant to or inconsistent with any of its provisions. An important aspect of the Constitution is Part II, safeguarding the fundamental rights and liberties of the individual. It is a comprehensive charter of human rights modelled upon the Convention. Among the rights guaranteed is that of respect for private life (Article 15.1) founded on the provisions of Article 8 (art. 8) of the Convention.

To avoid a legal vacuum in the domestic law of the land, the Constitution saved, subject to qualification, the legislation in force before independence. This was achieved by Article 188 of the Constitution. The adoption of laws predating the Constitution was subject to an important and all-embracing reservation designed to uphold the supremacy of the Constitution. While saving laws antedating the Constitution, Article 188.1 expressly made their sustainment dependent upon the compatibility of their provisions with the supreme law, the Constitution. The saving was subject to the condition that such laws would be construed and applied "... with such modification as may be necessary to bring them into conformity with this Constitution". The term "modification" is broadly defined by Article 188.5. It includes not only amendment and adaptation which are incidental to the power to modify but repeal as well.

As a result, colonial laws or any part of them that could not be reconciled with or brought into conformity with the Constitution by a legitimate process of modification, ceased to be part of the law or survived in such form as to be compatible

with its provisions.

The function of adjusting colonial legislation to the Constitution was entrusted to the judiciary to be exercised in the context of the transaction of ordinary judicial business. Article 188.4 provided:

> "Any court in the Republic applying the provisions of any such law which continues in force under paragraph 1 of this Article, shall apply it in relation to any such period, with such modification as may be necessary to bring it into accord with the provisions of the Constitution including the Transitional Provisions thereof."

Inevitably the task of streamlining colonial laws with the Constitution was a slow and laborious process, the more so as the term "law" included, in addition to the statutory law, rules and regulations too (Article 188.5).

As a consequence of Article 188 of the Constitution, a multitude of laws and regulations were kept in force subject to modification, including the 354 chapters of codified colonial legislation of which the Criminal Code with its 374 sections (creating an almost equal number of offences) was but one - CAP.154. The absence of an authoritative pronouncement on the conformity of any such law with the Constitution did not raise any presumption about its compatibility. This is not to say that litigants, including the Office of the Attorney-General, did not frequently refer to the colonial statute book as a readily available guide to the law on any given subject.

Article 15.1 of the Constitution safeguarded respect for private life as a fundamental human right to the same extent and with similar aspirations as Article 8 (art. 8) of the Convention. The Convention itself, including Article 8 (art. 8), was adopted as part of the domestic law of Cyprus by the enactment of ratification Law 39/62; and inasmuch as this law incorporated treaty obligations of Cyprus, its provisions had a superior force to those of any other municipal law (Article 169.3 of the Constitution), rendering inoperative any aspect of such legislation that conflicted with the Convention. In sum, legislation in force before independence had to conform as a condition for its validity to the provisions of the Constitution, including those of Article 15.1 and, as from 1962, it should not run contrary to the Convention, including Article 8 (art. 8). Moreover, Article 35 of the Constitution, an addendum to Part II of the Constitution, imposed a duty on all authorities of the State to secure within the limits of their respective competence the efficient application of fundamental human rights. Article 35 provides:

> "The legislative, executive and judicial authorities of the Republic shall be bound to secure, within the limits of their respective competence, the efficient application of the provisions of this Part."

The rights safeguarded by Article 15 could be circumscribed only in the manner and for the purposes specified in Article 15.2. The wording of Article 15.2 broadly corresponds with that of Article 8 para. 2 (art. 8-2) of the Convention. It is acknowledged that since independence no law was enacted aimed or purporting to limit or curtail the right of respect for

private life; and no law was passed criminalising any form of homosexual conduct between consenting adults in private. In Police v. Hondrou and Another (decided on 6 April 1962, 3 Reports of Supreme Constitutional Court, p. 82), the Supreme Constitutional Court concerned itself with the prerequisites for the limitation of fundamental human rights. The following passage from the judgment of the court (delivered by Forsthoff, P.), illuminates judicial approach to the subject:

> "It is only the people of a country themselves, through their elected legislators, who can decide to what extent its fundamental rights and liberties, as safeguarded by the Constitution, should be restricted or limited and this principle is inherently contained in all constitutions, such as ours, which expressly safeguard the fundamental rights and liberties and adopt the doctrine of the separation of powers."

It follows from the above that the criminalisation of homosexual acts between consenting adults in private rested solely and exclusively on the compatibility of the provisions of section 171 of the Criminal Code with Article 15 of the Constitution and, as from 1962, with Article 8 (art. 8) of the Convention too.

The ambit of fundamental human rights incorporated in the Convention (foreshadowed by the Universal Declaration of Human Rights of 1948) was not immediately identifiable or recognisable. This is certainly true of Cyprus. A number of prosecutions was founded on section 171 and convictions recorded for homosexual acts between consenting adults in private, without any question having been raised concerning the compatibility of section 171 with Article 15.1 of the Constitution or Article 8 (art. 8) of the Convention. It is no coincidence, I believe, but it is for similar reasons that we had no authoritative pronouncement on the effect of Article 8 (art. 8) and its implications respecting homosexual acts between consenting adults in private before the decision in Dudgeon v. the United Kingdom (judgment of 22 October 1981, Series A no. 45); a decision not so much concerned with the breadth of the right of respect for private life as with the acceptability of limitations to the right introduced in the interest of the "protection of morals" or the "protection of the rights and freedoms of others". Sexual conduct, it was affirmed, whatever its nature between consenting adults, is an inherent aspect of private life. The voluntary sexual choices and pursuits of adults in private are their exclusive business. Such is the breadth of the right of respect for the private life of the individual in the area under consideration.

The decision in Dudgeon was followed and applied in the case of Norris v. Ireland with similar consequences (judgment of 26 October 1988, Series A no. 142).

The Cyprus Government submitted that they accept the decisions of this Court in Dudgeon and Norris as definitive of the ambit of the right of respect for private life with regard to homosexual acts committed between consenting adults in private and the inamenity to subject it to limitations; and they have not sought to justify section 171 of the Criminal Code as a legitimate limitation of the right. On the contrary, they take the view that section 171 is incompatible with Article 15 of the Constitution and on that account ceased to be part of the law of

Cyprus since independence. Their argument is as follows: prosecutions mounted under section 171 of the Criminal Code before the decision in Dudgeon, were founded on a misconception of the implications of Article 15 of the Constitution and Article 8 (art. 8) of the Convention. When stock was taken of their effect from the decision in the Dudgeon case, they treated section 171 as having ceased to be part of the law of Cyprus; consequently, no prosecution was instituted ever since for homosexual acts between consenting adults in private. The changed attitude of the Attorney-General is not attributed to any policy decision evolved within the context of his discretionary powers but to a reassessment of the content and effect of the right of respect for private life. In the light of the above, they argued that the fear of applicant **Modinos** about a possible violation or compromise of his rights safeguarded by Article 8 (art. 8) of the Convention has no foundation.

The applicant for his part, submitted that the fear and agony he experiences about the perils to his right of respect for his private life are real and referred to a series of facts that reinforce them:

1. the omission of the State to formally abolish ssection 171 of the Criminal Code;

2. statements made by three successive Ministers of Justice to the effect that they would not initiate legislation to expunge section 171 from the Criminal Code or exclude from its province homosexual acts between consenting adults in private;

3. police investigations into alleged homosexual acts between consenting adults in private. Here it must be noted that the Government denied that any investigations were conducted into homosexual acts between consenting adults in private.

On the other hand, the Attorney-General's decision not to prosecute is no certain assurance for respect of his right safeguarded by Article 8 (art. 8) of the Convention. In effect, his counsel argued, it represents a policy decision liable to change at any future date. Furthermore, a private prosecution cannot be ruled out, which is in itself a source of anxiety.

The fear of the applicant is made more oppressive still by the decision of the Supreme Court of Cyprus in Costa v. The Republic (2 Cyprus Law Reports, p. 120 [1982]), especially the view taken that section 171 of the Criminal Code represents, in the context of the moral fabric of Cyprus, a legitimate limitation of the rights safeguarded by Article 15 of the Constitution and Article 8 (art. 8) of the Convention.

Notwithstanding the vigour and lucidity with which the parties argued their case, I consider it regrettable that neither of them made reference to the case-law of the Supreme Court of Cyprus subsequent to the decision in Costa, definitive of the rights safeguarded by Article 15.1 of the Constitution and the consequences attendant upon breach of fundamental human rights safeguarded by the Constitution. I feel I can, indeed I ought to, draw upon my knowledge of Cyprus case-law to which I drew the attention of my brethren, in determining matters at issue in these proceedings. After all, the cardinal issue, as indicated at the outset of this judgment, revolves around the state of

Cyprus law, in particular whether it criminalises homosexual acts between consenting adults in private.

After due consideration of the case, I have come to a contrary decision from the remaining members of the Court. My reasons for dissenting will become more readily understood if I were to recount the basic reasons founding the decision of the Court. The right of the applicant safeguarded by Article 8 (art. 8) of the Convention is imperilled by the continued presence of section 171 in the Criminal Code. Ministerial statements, indicating unwillingness to introduce legislation to abolish section 171, signify governmental approval of its preservation in the statute book. The pronouncements in Costa cannot, whatever their juridical status, but be treated as weighty judicial statements bearing upon the validity of section 171. Moreover, the policy of the Attorney-General not to prosecute cannot be divorced from the views of the incumbent of the post and provides no certain assurance for the future. Consequently, the risk of a prosecution by public authorities is ever present, whereas a private prosecution cannot be ruled out; therefore, the protection of this Court is necessary to sustain the efficacy of the rights of the applicant safeguarded by Article 8 (art. 8) of the Convention.

Below I explain my reasons for coming to a contrary conclusion but, before doing so, I must note the existence of an error in the findings of the Commission under the heading "Relevant domestic law and practice". In paragraph 24 it is stated that the offence in Costa "had been committed in private in a tent but within the sight of another person who was legitimately using the same tent". Thereafter, an extract is quoted from the judgment of the Court in Costa, indicating the reasons that justify in Cyprus the criminalisation of homosexual acts between consenting adults in private, in the interests of the protection of morals. Thus, the impression is conveyed that the remarks of the Court in Costa were necessary for the resolution of an issue involving homosexual acts in private. Presumably, the Commission had identified the subject at issue in the Costa case by reference to the headnote of the report that erroneously omitted the word "not" between "committed" and "in private" from the relevant text of the judgment. In the case of Costa, the offence did not concern the commission of acts of sodomy in private but in a tent temporarily set up to accommodate soldiers during military exercises and inevitably subject to overseeing by military authorities.

Now, the reasons for my dissent:

A. The presence of section 171 in the Criminal Code does not of itself suggest that it continues to be part of the law. A study of the case-law of Cyprus since independence indicates that, notwithstanding the effluxion of thirty or more years since independence, the course of reconciling colonial legislation with the Constitution is by no means complete. This is exemplified by two recent decisions of the Supreme Court of Cyprus: In The United Bible Societies (Gulf) v. Hadjikakou (Civil Appeal No. 7413, decided on 28 May 1990 - not yet reported in the official series), it was decided that the relevant provisions of the Civil Procedure Rules in force before independence, providing for the service of process on non-Greek or Turkish litigants, in English - the official language before independence - were incompatible with the Constitution and on that account they should be applied with necessary modification to bring them into

accord with the Constitution; an exercise resulting in the substitution of the official languages of the State, Greek and Turkish, for the English language. A more recent example still is the case of Republic v. Samson (Civil Appeal No. 8532, decided by the plenum of the Supreme Court on 26 September 1991 - not yet reported in the official series), where it was held that the provisions of the Prisons Regulation Law (part of the codified law of Cyprus at the time of independence) - CAP.286, conferring power on the Prisons Authorities to reduce sentence, should be applied in a manner compatible with the doctrine of separation of powers underlying the Constitution, making the judiciary the sole arbiters of the punishment for breach of penal laws.

B. Not only Ministers have no say in the prosecution of crime but in their official endeavours to ascertain the law they must seek the advice of the Attorney-General. Article 113.2 of the Constitution provides that the Attorney-General "shall" be the legal adviser of the Executive, including Ministers. Consequently, ministerial statements on the subject of criminalisation of homosexual acts in private are in no sense authoritative; moreover, they conflict with the view taken of the law by the legal adviser of government so they can be ignored as irrelevant.

The Attorney-General, it must be explained, is not a member of the Government but an independent officer of the Cyprus Republic, holding office on the same terms and conditions as judges of the Supreme Court (Article 112.4 of the Constitution).

C. The decision in Costa does not establish a binding judicial precedent concerning the compatibility of section 171 with Article 15 of the Constitution or as a legitimate limitation of the right safeguarded thereby or under Article 8 (art. 8) of the Convention, as part of the law of Cyprus (Law 39/62). In the judgment of the Court in Costa, it is made clear that the statements made and opinions expressed with regard to criminalisation of homosexual acts in private were of no direct relevance to the case under consideration; they were aimed to furnish an answer to arguments raised, broadening the issue before the Court. As such, they had no direct bearing on the outcome of the case. The offence of which Costa was convicted did not involve homosexual acts between consenting adults in private.

Judicial statements having no direct bearing on the resolution of matters at issue classify or qualify as obiter dicta. Under the Cyprus system of judicial precedent (as in other countries where the English system of judicial precedent applies), obiter dicta do not constitute an authoritative exposition of the law and as such are not binding. Only the ratio of a case, that is the reasons directly and inextricably supporting the outcome of the case, is binding in the sense of stare decisis. A Cyprus court is not bound to follow judicial pronouncements made obiter; of course, they do carry weight such as is warranted by the source of their emanation and the reasoning associated therewith. Hence the Attorney-General was justified not to treat the decision in Costa as an authoritative statement of the law concerning the applicability of section 171 of the Criminal Code, at any rate so far as it affected consensual homosexual acts in private.

Subsequent decisions of the Supreme Court diminish to the point of extinction any weight that might be attached to the

obiter pronouncements in Costa.

The decision of the plenum of the Supreme Court in Police v. Georghiades (2 Cyprus Law Reports, p. 33 [1983]) is a landmark in the case-law of Cyprus. The Court was asked to decide, upon a question of law reserved for its opinion, whether evidence deriving from the overhearing of a conversation between a psychologist and his client by means of an electronic listening and recording device was admissible in evidence upon a charge of perjury preferred against the psychologist. The Supreme Court was asked to decide, inter alia, whether the obtaining of the evidence constituted a breach of the rights of the psychologist safeguarded by Article 15 and, if the answer was in the affirmative, whether it could be admitted in evidence. The Court held unanimously that the evidence had been obtained in breach of the rights safeguarded by Article 15 and Article 8 (art. 8) of the Convention amounting to a right of privacy. It was the first case since independence when the Supreme Court of Cyprus made a comprehensive survey on the right of respect for private life in the context of Article 15 of the Constitution and Article 8 (art. 8) of the Convention. The following passage from one of the two leading judgments in the case (given by myself) highlights the ambit of the right guaranteed by Article 15:

> "The right to privacy is regarded as fundamental because of the protection it affords to the individuality of the person, on the one hand and, the space it offers for the development of his personality, on the other. Man is entitled to function autonomously in his private life and the right to privacy is aimed to shield him in this area from public gaze ..."

Elsewhere in the same judgment, it is explained that:

> "The right to privacy, safeguarded by Article 15, is intended to establish the autonomy of the individual in his private and family life ..."

In the same judgment it is explained that evidence obtained or resulting from breach of fundamental human rights is inadmissible under any guise or circumstances. The matter is put thus:

> "I am of the opinion that the basic rights safeguarded in this part of the Constitution, those referring to fundamental freedoms and liberties, are inalienable and inhere in man at all times, to be enjoyed and exercised under constitutional protection. Interference by anyone, be it the State or an individual, is unconstitutional and, a right vests thereupon to the victim to invoke constitutional, as well as municipal, law remedies for the vindication of his rights. The rights guaranteed by Articles 15.1 and 17.1 fall in this category, aimed as they are, to safeguard the dignity of man and ensure a quality of life fit for man and his gifted nature."

The decision in Georghiades (supra) has been consistently applied by the courts of Cyprus since 1983. In Merthodja v. The Police (2 Cyprus Law Reports, p. 227 [1987]), the Supreme Court ruled, on the authority of Georghiades, that a statement amounting to a confession made by the accused (charged with the offence of publishing information relating to the defence works of the Republic contrary to section 50A of the Criminal Code) to

the Police Authorities while detained contrary to law was ipso facto inadmissible as evidence stemming from a breach of the fundamental right of liberty safeguarded by Article 11 of the Constitution. More recently, in Police v. Yiallourou (Question of Law Reserved No. 279, given on 7 April 1992), the Court held, on the authority of Georghiades, that a telephone conversation constituted a matter of private life, irrespective of the content of the conversation. Consequently, telephone tapping constituted a violation of the right and on that account a rule of absolute exclusion of its content operated, making the evidence inadmissible for any purpose whatsoever.

The case-law of the Supreme Court of Cyprus establishes that the right to respect for private life, safeguarded by Article 15 of the Constitution and Article 8 (art. 8) of the Convention, should be given effect to in all its breadth and that no attempt to whittle it down can be countenanced by the Court. In the light of the aforesaid interpretation of the fundamental right of respect for private life, it can be predicated that section 171, to the extent that it criminalises homosexual acts between consenting adults in private, is no part of the law because of its repugnancy to Article 15 of the Constitution and Article 8 (art. 8) of the Convention (Law 39/62). The absence of a prosecution for such acts, for the past eleven or more years, can justifiably be regarded as a reflection of this reality.

D. Unlike the Norris case, the policy not to prosecute homosexual acts between consenting adults in private does not rest on the discretionary powers of the Attorney-General exercised by reference to the facts of each individual case but on the correct understanding that Cyprus law does not criminalise such conduct.

E. The risk of private prosecution is inexistent. Unlike the position in Ireland explained in the Norris case, there is no actio popularis in Cyprus. Only the victim of a crime can mount a private prosecution, as explained in the decision of the Supreme Court in Ttofinis v. Theocharides (2 Cyprus Law Reports, p. 363 [1983]). Only a party injured by criminal conduct is in law entitled to raise a private prosecution. Adults engaged in homosexual acts in private cannot, under any circumstances, be regarded as the victims of the conduct in which they voluntarily engage. The fact that no case of a private prosecution was cited for homosexual acts between consenting adults in private is no coincidence but a due reflection of the limitation of the right to raise a private prosecution. And so far as I am aware, no private prosecution was ever raised concerning homosexual acts in private.

F. In the Norris case the point was made that the complaint of the applicant must have a sound objective basis although actual violation is not necessary in order to validate it. The facts that the applicant was never harassed in his private personal affairs and that he has been able to propagate the causes of the "Liberation Movement of Homosexuals in Cyprus" of which he is the President, without let or hindrance, are in themselves suggestive of the absence of a valid basis for his perceived fear of a likelihood of breach of his rights under Article 8 (art. 8) of the Convention.

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF A. D. T. v. THE UNITED KINGDOM

(Application no. 35765/97)

JUDGMENT

STRASBOURG

31 July 2000

In the case of A. D. T. v. the United Kingdom,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

MR J.-P. COSTA, *President*,
MR W. FUHRMANN,
MR L. LOUCAIDES,
MR P. KŪRIS,
SIR NICOLAS BRATZA,
MRS H.S. GREVE,
MR K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*.

Having deliberated in private on 30 November 1999 and on 11 July 2000,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 35765/97) against the United Kingdom lodged with the European Commission of Human Rights ("the Commission") under former Article 25 by a United Kingdom national "A.D.T." ("the applicant"), on 25 March 1997. The applicant asked the Court not to reveal his identity. The applicant was represented by Mr F. Whitehead, a lawyer practising in Manchester. The Government of the United Kingdom ("the Government") were represented by their Agent, Mrs S. Langrish, Foreign and Commonwealth Office, London.

2. On 23 October 1997 the Commission (First Chamber) decided to give notice of the application to the Government and invited them to submit observations on its admissibility and merits.

3. The Government submitted their observations on 20 February 1998. The applicant replied on 29 May 1998.

4. Following the entry into force of Protocol No. 11 on 1 November 1998, and in accordance with the provisions of Article 5 § 2 thereof, the case falls to be examined by the Court.

5. In accordance with Rule 52 § 1 of the Rules of Court, the President of the Court, Mr L. Wildhaber, assigned the case to the Third Section

6. On 16 March 1999 the Court declared the application admissible and decided to invite the parties to a hearing on the merits.

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 30 November 1999.

There appeared before the Court:

(a) *for the Government*
MRS S. LANGRISH, *Agent*,
MR N. GARNHAM, *Counsel*,
MS S. CHAKRABARTI,
MS D. GRICE, *Advisers*;

(b) *for the applicant*
MR B. EMMERSON, *Counsel*,
MR F WHITEHEAD, *Solicitor*,
MS A. MASON,
MS A. HUDSON, *Advisers*.

The Court heard addresses by Mr Emmerson and Mr Garnham.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is a practising homosexual. On 1 April 1996 at approximately 7.50 p.m., police officers conducted a search under warrant of the applicant's home. As a result of the search, various items were seized including photographs and a list of video tapes. The applicant was arrested at about 8.23 p.m. and taken to the local police station. A further search of the applicant's house was conducted the following day and further items, including video tapes, were seized.

9. The applicant was interviewed by the police on 2 April 1996. During the interview the applicant admitted that some of the video tapes found would contain footage of the applicant and up to four other adult men, engaging in acts, mainly of oral sex, in the applicant's home. On 2 April 1996 the applicant was charged with gross indecency between men contrary to Section 13 of the Sexual Offences Act 1956 ("gross indecency"). The charge related to the commission of the sexual acts depicted in one of the video tapes, which consisted of oral sex and mutual masturbation. It did not relate to the making or distribution of the tapes themselves.

10. On 30 October 1996, the applicant appeared before a Magistrates' Court. The principal evidence adduced by the Crown consisted of a single specimen video containing footage of the applicant and up to four other men engaging in acts of oral sex and mutual masturbation. The acts which formed the basis of the charge involved consenting adult men, took place in

the applicant's home and were not visible to anyone other than the participants. There was no element of sado-masochism or physical harm involved in the activities depicted on the video tape. The applicant was convicted of the offence of gross indecency. On 20 November 1996 the applicant was sentenced and conditionally discharged for two years. An order was made for the confiscation and destruction of the seized material.

11. The applicant was subsequently advised by Counsel that an appeal against conviction would enjoy no prospect of success since the provisions of the relevant legislation were clear and mandatory. The applicant did not appeal against the conviction.

II. RELEVANT DOMESTIC LAW AND PRACTICE

12. Section 13 of the Sexual Offences Act 1956 provides:

> "It is an offence for a man to commit an act of gross indecency with another man, whether in public or private, or to be a party to the commission by a man of an act of gross indecency with another man, or to procure the commission by a man of an act of gross indecency with another man."

13. By Section 37 of, and paragraph 16 of the Second Schedule to, the Sexual Offences Act 1956 the offence of gross indecency between men is punishable on indictment by up to five years' imprisonment if committed by a man of, or over the age of, twenty-one with a man under the age of eighteen, and otherwise by a maximum of two years' imprisonment.

14. If, as in the present case, the offence is tried summarily by magistrates, the maximum penalty is six months' imprisonment and/or a fine of £5,000 (Magistrates' Courts Act 1980, sections 17 and 32 and Schedule 1, paragraph 23(b)).

15. There is no statutory definition of "gross indecency". However in its Report, the Committee on Homosexual Offences and Prostitution (Wolfenden Committee) 1957 noted:

> "104. 'Gross indecency' is not defined by statute. It appears, however, to cover any act involving sexual indecency between two male persons. If two male persons acting in concert behave in an indecent manner the offence is committed even though there has been no actual physical contact [R. v Hunt 34 Cr App R 135].
>
> 105. From the police reports we have seen and the other evidence we have received it appears that the offence usually takes one of three forms; either there is mutual masturbation; or there is some form of intercrural contact; or oral-genital contact (with or without emission) takes place. Occasionally the offence may take a more recondite form; techniques in heterosexual relations vary considerably, and the same is true of homosexual relations."

16. The Sexual Offences Act 1967 introduced a qualification to the legislation regulating male homosexual conduct. It provided that homosexual acts in private between consenting adult men were no longer an offence. Homosexual acts are defined as buggery with another man or gross

indecency between men (Section 1 (7)). By virtue of Section 1(2), an act is not done in private if, inter alia, more than two persons take part or are present.

17. Section 1 of the Sexual Offences Act 1967, in so far as relevant, provides:

> "(1) Notwithstanding any statutory or common law provision, but subject to the provisos of the next following section, a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of eighteen years.
>
> (2) An act which would otherwise be treated for the purposes of this Act as being done in private shall not be so treated if done-
>
> (a) when more than two persons take part or are present; or
>
> (b) in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise. ...
>
> (7) For the purposes of this section a man shall be treated as doing a homosexual act if, and only if, he commits buggery with another man or commits an act of gross indecency with another man or is a party to the commission by a man of such an act."

18. There are no provisions under domestic law for the regulation of private homosexual acts between consenting adult women.

19. Likewise there are no provisions under domestic legislation affecting heterosexual behaviour which correspond to Section 13 of the Sexual Offences Act 1956. Thus acts of oral sex and mutual masturbation between more than two consenting adult heterosexuals (as long as there are no homosexual acts between any two males) do not constitute an offence.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

20. The applicant complained that his conviction for gross indecency constituted a violation of his right to respect for his private life, protected by Article 8 of the Convention. Article 8 reads, in its relevant parts, as follows:

> "1. Everyone has the right to respect for his private ... life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Whether there was an interference

21. By reference to the case of Laskey, Jaggard and Brown (Laskey, Jaggard and Brown v. the United Kingdom judgment of 19 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 131, § 36), the Government contend that there was no interference with the applicant's right to respect for his private life as the sexual activity in the present case fell outside the scope of "private life" within the meaning of Article 8 § 1 of the Convention. They point, first, to the number of individuals present and, secondly, to the fact that the sexual activities were recorded on video tape.

22. The applicant sees a dual interference with his right to respect for his private life. First, he refers to the very existence of a criminal law which prohibits homosexual activity in a private place where it involves more than two participants and, secondly, he underlines that that law was applied in the criminal prosecution which was brought against him. On the facts, the applicant notes that there was neither organised activity nor any risk of injury in the present case, and adds that had it not been for the prosecution, the video tape would not have been distributed in any real sense whatever.

23. The Court recalls that the mere existence of legislation prohibiting male homosexual conduct in private may continuously and directly affect a person's private life (see, as the most recent Court case-law, the Modinos v. Cyprus judgment of 22 April 1993, Series A no. 259, p. 11, § 24).

24. The present applicant was aware that his conduct was in breach of the criminal law, and he was thus continuously and directly affected by the legislation. In addition, he was directly affected in that a criminal prosecution was brought against him which resulted in his conviction for a breach of Section 13 of the Sexual Offences Act 1956.

25. As to the Government's comments in connection with the scope of "private life" within the meaning of Article 8 of the Convention, the Court recalls that there was no dispute between the parties in the case of Laskey, Jaggard and Brown as to the existence of an interference (see the above-mentioned judgment, p. 131, § 36). In that case, the Court's comments did not go beyond raising a question "whether the sexual activities of the applicants fell entirely within the notion of 'private life'". The sole element in the present case which could give rise to any doubt about whether the applicants' private lives were involved is the video recording of the activities. No evidence has been put before the Court to indicate that there was any actual likelihood of the contents of the tapes being rendered public, deliberately or inadvertently. In particular, the applicant's conviction related not to any offence involving the making or distribution of the tapes, but solely to the acts themselves. The Court finds it most unlikely that the applicant, who had gone to some lengths not to reveal his sexual orientation, and who has repeated his desire for anonymity before the Court, would knowingly be involved in any such publication.

26. The Court thus considers that the applicant has been the victim of an interference with his right to respect for his private life both as regards the existence of legislation prohibiting consensual sexual acts between more than two men in private, and as regards the conviction for gross indecency.

B. Whether the interference was justified

27. The Government consider that any interference with the applicant's right to respect for his private life was in accordance with the law and necessary for the protection of morals or the rights and freedoms of others. They underline that a margin of appreciation is left to national authorities in assessing whether a pressing social need exists, and claim that the margin must be particularly broad where the protection of morals is at issue: the mere fact that intimate aspects of private life generally call for a narrower margin of appreciation cannot prevent the margin in the present case from being a significant one. They draw a distinction between intimate, private and therefore acceptable homosexual activity (between two men), and group, potentially public and therefore unacceptable homosexual activity (between more than two men). At the hearing before the Court, the Government accepted, in the light of a review of sex offences which is taking place in the United Kingdom, that the precise extent of permissible legislative interference with group activities is difficult to define, although they maintained that in the present case the prosecution was compatible with the Convention.

28. The applicant underlines that he was not prosecuted for recording his sexual activities on video tape or for distributing the tapes, but was prosecuted under a law which prohibits the sexual acts themselves, even though they were carried out in the privacy of the bedroom of his own home. The offence was committed not because it was video taped, but because more than two people were participating in the sexual activities. The applicant repeats that there was no evidence to suggest that there was any risk of the tapes finding their way into the public domain.

29. An interference with the exercise of an Article 8 right will not be compatible with Article 8 § 2 unless it is "in accordance with the law", has an aim or aims that is or are legitimate under that paragraph and is "necessary in a democratic society" for the aforesaid aim or aims (see the Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, p. 19, § 43).

30. The applicant does not claim that the legislation in the present case was not "in accordance with the law", or that its aims were not legitimate. The Court finds that the interference so far as it relates to the legislation was in accordance with the law, in that Section 13 of the 1956 Act and Section 1(2) of the 1967 Act together prescribed the act which was prohibited and the relevant penalty, and that its aims, of protecting morals and protecting the

rights and freedoms of others, were legitimate (see, in this context, the above-mentioned Dudgeon judgment, p. 20, § 47). The applicant does, however, submit that his prosecution for gross indecency pursued no legitimate aim as the only aim put forward - the risk that the video recording might be witnessed by the public at large - had nothing to do with the offence of gross indecency, which was committed regardless of the potential audience for the video. In the light of its conclusions below on the question of the proportionality of the interference with any aims pursued, the Court does not consider it necessary to determine this particular point.

31. The cardinal issue in the case is whether existence of the legislation in question, and its application in the prosecution and conviction of the applicant, were "necessary in a democratic society" for these aims.

32. The Court recalls that in the case of Dudgeon, in which the Court was considering the existence of legislation, the Court (at p. 24, § 60) found no "pressing social need" for the criminalisation of homosexual acts between two consenting male adults over the age of 21 years, and that such justifications as there were for retaining the law were outweighed by the

> "detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved."

33. Those principles were adopted and repeated in the subsequent cases of Norris v. Ireland (judgment of 26 October 1988, Series A no. 142, p. 20, § 46), Modinos v. Cyprus (judgment of 22 April 1994, Series A no. 259, p. 12, § 25) and Marangos v. Cyprus (No. 31106/96, Comm. Rep. 3 December 1997).

34. There are differences between those decided cases and the present application. The principal point of distinction is that in the present case the sexual activities involved more than two men, and that the applicant was convicted for gross indecency as more than two men had been present.

35. The Government contend that where groups of men gather in order to perform sexual activities, the possibility of such activities being publicised is inevitable, and that this applies all the more where the activities are video taped. They claim that because of the less intimate nature of group activities, the margin of appreciation afforded to the national authorities is a significant one. The applicant underlines that the offence is committed whenever more than two people are present, and does not depend on the involvement of a large number of people.

36. It is not the Court's role to determine whether legislation complies with the Convention in the abstract. The Court will therefore consider the compatibility of the legislation in the present case with the Convention in the light of the circumstances of the case, that is, that the applicant wished to be

able to engage, in private, in non-violent sexual activities with up to four other men.

37. The Court can agree with the Government that, at some point, sexual activities can be carried out in such a manner that State interference may be justified, either as not amounting to an interference with the right to respect for private life, or as being justified for the protection, for example, of health or morals. The facts of the present case, however, do not indicate any such circumstances. The applicant was involved in sexual activities with a restricted number of friends in circumstances in which it was most unlikely that others would become aware of what was going on. It is true that the activities were recorded on video tape, but the Court notes that the applicant was prosecuted for the activities themselves, and not for the recording, or for any risk of it entering the public domain. The activities were therefore genuinely "private", and the approach of the Court must be to adopt the same narrow margin of appreciation as it found applicable in other cases involving intimate aspects of private life (as, for example, in the Dudgeon judgment, p. 21, § 52).

38. Given the narrow margin of appreciation afforded to the national authorities in the case, the absence of any public health considerations and the purely private nature of the behaviour in the present case, the Court finds that the reasons submitted for the maintenance in force of legislation criminalising homosexual acts between men in private, and *a fortiori* the prosecution and conviction in the present case, are not sufficient to justify the legislation and the prosecution.

39. There has therefore been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

40. The applicant alleged a violation of Article 14 of the Convention, taken together with Article 8 of the Convention, on the ground that no provision of domestic law regulated sexual acts between consenting adult heterosexuals or between lesbians. Article 14 of the Convention provides as follows:

> "The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

41. The Court recalls that in its above-mentioned Dudgeon judgment, having found a violation of Article 8 of the Convention, it did not deem it necessary to examine the case under Article 14 as well (p. 26, § 70). It reaches the same conclusion in the present case.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damages

42. The applicant claimed a total of GBP 10,929.05 pecuniary loss in respect of the costs of defending the criminal proceedings against him (GBP 1,887.05), travel expenses (GBP 21), prosecution costs (GBP 250) and items confiscated and destroyed at the end of the criminal proceedings (GBP 8,771). He also claimed GBP 10,000 in respect of non-pecuniary loss.

43. The Government were "content for just satisfaction to be set in accordance with the applicant's proposals".

44. The Court considers the sums claimed by the applicant to be reasonable and in accordance with the principles laid down by its own case-law under Article 41 of the Convention. It awards the applicant the sum of GBP 20,929.05.

B. Costs and expenses

45. The applicant also claimed a total of GBP 12,391.83 by way of costs and expenses, including value-added tax. Save for arithmetical comments (taken into account in that figure) the Government made no observations on the total.

46. The Court awards the applicant the sum of GBP 12,391.83.

C. Default interest

According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds* that it is not necessary to examine the case under Article 14 of the Convention;

3. *Holds*

(a) that the respondent Government is to pay the applicant, within three months from the date on which the judgment becomes final, in respect of damages, GBP 20,929.05 (twenty thousand, nine hundred and twenty-nine pounds sterling and five pence) and GBP 12,391.83 (twelve thousand, three hundred and ninety-one pounds sterling and eighty-three pence) for costs and expenses,

(b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement.

Done in English, and notified in writing on 31 July 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF LUSTIG-PREAN AND BECKETT
v. THE UNITED KINGDOM

(Applications nos. 31417/96 and 32377/96)

JUDGMENT

STRASBOURG

27 September 1999

In the case of Lustig-Prean and Beckett v. the United Kingdom,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Sir Nicolas BRATZA,
Mr L. LOUCAIDES,
Mr P. KŪRIS,
Mr W. FUHRMANN,
Mrs H.S. GREVE,
Mr K. TRAJA, *Judges*,

and also of Ms S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 18 May 1999 and on 24 August 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in two applications against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

The first applicant, Mr Duncan Lustig-Prean, is a British national born in 1959 and resident in London. He was represented before the Commission and, subsequently, before the Court by Mr S. Grosz, a solicitor practising in London. His application was introduced on 23 April 1996 and was registered on 7 May 1996 under file no. 31417/96.

The second applicant, Mr John Beckett, is a British national born in 1970 and resident in Sheffield. He was represented before the Commission and, subsequently, before the Court by Ms H. Larter, a solicitor practising in Sheffield. His application was introduced on 11 July 1996 and was registered on 22 July 1996 under file no. 32377/96.

2. Both applicants complained that the investigations into their homosexuality and their discharge from the Royal Navy on the sole ground that they are homosexual constituted violations of Article 8 of the Covention taken alone and in conjunction with Article 14.

3. On 20 May 1997 the Commission (Plenary) decided to give notice of the applications to the United Kingdom Government ("the Government")

and invited them to submit observations on the admissibility and merits of the applications. In addition, the applications were joined to two similar

applications (nos. 33985/96 and 33986/96, Smith v. the United Kingdom and Grady v. the United Kingdom).

The Government, represented by Mr M. Eaton and, subsequently, by Mr C. Whomersley, both Agents, Foreign and Commonwealth Office, submitted their observations on 17 October 1997, to which the applicants replied on 20 November and 8 December 1997, respectively.

4. On 17 January 1998 the Commission decided to adjourn the applications pending the outcome of a reference to the European Court of Justice ("ECJ") pursuant to Article 177 of the Treaty of Rome by the English High Court on the question of the applicability of the Council Directive 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 76/207/EEC ("the Equal Treatment Directive") to a difference of treatment based on sexual orientation.

5. On 23 January 1998 the Commission granted Mr Beckett legal aid.

6. On 13 July 1998 the High Court delivered its judgment withdrawing its reference of the above question given the decision of the ECJ in the case of *R. v. Secretary of State for Defence, ex parte Perkins* (13 July 1998).

7. Following the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 2 thereof, the applications fall to be examined by the Court.

In accordance with Rule 52 § 1 of the Rules of Court[1], the President of the Court, Mr L. Wildhaber, assigned the case to the Third Section. The Chamber constituted within the Section included *ex officio* Sir Nicolas Bratza, the judge elected in respect of the United Kingdom (Article 27 § 2 of the Convention and Rule 26 § 1 (a)), and Mr J.-P. Costa, Acting President of the Section and President of the Chamber (Rules 12 and 26 § 1 (a)). The other members designated by the latter to complete the Chamber were Mr L. Loucaides, Mr P. Kūris, Mr W. Fuhrmann, Mrs H.S. Greve and Mr K. Traja (Rule 26 § 1 (b)).

8. On 23 February 1998 the Chamber declared the applications admissible[2] and, while it retained the joinder of the present applications, it decided to disjoin them from the above-mentioned Smith and Grady cases. It was also decided to hold a hearing on the merits of the case.

9. On 4 May 1999 the President of the Chamber decided to grant Mr Lustig-Prean legal aid.

Notes by the Registry

1. The Rules of Court came into force on 1 November 1998.
2. The text of the Court's decision is obtainable from the Registry.

10. The hearing in this case and in the case of Smith and Grady v. the United Kingdom took place in public in the Human Rights Building, Strasbourg, on 18 May 1999.

There appeared before the Court:

(a) *for the Government*
Mr C. WHOMERSLEY, Foreign and Commonwealth Office, *Agent*,
Mr J. EADIE, *Counsel*,
Mr J. BETTELEY,
Ms J. PFIEFFER, *Advisers*;

(b) *for the applicants*
Mr D. PANNICK QC,
Mr J. BOWERS QC, *Counsel*,
Mr S. GROSZ,
Ms H. LARTER, *Solicitors*,
Mr A. MASON, *Adviser*.

The Court heard addresses by Mr Pannick and Mr Eadie.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The first applicant

11. Mr Lustig-Prean (the first applicant) joined the Royal Navy Reserve as a radio operator and in 1982 commenced a career in the Royal Navy. On 27 April 1983 he became a midshipman in the executive branch of the navy. His evaluation of November 1989 noted that he was an officer with "great potential" and the "sort of person that the Royal Navy needs to attract and retain". His evaluation of December 1993 concluded that the applicant "is a balanced, enlightened and knowledgeable man who enjoys my complete trust in all matters. He is an outstanding prospect for early promotion to commander." In 1994 the applicant attained the rank of lieutenant-commander.

12. For about thirty months prior to June 1994 the applicant had been involved in a steady relationship with a civilian partner. In early June 1994

the applicant was informed that the Royal Navy Special Investigations Branch ("the service police") had been given his name anonymously in connection with an allegation of homosexuality and was investigating the matter. The applicant admitted to his commanding officer that he was homosexual.

13. The applicant was interviewed on 13 June 1994 by personnel from the service police about his sexual orientation for approximately twenty minutes. At the beginning of the interview, the applicant was cautioned that he did not have to answer questions and that any responses could be used in evidence later. He was also informed that he could obtain legal advice. The applicant confirmed his awareness of those rights and agreed to be interviewed without legal advice. He then confirmed that he was homosexual, acknowledging that he had been a practising homosexual since his teenage years.

He was then asked, *inter alia*, whether he had had homosexual contact with service personnel (at least four questions on this subject), what type of sexual relations he had had with a particular person, when and where this had occurred, about his current relationship and whether his parents knew of his homosexuality. The applicant was asked repeatedly about who had tipped him off that he was the subject of an investigation by the service police and he was told that the question was put because the service police had "a lot of background knowledge about certain things" and there was somebody "providing information to us". The applicant indicated that he was anxious to assist the service police to make sure that the issue was kept as "private and discreet as possible". He was then informed that a search was normally completed but the search did not take place since, in anticipation, the applicant had already cleared his cabin of any incriminating evidence.

14. The applicant was again interviewed on 14 June 1994 for approximately ten minutes. It was explained to the applicant that the purpose of the interview was to ask him about an allegation, contained in an anonymous letter sent to the applicant's commanding officer some time previously, that the applicant had had a relationship with a serviceman. The interviewer then explained that he was "attempting to keep the need to visit Newcastle and to investigate this matter to a minimum", as the applicant wished. The applicant was then asked whether he had had the relationship as alleged in the letter. The anonymous letter was read. The writer claimed that he had recently had a relationship with the applicant, that the writer was HIV-positive and that he believed that the applicant was involved with a member of the armed forces. The applicant's comments were requested, in particular, as to who would have written the letter. The interviewer also enquired of the applicant "purely as a matter of interest, although it's a personal thing" whether the applicant was HIV-positive. In this context, it was indicated a number of times to the applicant that the purpose of the

second interview was to avoid further investigations. He was also told that it would "come back" on the applicant's interviewer if the latter did not properly follow up on the anonymous letter.

15. In a final evaluation dated 14 June 1994 the applicant's commander noted that the applicant left the ship "with a well-deserved reputation for outstanding professional ability and admirable personal qualities". He concluded that the applicant's "loyal, dependable and always dignified service" would be "sorely missed".

16. On 16 December 1994 the Admiralty Board informed the applicant that it had decided to terminate his commission and to discharge him, administratively, from the navy with effect from 17 January 1995. The ground for his discharge was his sexual orientation. The applicant's commission was removed and most of the bonus which he had received with that promotion was recouped by the naval authorities (£4,875 out of £6,000). His term of service would otherwise have terminated in 2009, with the possibility of renewal.

B. The second applicant

17. On 20 February 1989 Mr Beckett (the second applicant) joined the Royal Navy, enlisting for twenty-two years' service. In 1991 he became a substantive weapons engineering mechanic. The applicant's report dated 27 November 1992 noted that he displayed potential in a number of areas essential to good leadership, that he had the ability to become an above-average leading hand and that if he applied his new skills wisely he could, with experience, be considered as a potential officer candidate.

18. In May 1993 the applicant had been refused time off to deal with a personal matter (he wished to collect his Aids test results) and consequently he spoke with the chaplain, to whom he admitted his sexual orientation. On 10 May 1993 the applicant was asked by his lieutenant-commander to repeat what he had told the chaplain and he again admitted his homosexuality to that officer. He was then called for interview by the service police. He was cautioned in the same terms as the first applicant and told that he would not be questioned on the above admissions prior to a search of his locker. His consent to the search was requested and given. The interview, which had lasted approximately five minutes, was suspended pending the search. During the search, slides (of himself, his partner and some of his service friends) and personal postcards were seized.

19. The applicant's interview with the service police then resumed and lasted approximately one hour. The applicant immediately confirmed his homosexuality, later clarifying that he first had "niggling doubts" about his sexual orientation approximately two and a half years previously. He was then questioned about a previous relationship with a woman; he was asked the woman's name and where she was from, when he had that relationship, why it ended, whether they had a sexual relationship, whether he enjoyed their relationship and whether "she was enough for you". Details were sought as to how and what he did when he realised he was homosexual and, in this respect, he was asked what sort of feelings he had for a man, whether he had been "touched up" or "abused" as a child and whether he had bought pornographic magazines.

The applicant was then questioned about his first and current homosexual relationship which began in December 1992 and, in this regard, he was asked about his first night with his partner, who was "butch" and who was "bitch" in the relationship and what being "butch" meant in sexual terms. Detailed questions were put as to how they had sex and whether they used condoms, lubrication and other sex aids, whether they ever had sex in a public place and how they intended to develop the relationship. He was also asked about gay bars he frequented, whether he had ever joined contact magazines, whether his parents knew about his homosexuality and whether he agreed that his secret life could be used as a basis to blackmail him and render him a weak link in the service. The personal slides and postcards which had been taken from his locker were examined and the applicant was questioned in detail about their contents.

20. The service police report completed after the applicant's interview included several internal documents where it was noted that the applicant, in openly declaring his homosexuality and his relationship with a civilian, had effectively disposed "of any immediate potential security concern". For that reason, it was considered in the report that "no cause was identified for conducting a security interview with Beckett". That report also accepted that a case for fraudulent entry into the armed forces would be inappropriate given the date when the applicant had discovered his homosexuality. An officer, who advised the Admiralty Board on the applicant's discharge, noted that the applicant's reporting officers had commented on his "affability, intelligence, dedication and ambition" and pointed out that, had it not been for the applicant's homosexuality, "his Royal Navy career would have blossomed".

21. Prior to his discharge, the applicant completed his duties and remained in communal sleeping accommodation with no reported difficulties. On 28 July 1993 the applicant's administrative discharge was approved on the basis of his homosexuality. The applicant then complained about the decision to discharge him to the Admiralty Board and on 6 December 1994 the Admiralty Board dismissed the applicant's complaint.

C. The applicants' judicial review proceedings (*R. v. Ministry of Defence, ex parte Smith and Others* 2 Weeky Law Reports 305)

22. Along with Ms Smith and Mr Grady (see paragraph 3 above), the applicants obtained leave to apply for judicial review of the decisions to discharge them from the armed forces. The applicants argued that the policy of the Ministry of Defence against homosexuals in the armed forces was "irrational", that it was in breach of the Convention and that it was contrary to the Equal Treatment Directive. The Ministry of Defence maintained that the policy was necessary mainly to maintain morale and unit effectiveness, in view of the *loco parentis* role of the services as regards minor recruits and in light of the requirement of communal living in the armed forces.

23. On 7 June 1995 the High Court dismissed the application for judicial review, Lord Justice Simon Brown giving the main judgment of the court. He noted that the cases illustrated the hardships resulting from the absolute policy against homosexuals in the armed forces and that all four of the applicants had exemplary service records, some with reports written in glowing terms. Moreover, he found that in none of the cases before him was it suggested that the applicants' sexual orientation had in any way affected their ability to carry out their work or had any ill-effect on discipline. There was no reason to doubt that, but for their discharge on the sole ground of sexual orientation, they would have continued to perform their service duties entirely efficiently and with the continued support of their colleagues. All were devastated by their discharge.

Simon Brown LJ reviewed the background to the "age old" policy, the relevance of the Parliamentary Select Committee's report of 1991, the position in other armed forces around the world, the arguments of the Ministry of Defence (noting that the security argument was no longer of substantial concern to the Government) together with the applicants' arguments against the policy. He considered that the balance of argument clearly lay with the applicants, describing the applicants' submissions in favour of a conduct-based code as "powerful". In his view, the tide of

history was against the Ministry of Defence. He further observed that it was improbable, whatever the High Court would say, that the policy could survive for much longer and added, "I doubt whether most of those present in court throughout the proceedings now believe otherwise."

24. However, having considered arguments as to the test to be applied in the context of these judicial review proceedings, Simon Brown LJ concluded that the conventional Wednesbury principles, adapted to a human rights context, should be applied.

Accordingly, where fundamental human rights were being restricted, the Minister of Defence needed to show that there was an important competing interest to justify the restriction. The primary decision was for him and the secondary judgment of the court amounted to asking whether a reasonable Minister, on the material before him, could have reasonably made that primary judgment. He later clarified that it was only if the purported justification "outrageously defies logic or accepted moral standards" that the court could strike down the Minister's decision. He noted that within the limited scope of that review, the court had to be scrupulous to ensure that no recognised ground of challenge was in truth available to an applicant before rejecting the application. When the most fundamental human rights are threatened, the court would not, for example, be inclined to overlook some minor flaw in the decision-making process, or to adopt a particularly benevolent view of the Minister's evidence, or to exercise its discretion to withhold relief. However, he emphasised that, even where the most fundamental human rights were being restricted, "the threshold of unreasonableness is not lowered".

It was clear that the Secretary of State had cited an important competing public interest. But the central question was whether it was reasonable for the Secretary of State to take the view that allowing homosexuals into the forces would imperil that interest. He pointed out that, although he might have considered the Minister wrong,

> "…[the courts] owe a duty ... to remain within their constitutional bounds and not trespass beyond them. Only if it were plain beyond sensible argument that no conceivable damage could be done to the armed services as a fighting unit would it be appropriate for this Court now to remove the issue entirely from the hands of both the military and of the government. If the Convention … were part of our law and we were accordingly entitled to ask whether the policy answers a pressing social need and whether the restriction on human rights involved can be shown proportionate to the benefits then clearly the primary judgment … would be for us and not others: the constitutional balance would shift. But that is not the position. In exercising merely a secondary judgment, this Court is bound to act with some reticence. Our approach must reflect, not overlook, where responsibility ultimately lies for the defence of the realm and recognise too that Parliament is exercising a continuing supervision over this area of prerogative power."

Accordingly, while the Minister's suggested justification for the ban may have seemed "unconvincing", the Minister's stand could not properly be said to be unlawful. It followed that the applications had to be rejected "albeit with hesitation and regret". A brief analysis of the Convention's case-law led the judge to comment that he strongly suspected that, as far as the United Kingdom's obligations were concerned, the days of the policy were numbered.

25. Simon Brown LJ also found that the Equal Treatment Directive was not applicable to discrimination on grounds of sexual orientation and that the domestic courts could not rule on Convention matters. He also observed that the United States, Canada, Australia, New Zealand, Ireland, Israel, Germany, France, Norway, Sweden, Austria and the Netherlands permitted homosexuals to serve in their armed forces and that the evidence indicated that the only countries operating a blanket ban were Turkey and Luxembourg (and, possibly, Portugal and Greece).

26. In August 1995 a consultation paper was circulated by the Ministry of Defence to "management" levels in the armed forces relating to the Ministry of Defence's policy against homosexuals in those forces. The covering letter circulating this paper pointed out that the "Minister for the Armed Forces has decided that evidence is to be gathered within the Ministry of Defence in support of the current policy on homosexuality". It was indicated that the case was likely to progress to the European courts and that the applicants in the judicial review proceedings had argued that the Ministry of Defence's position was "bereft of factual evidence" but that this was not surprising since evidence was difficult to amass given that homosexuals were not permitted to serve. Since "this should not be allowed to weaken the arguments for maintaining the policy", the addressees of the letter were invited to comment on the consultation paper and "to provide any additional evidence in support of the current policy by September 1995". The consultation paper attached referred, *inter alia*, to two incidents which were considered damaging to unit cohesion. The first involved a homosexual who had had a relationship with a sergeant's mess waiter and the other involved an Australian on secondment whose behaviour was described as "so disruptive" that his attachment was terminated.

27. On 3 November 1995 the Court of Appeal dismissed the applicants' appeal. The Master of the Rolls, Sir Thomas Bingham, delivered the main judgment (with which the two other judges of the Court of Appeal agreed).

28. As to the court's approach to the issue of "irrationality", he considered that the following submission was an accurate distillation of the relevant jurisprudence on the subject:

> "the court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

He went on to quote from, *inter alia*, the judgment of Lord Bridge in *R. v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 Appeal Cases 696, where it was pointed out that:

> "the primary judgment as to whether the particular competing public interest justifies the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make that primary judgment."

Moreover, he considered that the greater the policy content of the decision and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court had to be in holding a decision to be irrational.

29. Prior to applying this test of irrationality, the Master of the Rolls noted that the case concerned innate qualities of a very personal kind, that the decisions of which the applicants complained had had a profound effect on their careers and prospects and that the applicants' rights as human beings were very much in issue. While the domestic court was not the primary decision-maker and while it was not the role of the courts to regulate the conditions of service in the armed forces, "it has the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power. While the court must properly defer to the expertise of responsible decision-makers, it must not shrink from its fundamental duty to 'do right to all manner of people' …".

30. He then reviewed, by reference to the test of irrationality outlined above, the submissions of the parties in favour of and against the policy, commenting that the applicants' arguments were "of very considerable cogency" which called to be considered in depth with particular reference to past experience in the United Kingdom, to the developing experience of other countries and to the potential effectiveness of a detailed prescriptive code in place of the present blanket ban. However, he concluded that the policy could not be considered "irrational" at the time the applicants were discharged from the armed forces, finding that the threshold of irrationality was "a high one" and that it had not been crossed in this case.

31. On the Convention, the Master of the Rolls noted as follows:

> "It is, inevitably, common ground that the United Kingdom's obligation, binding in international law, to respect and ensure compliance with [Article 8 of the Convention] is not one that is enforceable by domestic courts. The relevance of the Convention in the present context is as background to the complaint of irrationality. The fact that a decision-maker failed to take account of Convention obligations when exercising an administrative discretion is not of itself a ground for impugning the exercise of that discretion."

He observed that to dismiss a person from his or her employment on the grounds of a private sexual preference, and to interrogate him or her about private sexual behaviour, would not appear to show respect for that person's private and family life and that there might be room for argument as to whether the policy answered a "pressing social need" and, in particular, was proportionate to the legitimate aim pursued. However, he held that these were not questions to which answers could be properly or usefully proffered by the Court of Appeal, but rather were questions for the European Court of Human Rights to which court the applicants might have to pursue their claim. He further accepted that the Equal Treatment Directive did not apply to complaints in relation to sexual orientation.

32. Henry LJ of the Court of Appeal agreed with the judgment of the Master of the Rolls and, in particular, with the latter's approach to the irrationality test and with his view on the inability of the court to resolve Convention issues. He questioned the utility of a debate as to the likely fate of the "longstanding" policy of the Ministry of Defence before the European Court of Human Rights with which the primary adjudicating role on the Convention lay. The Court of Appeal did not entertain "hypothetical questions". In Henry LJ's view, the only relevance of the Convention was as "background to the complaint of irrationality", which point had been already made by the Master of the Rolls. It was important to highlight this point since Parliament had not given the domestic courts primary jurisdiction over human rights issues contained in the Convention and because the evidence and submissions before the Court of Appeal related to that court's secondary jurisdiction and not to its primary jurisdiction.

33. Thorpe LJ of the Court of Appeal agreed with both preceding judgments and, in particular, with the views expressed on the rationality test to be applied and on its application in the particular case. The applicants' arguments that their rights under Article 8 had been breached were "persuasive" but the evidence and arguments that would ultimately determine that issue were not before the Court of Appeal. He also found that the applicants' challenge to the arguments in support of the policy was "completely persuasive" and added that what impressed him most in relation to the merits was the complete absence of illustration and

substantiation by specific examples, not only in the Secretary of State's evidence filed in the High Court, but also in the case presented to the Parliamentary Select Committee in 1991. The policy was, in his view, "ripe for review and for consideration of its replacement by a strict conduct code". However, the applicants' attack on the Secretary of State's rationality fell "a long way short of success".

34. On 19 March 1996 the Appeals Committee of the House of Lords refused leave to appeal to the House of Lords.

D. The applicants' Industrial Tribunal proceedings

35. In December 1995 Mr Lustig-Prean issued proceedings in the Industrial Tribunal claiming unfair dismissal and sexual discrimination contrary to the Sexual Discrimination Act 1975. Those proceedings were adjourned pending the above-described application for leave to appeal to the House of Lords. Further to the rejection of the application, he requested the withdrawal of his Industrial Tribunal proceedings and those proceedings were dismissed by the Industrial Tribunal on 25 April 1996.

36. In December 1997 Mr Beckett also issued proceedings in the Industrial Tribunal claiming sexual discrimination contrary to the 1975 Act. In the light of subsequent decisions of the ECJ and of the domestic courts, the second applicant subsequently requested the withdrawal of those proceedings which were, on 27 August 1998, dismissed by the Industrial Tribunal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Decriminalisation of homosexual acts

37. By virtue of section 1(1) of the Sexual Offences Act 1967, homosexual acts in private between two consenting adults (at the time meaning 21 years or over) ceased to be criminal offences. However, such acts continued to constitute offences under the Army and Air Force Acts 1955 and the Naval Discipline Act 1957 (Section 1(5) of the 1967 Act). Section 1(5) of the 1967 Act was repealed by the Criminal Justice and Public Order Act 1994 (which Act also reduced the age of consent to 18 years). However, section 146(4) of the 1994 Act provided that nothing in that section prevented a homosexual act (with or without other acts or circumstances) from constituting a ground for discharging a member of the armed forces.

B. *R. v. Secretary of State for Defence, ex parte Perkins*, judgments of 13 March 1997 and 13 July 1998, and related cases

38. On 30 April 1996 the ECJ decided that transsexuals were protected from discrimination on grounds of their transsexuality under European Community law (*P. v. S. and Cornwall County Council* [1996] Industrial Relations Law Reports 347).

39. On 13 March 1997 the High Court referred to the ECJ pursuant to Article 177 of the Treaty of Rome the question of the applicability of the Equal Treatment Directive to differences of treatment based on sexual orientation *(R. v. Secretary of State for Defence, ex parte Perkins*, 13 March 1997). Mr Perkins had been discharged from the Royal Navy on grounds of his homosexuality.

40. On 17 February 1998 the ECJ found that the Equal Pay Directive 75/117/EEC did not apply to discrimination on grounds of sexual orientation (*Grant v. South West Trains Ltd* [1998] Industrial Cases Reports 449).

41. Consequently, on 2 March 1998 the ECJ enquired of the High Court in the Perkins' case whether it wished to maintain the Article 177 reference. After a hearing between the parties, the High Court decided to withdraw the question from the ECJ *(R. v. Secretary of State for Defence, ex parte Perkins*, 13 July 1998). Leave to appeal was refused.

C. The Ministry of Defence policy on homosexual personnel in the armed forces

42. As a consequence of the changes made by the Criminal Justice and Public Order Act 1994, updated Armed Forces' Policy and Guidelines on Homosexuality ("the Guidelines") were distributed to the respective service directorates of personnel in December 1994. The Guidelines provided, *inter alia*, as follows:

> "Homosexuality, whether male or female, is considered incompatible with service in the armed forces. This is not only because of the close physical conditions in which personnel often have to live and work, but also because homosexual behaviour can cause offence, polarise relationships, induce ill-discipline and, as a consequence, damage morale and unit effectiveness. If individuals admit to being homosexual whilst serving and their Commanding Officer judges that this admission is well-founded they will be required to leave the services. ...

> The armed forces' policy on homosexuality is made clear to all those considering enlistment. If a potential recruit admits to being homosexual, he/she will not be enlisted. Even if a potential recruit admits to being homosexual but states that he/she does not at present nor in the future intend to engage in homosexual activity, he/she will not be enlisted. ...
>
> In dealing with cases of suspected homosexuality, a Commanding Officer must make a balanced judgment taking into account all the relevant factors. ... In most circumstances, however, the interests of the individual and the armed forces will be best served by formal investigation of the allegations or suspicion. Depending on the circumstances, the Commanding Officer will either conduct an internal inquiry, using his own staff, or he will seek assistance from the Service Police. When conducting an internal inquiry he will normally discuss the matter with his welfare support staff. Homosexuality is not a medical matter, but there may be circumstances in which the Commanding Officer should seek the advice of the Unit Medical Officer on the individual concerned and may then, if the individual agrees, refer him/her to the Unit Medical Officer. ...
>
> A written warning in respect of an individual's conduct or behaviour may be given in circumstances where there is some evidence of homosexuality but insufficient ... to apply for administrative discharge ... . If the Commanding Officer is satisfied on a high standard of proof of an individual's homosexuality, administrative action to terminate service ... is to be initiated, ..."

One of the purposes of the Guidelines was the reduction of the involvement of the service police whose investigatory methods, based on criminal procedures, had been strongly resented and widely publicised in the past (confirmed at paragraph 9 of the Homosexual Policy Assessment Team's report of February 1996 which is summarised at paragraphs 44-55 below. However, paragraph 100 of this report indicated that investigation into homosexuality is part of "normal service police duties".)

43. The affidavit of Air Chief Marshal Sir John Frederick Willis KCB, CBE, Vice Chief of the Defence Staff, Ministry of Defence dated 4 September 1996, which was submitted to the High Court in the case of *R. v. Secretary of State for Defence, ex parte Perkins* (13 July1998), read, in so far as relevant, as follows:

> "The policy of the Ministry of Defence is that the special nature of homosexual life precludes the acceptance of homosexuals and homosexuality in the armed forces. The primary concern of the armed forces is the maintenance of an operationally effective and efficient force and the consequent need for strict maintenance of discipline. [The Ministry of Defence] believes that the presence of homosexual personnel has the potential to undermine this.

> The conditions of military life, both on operations and within the service environment, are very different from those experienced in civilian life. … The [Ministry of Defence] believes that these conditions, and the need for absolute trust and confidence between personnel of all ranks, must dictate its policy towards homosexuality in the armed forces. It is not a question of a moral judgement, nor is there any suggestion that homosexuals are any less courageous than heterosexual personnel; the policy derives from a practical assessment of the implications of homosexuality for fighting power."

D. The report of the Homosexuality Policy Assessment Team – February 1996

1. General

44. Following the decision in the case *of R. v. Ministry of Defence, ex parte Smith and Others* 2 Weekly Law Reports 305, the Homosexuality Policy Assessment Team ("HPAT") was established by the Ministry of Defence in order to undertake an internal assessment of the armed forces' policy on homosexuality. The HPAT was composed of Ministry of Defence civil servants and representatives of the three services. The HPAT's assessment was to form the basis of the Ministry's evidence to the next Parliamentary Select Committee (as confirmed in the affidavit of Air Chief Marshal Sir John Frederick Willis referred to at paragraph 43 above). The HPAT was to consult the Ministry of Defence, the armed forces' personnel of all ranks, service and civilian staff responsible for carrying out the policy together with members of the legal adviser's staff. It was also to examine the policies of other nations (Annex D to the HPAT report).

The report of the HPAT was published in February 1996 and ran to approximately 240 pages, together with voluminous annexes. The starting-point of the assessment was an assumption that homosexual men and women were in themselves no less physically capable, brave, dependable and skilled than heterosexuals. It was considered that any problems to be identified would lie in the difficulties which integration of declared homosexuals would pose to the military system which was largely staffed by heterosexuals. The HPAT considered that the best predictors of the "reality and severity" of the problems of the integration of homosexuals would be the service personnel themselves (paragraph 30 of the report).

2. The methods of investigation used

45. There were eight main areas of investigation (paragraph 28 of the report):

(a) The HPAT consulted with policy-makers in the Ministry of Defence. The latter emphasised the uniqueness of the military environment and the distinctly British approach to service life and the HPAT found little disagreement with this general perspective from the service people it interviewed (paragraph 37);

(b) A signal was sent to all members of the services, including the reserve forces, requesting any written views on the issues. By 16 January 1996 the HPAT had received 639 letters. 587 of these letters were against any change in the policy, 58 of which were multiply signed. Only 11 of those letters were anonymous (paragraphs 46-48);

(c) The HPAT attitude survey consisted of a questionnaire administered to a total of 1,711 service personnel chosen as representative of the services. The questionnaires were administered in examination-type conditions and were to be completed anonymously. The results indicated that there was "overwhelming support across the services" for the policy excluding homosexuals from the armed forces. Service personnel viewed homosexuality as clearly more acceptable in civilian than in service life (paragraphs 49-59 and Annex G);

(d) During the HPAT's visit to ten military bases in late 1995 in order to administer the above questionnaire, individual one-to-one interviews were conducted with personnel who had completed the attitude questionnaire. 180 interviewees randomly selected from certain ranks and occupational areas were selected from each of the ten units visited. Given the small number of interviewees, the responses were analysed qualitatively rather than quantitatively (Annex G);

(e) A number of single-service focus group discussions were held with randomly selected personnel from representative ranks and functions (Annex G refers to 36 such discussions whereas paragraph 61 of the report refers to 43). The purpose of the group discussions was to examine the breadth and depth of military views and to provide insights that would complement the survey results. The HPAT commented that the nature of the discussions showed little reticence in honestly and fully putting forward views; there was an "overwhelming view that homosexuality was not 'normal' or 'natural' whereas women and ethnic minorities were 'normal'". The vast majority of participants believed that the present ban on homosexuals should remain (paragraphs 61-69 and Annex G);

(f) One sub-team of the HPAT went to Australia, Germany and France and the other visited the United States, Canada and the Netherlands. The

HPAT interviewed an eminent Israeli military psychologist since the Israeli military would not accept the HPAT visit (paragraphs 70-77 and Annex H). It is also apparent that the HPAT spoke to representatives of the police, the fire service and the merchant navy (paragraphs 78-82);

(g) Tri-service regional focus discussion groups were also held to examine the breadth and depth of the personnel's views. The groups were drawn from the three services and from different units. Three such discussion groups were held and overall the results were the same as those from the single-service focus groups (paragraphs 83-84 and Annex G);

(h) Postal single-service attitude surveys were also completed by a randomly selected sample of personnel stratified by rank, age and gender. The surveys were distributed to 3,000 (6%) of the Royal Navy and Royal Marine personnel, to 6,000 (5.4%) of the Army personnel and to 4,491 (6%) of the Royal Air Force personnel. On average over half of the surveys were returned (paragraphs 65-86 and Annex G).

3. The impact on fighting power

46. The HPAT report defined "fighting power" (often used interchangeably with combat effectiveness, operational efficiency or operational effectiveness) as the "ability to fight" which is in turn made up of three components. These are the "conceptual" and "physical" components together with the "moral component", the latter being defined as "the ability to get people to fight including morale, comradeship, motivation, leadership and management".

47. The focus throughout the assessment was upon the anticipated effects on fighting power and this was found to be the "key problem" in integrating homosexuals into the armed forces. It was considered well established that the presence of known or strongly suspected homosexuals in the armed forces would produce certain behavioural and emotional responses and problems which would affect morale and, in turn, significantly and negatively affect the fighting power of the armed forces.

These anticipated problems included controlling homosexual behaviour and heterosexual animosity, assaults on homosexuals, bullying and harassment of homosexuals, ostracism and avoidance, "cliquishness" and pairing, leadership and decision-making problems including allegations of

favouritism, discrimination and ineffectiveness (but excluding the question of homosexual officers taking tactical decisions swayed by sexual preference), sub-cultural friction, privacy/decency issues, increased dislike and suspicions (polarised relationships), and resentment over imposed change especially if controls on heterosexual expression also had to be tightened (see Section F.II of the report).

4. Other issues

48. The HPAT also assessed other matters it described as "subsidiary" (Section G and paragraph 177 of the report). It found that, while cost implications of changing the policy were not quantifiable, it was not considered that separate accommodation for homosexuals would be warranted or wise and, accordingly, major expenditures on accommodation were considered unlikely (paragraphs 95-97). Wasted training as regards discharged homosexuals was not considered to be a significant argument against maintaining the policy (paragraphs 98-99). Should the wider social and legal position change in relation to civilian homosexual couples, then entitlements for homosexual partners would have to be accepted (paragraph 101). Large amounts of money or time were unlikely to be devoted to homosexual awareness training, given that it was unlikely to be effective in changing attitudes. It was remarked that, if required, tolerance training would probably be best addressed as "part of an integrated programme for equal opportunities training in the military" (paragraph 102). There were strong indications that recruitment and retention rates would go down if there was a change in policy (paragraphs 103-04).

49. Concerns expressed about the fulfilment of the forces' *loco parentis* responsibilities for young recruits were found not to stand up to close examination (paragraph 111).

5. Medical and security concerns

50. Medical and security concerns were considered separately (Sections H and I, respectively, and paragraph 177 of the report). While it was noted that medical concerns of personnel (in relation to, *inter alia*, Aids) were disproportionate to the clinical risks involved, it was considered that these concerns would probably need to be met with education packages and compulsory Aids testing. Otherwise, real acceptance and integration of homosexuals would be seriously prejudiced by emotional reactions and resentments and by concerns about the threat of Aids. The security issues (including the possibility of blackmail of those suspected of being homosexual) raised in defence of the policy were found not to stand up to close examination.

6. The experience in other countries and in civilian disciplined services

51. The HPAT observed that there were a wide variety of official positions and legal arrangements evolving from local legal and political circumstances and ranging from a formal prohibition of all homosexual activity (the United States), to administrative arrangements falling short of real equality (France and Germany), to a deliberate policy to create an armed force friendly to homosexuals (the Netherlands). According to the HPAT, those countries which had no legal ban on homosexuals were more tolerant, had written constitutions and therefore a greater tradition of respect for human rights. The report continued:

> "But nowhere did HPAT learn that there were significant numbers of open homosexuals serving in the Forces … . Whatever the degree of official toleration or encouragement, informal pressures or threats within the military social system appeared to prevent the vast majority of homosexuals from choosing to exercise their varying legal rights to open expression of their active sexual identity in a professional setting. … It goes without saying that the continuing reticence of military homosexuals in these armed forces means that there has been little practical experience of protecting them against ostracism, harassment or physical attack.
>
> Since this common pattern of a near absence of openly homosexual personnel occurs irrespective of the formal legal frameworks, it is reasonable to assume that it is the informal functioning of actual military systems which is largely incompatible with homosexual self-expression. This is entirely consistent with the pattern of British service personnel's attitudes confirmed by the HPAT."

52. In January 1996 there were over 35,000 British service personnel (25% approximately of the British armed forces) deployed overseas on operations, more than any other NATO country in Europe (paragraph 43).

The HPAT concluded, nevertheless, that the policy had not presented significant problems when working with the armed forces of allied nations. The HPAT remarked that British service personnel had shown a "robust indifference" to arrangements in foreign forces and no concern over what degree of acceptance closely integrated allies give to homosexuals. This is because the average service person considers that those others "are not British, have different standards, and are thus only to be expected to do things differently" and because personnel from different nations are accommodated apart. It was also due to the fact that homosexuals in foreign forces, where they were not formally banned, were not open about their sexual orientation. Consequently, the chances were small of the few open homosexuals happening to be in a situation where their sexual orientation would become a problem with British service personnel (paragraph 105).

53. Important differences were considered by the HPAT to exist between the armed forces and civilian disciplined services in the United Kingdom including the police, the fire brigade and the merchant navy which did not operate the same policy against homosexuals. It considered that:

> "None of these occupations involves the same unremittingly demanding and long-term working environment as the Armed Forces, or requires the same emphasis on building rapidly interchangeable, but fiercely committed and self-supporting teams, capable of retaining their cohesion after months of stress, casualties and discomfort …" (paragraph 203)

7. Alternative options to the current policy

54. Alternative options were considered by the HPAT including a code of conduct applicable to all, a policy based on the individual qualities of homosexual personnel, lifting the ban and relying on service personnel reticence, the "don't ask, don't tell" solution offered by the USA and a "no open homosexuality" code. It concluded that no policy alternative could be identified which avoided risks for fighting power with the same certainty as the present policy and which, in consequence, would not be strongly opposed by the service population (paragraphs 153-75).

8. The conclusions of the HPAT (paragraphs 176-91)

55. The HPAT found that:

> "the key problem remains and its intractability has indeed been re-confirmed. The evidence for an anticipated loss in fighting power has been set out in section F and forms the centrepiece of this assessment. The various steps in the argument and the overall conclusion have been shown not only by the Service authorities but by the great majority of Service personnel in all ranks".

Current service attitudes were considered unlikely to change in the near future. While clearly hardship and invasion of privacy were involved, the risk to fighting power demonstrated why the policy was, nevertheless, justified. It considered that it was not possible to draw any meaningful comparison between the integration of homosexuals and of women and ethnic minorities into the armed forces since homosexuality raised problems of a type and intensity that gender and race did not.

The HPAT considered that, in the longer term, evolving social attitudes towards homosexuality might reduce the risks to fighting power inherent in change but that their assessment could "only deal with present attitudes and risks". It went on:

> "… certainly, if service people believed that they could work and live alongside homosexuals without loss of cohesion, far fewer of the anticipated problems would emerge. But the Ministry must deal with the world as it is. Service attitudes, in as far as they differ from those of the general population, emerge from the unique conditions of military life, and represent the current social and psychological realities. They indicate military risk from a policy change…
>
> … after collecting the most exhaustive evidence available, it is also evident that in the UK homosexuality remains in practice incompatible with service life if the armed services, in their present form, are to be maintained at their full potential fighting power. ... Furthermore, the justification for the present policy has been overwhelmingly endorsed by a demonstrated consensus of the profession best able to judge it. It must follow that a major change to the Ministry's current Tri-service Guidelines on homosexuality should be contemplated only for clearly stated non-defence reasons, and with a full acknowledgement of the impact on Service effectiveness and service people's feelings."

E. The armed forces' policy on sexual and racial harassment and bullying and on equal opportunities

56. The Defence Council's "Code of Practice on Race Relations" issued in December 1993 declared the armed forces to be equal opportunity employers. It stated that no form of racial discrimination, harassment or abuse would be tolerated, that allegations would be investigated and, if proved, disciplinary action would be taken. It provided for a complaints procedure in relation to discrimination or harassment and it warned against the victimisation of service personnel who made use of their right of complaint and redress.

57. In January 1996 the army published an Equal Opportunities Directive dealing with racial and sexual harassment and bullying. The policy document contained, as a preamble, a statement of the Adjutant-General which reads as follows:

> "The reality of conflict requires high levels of teamwork in which individual soldiers can rely absolutely on their comrades and their leaders. There can, therefore, be no place in the Army for harassment, bullying and discrimination which will affect morale and break down the trust and cohesion of the group.
>
> It is the duty of every soldier to ensure that the Army is kept free of such behaviour which would affect cohesion and efficiency. Army policy is clear: all soldiers must be treated equally on the basis of their ability to perform their duty.
>
> I look to each one of you to uphold this policy and to ensure that we retain our acknowledged reputation as a highly professional Army."

The Directive provided definitions of racial and sexual harassment, indicated that the army wanted to prevent all forms of offensive and unfair behaviour in these respects and pointed out that it was the duty of each soldier not to behave in a way that could be offensive to others or to allow others to behave in that way. It also defined bullying and indicated that, although the army fosters an aggressive spirit in soldiers who will have to go to war, controlled aggression, self-sufficiency and strong leadership must not be confused with thoughtless and meaningless use of intimidation and violence which characterise bullying. Bullying undermines morale and creates fear and stress both in the individual and the group being bullied and in the organisation. The army was noted to be a close-knit community where team work, cohesion and trust are paramount. Thus, high standards of personal conduct and respect for others were demanded from all.

The Directive endorsed the use of military law by commanders. Supplementary leaflets promoting the Directive were issued to every individual soldier. In addition, specific equal opportunities posts were created in personnel centres and a substantial training programme in the Race Relations Act 1976 was initiated.

F. The reports of the Parliamentary Select Committee

58. Every five years an Armed Forces' Bill goes through Parliament and a Select Committee conducts a review in connection with that bill.

59. The report of the Select Committee dated 24 April 1991 noted, under the heading "Homosexuality":

> "That the present policy causes very real distress and the loss to the services of some men and women of undoubted competence and good character is beyond dispute. Society outside the armed forces is now much more tolerant of differences in sexual orientation than it was, and this may also possibly be true of the armed forces. Nevertheless, there is considerable force to the [Ministry of Defence's] argument that the presence of people known to be homosexual can cause tension in a group of people required to live and work sometimes under great stress and physically at very close quarters, and thus damage its cohesion and fighting effectiveness. It may be that this will change particularly with the integration of women into hitherto all-male units. We are not yet persuaded that the time has come to require the armed forces to accept homosexuals or homosexual activity."

60. The 1996 Select Committee report (produced after that committee's review of the Armed Forces Act 1996) referred to evidence taken from members of the Ministry of Defence and from homosexual support groups and to the HPAT Report. Once again, the committee did not recommend any change in the Government's policy. It noted that, since its last report, a total of 30 officers and 331 persons of other rank had been discharged or dismissed on grounds of homosexuality. The committee was satisfied that no reliable lessons could as yet be drawn from the experience of other countries. It acknowledged the strength of the human rights arguments put forward, but noted that there had to be a balance struck between individual rights and the needs of the whole. It was persuaded by the HPAT summary of the strength of opposition throughout the armed services to any relaxation of the policy. It accepted that the presence of openly homosexual servicemen and women would have a significant adverse impact on morale and, ultimately, on operational effectiveness. The matter was then debated in the House of Commons and members, by 188 votes to 120, rejected any change to the existing policy.

G. Information to persons recruited into the armed forces

61. Prior to September 1995, applicants to the armed forces were informed about the armed forces' policy as regards homosexuals in the armed forces by means of a leaflet entitled "Your Rights and Responsibilities". To avoid any misunderstanding and so that each recruit to each of the armed services received identical information, on 1 September 1995 the armed forces introduced a Service Statement to be read and signed before enlistment. Paragraph 8 of that statement is headed "Homosexuality" and states that homosexuality is not considered compatible with service life and "can lead to administrative discharge".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

62. The applicants complained that the investigations into their homosexuality and their subsequent discharge from the Royal Navy on the sole ground that they were homosexual, in pursuance of the Ministry of Defence's absolute policy against homosexuals in the British armed forces, constituted a violation of their right to respect for their private lives protected by Article 8 of the Convention. That Article, in so far as is relevant, reads as follows:

> "1. Everyone has the right to respect for his private … life…
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, … for the prevention of disorder…"

A. Whether there was an interference

63. The Government accepted, in their written observations, that there had been interferences with the applicants' right to respect for their private lives. However, noting that neither of the applicants denied knowledge during the relevant period of the policy against homosexuals in the armed forces, the Government made no admissions as to the dates from which the

applicants also appreciated that they were homosexual. During the hearing before the Court the Government, referring in particular to Mr Lustig-Prean, clarified that, if the applicants were aware of the policy and of their homosexuality on recruitment, then their discharge would not have amounted to an interference with their rights guaranteed by Article 8 of the Convention.

The applicants argued that they were not complaining about being refused entry to the armed forces and that they had not been dismissed for lying during recruitment. In any event, the protection afforded by Article 8 could not depend on the degree of knowledge of the applicants of their sexual orientation when they were young men.

64. The Court notes that the Government have not claimed that the applicants waived their rights under Article 8 of the Convention when they initially joined the armed forces. It also notes that the applicants were not dismissed for failure to disclose their homosexuality on recruitment. Further, the Government do not dispute Mr Beckett's statement made during his interview that he had discovered his homosexual orientation after recruitment.

In these circumstances, the Court is of the view that the investigations by the military police into the applicants' homosexuality, which included detailed interviews with each of them and with third parties on matters relating to their sexual orientation and practices, together with the preparation of a final report for the armed forces' authorities on the investigations, constituted a direct interference with the applicants' right to respect for their private lives. Their consequent administrative discharge on the sole ground of their sexual orientation also constituted an interference with that right (see the Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41, and, *mutatis mutandis*, the Vogt v. Germany judgment of 26 September 1995, Series A no. 323, p. 23, § 44).

B. Whether the interferences were justified

65. Such interferences can only be considered justified if the conditions of the second paragraph of Article 8 are satisfied. Accordingly, the interferences must be "in accordance with the law", have an aim which is legitimate under this paragraph and must be "necessary in a democratic society" for the aforesaid aim (see the Norris v. Ireland judgment of 26 October 1988, Series A no. 142, p. 18, § 39).

1. "In accordance with the law"

66. The parties did not dispute that there had been compliance with this element of Article 8 § 2 of the Convention. The Court notes that the Ministry of Defence policy excluding homosexuals from the armed forces was confirmed by the Court of Appeal in the present case to be lawful, in terms of both domestic and applicable European Community law. The policy was given statutory recognition and approval by the Sexual Offences Act 1967 and, more recently, by the Criminal Justice and Public Order Act 1994. The Court, accordingly, finds this requirement to be satisfied.

2. Legitimate aim

67. The Court observes that the essential justification offered by the Government for the policy and for the consequent investigations and discharges is the maintenance of the morale of service personnel and, consequently, of the fighting power and the operational effectiveness of the armed forces (see paragraph 88 below). The Court finds no reason to doubt that the policy was designed with a view to ensuring the operational effectiveness of the armed forces or that investigations were, in principle, intended to establish whether the person concerned was a homosexual to whom the policy was applicable. To this extent, therefore, the Court considers that the resulting interferences can be said to pursue the legitimate aims of "the interests of national security" and "the prevention of disorder".

The Court has more doubt as to whether the investigations continued to serve any such legitimate aim once the applicants had admitted their homosexuality. However, given the Court's conclusion at paragraph 104 below, it does not find that it is necessary to decide whether this element of the investigations pursued a legitimate aim within the meaning of Article 8 § 2 of the Convention.

3. "Necessary in a democratic society"

68. It remains to be determined whether the interferences in the present cases can be considered "necessary in a democratic society" for the aforesaid aims.

(a) The Government's submissions

69. The Government accepted from the outset that neither the applicants' service records nor their conduct gave any grounds for complaint and that there was no evidence that, prior to the discovery of their sexual orientation, such orientation adversely affected the performance by them or by their colleagues of their duties. Nor was it contended by the Government that homosexuals were less physically capable, brave, dependable or skilled than heterosexuals.

70. However, the Government emphasised, in the first place, the special British armed forces' context of the case. It was special because it was intimately connected with the nation's security and was, accordingly, central to a State's vital interests. Unit cohesion and morale lay at the heart of the effectiveness of the armed forces. Such cohesion and morale had to withstand the internal rigours of normal and corporate life, close physical and shared living conditions together with external pressures such as grave danger and war, all of which factors the Government argued applied or could have applied to each applicant. In this respect, the armed forces' were unique and there were no genuine comparables in terms of the civilian disciplined forces, such as the police and the fire brigade.

In such circumstances, the Government, while accepting that members of the armed forces had the right to the Convention's protection, argued that different, and stricter, rules applied in this context (see the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, p. 24, § 57; the Grigoriades v. Greece judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, pp. 2589-90, § 45; and the Kalaç v. Turkey judgment of 1 July 1997, *Reports* 1997-IV, p. 1209, § 28). Moreover, given the national security dimension to the present case a wide margin of appreciation was properly open to the State (see the Leander v. Sweden judgment of 26 March 1987, Series A no. 116, p. 25, § 59). Accordingly, the narrow margin of appreciation which applied to cases involving intimate private life matters could not be transposed unaltered to the present case.

In support of their argument for a broad margin of appreciation, the Government also referred to the fact that the issue of homosexuals in the armed forces has been the subject of intense debate in recent years in the United Kingdom, suggesting that the sensitivity and special context of the question meant that the decision was largely one for the national authorities. It was true that the degree of risk to fighting power was not consistent over time, given that attitudes and opinions, and, consequently, domestic law on the subject of homosexuality had developed over the years. Nevertheless, the approach to such matters in an armed forces context had to be cautious given the inherent risks. The process of review was ongoing and the Government indicated their commitment to a free vote in Parliament on the subject after the next Parliamentary Select Committee review of the policy in 2001.

71. Secondly, the Government argued that admitting homosexuals to the armed forces at this time would have a significant and negative effect on the morale of armed forces' personnel and, in turn, on the fighting power and the operational effectiveness of the armed forces. They considered that the observations and conclusions in the HPAT report of February 1996 (and, in particular, Section F of the report) provided clear evidence of the risk to fighting power and operational effectiveness. The Government submitted

that the armed forces' personnel (on whose views the HPAT report was based) were best placed to make this risk assessment and that their views should therefore be afforded considerable weight. Moreover, the relatively recent analyses completed by the HPAT, by the domestic courts (in *R. v. Ministry of Defence, ex parte Smith and Others* 2 Weekly Law Reports 305) and by the Parliamentary Select Committee all led to the conclusion that the policy should be maintained.

The Government considered that the choice between establishing a code of conduct and maintaining the present policy lay at the heart of the judgment to be made in this matter. However, the view in the United Kingdom was that such a code would not at present be sufficient to meet the risks identified because it was the knowledge or suspicion of the fact that a person was homosexual, and not the conduct of that person, which would cause damage to morale and effectiveness. Even assuming that the attitudes on which the HPAT report was based were at least in part based on a lack of tolerance or on insufficient broadmindedness, the reality of the risk to effectiveness remained. It was true that many European armed forces no longer excluded homosexuals but the relevant changes had been adopted in those countries too recently to yield any valuable lessons.

As to the applicants' submission about the alleged lack of evidence of past problems caused by the presence of homosexuals in the armed forces, the Government pointed out that the discharge of all persons of established homosexual orientation before such damage occurred meant that concrete evidence establishing the risks identified by the HPAT might not be available. In any event, the Government noted that the risks envisaged would result from the general relaxation of the policy, rather than its modification in any particular instance.

72. Thirdly, and as to the charge made by the applicants that the views expressed to the HPAT by the clear majority of serving personnel could be labelled as "homophobic prejudice", the Government pointed out that these views represented genuine concerns expressed by those with first-hand and detailed knowledge of the demands of service life. Most of those surveyed displayed a clear difference in attitude towards homosexuality in civilian life. Conclusions could not be drawn from the fact that women and racial minorities were admitted while homosexuals were not because women and men were segregated in recognition of potential problems that might arise, whereas such arrangements were simply not possible in the case of same sex orientation. The concerns about homosexuals were of a type and intensity not engendered by women or racial minorities.

73. Once there was a suspicion of homosexuality, an investigation was carried out. According to the Government, the extent of such investigation would depend on the circumstances but an investigation usually implied questioning the individual and seeking corroborative evidence. If homosexuality was denied, investigations were necessary and even if it was admitted, attempts were made to find relevant evidence through interviews and, depending on the circumstances, other inquiries. The aim of the investigations was to verify the homosexuality of the person suspected in order to detect those seeking an administrative discharge based on false pretences. During the hearing, the Government gave two recent examples of false claims of homosexuality in the army and in the Royal Air Force and three recent examples of such false claims in the Royal Navy. The investigations were also necessary given certain security concerns (in particular, the risk of blackmail of homosexual personnel), in light of the greater risk from the Aids virus in the homosexual community and for disciplinary reasons (homosexual acts might be disciplined in certain cases including, for example, where they resulted from an abuse of authority). The Government maintained that the applicants freely chose, in any event, to answer the questions put to them. Both were told that they did not have to answer the questions and that they could have legal advice.

While the bulk of the questioning was, in the submission of the Government, justified by the reasons for the investigation outlined above, the Government did not seek to defend the level of detailed questioning about precise sexual activities to which, at one stage, Mr Beckett was subjected. However, they argued that these indefensible, but specific, aspects of the questioning did not tilt the balance in favour of a finding of a violation.

(b) The applicants' submissions

74. The applicants submitted that the interferences with their private lives, given the subject matter, nature and extent of the intrusions at issue, were serious and grave and required particularly serious reasons by way of justification (see the Dudgeon judgment cited above, p. 21, § 52). The subject matter of the interferences was a most intimate part of their private lives, made public by the Ministry of Defence policy itself. The applicants also took issue with the detailed investigations carried out by the service police and with, in particular, the prurient questions put during the interviews, together with the search of Mr Beckett's locker and the seizure

of his personal postcards and photographs. Referring also to their years of service, to their promotions (past and imminent), to their exemplary service records and to the fact that there was no indication that their homosexuality had in any way affected their work or service life, the applicants emphasised that they were, nevertheless, deprived of a career in which they excelled on the basis of "unsuitability for service" by reason of a blanket policy against homosexuals in the armed forces.

The applicants added, in this context, that a blanket policy was not adopted by the armed forces in any other context. It was not adopted in the case of personal characteristics or traits such as gender, race or colour. Indeed, the Ministry of Defence actively promoted equality and tolerance in these areas. Nor was there a blanket policy against those whose actions could or did affect morale and service efficiency such as those involved in theft or adultery or those who carried out dangerous acts under the influence of drugs or alcohol. In the latter circumstances, the individual could be dismissed, but only after a consideration of all the circumstances of the case. Moreover, no policy against homosexuals existed in comparable British services such as the Merchant Navy, the Royal Fleet Auxiliary, the police and the fire brigade, Mr Beckett pointing out that he had worked successfully as a police officer since his discharge from the navy.

75. The applicants also argued that the Government's core argument as to the risk to morale and, consequently, to fighting power and operational effectiveness was unsustainable for three main reasons.

76. In the first place, the applicants considered that the Government could not, consistently with Article 8, rely on and pander to the perceived prejudice of other service personnel. Given the absence of any rational basis for armed forces' personnel to behave any differently if they knew that an individual was a homosexual, the alleged risk of adverse reactions by service personnel was based on pure prejudice. It was the responsibility of the armed forces by reason of Article 1 of the Convention to ensure that those they employed understood that it was not acceptable for them to act by reference to pure prejudice. However, rather than taking steps to remedy such prejudice, the armed forces punished the victims of prejudice. The applicants considered that the logic of the Government's argument applied equally to the contexts of racial, religious and gender prejudice; the Government could not seriously suggest that, for example, racial prejudice on the part of armed forces' personnel would be sufficient to justify excluding coloured persons from those forces.

Moreover, Convention jurisprudence established that the Government could not rely on pure prejudice to justify interference with private life (see, *inter alia*, application no. 25186/94, Sutherland v. the United Kingdom, Commission's report of 1 July 1997, as yet unpublished, §§ 56, 57, 62, 63 and 65). Furthermore, the applicants pointed out that the Court has found (in its Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria judgment of 19 December 1994, Series A no. 302, p. 17, §§ 36 and 38) that the demands of "pluralism, tolerance and broadmindedness" apply as much to service personnel as to other persons and that fundamental rights must be protected in the army of a democratic State just as in the society that such an army serves. They argued that the Court's reasoning in that case was based on a vital principle equally applicable in the present case – the armed forces of a country exist to protect the liberties valued by a democratic society, and so the armed forces should not be allowed themselves to march over, and cause substantial damage to, such principles.

77. Secondly, the applicants argued that such perceived prejudice would not have occurred but for the actions of the Ministry of Defence in adopting and applying the policy. The Government accepted that the applicants had worked efficiently and effectively in the armed forces for years without any problems arising by reason of their sexual orientation. The Government's concern related to the presence of openly homosexual service personnel; the private lives of the present applicants were indeed private and would have remained so but for the policy. There was, accordingly, no reason to believe that any difficulty would have arisen had it not been for the policy adopted by the Government.

78. Thirdly, the applicants submitted that the Government were required to substantiate their concerns about the threat to military discipline (see the Vereinigung Demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, § 38) but had not produced any objective evidence to support their submission as to the risk to morale and operational effectiveness.

In this respect, they argued that the HPAT report was inadequate and fundamentally flawed. The assessment was not carried out by independent consultants. It was, moreover, conducted against the background of the publicly voiced hostility of the armed forces' authorities to a change in the policy and followed the circulation of an army consultation document which suggested that senior army personnel thought that the purpose of the HPAT review was to gather evidence in support of the current policy on homosexuality. Indeed the majority of the questions in the HPAT questionnaire expressed hostile attitudes to homosexuality or suggested

negative responses. In addition, the report contained no concrete evidence of specific problems caused by the presence of homosexual personnel in the armed forces of the United Kingdom or overseas. Furthermore, it was based on a statistically insignificant response rate and those responding were not guaranteed anonymity.

79. As to the dismissal by the HPAT of the experience of other countries which did not ban homosexuals from their armed forces, the applicants considered that the statement in the report that armed forces' personnel of such other countries were more tolerant was not supported by any evidence. In any event, even if those other countries had written constitutions and, consequently, a longer tradition of respect for human rights, the Government were required to comply with their Convention obligations. Whether there was a lack of openly homosexual personnel serving in the armed forces of those countries or not, the fact remained that sexual orientation was part of an individual's private life and no conclusions could be drawn from the fact that homosexuals serving in foreign armed forces might have chosen to keep their sexuality private as they were entitled to do. The applicants also pointed to the number of United Kingdom service personnel who had worked and were currently working alongside homosexual personnel in the armed forces of other NATO countries without any apparent problems.

As to the assertion that investigations were necessary to avoid false declarations of homosexuality by those wishing to leave the armed forces, the applicants pointed to the lack of evidence of such false declarations presented by the Government and to the fact that they themselves had clearly wished to stay in the armed forces. In addition, they submitted that they felt obliged to answer the questions in the interviews because otherwise, as the Government accepted, their private and intimate affairs would have been the subject of wider and less discreet investigations elsewhere.

As to the Government's reliance on the Court's Kalaç judgment, the applicants pointed out that the case related to the sanctioning of public conduct and not of an individual's private characteristics.

(c) The Court's assessment

(i) Applicable general principles

80. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a pressing social need and, in particular, is proportionate to the legitimate aim pursued (see the Norris judgment cited above, p. 18, § 41).

Given the matters at issue in the present case, the Court would underline the link between the notion of "necessity" and that of a "democratic society", the hallmarks of the latter including pluralism, tolerance and broadmindedness (see the Vereinigung Demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, § 36, and the Dudgeon judgment cited above, p. 21, § 53).

81. The Court recognises that it is for the national authorities to make the initial assessment of necessity, though the final evaluation as to whether the reasons cited for the interference are relevant and sufficient is one for this Court. A margin of appreciation is left open to Contracting States in the context of this assessment, which varies according to the nature of the activities restricted and of the aims pursued by the restrictions (see the Dudgeon judgment cited above, pp. 21 and 23, §§ 52 and 59).

82. Accordingly, when the relevant restrictions concern "a most intimate part of an individual's private life", there must exist "particularly serious reasons" before such interferences can satisfy the requirements of Article 8 § 2 of the Convention (see the Dudgeon judgment cited above, p. 21, § 52).

When the core of the national security aim pursued is the operational effectiveness of the armed forces, it is accepted that each State is competent to organise its own system of military discipline and enjoys a certain margin of appreciation in this respect (see the Engel and Others judgment cited above, p. 25, § 59). The Court also considers that it is open to the State to impose restrictions on an individual's right to respect for his private life where there is a real threat to the armed forces' operational effectiveness, as the proper functioning of an army is hardly imaginable without legal rules designed to prevent service personnel from undermining it. However, the national authorities cannot rely on such rules to frustrate the exercise by individual members of the armed forces of their right to respect for their private lives, which right applies to service personnel as it does to others within the jurisdiction of the State. Moreover, assertions as to a risk to operational effectiveness must be "substantiated by specific examples" (see, *mutatis mutandis*, the Vereinigung Demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, §§ 36 and 38, and the Grigoriades judgment cited above, pp. 2589-90, § 45).

(ii) Application to the facts of the case

83. It is common ground that the sole reason for the investigations conducted and for the applicants' discharge was their sexual orientation. Concerning as it did a most intimate aspect of an individual's private life, particularly serious reasons by way of justification were required (see paragraph 82 above). In the case of the present applicants, the Court finds the interferences to have been especially grave for the following reasons.

84. In the first place, the investigation process (see the Guidelines at paragraph 42 above and the Government's submissions at paragraph 73) was of an exceptionally intrusive character.

An anonymous letter to Mr Lustig-Prean's commanding officer, and Mr Beckett's confiding in a service chaplain, prompted the investigations into their sexual orientation, a matter which, until then, each applicant had kept private. The investigations were conducted by the service police, whose investigation methods were, according to the HPAT, based on criminal procedures and whose presence the HPAT described as widely publicised and strongly resented among the forces (see paragraph 42 above). It is clear from the transcripts of the interviews that the investigations had already commenced prior to the interviews. Two interviews were conducted with each applicant on the subject of their homosexuality and both applicants were asked detailed questions of an intimate nature about their particular sexual practices and preferences. Certain lines of questioning of both applicants were, in the Court's view, particularly intrusive and offensive and, indeed, the Government accepted that they could not defend the level of detailed questioning about precise sexual activities to which Mr Beckett was, at one point, subjected. Mr Beckett's locker was also searched, personal postcards and photographs were seized and he was later questioned on the content of these items. After the interviews, a service police report was prepared for the naval authorities on each applicant's homosexuality and related matters.

85. Secondly, the administrative discharge of the applicants had, as Sir Thomas Bingham MR described, a profound effect on their careers and prospects.

Prior to the events in question, both applicants enjoyed relatively successful service careers in their particular field. Mr Lustig-Prean had over twelve years' service in the navy and the year before he was discharged he had been promoted to lieutenant-commander. His evaluations prior to and after his discharge were very positive. Mr Beckett enlisted for twenty two years' service. He had served in the navy for over four years and was a substantive weapons engineering mechanic when discharged in July 1993. His evaluations prior to and after his discharge were also very positive. The Government accepted in their observations that neither of the applicants' service records nor the conduct of the applicants gave any grounds for complaint and the High Court described their service records as "exemplary".

The Court notes, in this respect, the unique nature of the armed forces (underlined by the Government in their pleadings before the Court) and, consequently, the difficulty in directly transferring essentially military qualifications and experience to civilian life. In this regard, it recalls that one of the reasons why the Court considered Mrs Vogt's dismissal from her post as a school teacher to be a "very severe measure", was its finding that school teachers in her situation would "almost certainly be deprived of the opportunity to exercise the sole profession for which they have a calling, for which they have been trained and in which they have acquired skills and experience" (Vogt judgment cited above, p. 29, § 60).

86. Thirdly, the absolute and general character of the policy which led to the interferences in question is striking (see the Dudgeon judgment cited above, p. 24, § 61, and the Vogt judgment cited above, p. 28, § 59). The policy results in an immediate discharge from the armed forces once an individual's homosexuality is established and irrespective of the individual's conduct or service record. With regard to the Government's reference to the Kalaç judgment, the Court considers that the compulsory retirement of Mr Kalaç is to be distinguished from the discharge of the present applicants, the former being dismissed on grounds of his conduct while the applicants were discharged on grounds of their innate personal characteristics.

87. Accordingly, the Court must consider whether, taking account of the margin of appreciation open to the State in matters of national security, particularly convincing and weighty reasons exist by way of justification for the interferences with the applicants' right to respect for their private lives.

88. The core argument of the Government in support of the policy is that the presence of open or suspected homosexuals in the armed forces would have a substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces. The Government rely in this respect on the report of the HPAT and, in particular, on Section F of the report.

Although the Court acknowledges the complexity of the study undertaken by the HPAT, it entertains certain doubts as to the value of the HPAT report for present purposes. The independence of the assessment contained in the report is open to question given that it was completed by Ministry of Defence civil servants and service personnel (see paragraph 44 above) and given the approach to the policy outlined in the letter circulated by the Ministry of Defence in August 1995 to management levels in the armed forces (see paragraph 26 above). In addition, on any reading of the Report and the methods used (see paragraph 45 above), only a very small proportion of the armed forces' personnel participated in the assessment. Moreover, many of the methods of assessment (including the consultation with policy-makers in the Ministry of Defence, one-to-one interviews and the focus group discussions) were not anonymous. It also appears that many of the questions in the attitude survey suggested answers in support of the policy.

89. Even accepting that the views on the matter which were expressed to the HPAT may be considered representative, the Court finds that the perceived problems which were identified in the HPAT report as a threat to the fighting power and operational effectiveness of the armed forces were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation. The Court observes, in this respect, that no moral judgment is made on homosexuality by the policy, as was confirmed in the affidavit of the Vice Chief of the Defence Staff filed in the Perkins' proceedings (see paragraph 43 above). It is also accepted by the Government that neither the records nor conduct of the applicants nor the physical capability, courage, dependability and skills of homosexuals in general are in any way called into question by the policy.

90. The question for the Court is whether the above-noted negative attitudes constitute sufficient justification for the interferences at issue.

The Court observes from the HPAT report 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 outlined above, any more than similar negative attitudes towards those of a different race, origin or colour.

91. The Government emphasised that the views expressed in the HPAT report served to show that any change in the policy would entail substantial damage to morale and operational effectiveness. The applicants considered these submissions to be unsubstantiated.

92. The Court notes the lack of concrete evidence to substantiate the alleged damage to morale and fighting power that any change in the policy would entail. Thorpe LJ in the Court of Appeal found that there was no actual or significant evidence of such damage as a result of the presence of homosexuals in the armed forces (see paragraph 33 above), and the Court further considers that the subsequent HPAT assessment did not, whatever its value, provide evidence of such damage in the event of the policy changing. Given the number of homosexuals dismissed between 1991 and 1996 (see paragraph 60 above), the number of homosexuals who were in the armed forces at the relevant time cannot be said to be insignificant. Even if the absence of such evidence can be explained by the consistent application of the policy, as submitted by the Government, this is insufficient to demonstrate to the Court's satisfaction that operational effectiveness problems of the nature and level alleged can be anticipated in the absence of the policy (see the Vereinigung Demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, § 38).

93. However, in the light of the strength of feeling expressed in certain submissions to the HPAT and the special, interdependent and closely knit nature of the armed forces' environment, the Court considers it reasonable to assume that some difficulties could be anticipated as a result of any change in what is now a long-standing policy. Indeed, it would appear that the presence of women and racial minorities in the armed forces led to relational difficulties of the kind which the Government suggest admission of homosexuals would entail (see paragraphs 56 and 57 above).

94. The applicants submitted that a strict code of conduct applicable to all personnel would address any potential difficulties caused by negative attitudes of heterosexuals. The Government, while not rejecting the possibility out of hand, emphasised the need for caution given the subject matter and the armed forces context of the policy and pointed out that this was one of the options to be considered by the next Parliamentary Select Committee in 2001.

95. The Court considers it important to note, in the first place, the approach already adopted by the armed forces to deal with racial discrimination and with racial and sexual harassment and bullying (see paragraphs 56-57 above). The January 1996 Directive, for example, imposed both a strict code of conduct on every soldier together with disciplinary rules to deal with any inappropriate behaviour and conduct. This dual approach was supplemented with information leaflets and training programmes, the army emphasising the need for high standards of personal conduct and for respect for others.

The Government, nevertheless, underlined that it is "the knowledge or suspicion of homosexuality" which would cause the morale problems and not conduct, so that a conduct code would not solve the anticipated difficulties. However, in so far as negative attitudes to homosexuality are insufficient, of themselves, to justify the policy (see paragraph 90 above), they are equally insufficient to justify the rejection of a proposed alternative. In any event, the Government themselves recognised during the hearing that the choice between a conduct code and the maintenance of the policy lay at the heart of the judgment to be made in this case. This is also consistent with the Government's direct reliance on Section F of the HPAT's report, where the anticipated problems identified as posing a risk to morale were almost exclusively problems relating to behaviour and conduct (see paragraphs 46-47 above).

The Government maintained that homosexuality raised problems of a type and intensity that race and gender did not. However, even if it can be assumed that the integration of homosexuals would give rise to problems not encountered with the integration of women or racial minorities, the Court is not satisfied that the codes and rules which have been found to be effective in the latter case would not equally prove effective in the former. The "robust indifference" reported by the HPAT of the large number of British armed forces' personnel serving abroad with allied forces to homosexuals serving in those foreign forces, serves to confirm that the perceived problems of integration are not insuperable (see paragraph 52 above).

96. The Government highlighted particular problems which might be posed by the communal accommodation arrangements in the armed forces. Detailed submissions were made during the hearing, the parties disagreeing as to the potential consequences of shared single-sex accommodation and associated facilities.

The Court notes that the HPAT itself concluded that separate accommodation for homosexuals would not be warranted or wise and that substantial expenditure would not, therefore, have to be incurred in this respect. Nevertheless, the Court remains of the view that it has not been shown that the conduct codes and disciplinary rules referred to above could not adequately deal with any behavioural issues arising on the part either of homosexuals or of heterosexuals.

97. The Government, referring to the relevant analysis in the HPAT report, further argued that no worthwhile lessons could be gleaned from the relatively recent legal changes in those foreign armed forces which now admitted homosexuals. The Court disagrees. It notes the evidence before the domestic courts to the effect that the European countries operating a blanket legal ban on homosexuals in their armed forces are now in a small minority. It considers that, even if relatively recent, the Court cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of Contracting States on this issue (see the Dudgeon judgment cited above, pp. 23-24, § 60).

98. Accordingly, the Court concludes that convincing and weighty reasons have not been offered by the Government to justify the policy against homosexuals in the armed forces or, therefore, the consequent discharge of the applicants from those forces.

99. While the applicants' administrative discharges were a direct consequence of their homosexuality, the Court considers that the justification for the investigations into the applicants' homosexuality requires separate consideration in so far as those investigations continued after the applicants' early and clear admissions of homosexuality.

100. The Government maintained that investigations, including the interviews and searches, were necessary in order to detect false claims of homosexuality by those seeking administrative discharges from the armed forces. The Government cited five examples of individuals in the armed forces who had relatively recently made such false claims. However, since it was and is clear, in the Court's opinion, that at the relevant time both Mr Lustig-Prean and Mr Beckett wished to remain in the navy, the Court does not find that the risk of false claims of homosexuality could, in the case of the present applicants, provide any justification for their continued questioning.

101. The Government further submitted that the medical, security and disciplinary concerns outlined by the HPAT justified certain lines of questioning of the applicants. However, the Court observes that, in the HPAT report, security issues relating to those suspected of being homosexual were found not to stand up to close examination as a ground for maintaining the policy. The Court is, for this reason, not persuaded that the risk of blackmail, being the main security ground canvassed by the Government, justified the continuation of the questioning of either of the present applicants. Similarly, the Court does not find that the clinical risks (which were, in any event, substantially discounted by the HPAT as a ground for maintaining the policy) justified the extent of the applicants' questioning. Moreover, no disciplinary issue existed in the case of either applicant.

102. The Government, referring to the cautions given to the applicants at the beginning of their interviews, further argued that the applicants were not obliged to participate in the interview process. Moreover, Mr Beckett was asked to consent to a search of his locker. The Court considers, however, that the applicants did not have any real choice but to cooperate. It is clear that the interviews formed a standard and important part of the investigation process which was designed to verify to "a high standard of proof" the sexual orientation of the applicants (see the Guidelines at paragraph 42 above and the Government's submissions at paragraph 73). Had the applicants not participated in the interview process and had Mr Beckett not consented to the search, the Court is satisfied that the authorities would have proceeded to verify the suspected homosexuality of the applicants by other means which were likely to be less discreet. This was, in fact, made clear a number of times to Mr Lustig-Prean during his interview, who confirmed that he wished to keep the matter as discreet as possible.

103. In such circumstances, the Court considers that the Government have not offered convincing and weighty reasons justifying the continued investigation of the applicants' sexual orientation once they had confirmed their homosexuality to the naval authorities.

104. In sum, the Court finds that neither the investigations conducted into the applicants' sexual orientation, nor their discharge on the grounds of their homosexuality in pursuance of the Ministry of Defence policy, were justified under Article 8 § 2 of the Convention.

105. Accordingly, there has been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 8

106. The applicants also invoked Article 14 of the Convention in conjunction with Article 8 in relation to the operation of the Ministry of Defence policy against them. Article 14 reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

107. The Government argued that no separate issue arose under Article 14 of the Convention and the applicants relied on their submissions outlined in the context of Article 8 above.

108. The Court considers that, in the circumstances of the present case, the applicants' complaints that they were discriminated against on grounds of their sexual orientation by reason of the existence and application of the policy of the Ministry of Defence, amounts in effect to the same complaint, albeit seen from a different angle, that the Court has already considered in relation to Article 8 of the Convention (see the Dudgeon judgment cited above, pp. 25-26, §§ 64-70).

109. Accordingly, the Court considers that the applicants' complaints under Article 14 in conjunction with Article 8 do not give rise to any separate issue.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

110. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

111. The applicants submitted detailed claims for compensation in respect of pecuniary and non-pecuniary damage and for the reimbursement of their costs and expenses. However, they required further information from the Government before they could complete their proposals.

112. The Government argued at the hearing that a finding of a violation would be sufficient just satisfaction or, in the alternative, that the submissions of the applicants were inflated. The Government also required further time to respond in detail to the applicants' definitive proposals.

113. The Court has already agreed to provide further time to the parties to submit their definitive just satisfaction proposals. Accordingly, the Court considers that the question raised under Article 41 is not yet ready for decision. It is, accordingly, necessary to reserve it and to fix the further procedure, account being taken of the possibility of an agreement between the parties (Rule 75 § 4 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;
2. *Holds* that no separate issue arises under Article 14 of the Convention taken in conjunction with Article 8;
3. *Holds* that the question of the application of Article 41 of the Convention is not ready for decision;

Consequently,

(a) *reserves* the said question;

(b) *invites* the parties to notify the Court of any agreement they may reach;

(c) *reserves* the further procedure and *delegates* to the President the power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights building, Strasbourg, on 27 September 1999.

J.-P. COSTA
President

S. DOLLÉ
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly concurring, partly dissenting opinion of Mr Loucaides is annexed to this judgment.

J-P.C.
S.D.

PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE LOUCAIDES

I agree with the majority on all points except as regards the finding that there has been a violation of Article 8 of the Convention by reason of the applicants' discharge from the armed forces on account of their homosexuality.

In this respect I have been convinced by the argument of the Government that particular problems might be posed by the communal accommodation arrangements in the armed forces. The applicants would have to share single-sex accommodation and associated facilities (showers, toilets, etc.) with their heterosexual colleagues. To my mind, the problems in question are in substance analogous to those which would result from the communal accommodation of male members of the armed forces with female members. What makes it necessary for males not to share accommodation and other associated facilities with females is the difference in their sexual orientation. It is precisely this difference between homosexuals and heterosexuals which makes the position of the Government convincing.

I find the answer given by the majority regarding this aspect of the case unsatisfactory. The Court noted (at paragraph 96 of the judgment) that the HPAT considered that "separate accommodation for homosexuals would not be warranted or wise" and the Court found that, in any case, "it ha[d] not been shown that the conduct codes and disciplinary rules ... could not adequately deal with any behavioural issues arising on the part either of homosexuals or of heterosexuals". The fact that separate accommodation is not "warranted or wise" does not justify communal accommodation if such accommodation is really problematic. On the other hand, "conduct codes and disciplinary rules" cannot change the sexual orientation of people and the relevant problems which – for the purposes of the issue under consideration – in the analogous case of women makes it incumbent to accommodate them separately from male soldiers. It is the compulsory living together of groups of people of different sexual orientation which creates the problem. I should add here that if homosexuals had a right to be members of the armed forces their sexual orientation could become known either through them disclosing it or manifesting it in some way.

The aim of not allowing homosexuals in the armed forces was to ensure the operational effectiveness of the armed forces and to this extent the resulting interferences pursued the legitimate aims of "the interests of national security" and "the prevention of disorder". This was accepted by the Court. My disagreement with the majority relates to the question of whether the interference in the present case can be considered "necessary in a democratic society" for the aim in question. The majority underlined the principle that when the relevant restrictions to a Convention right concern a most intimate part of an individual's private life there must exist particularly

serious reasons before the interferences can satisfy the requirements of Article 8 of the Convention. However, I agree with the Government that the narrow margin of appreciation which is applied to cases involving intimate private-life matters is widened in cases like the present, in which the legitimate aim of the relevant restriction relates to the operational effectiveness of the armed forces and, therefore, to the interests of national security. This, I think, is the logical connotation of the principle that in assessing the pressing social need in cases of interferences with the right to respect for an individual's private life from the standpoint of the protection of national security, the State has a wide margin of appreciation (see the Leander v. Sweden judgment of 26 March 1987, Series A no. 116, p. 25, § 59).

Regard must also be had to the principle that limitations incapable of being imposed on civilians may be placed on certain of the rights and freedoms of members of the armed forces (see the Kalaç v. Turkey judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, p. 1209, § 28).

I believe that the Court should not interfere simply because there is a disagreement with the necessity of the measures taken by a State. Otherwise the concept of the margin of appreciation would be meaningless. The Court may substitute its own view for that of the national authorities only when the measure is patently disproportionate to the aim pursued. I should add that the wider the margin of appreciation allowed to the State, the narrower should be the scope for interference by the Court.

I do not think that the facts of the present case justify our Court's interference. As I have already stated above, the sexual orientation of homosexuals does create the problems highlighted by the Government as a result of the communal accommodation with heterosexuals. There is nothing patently disproportionate in the approach of the Government. On the contrary, it was in the circumstances reasonably open to them to adopt the policy of not allowing homosexuals in the armed forces. This condition was made clear to the applicants before their recruitment. It was not imposed afterwards (cf. the Young, James and Webster v. the United Kingdom judgment of 13 August 1981, Series A no. 44, p. 25, § 62). In this respect it may be useful to add that the Convention does not guarantee the right to serve in the armed forces (see Marangos v. Cyprus, application no. 31106/96, decision on admissibility, 3 December 1997, p. 14, unpublished).

In the circumstances, I find that the applicants' discharge on account of their homosexuality in pursuance of the Ministry of Defence policy was justified under Article 8 § 2 of the Convention, as being necessary in a democratic society in the interests of national security and the prevention of disorder.

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF SMITH AND GRADY
v. THE UNITED KINGDOM

(Applications nos. 33985/96 and 33986/96)

JUDGMENT

STRASBOURG

27 September1999

In the case of Smith and Grady v. the United Kingdom,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Sir Nicolas BRATZA,
Mr L. LOUCAIDES,
Mr P. KŪRIS,
Mr W. FUHRMANN,
Mrs H.S. GREVE,
Mr K. TRAJA, *Judges,*

and also of Ms S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 18 May and 24 August 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in two applications against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

The first applicant, Ms Jeanette Smith, is a British national born in 1966 and resident in Edinburgh. Her application was introduced on 9 September 1996 and was registered on 27 November 1996 under file no. 33985/96. The second applicant, Mr Graeme Grady, is a British national born in 1963 and resident in London. His application was introduced on 6 September 1996 and was also registered on 27 November 1996 under file no. 33986/96. Both applicants were represented before the Commission and, subsequently, before the Court by Mr P. Leech, a legal director of Liberty which is a civil liberties group based in London.

2. The applicants complained that the investigations into their homosexuality and their discharge from the Royal Air Force on the sole ground that they are homosexual constituted violations of Article 8 of the Convention taken alone and in conjunction with Article 14. They also invoked Articles 3 and 10 of the Convention taken alone and in conjunction with Article 14 in relation to the policy of the Ministry of Defence against homosexuals in the armed forces and the consequent investigations and discharges. They further complained under Article 13 that they did not have an effective domestic remedy for these violations.

3. On 20 May 1997 the Commission (Plenary) decided to give notice of the applications to the United Kingdom Government ("the Government") and invited them to submit observations on the admissibility and merits of the applications. In addition, the applications were joined to two similar applications (nos. 31417/96 and 32377/96, Lustig-Prean v. the United Kingdom and Beckett v. the United Kingdom).

The Government, represented by Mr M. Eaton and, subsequently, by Mr C. Whomersley, both Agents, Foreign and Commonwealth Office, submitted their observations on 17 October 1997.

4. On 17 January 1998 the Commission decided to adjourn the applications pending the outcome of a reference to the European Court of Justice ("ECJ") pursuant to Article 177 of the Treaty of Rome by the English High Court on the question of the applicability of the Council Directive 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 76/207/EEC ("the Equal Treatment Directive") to a difference of treatment based on sexual orientation.

5. On 17 April 1998 the applicants submitted their observations in response to those of the Government.

6. On 13 July 1998 the High Court delivered its judgment withdrawing its reference of the above question given the decision of the ECJ in the case of *R. v. Secretary of State for Defence, ex parte Perkins* (13 July 1998).

7. Following the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 2 thereof, the applications fall to be examined by the Court.

In accordance with Rule 52 § 1 of the Rules of Court[1], the President of the Court, Mr L. Wildhaber, assigned the case to the Third Section. The Chamber constituted within the Section included *ex officio* Sir Nicolas Bratza, the judge elected in respect of the United Kingdom (Article 27 § 2 of the Convention and Rule 26 § 1 (a)), and Mr J.-P. Costa, Acting President of the Section and President of the Chamber (Rules 12 and 26 § 1 (a)). The other members designated by the latter to complete the Chamber were Mr L. Loucaides, Mr P. Kūris, Mr W. Fuhrmann, Mrs H.S. Greve and Mr K. Traja (Rule 26 § 1 (b)).

8. On 23 February 1998 the Chamber declared the applications admissible[2] and, while it retained the joinder of the present applications, it decided to disjoin them from the Lustig-Prean and Beckett cases. The Chamber also decided to hold a hearing on the merits of case.

Notes by the Registry

1. The Rules of Court came into force on 1 November 1998.
2. The text of the Court's decision is obtainable from the Registry.

9. On 29 April 1999 the President of the Chamber decided to grant Ms Smith legal aid.

10. The hearing in this case and in the case of Lustig-Prean and Beckett v. the United Kingdom, took place in public in the Human Rights Building, Strasbourg, on 18 May 1999.

There appeared before the Court:

(a) *for the Government*
Mr C. WHOMERSLEY, Foreign and Commonwealth Office, *Agent*,
Mr J. EADIE, *Counsel*,
Mr J. BETTELEY,
Ms J. PFIEFFER, *Advisers*;

(b) *for the applicants*
Mr B. EMMERSON,
Ms J. SIMOR, *Counsel*,
Mr P. LEECH,
Ms D LUPING, *Solicitors*,
Mr A. CLAPHAM, *Adviser*.

The Court heard addresses by Mr Emmerson and Mr Eadie.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The first applicant

11. On 8 April 1989 Ms Jeanette Smith (the first applicant) joined the Royal Air Force to serve a nine-year engagement (which could be extended) as an enrolled nurse. She subsequently obtained the rank of senior aircraft woman. From 1991 to 1993 she was recommended for promotion. A promotion was dependent on her becoming a staff nurse and in 1992 she was accepted for the relevant conversion course. Her final exams were to take place in September 1994.

12. On 12 June 1994 the applicant found a message on her answering machine from an unidentified female caller. The caller stated that she had informed the air force authorities of the applicant's homosexuality. On

13 June 1994 the applicant did not report, as required, for duty. On that day a woman telephoned the air force Provost and Security Service ("the service police") stating, *inter alia*, that the applicant was homosexual and was sexually harassing the caller.

13. On 15 June 1994 the applicant reported for duty. She was called to a pre-disciplinary interview because of her absence without leave. In explaining why she did not report for duty, she referred to the anonymous telephone message and admitted that she was homosexual. She also confirmed that she had a previous and current homosexual relationship. Both relationships were with civilians and the current relationship had begun eighteen months previously. The assistance of the service police was requested, a unit investigation report was opened and an investigator from the service police was appointed.

14. The applicant was interviewed on the same day by that investigator and another officer (female) from the service police. The interview lasted approximately thirty-five minutes. She was cautioned that she did not have to say anything but that anything she did say could be given in evidence. The applicant later confirmed that her solicitor had advised her not to say anything but she agreed that she would answer simple questions but not the "nitty gritty". She was told that she may be asked questions which could embarrass her and that if she felt embarrassed she should say so. It was also explained that the purpose of the questions was to verify that her admission was not an attempt to obtain an early discharge from the service.

The applicant confirmed that, while she had had "thoughts" about her sexual orientation for about six years, she had her first lesbian relationship during her first year in the air force. She was asked how she came to realise that she was lesbian, the names of her previous partners (she refused to give this information) and whether her previous partners were in the service (this question was put a number of times). She was questioned about how she had met her current partner and the extent of her relationship with that partner but she would not respond at first, at which stage her interviewer queried how else he was to substantiate her homosexuality. The applicant then confirmed that she and her partner had a full sexual relationship.

She was also asked whether she and her partner had a sexual relationship with their foster daughter (16 years old). The applicant indicated that she knew the consequences of her homosexuality being discovered and, while she considered herself just as capable of doing the job as another, she had come to terms with what was going to happen to her. The interviewers also wanted to know whether she had taken legal advice, who was her solicitor, what advice he had already given her and what action she proposed to take after the interview. She was also asked whether she had thought about HIV, whether she was being "careful", what she did in her spare time and whether she was into "girlie games" like hockey and netball. The applicant agreed

that her partner, who was waiting outside during the interview, could be interviewed for "corroboration" purposes.

15. The report prepared by the interviewers dated 15 June 1994 described the subsequent interview of the applicant's partner. The latter confirmed that she and the applicant had been involved in a full sexual relationship for about eighteen months but she declined to elaborate further.

16. The investigation report was sent to the applicant's commanding officer who, on 10 August 1994, recommended the applicant's administrative discharge. On 16 November 1994 the applicant received a certificate of discharge from the armed forces. An internal air force document dated 17 October 1996 described the applicant's overall general assessment for trade proficiency and personal qualities as very good and her overall conduct assessments as exemplary.

B. The second applicant

17. On 12 August 1980 Mr Graeme Grady (the second applicant) joined the Royal Air Force at the rank of aircraftman serving as a trainee administrative clerk. By 1991 he had achieved the rank of sergeant and worked as a personnel administrator, at which stage he was posted to Washington at the British Defence Intelligence Liaison Service (North America) – "BDILS(NA)"). He served as chief clerk and led the BDILS(NA) support staff team. In May 1993 the applicant, who was married with two children, told his wife that he was homosexual.

18. The applicant's general assessment covering the period June 1992 to June 1993 gave him 8 out of a maximum of 9 marks for trade proficiency, supervisory ability and personal qualities. His ability to work well with all rank levels, with Canadian and Australian peers and with his senior officer contacts was noted, his commanding officer concluding that the applicant was highly recommended for promotion (a special recommendation being noted as well within his reach) and that he was particularly suited for "PS [personal assistant]/SDL [special duties list]/Diplomatic duties".

19. Following disclosures to the wife of the head of the BDILS(NA) by their nanny, the head of the BDILS(NA) reported that it was suspected that the applicant was homosexual. A unit investigation report was opened and a service police officer nominated as investigator.

20. On 12 May 1994 the applicant's security clearance was replaced with a lower security clearance. On 17 May 1994 he was relieved of his duties by the head of the BDILS(NA) and was informed that he was being returned to the United Kingdom pending investigation of a problem with his security clearance. On the same day the applicant was brought to his home to pack his belongings and was required to leave Washington for the United

Kingdom. He was then required to remain at the relevant air force base in the United Kingdom.

21. On 19 May 1994 the head of the BDILS(NA) advised two service police investigators, who had by then arrived in Washington, that his own wife, their nanny, the applicant's wife and another (female) employee of the BDILS(NA), together with the latter's husband, should be interviewed.

22. The nanny detailed in a statement how, through her own involvement in the homosexual community, she had come to suspect that the applicant was homosexual. The wife of the head of the BDILS(NA) revealed in interview confidences made to her by the applicant's wife about the applicant's marriage difficulties and sex life and informed investigators about a cycling holiday taken by the applicant with a male colleague. It was decided by the investigators that her statement would serve no useful purpose. The applicant's colleague and the latter's husband also spoke of the applicant's marriage difficulties, the sleeping arrangements of the applicant and his wife and the applicant's cycling holiday with a male colleague. These persons were also asked about the possibility of the applicant having had an extra-marital relationship and of being involved in the homosexual community. The investigators later reported that these friends were clearly loyal to the applicant and not to be believed.

23. The applicant's wife was then interviewed. The case progress report dated 22 May 1994 describes the interview in detail. It was explained to the applicant's wife that the interview related to the applicant's security clearance and that her husband had been transferred to the United Kingdom at short notice in accordance with standard procedure. She agreed to talk to the investigators and, further to questioning, outlined in some detail their financial position, the course of and the current state of their marriage, their sexual habits and the applicant's relationship with his two children. She confirmed that her husband's sexual tendencies were normal and indicated that her husband had gone on his own on the cycling holiday in question.

24. On 23 May 1994 the applicant's lower security clearance was suspended.

25. On 25 May 1994 the applicant was required to attend an interview with the same two investigators who had returned from the United States. It began at 2.35 p.m. and was conducted under caution with an observer (also from the air force) present at the applicant's request. The applicant was informed that an allegation had been made regarding his sexual orientation (the terms "queen" and "out and out bender" were used) and it was made clear that the investigators had been to Washington and had spoken to a number of people, one or two of whom thought he was gay.

The applicant denied he was homosexual. He was asked numerous questions about his work, his relationship with the head of the BDILS(NA), his cycling holiday and about his female colleague. He was told that his wife had been interviewed in detail and he was informed from time to time by the interviewers if his answers matched those of his wife. He was asked to tell the interviewers about the break up of his marriage, whether he had extra-marital affairs, about his and his wife's sex life including their having protected sex and about their financial situation. He was also questioned on the cycling holiday, about a male colleague and the latter's sexual orientation. They asked the applicant who he was calling since he had returned to the United Kingdom and how he was telephoning. He was told that he would be asked to supply his electronic diary which contained names, addresses and telephone numbers and was told that the entries would be verified for homosexual contacts. They informed the applicant that they had a warrant if he did not agree to a search of his accommodation. The applicant agreed to the search. The applicant also requested time to think and to take legal advice. The interview was adjourned at 3.14 p.m.

26. The applicant then took advice from a solicitor and his accommodation was searched. The interview recommenced at 7.44 p.m. with the applicant's solicitor and an observer present. Despite being pressed with numerous questions, the applicant answered "no comment" to most of the questions posed. Given the applicant's responses, his lawyer was asked what advice had been given to the applicant. The applicant's digital diary was taken from him. He was asked whether he realised the security implications of the investigation and that his career was on the line if the allegations against him were proved. One of the investigators then asked him:

> "… if you wish to change your mind and want to speak to me, while I'm still here, before I go back to Washington; because I'm going back to Washington. Because I'm going to see the Colonel tomorrow, that is the one in London, who is then going to see the General and we're going to get permission to speak to the Americans … and I shall stay out there, Graeme, until I have spoken to all Americans that you know. Expense is not a problem. Time is not a problem. …"

The detailed evidence given by his wife to the investigators was put to the applicant, including information about his relationship with his son, his daughter and his mother-in-law, about matters relating to the family home of which the applicant was not aware and about his having protected sex with his wife. The interviewer returned again to the subject of the applicant having previously grown cold towards his wife but now declaring his love for her. The applicant continued to respond "no comment". It was explained to the applicant's solicitor that the service attitude in relation to

investigations involving acts of alleged homosexuality did not warrant the provision of legal advice and that the applicant's solicitor was only delaying matters. The investigators also mentioned that it was a security matter which they would not detail further since his solicitor did not have security clearance, but that the applicant should not be surprised if some counter intelligence people came to talk to him and that there would be no legal advice for that.

The applicant requested time to speak to his lawyer and the interview was interrupted at 8.10 p.m. The applicant then spoke to his lawyer and asked to think about matters overnight.

27. The interview recommenced at 3.27 p.m. on 26 May 1994 with the same investigators and an observer, but the applicant did not require a solicitor. The applicant admitted his homosexuality almost immediately and confirmed that the reason he denied it at first was that he was not clear about the position as regards the retention of certain accumulated benefits on discharge and he was concerned about his family's financial position in that eventuality. However, he had since discovered that his discharge would be administrative and that he would get his terminal benefits, so he could be honest.

The applicant was questioned further about a person called "Randy", whether his wife knew he was homosexual, whether a male colleague was homosexual and when he had "come out". He was asked whether he was a practising homosexual, but he declined to give the name of his current partner, at which stage it was explained to him that the service had to verify his admission of homosexuality to avoid fraudulent attempts at early discharge. He was then questioned about his first sexual relationship (he confirmed that it began in October 1993), his homosexual partners (past and present), who they were, where they worked, how old they were, how the applicant met them and about the nature of his relationship with them, including the type of sex they had.

During this interview, the personal items taken from the applicant were produced and the applicant was questioned about, *inter alia*, the contents of his digital diary, a photograph, a torn envelope and a letter from the applicant to his current partner. He was questioned further about when he first realised he was homosexual, who knew about his sexual orientation, his relationship with his wife (including their sexual relationship), what his wife thought about his homosexuality, his HIV status and again about the nature of his sexual relationships with his homosexual partners. The interview terminated at 4.10 p.m.

28. The investigators prepared a report on 13 June 1994. In his certificate of qualifications and reference on discharge dated 12 October 1994, the applicant was described as a loyal serviceman and a conscientious and hard-working tradesman who could be relied upon to achieve the highest standards. It was also noted that he had displayed sound personal qualities and integrity throughout his service and had enjoyed the respect of his superiors, peers and subordinates alike. The applicant was administratively discharged with effect from 12 December 1994.

C. The applicants' judicial review proceedings (*R. v. Ministry of Defence, ex parte Smith and Others* 2 Weekly LawReports 305)

29. Along with Mr Lustig-Prean and Mr Beckett (see paragraph 3 above), the applicants obtained leave to apply for judicial review of the decisions to discharge them from the armed forces. The applicants argued that the policy of the Ministry of Defence against homosexuals in the armed forces was "irrational", that it was in breach of the Convention and that it was contrary to the Equal Treatment Directive. The Ministry of Defence maintained that the policy was necessary mainly to maintain morale and unit effectiveness, in view of the *loco parentis* role of the services as regards minor recruits and in light of the requirement of communal living in the armed forces.

30. On 7 June 1995 the High Court dismissed the application for judicial review, Lord Justice Simon Brown giving the main judgment of the court. He noted that the cases illustrated the hardships resulting from the absolute policy against homosexuals in the armed forces and that all four of the applicants had exemplary service records, some with reports written in glowing terms. Moreover, he found that in none of the cases before him was it suggested that the applicants' sexual orientation had in any way affected their ability to carry out their work or had any ill-effect on discipline. There was no reason to doubt that, but for their discharge on the sole ground of sexual orientation, they would have continued to perform their service duties entirely efficiently and with the continued support of their colleagues. All were devastated by their discharge.

Simon Brown LJ reviewed the background to the "age old" policy, the relevance of the Parliamentary Select Committee's report of 1991, the position in other armed forces around the world, the arguments of the Ministry of Defence (noting that the security argument was no longer of substantial concern to the Government) together with the applicants' arguments against the policy. He considered that the balance of argument clearly lay with the applicants, describing the applicants' submissions in favour of a conduct-based code as "powerful". In his view, the tide of history was against the Ministry of Defence. He further observed that it was improbable, whatever the High Court would say, that the policy could survive for much longer and added, "I doubt whether most of those present in court throughout the proceedings now believe otherwise."

31. However, having considered arguments as to the test to be applied in the context of these judicial review proceedings, Simon Brown LJ concluded that the conventional Wednesbury principles, adapted to a human rights context, should be applied.

Accordingly, where fundamental human rights were being restricted, the Minister of Defence needed to show that there was an important competing interest to justify the restriction. The primary decision was for him and the secondary judgment of the court amounted to asking whether a reasonable Minister, on the material before him, could have reasonably made that primary judgment. He later clarified that it was only if the purported justification "outrageously defies logic or accepted moral standards" that the court could strike down the Minister's decision. He noted that within the limited scope of that review, the court had to be scrupulous to ensure that no recognised ground of challenge was in truth available to an applicant before rejecting the application. When the most fundamental human rights are threatened, the court would not, for example, be inclined to overlook some minor flaw in the decision-making process, or to adopt a particularly benevolent view of the Minister's evidence, or to exercise its discretion to withhold relief. However, he emphasised that, even where the most fundamental human rights were being restricted, "the threshold of unreasonableness is not lowered".

It was clear that the Secretary of State had cited an important competing public interest. But the central question was whether it was reasonable for the Secretary of State to take the view that allowing homosexuals into the forces would imperil that interest. He pointed out that, although he might have considered the Minister wrong,

> "… [the courts] owe a duty ... to remain within their constitutional bounds and not trespass beyond them. Only if it were plain beyond sensible argument that no conceivable damage could be done to the armed services as a fighting unit would it be appropriate for this court now to remove the issue entirely from the hands of both the military and of the government. If the Convention … were part of our law and we were accordingly entitled to ask whether the policy answers a pressing social need and whether the restriction on human rights involved can be shown proportionate to the benefits then clearly the primary judgment … would be for us and not others: the constitutional balance would shift. But that is not the position. In exercising merely a secondary judgment, this court is bound to act with some reticence. Our approach must reflect, not overlook, where responsibility ultimately lies for the defence of the realm and recognise too that Parliament is exercising a continuing supervision over this area of prerogative power."

Accordingly, while the Minister's suggested justification for the ban may have seemed "unconvincing", the Minister's stand could not properly be said to be unlawful. It followed that the applications had to be rejected "albeit with hesitation and regret". A brief analysis of the Convention's case-law led the judge to comment that he strongly suspected that, as far as the United Kingdom's obligations were concerned, the days of the policy were numbered.

32. Simon Brown LJ also found that the Equal Treatment Directive was not applicable to discrimination on grounds of sexual orientation and that the domestic courts could not rule on Convention matters. He also observed that the United States, Canada, Australia, New Zealand, Ireland, Israel, Germany, France, Norway, Sweden, Austria and the Netherlands permitted homosexuals to serve in their armed forces and that the evidence indicated that the only countries operating a blanket ban were Turkey and Luxembourg (and, possibly, Portugal and Greece).

33. In August 1995 a consultation paper was circulated by the Ministry of Defence to "management" levels in the armed forces relating to the Ministry of Defence's policy against homosexuals in those forces. The covering letter circulating this paper pointed out that the "Minister for the Armed Forces has decided that evidence is to be gathered within the Ministry of Defence in support of the current policy on homosexuality". It was indicated that the case was likely to progress to the European courts and that the applicants in the judicial review proceedings had argued that the Ministry of Defence's position was "bereft of factual evidence" but that this was not surprising since evidence was difficult to amass given that homosexuals were not permitted to serve. Since "this should not be allowed to weaken the arguments for maintaining the policy", the addressees of the letter were invited to comment on the consultation paper and "to provide

any additional evidence in support of the current policy by September 1995". The consultation paper attached referred, *inter alia*, to two incidents which were considered damaging to unit cohesion. The first involved a homosexual who had had a relationship with a sergeant's mess waiter and the other involved an Australian on secondment whose behaviour was described as "so disruptive" that his attachment was terminated.

34. On 3 November 1995 the Court of Appeal dismissed the applicants' appeal. The Master of the Rolls, Sir Thomas Bingham, delivered the main judgment (with which the two other judges of the Court of Appeal agreed).

35. As to the Court's approach to the issue of "irrationality", he considered that the following submission was an accurate distillation of the relevant jurisprudence on the subject:

> "the court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

He went on to quote from, *inter alia*, the judgment of Lord Bridge in *R. v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 Appeal Cases 696, where it was pointed out that:

> "the primary judgment as to whether the particular competing public interest justifies the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make that primary judgment."

Moreover, he considered that the greater the policy content of the decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court had to be in holding a decision to be irrational.

36. Prior to applying this test of irrationality, the Master of the Rolls noted that the case concerned innate qualities of a very personal kind, that the decisions of which the applicants complained had had a profound effect on their careers and prospects and that the applicants' rights as human beings were very much in issue. While the domestic court was not the primary decision-maker and while it was not the role of the courts to regulate the conditions of service in the armed forces, "it has the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power. While the court must properly defer to the expertise of responsible decision-makers, it must not shrink from its fundamental duty to 'do right to all manner of people' …".

37. He then reviewed, by reference to the test of irrationality outlined above, the submissions of the parties in favour of and against the policy,

commenting that the applicants' arguments were "of very considerable cogency" which called to be considered in depth with particular reference to past experience in the United Kingdom, to the developing experience of other countries and to the potential effectiveness of a detailed prescriptive code in place of the present blanket ban. However, he concluded that the policy could not be considered "irrational" at the time the applicants were discharged from the armed forces, finding that the threshold of irrationality was "a high one" and that it had not been crossed in this case.

38. On the Convention, the Master of the Rolls noted as follows:

> "It is, inevitably, common ground that the United Kingdom's obligation, binding in international law, to respect and ensure compliance with [Article 8 of the Convention] is not one that is enforceable by domestic courts. The relevance of the Convention in the present context is as background to the complaint of irrationality. The fact that a decision-maker failed to take account of Convention obligations when exercising an administrative discretion is not of itself a ground for impugning the exercise of that discretion."

He observed that to dismiss a person from his or her employment on the grounds of a private sexual preference, and to interrogate him or her about private sexual behaviour, would not appear to show respect for that person's private and family life and that there might be room for argument as to whether the policy answered a "pressing social need" and, in particular, was proportionate to the legitimate aim pursued. However, he held that these were not questions to which answers could be properly or usefully proffered by the Court of Appeal but rather were questions for the European Court of Human Rights, to which court the applicants might have to pursue their claim. He further accepted that the Equal Treatment Directive did not apply to complaints in relation to sexual orientation.

39. Henry LJ of the Court of Appeal agreed with the judgment of the Master of the Rolls and, in particular, with the latter's approach to the irrationality test and with his view on the inability of the court to resolve Convention issues. He questioned the utility of a debate as to the likely fate of the "longstanding" policy of the Ministry of Defence before the European Court of Human Rights with which the primary adjudicating role on the Convention lay. The Court of Appeal did not entertain "hypothetical questions". In Henry LJ's view, the only relevance of the Convention was as "background to the complaint of irrationality", which point had been already made by the Master of the Rolls. It was important to highlight this point since Parliament had not given the domestic courts primary

jurisdiction over human rights issues contained in the Convention and because the evidence and submissions before the Court of Appeal related to that court's secondary jurisdiction and not to its primary jurisdiction.

40. Thorpe LJ of the Court of Appeal agreed with both preceding judgments and, in particular, with the views expressed on the rationality test to be applied and on its application in the particular case. The applicants' arguments that their rights under Article 8 had been breached were "persuasive" but the evidence and arguments that would ultimately determine that issue were not before the Court of Appeal. He also found that the applicants' challenge to the arguments in support of the policy was "completely persuasive" and added that what impressed him most in relation to the merits was the complete absence of illustration and substantiation by specific examples, not only in the Secretary of State's evidence filed in the High Court, but also in the case presented to the Parliamentary Select Committee in 1991. The policy was, in his view, "ripe for review and for consideration of its replacement by a strict conduct code". However, the applicants' attack on the Secretary of State's rationality fell "a long way short of success".

41. On 19 March 1996 the Appeals Committee of the House of Lords refused leave to appeal to the House of Lords.

D. The applicants' Industrial Tribunal proceedings

42. In or around the time the applicants lodged their applications for leave to take judicial review proceedings, they also instituted proceedings before the Industrial Tribunal alleging discrimination contrary to the Sexual Discrimination Act 1975. The latter proceedings were stayed pending the outcome of the judicial review proceedings.

43. By letter dated 25 November 1998 the applicants confirmed to the Court that they had requested the withdrawal of the Industrial Tribunal proceedings given the outcome of the judicial review proceedings and other intervening jurisprudence of the domestic courts and of the ECJ.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Decriminalisation of homosexual acts

44. By virtue of section 1(1) of the Sexual Offences Act 1967, homosexual acts in private between two consenting adults (at the time meaning 21 years or over) ceased to be criminal offences. However, such acts continued to constitute offences under the Army and Air Force Acts 1955 and the Naval Discipline Act 1957 (Section 1(5) of the 1967 Act). Section 1(5) of the 1967 Act was repealed by the Criminal Justice and Public Order Act 1994 (which Act also reduced the age of consent to 18 years). However, section 146(4) of the 1994 Act provided that nothing in that section prevented a homosexual act (with or without other acts or circumstances) from constituting a ground for discharging a member of the armed forces.

B. *R. v. Secretary of State for Defence, ex parte Perkins*, judgments of 13 March 1997 and 13 July 1998, and related cases

45. On 30 April 1996 the ECJ decided that transsexuals were protected from discrimination on grounds of their transsexuality under European Community law (*P. v. S. and Cornwall County Council* [1996] Industrial Relations Law Reports 347).

46. On 13 March 1997 the High Court referred to the ECJ pursuant to Article 177 of the Treaty of Rome the question of the applicability of the Equal Treatment Directive to differences of treatment based on sexual orientation *(R. v. Secretary of State for Defence, ex parte Perkins*, 13 March 1997). Mr Perkins had been discharged from the Royal Navy on grounds of his homosexuality.

47. On 17 February 1998 the ECJ found that the Equal Pay Directive 75/117/EEC did not apply to discrimination on grounds of sexual orientation (*Grant v. South West Trains Ltd* [1998] Industrial Cases Reports 449).

48. Consequently, on 2 March 1998 the ECJ enquired of the High Court in the Perkins' case whether it wished to maintain the Article 177 reference. After a hearing between the parties, the High Court decided to withdraw the question from the ECJ *(R. v. Secretary of State for Defence, ex parte Perkins*, 13 July 1998). Leave to appeal was refused.

C. The Ministry of Defence policy on homosexual personnel in the armed forces

49. As a consequence of the changes made by the Criminal Justice and Public Order Act 1994, updated Armed Forces' Policy and Guidelines on Homosexuality ("the Guidelines") were distributed to the respective service directorates of personnel in December 1994. The Guidelines provided, *inter alia*, as follows:

> "Homosexuality, whether male or female, is considered incompatible with service in the armed forces. This is not only because of the close physical conditions in which personnel often have to live and work, but also because homosexual behaviour can cause offence, polarise relationships, induce ill-discipline and, as a consequence, damage morale and unit effectiveness. If individuals admit to being homosexual whilst serving and their Commanding Officer judges that this admission is well-founded they will be required to leave the services. ...
>
> The armed forces' policy on homosexuality is made clear to all those considering enlistment. If a potential recruit admits to being homosexual, he/she will not be enlisted. Even if a potential recruit admits to being homosexual but states that he/she does not at present nor in the future intend to engage in homosexual activity, he/she will not be enlisted. ...
>
> In dealing with cases of suspected homosexuality, a Commanding Officer must make a balanced judgment taking into account all the relevant factors. ... In most circumstances, however, the interests of the individual and the armed forces will be best served by formal investigation of the allegations or suspicion. Depending on the circumstances, the Commanding Officer will either conduct an internal inquiry, using his own staff, or he will seek assistance from the Service Police. When conducting an internal inquiry he will normally discuss the matter with his welfare support staff. Homosexuality is not a medical matter, but there may be circumstances in which the Commanding Officer should seek the advice of the Unit Medical Officer on the individual concerned and may then, if the individual agrees, refer him/her to the Unit Medical Officer. ...
>
> A written warning in respect of an individual's conduct or behaviour may be given in circumstances where there is some evidence of homosexuality but insufficient ... to apply for administrative discharge ... . If the Commanding Officer is satisfied on a high standard of proof of an individual's homosexuality, administrative action to terminate service ... is to be initiated, ..."

One of the purposes of the Guidelines was the reduction of the involvement of the service police whose investigatory methods, based on criminal procedures, had been strongly resented and widely publicised in the past (confirmed at paragraph 9 of the Homosexual Policy Assessment Team's report of February 1996 which is summarised at paragraphs 51-62 below. However, paragraph 100 of this report indicated that investigation into homosexuality is part of "normal service police duties".)

50. The affidavit of Air Chief Marshal Sir John Frederick Willis KCB, CBE, Vice Chief of the Defence Staff, Ministry of Defence dated 4 September 1996, which was submitted to the High Court in the case of *R. v. Secretary of State for Defence, ex parte Perkins* (13 July1998), read, in so far as relevant, as follows:

> "The policy of the Ministry of Defence is that the special nature of homosexual life precludes the acceptance of homosexuals and homosexuality in the armed forces. The primary concern of the armed forces is the maintenance of an operationally effective and efficient force and the consequent need for strict maintenance of discipline. [The Ministry of Defence] believes that the presence of homosexual personnel has the potential to undermine this.
>
> The conditions of military life, both on operations and within the service environment, are very different from those experienced in civilian life. … The [Ministry of Defence] believes that these conditions, and the need for absolute trust and confidence between personnel of all ranks, must dictate its policy towards homosexuality in the armed forces. It is not a question of a moral judgement, nor is there any suggestion that homosexuals are any less courageous than heterosexual personnel; the policy derives from a practical assessment of the implications of homosexuality for fighting power."

D. The report of the Homosexuality Policy Assessment Team – February 1996

1. General

51. Following the decision in the case *of R. v. Ministry of Defence, ex parte Smith and Others* 2 Weekly Law Reports 305, the Homosexuality Policy Assessment Team ("HPAT") was established by the Ministry of Defence in order to undertake an internal assessment of the armed forces' policy on homosexuality. The HPAT was composed of Ministry of Defence civil servants and representatives of the three services. The HPAT's assessment was to form the basis of the Ministry's evidence to the next Parliamentary Select Committee (as confirmed in the affidavit of Air Chief Marshal Sir John Frederick Willis referred to at paragraph 50 above). The HPAT was to consult the Ministry of Defence, the armed forces' personnel of all ranks, service and civilian staff responsible for carrying out the policy together with members of the legal adviser's staff. It was also to examine the policies of other nations (Annex D to the HPAT report).

The report of the HPAT was published in February 1996 and ran to approximately 240 pages, together with voluminous annexes. The starting-point of the assessment was an assumption that homosexual men and women were in themselves no less physically capable, brave, dependable and skilled than heterosexuals. It was considered that any problems to be identified would lie in the difficulties which integration of declared homosexuals would pose to the military system which was largely staffed by heterosexuals. The HPAT considered that the best predictors of the "reality and severity" of the problems of the integration of homosexuals would be the service personnel themselves (paragraph 30 of the report).

2. The methods of investigation used

52. There were eight main areas of investigation (paragraph 28 of the report):

(a) The HPAT consulted with policy-makers in the Ministry of Defence. The latter emphasised the uniqueness of the military environment and the distinctly British approach to service life and the HPAT found little disagreement with this general perspective from the service people it interviewed (paragraph 37);

(b) A signal was sent to all members of the services, including the reserve forces, requesting any written views on the issues. By 16 January 1996 the HPAT had received 639 letters. 587 of these letters were against any change in the policy, 58 of which were multiply signed. Only 11 of those letters were anonymous (paragraphs 46-48);

(c) The HPAT attitude survey consisted of a questionnaire administered to a total of 1,711 service personnel chosen as representative of the services. The questionnaires were administered in examination-type conditions and were to be completed anonymously. The results indicated that there was "overwhelming support across the services" for the policy excluding homosexuals from the armed forces. Service personnel viewed homosexuality as clearly more acceptable in civilian than in service life (paragraphs 49-59 and Annex G);

(d) During the HPAT's visit to ten military bases in late 1995 in order to administer the above questionnaire, individual one-to-one interviews were conducted with personnel who had completed the attitude questionnaire. 180 interviewees randomly selected from certain ranks and occupational areas were selected from each of the ten units visited. Given the small number of interviewees, the responses were analysed qualitatively rather than quantitatively (Annex G);

(e) A number of single-service focus group discussions were held with randomly selected personnel from representative ranks and functions (Annex G refers to 36 such discussions whereas paragraph 61 of the report refers to 43). The purpose of the group discussions was to examine the breadth and depth of military views and to provide insights that would complement the survey results. The HPAT commented that the nature of the discussions showed little reticence in honestly and fully putting forward views; there was an "overwhelming view that homosexuality was not 'normal' or 'natural' whereas women and ethnic minorities were 'normal'". The vast majority of participants believed that the present ban on homosexuals should remain (paragraphs 61-69 and Annex G);

(f) One sub-team of the HPAT went to Australia, Germany and France and the other visited the United States, Canada and the Netherlands. The HPAT interviewed an eminent Israeli military psychologist since the Israeli military would not accept the HPAT visit (paragraphs 70-77 and Annex H). It is also apparent that the HPAT spoke to representatives of the police, the fire service and the merchant navy (paragraphs 78-82);

(g) Tri-service regional focus discussion groups were also held to examine the breadth and depth of the personnel's views. The groups were drawn from the three services and from different units. Three such discussion groups were held and overall the results were the same as those from the single-service focus groups (paragraphs 83-84 and Annex G);

(h) Postal single-service attitude surveys were also completed by a randomly selected sample of personnel stratified by rank, age and gender. The surveys were distributed to 3,000 (6%) of the Royal Navy and Royal Marine personnel, to 6,000 (5.4%) of the Army personnel and to 4,491 (6%) of the Royal Air Force personnel. On average over half of the surveys were returned (paragraphs 65-86 and Annex G).

3. The impact on fighting power

53. The HPAT report defined "fighting power" (often used interchangeably with combat effectiveness, operational efficiency or operational effectiveness) as the "ability to fight" which is in turn made up of three components. These are the "conceptual" and "physical" components together with the "moral component", the latter being defined as "the ability to get people to fight including morale, comradeship, motivation, leadership and management".

54. The focus throughout the assessment was upon the anticipated effects on fighting power and this was found to be the "key problem" in integrating homosexuals into the armed forces. It was considered well established that the presence of known or strongly suspected homosexuals in the armed forces would produce certain behavioural and emotional responses and problems which would affect morale and, in turn, significantly and negatively affect the fighting power of the armed forces.

These anticipated problems included controlling homosexual behaviour and heterosexual animosity, assaults on homosexuals, bullying and harassment of homosexuals, ostracism and avoidance, "cliquishness" and pairing, leadership and decision-making problems including allegations of favouritism, discrimination and ineffectiveness (but excluding the question of homosexual officers taking tactical decisions swayed by sexual preference), sub-cultural friction, privacy/decency issues, increased dislike and suspicions (polarised relationships), and resentment over imposed change especially if controls on heterosexual expression also had to be tightened (see Section F.II of the report).

4. Other issues

55. The HPAT also assessed other matters it described as "subsidiary" (Section G and paragraph 177 of the Report). It found that, while cost implications of changing the policy were not quantifiable, it was not considered that separate accommodation for homosexuals would be warranted or wise and, accordingly, major expenditures on accommodation were considered unlikely (paragraphs 95-97). Wasted training as regards discharged homosexuals was not considered to be a significant argument against maintaining the policy (paragraphs 98-99). Should the wider social and legal position change in relation to civilian homosexual couples, then entitlements for homosexual partners would have to be accepted (paragraph 101). Large amounts of money or time were unlikely to be devoted to homosexual awareness training, given that it was unlikely to be effective in changing attitudes. It was remarked that, if required, tolerance training would probably be best addressed as "part of an integrated programme for equal opportunities training in the military" (paragraph 102). There were strong indications that recruitment and retention rates would go down if there was a change in policy (paragraphs 103-04).

56. Concerns expressed about the fulfilment of the forces' *loco parentis* responsibilities for young recruits were found not to stand up to close examination (paragraph 111).

5. Medical and security concerns

57. Medical and security concerns were considered separately (Sections H and I, respectively, and paragraph 177 of the report). While it was noted that medical concerns of personnel (in relation to, *inter alia*, Aids) were disproportionate to the clinical risks involved, it was considered that these concerns would probably need to be met with education packages and compulsory Aids testing. Otherwise, real acceptance and integration of homosexuals would be seriously prejudiced by emotional reactions and resentments and by concerns about the threat of Aids. The security issues (including the possibility of blackmail of those suspected of being homosexual) raised in defence of the policy were found not to stand up to close examination.

6. The experience in other countries and in civilian disciplined services

58. The HPAT observed that there were a wide variety of official positions and legal arrangements evolving from local legal and political circumstances and ranging from a formal prohibition of all homosexual activity (the United States), to administrative arrangements falling short of real equality (France and Germany), to a deliberate policy to create an armed force friendly to homosexuals (the Netherlands). According to the HPAT, those countries which had no legal ban on homosexuals were more tolerant, had written constitutions and therefore a greater tradition of respect for human rights. The report continued:

> "But nowhere did HPAT learn that there were significant numbers of open homosexuals serving in the Forces … . Whatever the degree of official toleration or encouragement, informal pressures or threats within the military social system appeared to prevent the vast majority of homosexuals from choosing to exercise their varying legal rights to open expression of their active sexual identity in a professional setting. … It goes without saying that the continuing reticence of military homosexuals in these armed forces means that there has been little practical experience of protecting them against ostracism, harassment or physical attack.
>
> Since this common pattern of a near absence of openly homosexual personnel occurs irrespective of the formal legal frameworks, it is reasonable to assume that it is the informal functioning of actual military systems which is largely incompatible with homosexual self-expression. This is entirely consistent with the pattern of British service personnel's attitudes confirmed by the HPAT."

59. In January 1996 there were over 35,000 British service personnel (25% approximately of the British armed forces) deployed overseas on operations, more than any other NATO country in Europe (paragraph 43).

The HPAT concluded, nevertheless, that the policy had not presented significant problems when working with the armed forces of allied nations. The HPAT remarked that British service personnel had shown a "robust indifference" to arrangements in foreign forces and no concern over what degree of acceptance closely integrated allies give to homosexuals. This is because the average service person considers that those others "are not British, have different standards, and are thus only to be expected to do things differently" and because personnel from different nations are accommodated apart. It was also due to the fact that homosexuals in foreign forces, where they were not formally banned, were not open about their sexual orientation. Consequently, the chances were small of the few open homosexuals happening to be in a situation where their sexual orientation would become a problem with British service personnel (paragraph 105).

60. Important differences were considered by the HPAT to exist between the armed forces and civilian disciplined services in the United Kingdom including the police, the fire brigade and the merchant navy which did not operate the same policy against homosexuals. It considered that:

> "None of these occupations involves the same unremittingly demanding and long-term working environment as the Armed Forces, or requires the same emphasis on building rapidly interchangeable, but fiercely committed and self-supporting teams, capable of retaining their cohesion after months of stress, casualties and discomfort …" (paragraph 203)

7. Alternative options to the current policy

61. Alternative options were considered by the HPAT including a code of conduct applicable to all, a policy based on the individual qualities of homosexual personnel, lifting the ban and relying on service personnel reticence, the "don't ask, don't tell" solution offered by the USA and a "no open homosexuality" code. It concluded that no policy alternative could be identified which avoided risks for fighting power with the same certainty as the present policy and which, in consequence, would not be strongly opposed by the service population (paragraphs 153-75).

8. The conclusions of the HPAT (paragraphs 176-91)

62. The HPAT found that:

> "the key problem remains and its intractability has indeed been re-confirmed. The evidence for an anticipated loss in fighting power has been set out in section F and forms the centrepiece of this assessment. The various steps in the argument and the overall conclusion have been shown not only by the Service authorities but by the great majority of Service personnel in all ranks".

Current service attitudes were considered unlikely to change in the near future. While clearly hardship and invasion of privacy were involved, the risk to fighting power demonstrated why the policy was, nevertheless, justified. It considered that it was not possible to draw any meaningful comparison between the integration of homosexuals and of women and ethnic minorities into the armed forces since homosexuality raised problems of a type and intensity that gender and race did not.

The HPAT considered that, in the longer term, evolving social attitudes towards homosexuality might reduce the risks to fighting power inherent in change but that their assessment could "only deal with present attitudes and risks". It went on:

> "… certainly, if service people believed that they could work and live alongside homosexuals without loss of cohesion, far fewer of the anticipated problems would emerge. But the Ministry must deal with the world as it is. Service attitudes, in as far as they differ from those of the general population, emerge from the unique conditions of military life, and represent the current social and psychological realities. They indicate military risk from a policy change…
>
> … after collecting the most exhaustive evidence available, it is also evident that in the UK homosexuality remains in practice incompatible with service life if the armed services, in their present form, are to be maintained at their full potential fighting power. ... Furthermore, the justification for the present policy has been overwhelmingly endorsed by a demonstrated consensus of the profession best able to judge it. It must follow that a major change to the Ministry's current Tri-service Guidelines on homosexuality should be contemplated only for clearly stated non-defence reasons, and with a full acknowledgement of the impact on Service effectiveness and service people's feelings."

E. The armed forces' policy on sexual and racial harassment and bullying and on equal opportunities

63. The Defence Council's "Code of Practice on Race Relations" issued in December 1993 declared the armed forces to be equal opportunity employers. It stated that no form of racial discrimination, harassment or abuse would be tolerated, that allegations would be investigated and, if proved, disciplinary action would be taken. It provided for a complaints procedure in relation to discrimination or harassment and it warned against the victimisation of service personnel who made use of their right of complaint and redress.

64. In January 1996 the army published an Equal Opportunities Directive dealing with racial and sexual harassment and bullying. The policy document contained, as a preamble, a statement of the Adjutant-General which reads as follows:

> "The reality of conflict requires high levels of teamwork in which individual soldiers can rely absolutely on their comrades and their leaders. There can, therefore, be no place in the Army for harassment, bullying and discrimination which will affect morale and break down the trust and cohesion of the group.
>
> It is the duty of every soldier to ensure that the Army is kept free of such behaviour which would affect cohesion and efficiency. Army policy is clear: all soldiers must be treated equally on the basis of their ability to perform their duty.
>
> I look to each one of you to uphold this policy and to ensure that we retain our acknowledged reputation as a highly professional Army."

The Directive provided definitions of racial and sexual harassment, indicated that the army wanted to prevent all forms of offensive and unfair behaviour in these respects and pointed out that it was the duty of each soldier not to behave in a way that could be offensive to others or to allow others to behave in that way. It also defined bullying and indicated that, although the army fosters an aggressive spirit in soldiers who will have to go to war, controlled aggression, self-sufficiency and strong leadership must not be confused with thoughtless and meaningless use of intimidation and violence which characterise bullying. Bullying undermines morale and creates fear and stress both in the individual and the group being bullied and

in the organisation. The army was noted to be a close-knit community where team work, cohesion and trust are paramount. Thus, high standards of personal conduct and respect for others were demanded from all.

The Directive endorsed the use of military law by commanders. Supplementary leaflets promoting the Directive were issued to every individual soldier. In addition, specific equal opportunities posts were created in personnel centres and a substantial training programme in the Race Relations Act 1976 was initiated.

F. The reports of the Parliamentary Select Committee

65. Every five years an Armed Forces' Bill goes through Parliament and a Select Committee conducts a review in connection with that bill.

66. The report of the Select Committee dated 24 April 1991 noted, under the heading "Homosexuality":

> "That the present policy causes very real distress and the loss to the services of some men and women of undoubted competence and good character is beyond dispute. Society outside the armed forces is now much more tolerant of differences in sexual orientation than it was, and this may also possibly be true of the armed forces. Nevertheless, there is considerable force to the [Ministry of Defence's] argument that the presence of people known to be homosexual can cause tension in a group of people required to live and work sometimes under great stress and physically at very close quarters, and thus damage its cohesion and fighting effectiveness. It may be that this will change particularly with the integration of women into hitherto all-male units. We are not yet persuaded that the time has come to require the armed forces to accept homosexuals or homosexual activity."

67. The 1996 Select Committee report (produced after that committee's review of the Armed Forces Act 1996) referred to evidence taken from members of the Ministry of Defence and from homosexual support groups and to the HPAT report. Once again, the committee did not recommend any change in the Government's policy. It noted that, since its last report, a total of 30 officers and 331 persons of other rank had been discharged or dismissed on grounds of homosexuality. The committee was satisfied that no reliable lessons could as yet be drawn from the experience of other countries. It acknowledged the strength of the human rights arguments put forward, but noted that there had to be a balance struck between individual rights and the needs of the whole. It was persuaded by the HPAT summary

of the strength of opposition throughout the armed services to any relaxation of the policy. It accepted that the presence of openly homosexual servicemen and women would have a significant adverse impact on morale and, ultimately, on operational effectiveness. The matter was then debated in the House of Commons and members, by 188 votes to 120, rejected any change to the existing policy.

G. Information to persons recruited into the armed forces

68. Prior to September 1995, applicants to the armed forces were informed about the armed forces' policy as regards homosexuals in the armed forces by means of a leaflet entitled "Your Rights and Responsibilities". To avoid any misunderstanding and so that each recruit to each of the armed services received identical information, on 1 September 1995 the armed forces introduced a Service Statement to be read and signed before enlistment. Paragraph 8 of that statement is headed "Homosexuality" and states that homosexuality is not considered compatible with service life and "can lead to administrative discharge".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

69. The applicants complained that the investigations into their homosexuality and their subsequent discharge from the Royal Air Force on the sole ground that they were homosexual, in pursuance of the Ministry of Defence's absolute policy against homosexuals in the British armed forces, constituted a violation of their right to respect for their private lives protected by Article 8 of the Convention. That Article, in so far as is relevant, reads as follows:

> "1. Everyone has the right to respect for his private … life…
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, … for the prevention of disorder…"

A. Whether there was an interference

70. The Government accepted, in their written observations, that there had been interferences with the applicants' right to respect for their private lives. However, noting that neither of the applicants denied knowledge during the relevant period of the policy against homosexuals in the armed forces, the Government made no admissions as to the dates from which the applicants also appreciated that they were homosexual. During the hearing before the Court the Government, referring in particular to Ms Smith, clarified that, if the applicants were aware of the policy and of their homosexuality on recruitment, then their discharge would not have amounted to an interference with their rights guaranteed by Article 8 of the Convention.

The applicants argued that they were not complaining about being refused entry to the armed forces and that they had not been dismissed for lying during recruitment. In any event, the protection afforded by Article 8 could not depend on the degree of knowledge of the applicants of their sexual orientation when they were young men or women.

71. The Court notes that the Government have not claimed that the applicants waived their rights under Article 8 of the Convention when they initially joined the armed forces. It also notes that the applicants were not dismissed for failure to disclose their homosexuality on recruitment. Further, it finds from the evidence that Ms Smith only came to realise that she was homosexual after recruitment.

In these circumstances, the Court is of the view that the investigations by the military police into the applicants' homosexuality, which included detailed interviews with each of them and with third parties on matters relating to their sexual orientation and practices, together with the preparation of a final report for the armed forces' authorities on the investigations, constituted a direct interference with the applicants' right to respect for their private lives. Their consequent administrative discharge on the sole ground of their sexual orientation also constituted an interference with that right (see the Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41, and, *mutatis mutandis*, the Vogt v. Germany judgment of 26 September 1995, Series A no. 323, p. 23, § 44).

B. Whether the interferences were justified

72. Such interferences can only be considered justified if the conditions of the second paragraph of Article 8 are satisfied. Accordingly, the interferences must be "in accordance with the law", have an aim which is legitimate under this paragraph and must be "necessary in a democratic society" for the aforesaid aim (see the Norris v. Ireland judgment of 26 October 1988, Series A no. 142, p. 18, § 39).

1. "In accordance with the law"

73. The parties did not dispute that there had been compliance with this element of Article 8 § 2 of the Convention. The Court notes that the Ministry of Defence policy excluding homosexuals from the armed forces was confirmed by the Court of Appeal in the present case to be lawful, in terms of both domestic and applicable European Community law. The policy was given statutory recognition and approval by the Sexual Offences Act 1967 and, more recently, by the Criminal Justice and Public Order Act 1994. The Court, accordingly, finds this requirement to be satisfied.

2. Legitimate aim

74. The Court observes that the essential justification offered by the Government for the policy and for the consequent investigations and discharges is the maintenance of the morale of service personnel and, consequently, of the fighting power and the operational effectiveness of the armed forces (see paragraph 95 below). The Court finds no reason to doubt that the policy was designed with a view to ensuring the operational effectiveness of the armed forces or that investigations were, in principle, intended to establish whether the person concerned was a homosexual to whom the policy was applicable. To this extent, therefore, the Court considers that the resulting interferences can be said to pursue the legitimate aims of "the interests of national security" and "the prevention of disorder".

The Court has more doubt as to whether the investigations continued to serve any such legitimate aim once the applicants had admitted their homosexuality. However, given the Court's conclusion at paragraph 111 below, it does not find that it is necessary to decide whether this element of the investigations pursued a legitimate aim within the meaning of Article 8 § 2 of the Convention.

3. "Necessary in a democratic society"

75. It remains to be determined whether the interferences in the present cases can be considered "necessary in a democratic society" for the aforesaid aims.

(a) The Government's submissions

76. The Government accepted from the outset that neither the applicants' service records nor their conduct gave any grounds for complaint and that there was no evidence that, prior to the discovery of their sexual orientation, such orientation adversely affected the performance by them or by their colleagues of their duties. Nor was it contended by the Government that homosexuals were less physically capable, brave, dependable or skilled than heterosexuals.

77. However, the Government emphasised, in the first place, the special British armed forces' context of the case. It was special because it was intimately connected with the nation's security and was, accordingly, central to a State's vital interests. Unit cohesion and morale lay at the heart of the effectiveness of the armed forces. Such cohesion and morale had to withstand the internal rigours of normal and corporate life, close physical and shared living conditions together with external pressures such as grave danger and war, all of which factors the Government argued applied or could have applied to each applicant. In this respect, the armed forces' were unique and there were no genuine comparables in terms of the civilian disciplined forces, such as the police and the fire brigade.

In such circumstances, the Government, while accepting that members of the armed forces had the right to the Convention's protection, argued that different, and stricter, rules applied in this context (see the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, p. 24, § 57; the Grigoriades v. Greece judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, pp. 2589-90, § 45; and the Kalaç v. Turkey judgment of 1 July 1997, *Reports* 1997-IV, p. 1209, § 28). Moreover, given the national security dimension to the present case a wide margin of appreciation was properly open to the State (see the Leander v. Sweden judgment of 26 March 1987, Series A no. 116, p. 25, § 59). Accordingly, the narrow margin of appreciation which applied to cases involving intimate private life matters could not be transposed unaltered to the present case.

In support of their argument for a broad margin of appreciation, the Government also referred to the fact that the issue of homosexuals in the armed forces has been the subject of intense debate in recent years in the United Kingdom, suggesting that the sensitivity and special context of the question meant that the decision was largely one for the national authorities. It was true that the degree of risk to fighting power was not consistent over time, given that attitudes and opinions, and, consequently, domestic law on the subject of homosexuality had developed over the years. Nevertheless, the approach to such matters in an armed forces' context had to be cautious given the inherent risks. The process of review was ongoing and the Government indicated their commitment to a free vote in Parliament on the subject after the next Parliamentary Select Committee review of the policy in 2001.

78. Secondly, the Government argued that admitting homosexuals to the armed forces at this time would have a significant and negative affect on the morale of armed forces' personnel and, in turn, on the fighting power and the operational effectiveness of the armed forces. They considered that the observations and conclusions in the HPAT report of February 1996 (and, in particular, Section F of the report) provided clear evidence of the risk to fighting power and operational effectiveness. The Government submitted

that the armed forces' personnel (on whose views the HPAT report was based) were best placed to make this risk assessment and that their views should therefore be afforded considerable weight. Moreover, the relatively recent analyses completed by the HPAT, by the domestic courts (in *R. v. Ministry of Defence, ex parte Smith and Others* 2 Weekly Law Reports 305) and by the Parliamentary Select Committee all led to the conclusion that the policy should be maintained.

The Government considered that the choice between establishing a code of conduct and maintaining the present policy lay at the heart of the judgment to be made in this matter. However, the view in the United Kingdom was that such a code would not at present be sufficient to meet the risks identified because it was the knowledge or suspicion of the fact that a person was homosexual, and not the conduct of that person, which would cause damage to morale and effectiveness. Even assuming that the attitudes on which the HPAT report was based were at least in part based on a lack of tolerance or on insufficient broadmindedness, the reality of the risk to effectiveness remained. It was true that many European armed forces no longer excluded homosexuals but the relevant changes had been adopted in those countries too recently to yield any valuable lessons.

As to the applicants' submission about the alleged lack of evidence of past problems caused by the presence of homosexuals in the armed forces, the Government pointed out that the discharge of all persons of established homosexual orientation before such damage occurred meant that concrete evidence establishing the risks identified by the HPAT might not be available. In any event, the Government noted that the risks envisaged would result from the general relaxation of the policy, rather than its modification in any particular instance.

79. Thirdly, and as to the charge made by the applicants that the views expressed to the HPAT by the clear majority of serving personnel could be labelled as "homophobic prejudice", the Government pointed out that these views represented genuine concerns expressed by those with first-hand and detailed knowledge of the demands of service life. Most of those surveyed displayed a clear difference in attitude towards homosexuality in civilian life. Conclusions could not be drawn from the fact that women and racial minorities were admitted while homosexuals were not because women and men were segregated in recognition of potential problems that might arise, whereas such arrangements were simply not possible in the case of same sex orientation. The concerns about homosexuals were of a type and intensity not engendered by women or racial minorities.

80. Once there was a suspicion of homosexuality, an investigation was carried out. According to the Government, the extent of such investigation would depend on the circumstances but an investigation usually implied questioning the individual and seeking corroborative evidence. If homosexuality was denied, investigations were necessary and even if it was admitted, attempts were made to find relevant evidence through interviews and, depending on the circumstances, other inquiries. The aim of the investigations was to verify the homosexuality of the person suspected in order to detect those seeking an administrative discharge based on false pretences. During the hearing, the Government gave two recent examples of false claims of homosexuality in the army and in the Royal Air Force and three recent examples of such false claims in the Royal Navy. The investigations were also necessary given certain security concerns (in particular, the risk of blackmail of homosexual personnel), in light of the greater risk from the Aids virus in the homosexual community and for disciplinary reasons (homosexual acts might be disciplined in certain cases including, for example, where they resulted from an abuse of authority). The Government maintained that the applicants freely chose, in any event, to answer the questions put to them. Both were told that they did not have to answer the questions and that they could have legal advice.

While the bulk of the questioning was, in the submission of the Government, justified by the reasons for the investigation outlined above, the Government did not seek to defend the question put to Ms Smith as to whether she or her partner had had a sexual relationship with their foster daughter. However, they argued that this indefensible, but specific, aspect of the questioning did not tilt the balance in favour of a finding of a violation.

(b) The applicants' submissions

81. The applicants submitted that the interferences with their private lives, given the subject matter, nature and extent of the intrusions at issue, were serious and grave and required particularly serious reasons by way of justification (see the Dudgeon judgment cited above, p. 21, § 52). The subject matter of the interferences was a most intimate part of their private lives, made public by the Ministry of Defence policy itself. The applicants also took issue with the detailed investigations carried out by the service police and with, in particular, the prurient questions put during the interviews, the interviews with third parties, the search of Mr Grady's accommodation and the seizure of his personal affairs. Referring also to their years of service, to their promotions (past and imminent), to their exemplary service records and to the fact that there was no indication that

their homosexuality had in any way affected their work or service life, the applicants emphasised that they were, nevertheless, deprived of a career in which they excelled on the basis of "unsuitability for service" by reason of a blanket policy against homosexuals in the armed forces.

The applicants added, in this context, that a blanket policy was not adopted by the armed forces in any other context. It was not adopted in the case of personal characteristics or traits such as gender, race or colour. Indeed, the Ministry of Defence actively promoted equality and tolerance in these areas. Nor was there a blanket policy against those whose actions could or did affect morale and service efficiency such as those involved in theft or adultery or those who carried out dangerous acts under the influence of drugs or alcohol. In the latter circumstances, the individual could be dismissed, but only after a consideration of all the circumstances of the case. Moreover, no policy against homosexuals existed in comparable British services such as the Merchant Navy, the Royal Fleet Auxiliary, the police, the fire brigade and the nursing profession.

82. The applicants also argued that the Government's core argument as to the risk to morale and, consequently, to fighting power and operational effectiveness was unsustainable for three main reasons.

83. In the first place, the applicants considered that the Government could not, consistently with Article 8, rely on and pander to the perceived prejudice of other service personnel. Given the absence of any rational basis for armed forces' personnel to behave any differently if they knew that an individual was a homosexual, the alleged risk of adverse reactions by service personnel was based on pure prejudice. It was the responsibility of the armed forces by reason of Article 1 of the Convention to ensure that those they employed understood that it was not acceptable for them to act by reference to pure prejudice. However, rather than taking steps to remedy such prejudice, the armed forces punished the victims of prejudice. The applicants considered that the logic of the Government's argument applied equally to the contexts of racial, religious and gender prejudice; the Government could not seriously suggest that, for example, racial prejudice on the part of armed forces' personnel would be sufficient to justify excluding coloured persons from those forces.

Moreover, Convention jurisprudence established that the Government could not rely on pure prejudice to justify interference with private life (see, *inter alia*, application no. 25186/94, Sutherland v. the United Kingdom, Commission's report of 1 July 1997, as yet unpublished, §§ 56, 57, 62, 63 and 65). Furthermore, the applicants pointed out that the Court has found (in its Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria judgment of 19 December 1994, Series A no. 302, p. 17, §§ 36 and 38) that

the demands of "pluralism, tolerance and broadmindedness" apply as much to service personnel as to other persons and that fundamental rights must be protected in the army of a democratic State just as in the society that such an army serves. They argued that the Court's reasoning in that case was based on a vital principle equally applicable in the present case – the armed forces of a country exist to protect the liberties valued by a democratic society, and so the armed forces should not be allowed themselves to march over, and cause substantial damage to, such principles.

84. Secondly, the applicants argued that such perceived prejudice would not have occurred but for the actions of the Ministry of Defence in adopting and applying the policy. The Government accepted that the applicants had worked efficiently and effectively in the armed forces for years without any problems arising by reason of their sexual orientation. The Government's concern related to the presence of openly homosexual service personnel; the private lives of the present applicants were indeed private and would have remained so but for the policy. There was, accordingly, no reason to believe that any difficulty would have arisen had it not been for the policy adopted by the Government.

85. Thirdly, the applicants submitted that the Government was required to substantiate their concerns about the threat to military discipline (see the Vereinigung Demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, § 38) but had not produced any objective evidence to support their submission as to the risk to morale and operational effectiveness.

In this respect, they argued that the HPAT report was inadequate and fundamentally flawed. The assessment was not carried out by independent consultants. It was, moreover, conducted against the background of the publicly voiced hostility of the armed forces' authorities to a change in the policy and followed the circulation of an army consultation document which suggested that senior army personnel thought that the purpose of the HPAT review was to gather evidence in support of the current policy on homosexuality. Indeed the majority of the questions in the HPAT questionnaire expressed hostile attitudes to homosexuality or suggested negative responses. In addition, the report contained no concrete evidence of specific problems caused by the presence of homosexual personnel in the armed forces of the United Kingdom or overseas. Furthermore, it was based on a statistically insignificant response rate and those responding were not guaranteed anonymity.

86. As to the dismissal by the HPAT of the experience of other countries which did not ban homosexuals from their armed forces, the applicants considered that the statement in the report that armed forces' personnel of such other countries were more tolerant was not supported by any evidence. In any event, even if those other countries had written constitutions and, consequently, a longer tradition of respect for human rights, the Government were required to comply with their Convention obligations. Whether there was a lack of openly homosexual personnel serving in the armed forces of those countries or not, the fact remained that sexual orientation was part of an individual's private life and no conclusions could be drawn from the fact that homosexuals serving in foreign armed forces might have chosen to keep their sexuality private as they were entitled to do. The applicants also pointed to the number of United Kingdom service personnel who had worked and were currently working alongside homosexual personnel in the armed forces of other NATO countries without any apparent problems.

As to the assertion that investigations were necessary to avoid false declarations of homosexuality by those wishing to leave the armed forces, the applicants pointed to the lack of evidence of such false declarations presented by the Government and to the fact that they themselves had clearly wished to stay in the armed forces. In addition, they submitted that they felt obliged to answer the questions in the interviews because otherwise, as the Government accepted, their private and intimate affairs would have been the subject of wider and less discreet investigations elsewhere.

As to the Government's reliance on the Court's Kalaç judgment, the applicants pointed out that the case related to the sanctioning of public conduct and not of an individual's private characteristics.

(c) The Court's assessment

(i) Applicable general principles

87. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a pressing social need and, in particular, is proportionate to the legitimate aim pursued (see the Norris judgment cited above, p. 18, § 41).

Given the matters at issue in the present case, the Court would underline the link between the notion of "necessity" and that of a "democratic society", the hallmarks of the latter including pluralism, tolerance and broadmindedness (see the Vereinigung Demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, § 36, and the Dudgeon judgment cited above, p. 21, § 53).

88. The Court recognises that it is for the national authorities to make the initial assessment of necessity, though the final evaluation as to whether the reasons cited for the interference are relevant and sufficient is one for this Court. A margin of appreciation is left open to Contracting States in the context of this assessment, which varies according to the nature of the activities restricted and of the aims pursued by the restrictions (see the Dudgeon judgment cited above, pp. 21 and 23, §§ 52 and 59).

89. Accordingly, when the relevant restrictions concern "a most intimate part of an individual's private life", there must exist "particularly serious reasons" before such interferences can satisfy the requirements of Article 8 § 2 of the Convention (see the Dudgeon judgment cited above, p. 21, § 52).

When the core of the national security aim pursued is the operational effectiveness of the armed forces, it is accepted that each State is competent to organise its own system of military discipline and enjoys a certain margin of appreciation in this respect (see the Engel and Others judgment cited above, p. 25, § 59). The Court also considers that it is open to the State to impose restrictions on an individual's right to respect for his private life where there is a real threat to the armed forces' operational effectiveness, as the proper functioning of an army is hardly imaginable without legal rules designed to prevent service personnel from undermining it. However, the national authorities cannot rely on such rules to frustrate the exercise by individual members of the armed forces of their right to respect for their private lives, which right applies to service personnel as it does to others within the jurisdiction of the State. Moreover, assertions as to a risk to operational effectiveness must be "substantiated by specific examples" (see, *mutatis mutandis*, the Vereinigung Demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, §§ 36 and 38, and the Grigoriades judgment cited above, pp. 2589-90, § 45).

(ii) Application to the facts of the case

90. It is common ground that the sole reason for the investigations conducted and for the applicants' discharge was their sexual orientation. Concerning as it did a most intimate aspect of an individual's private life, particularly serious reasons by way of justification were required (see paragraph 89 above). In the case of the present applicants, the Court finds the interferences to have been especially grave for the following reasons.

91. In the first place, the investigation process (see the Guidelines at paragraph 49 above and the Government's submissions at paragraph 80) was of an exceptionally intrusive character.

Anonymous telephone calls to Ms Smith and to the service police, and information supplied by the nanny of Mr Grady's commander, prompted the investigations into their sexual orientation, a matter which, until then, each applicant had kept private. The investigations were conducted by the service police, whose investigation methods were, according to the HPAT, based on criminal procedures and whose presence the HPAT described as widely publicised and strongly resented among the forces (see paragraph 49 above).

Once the matter was brought to the attention of the service authorities, Mr Grady was required to return immediately (without his wife or children) to the United Kingdom. While he was in the United Kingdom, detailed investigations into his homosexuality began in the United States and included detailed and intrusive interviews about his private life with his wife, a colleague, the latter's husband and the nanny who worked with his commander's family.

Both applicants were interviewed and asked detailed questions of an intimate nature about their particular sexual practices and preferences. Certain lines of questioning of both applicants were, in the Court's view, particularly intrusive and offensive and, indeed, the Government conceded that they could not defend the question put to Ms Smith about whether she had had a sexual relationship with her foster daughter.

Ms Smith's partner was also interviewed. Mr Grady's accommodation was searched, many personal items (including a letter to his homosexual partner) were seized and he was later questioned in detail on the content of these items. After the interviews, a service police report was prepared for the air force authorities on each applicant's homosexuality and related matters.

92. Secondly, the administrative discharge of the applicants had, as Sir Thomas Bingham MR described, a profound effect on their careers and prospects.

Prior to the events in question, both applicants enjoyed relatively successful service careers in their particular field. Ms Smith had over five years' service in the air force; she had been recommended for promotion, had been accepted for a training course which would facilitate this promotion and was about to complete the course final examinations. Her evaluations prior to and after her discharge were very positive. Mr Grady had served in the air force for fourteen years, being promoted to sergeant and posted to a high-security position in Washington in 1991. His evaluations prior to and after his discharge were also very positive with recommendations for further promotion. The Government accepted in their observations that neither the service records nor the conduct of the applicants gave any grounds for complaint and the High Court described their service records as "exemplary".

The Court notes, in this respect, the unique nature of the armed forces (underlined by the Government in their pleadings before the Court) and, consequently, the difficulty in directly transferring essentially military qualifications and experience to civilian life. The Court recalls, in this respect that one of the several reasons why the Court considered Mrs Vogt's dismissal from her post as a school teacher to be a "very severe measure", was its finding that school teachers in her situation would "almost certainly be deprived of the opportunity to exercise the sole profession for which they have a calling, for which they have been trained and in which they have acquired skills and experience" (Vogt judgment cited above, p. 29, § 60). In this regard, the Court accepts that the applicants' training and experience would be of use in civilian life. However, it is clear that the applicants would encounter difficulty in obtaining civilian posts in their areas of specialisation which would reflect the seniority and status which they had achieved in the air force.

93. Thirdly, the absolute and general character of the policy which led to the interferences in question is striking (see the Dudgeon judgment cited above, p. 24, § 61, and the Vogt judgment cited above, p. 28, § 59). The policy results in an immediate discharge from the armed forces once an individual's homosexuality is established and irrespective of the individual's conduct or service record. With regard to the Government's reference to the Kalaç judgment, the Court considers that the compulsory retirement of Mr Kalaç is to be distinguished from the discharge of the present applicants, the former being dismissed on grounds of his conduct while the applicants were discharged on grounds of their innate personal characteristics.

94. Accordingly, the Court must consider whether, taking account of the margin of appreciation open to the State in matters of national security, particularly convincing and weighty reasons exist by way of justification for the interferences with the applicants' right to respect for their private lives.

95. The core argument of the Government in support of the policy is that the presence of open or suspected homosexuals in the armed forces would have a substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces. The Government rely in this respect on the report of the HPAT and, in particular, on Section F of the report.

Although the Court acknowledges the complexity of the study undertaken by the HPAT, it entertains certain doubts as to the value of the HPAT report for present purposes. The independence of the assessment contained in the report is open to question given that it was completed by Ministry of Defence civil servants and service personnel (see paragraph 51 above) and given the approach to the policy outlined in the letter circulated by the Ministry of Defence in August 1995 to management levels in the armed forces (see paragraph 33 above). In addition, on any reading of the

report and the methods used (see paragraph 52 above), only a very small proportion of the armed forces' personnel participated in the assessment. Moreover, many of the methods of assessment (including the consultation with policy-makers in the Ministry of Defence, one-to-one interviews and the focus group discussions) were not anonymous. It also appears that many of the questions in the attitude survey suggested answers in support of the policy.

96. Even accepting that the views on the matter which were expressed to the HPAT may be considered representative, the Court finds that the perceived problems which were identified in the HPAT report as a threat to the fighting power and operational effectiveness of the armed forces were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation. The Court observes, in this respect, that no moral judgment is made on homosexuality by the policy, as was confirmed in the affidavit of the Vice Chief of the Defence Staff filed in the Perkins' proceedings (see paragraph 50 above). It is also accepted by the Government that neither the records nor conduct of the applicants nor the physical capability, courage, dependability and skills of homosexuals in general are in any way called into question by the policy.

97. The question for the Court is whether the above-noted negative attitudes constitute sufficient justification for the interferences at issue.

The Court observes from the HPAT report 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 outlined above any more than similar negative attitudes towards those of a different race, origin or colour.

98. The Government emphasised that the views expressed in the HPAT report served to show that any change in the policy would entail substantial damage to morale and operational effectiveness. The applicants considered these submissions to be unsubstantiated.

99. The Court notes the lack of concrete evidence to substantiate the alleged damage to morale and fighting power that any change in the policy would entail. Thorpe LJ in the Court of Appeal found that there was no actual or significant evidence of such damage as a result of the presence of homosexuals in the armed forces (see paragraph 40 above), and the Court further considers that the subsequent HPAT assessment did not, whatever its value, provide evidence of such damage in the event of the policy changing. Given the number of homosexuals dismissed between 1991 and 1996 (see paragraph 67 above), the number of homosexuals who were in the armed

forces at the relevant time cannot be said to be insignificant. Even if the absence of such evidence can be explained by the consistent application of the policy, as submitted by the Government, this is insufficient to demonstrate to the Court's satisfaction that operational effectiveness problems of the nature and level alleged can be anticipated in the absence of the policy (see the Vereinigung Demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, § 38).

100. However, in the light of the strength of feeling expressed in certain submissions to the HPAT and the special, interdependent and closely knit nature of the armed forces' environment, the Court considers it reasonable to assume that some difficulties could be anticipated as a result of any change in what is now a long-standing policy. Indeed, it would appear that the presence of women and racial minorities in the armed forces led to relational difficulties of the kind which the Government suggest admission of homosexuals would entail (see paragraphs 63 and 64 above).

101. The applicants submitted that a strict code of conduct applicable to all personnel would address any potential difficulties caused by negative attitudes of heterosexuals. The Government, while not rejecting the possibility out of hand, emphasised the need for caution given the subject matter and the armed forces context of the policy and pointed out that this was one of the options to be considered by the next Parliamentary Select Committee in 2001.

102. The Court considers it important to note, in the first place, the approach already adopted by the armed forces to deal with racial discrimination and with racial and sexual harassment and bullying (see paragraphs 63-64 above). The January 1996 Directive, for example, imposed both a strict code of conduct on every soldier together with disciplinary rules to deal with any inappropriate behaviour and conduct. This dual approach was supplemented with information leaflets and training programmes, the army emphasising the need for high standards of personal conduct and for respect for others.

The Government, nevertheless, underlined that it is "the knowledge or suspicion of homosexuality" which would cause the morale problems and not conduct, so that a conduct code would not solve the anticipated difficulties. However, in so far as negative attitudes to homosexuality are insufficient, of themselves, to justify the policy (see paragraph 97 above), they are equally insufficient to justify the rejection of a proposed alternative. In any event, the Government themselves recognised during the hearing that the choice between a conduct code and the maintenance of the policy lay at the heart of the judgment to be made in this case. This is also consistent with the Government's direct reliance on Section F of the HPAT's report where the anticipated problems identified as posing a risk to morale were almost exclusively problems related to behaviour and conduct (see paragraphs 53-54 above).

The Government maintained that homosexuality raised problems of a type and intensity that race and gender did not. However, even if it can be assumed that the integration of homosexuals would give rise to problems not encountered with the integration of women or racial minorities, the Court is not satisfied that the codes and rules which have been found to be effective in the latter case would not equally prove effective in the former. The "robust indifference" reported by the HPAT of the large number of British armed forces' personnel serving abroad with allied forces to homosexuals serving in those foreign forces, serves to confirm that the perceived problems of integration are not insuperable (see paragraph 59 above).

103. The Government highlighted particular problems which might be posed by the communal accommodation arrangements in the armed forces. Detailed submissions were made during the hearing, the parties disagreeing as to the potential consequences of shared single-sex accommodation and associated facilities.

The Court notes that the HPAT itself concluded that separate accommodation for homosexuals would not be warranted or wise and that substantial expenditure would not, therefore, have to be incurred in this respect. Nevertheless, the Court remains of the view that it has not been shown that the conduct codes and disciplinary rules referred to above could not adequately deal with any behavioural issues arising on the part either of homosexuals or of heterosexuals.

104. The Government, referring to the relevant analysis in the HPAT report, further argued that no worthwhile lessons could be gleaned from the relatively recent legal changes in those foreign armed forces which now admitted homosexuals. The Court disagrees. It notes the evidence before the domestic courts to the effect that the European countries operating a blanket legal ban on homosexuals in their armed forces are now in a small minority. It considers that, even if relatively recent, the Court cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of Contracting States on this issue (see the Dudgeon judgment cited above, pp. 23-24, § 60).

105. Accordingly, the Court concludes that convincing and weighty reasons have not been offered by the Government to justify the policy against homosexuals in the armed forces or, therefore, the consequent discharge of the applicants from those forces.

106. While the applicants' administrative discharges were a direct consequence of their homosexuality, the Court considers that the justification for the investigations into the applicants' homosexuality requires separate consideration in so far as those investigations continued after the applicants' admissions of homosexuality. In Ms Smith's case her admission was immediate and Mr Grady admitted his homosexuality when his interview of 26 May 1994 commenced.

107. The Government maintained that investigations, including the interviews and searches, were necessary in order to detect false claims of homosexuality by those seeking administrative discharges from the armed forces. The Government cited five examples of individuals in the armed forces who had relatively recently made such false claims in order to obtain discharge. However, and despite the fact that Mr Grady's family life could have led to some doubts about the genuineness of the information received as to his homosexuality, it was and is clear, in the Court's opinion, that at the relevant time both Ms Smith and Mr Grady wished to remain in the air force. Accordingly, the Court does not find that the risk of false claims of homosexuality could, in the case of the present applicants, provide any justification for their continued questioning.

108. The Government further submitted that the medical, security and disciplinary concerns outlined by the HPAT justified certain lines of questioning of the applicants. However, the Court observes that, in the HPAT report, security issues relating to those suspected of being homosexual were found not to stand up to close examination as a ground for maintaining the policy. The Court is, for this reason, not persuaded that the risk of blackmail, being the main security ground canvassed by the Government, justified the continuation of the questioning of either of the present applicants. Similarly, the Court does not find that the clinical risks (which were, in any event, substantially discounted by the HPAT as a ground for maintaining the policy) justified the extent of the applicants' questioning. Moreover, no disciplinary issue existed in the case of either applicant.

109. The Government, referring to the cautions given to the applicants at the beginning of their interviews, further argued that the applicants were not obliged to participate in the interview process. Moreover, Ms Smith was asked to consent to her partner being interviewed and Mr Grady agreed to the search of his accommodation and to hand over his electronic diary. The Court considers, however, that the applicants did not have any real choice but to cooperate in this process. It is clear that the interviews formed a standard and important part of the investigation process which was designed to verify to "a high standard of proof" the sexual orientation of the applicants (see the Guidelines at paragraph 49 above and the Government's submissions at paragraph 80). Had the applicants not cooperated with the interview process, including with the additional elements of this process outlined above, the Court is satisfied that the authorities would have proceeded to verify the suspected homosexuality of the applicants by other means which were likely to be less discreet. That this was the alternative open to the applicants in the event of their failing to cooperate was made clear to both applicants, and in particularly forthright terms to Mr Grady.

110. In such circumstances, the Court considers that the Government have not offered convincing and weighty reasons justifying the continued investigation of the applicants' sexual orientation once they had confirmed their homosexuality to the air force authorities.

111. In sum, the Court finds that neither the investigations conducted into the applicants' sexual orientation, nor their discharge on the grounds of their homosexuality in pursuance of the Ministry of Defence policy, were justified under Article 8 § 2 of the Convention.

112. Accordingly, there has been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

113. The applicants also invoked Article 14 of the Convention taken in conjunction with Article 8 in relation to the operation of the Ministry of Defence policy against them. Article 14 reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

114. The Government argued that no separate issue arose under Article 14 of the Convention and the applicants relied on their submissions outlined in the context of Article 8 above.

115. The Court considers that, in the circumstances of the present case, the applicants' complaints that they were discriminated against on grounds of their sexual orientation by reason of the existence and application of the policy of the Ministry of Defence, amounts in effect to the same complaint, albeit seen from a different angle, that the Court has already considered in relation to Article 8 of the Convention (see the Dudgeon judgment cited above, pp. 25-26, §§ 64-70).

116. Accordingly, the Court considers that the applicants' complaints under Article 14 in conjunction with Article 8 do not give rise to any separate issue.

III ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

117. The applicants also complained, under Article 3 of the Convention taken alone and in conjunction with Article 14, that the policy excluding homosexuals from the armed forces and the consequent investigations and discharges amounted to degrading treatment. Article 3 reads, in so far as relevant, as follows:

> "No one shall be subjected to … degrading treatment or punishment."

118. The Government submitted that, given the serious and reasonable basis and aim of the policy (maintaining the fighting power and operational effectiveness of the armed forces) and the absence of any intention to degrade or humiliate, the policy cannot be categorised as degrading. They argued that the East African Asians case (applications nos. 4403/70 et sqq., East African Asians v. the United Kingdom, Commission's report of 14 December 1973, Decisions and Reports. 78-A, p. 5) to which the applicants referred, was not relevant as it dealt with racial discrimination. They agreed that the investigation process was not pleasant but argued that, given the matter at issue, intimate questions were inevitable and that the aim was not to humiliate persons but to deal with cases as quickly and as discreetly as possible. The Government again pointed out that the applicants chose to participate in the interviews.

119. The applicants maintained that their discriminatory treatment, based on crude stereotyping and prejudice, denied and caused affront to their individuality and dignity and, as such, amounted to treatment contrary to Article 3. The distinction made by the Government in relation to the above-cited East African Asians case was a technical one since the applicants were labelled and categorised, a process which debased and denigrated each applicant's existence and character. Moreover, treatment contrary to Article 3 could not be justified. As to the suggestion that they could have chosen not to participate in the interviews, they submitted that their complaint related to the entire investigation and dismissal process; the caution given was in fact the standard caution given to a criminal suspect and the very fact that questions were put was hurtful and degrading. The absence of a legal obligation to answer the questions in no way mitigated that effect since they had to cooperate in order to keep the investigations as discreet as possible. In any event, the questions extended significantly beyond an inquiry into sexual orientation in that they were questioned after they admitted their sexual orientation and many questions were prurient and offensive.

120. The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of that minimum is relative and depends on all of the circumstances of the case, such as the duration of the treatment and its physical or mental effects (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, § 162).

It is also recalled that treatment may be considered degrading if it is such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (see the Ireland v. the United Kingdom judgment cited above, pp. 66-67, § 167). Moreover, it is sufficient if the victim is humiliated in his or her own eyes (see the Tyrer v. the United Kingdom judgment of 25 April 1978, Series A no. 26, p. 16, § 32).

121. The Court has outlined above why it considers that the investigation and discharge together with the blanket nature of the policy of the Ministry of Defence were of a particularly grave nature (see paragraphs 90-93 above). Moreover, the Court would not exclude that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority of the nature described above could, in principle, fall within the scope of Article 3 (see, *mutatis mutandis*, the Abdulaziz, Cabales and Balkandali v. the United Kingdom judgment of 28 May 1985, Series A no. 94, p. 42, §§ 90-91).

122. However, while accepting that the policy, together with the investigation and discharge which ensued, were undoubtedly distressing and humiliating for each of the applicants, the Court does not consider, having regard to all the circumstances of the case, that the treatment reached the minimum level of severity which would bring it within the scope of Article 3 of the Convention.

123. Accordingly, the Court concludes that there has been no violation of Article 3 of the Convention taken alone or in conjunction with Article 14.

IV. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

124. The applicants further complained under Article 10 of the Convention, taken alone and in conjunction with Article 14, about the limitation imposed by the existence and operation of the policy of the Ministry of Defence on their right to give expression to their sexual identity. Article 10, in so far as relevant, reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority…

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, … for the prevention of disorder…"

125. The Government maintained that freedom of expression was not an issue in these cases. They submitted that the applicants were free to express information and ideas and to inform others of their sexual orientation. The investigations and their discharges were not the result of any expression of information or ideas but rather a consequence of the fact of their homosexuality which, until they came under investigation, they had chosen to conceal. In any event, any interference with the applicants' freedom of expression was justified for the reasons outlined in the context of Article 8 and, accordingly, no separate issue arose under Article 10.

126. The applicants argued that the right to give expression to one's sexuality encapsulated opinions, ideas and information essential to an individual and his or her identity. The policy of the Ministry of Defence forced them to live secret lives denying them the simple opportunity to communicate openly and freely their own sexual identity which, in turn, had a chilling effect on them and was a powerful inhibiting factor in their right to express themselves. For the reasons outlined in the context of Article 8, the applicants submitted that the interference with their right to freedom of expression did not comply with the requirements of the second paragraph of Article 10 of the Convention. They added that any restriction on freedom of expression, including the expression of one's sexual orientation, must be narrowly interpreted and the Government's reliance solely on the justification offered for the interferences with their Article 8 rights was, therefore, insufficient in the Article 10 context. Given the fact that expression which might shock, offend or disturb was protected, the mere fact that members of the armed forces would, as the Government submitted, have been upset by the presence of known homosexuals was insufficient justification for an interference under Article 10 of the Convention.

Finally, the applicants maintained that the Government's submission as to their freedom to express their homosexuality was hardly credible. If the applicants had done so, they would have been immediately investigated and discharged; that was what effectively happened.

127. The Court would not rule out that the silence imposed on the applicants as regards their sexual orientation, together with the consequent and constant need for vigilance, discretion and secrecy in that respect with colleagues, friends and acquaintances as a result of the chilling effect of the Ministry of Defence policy, could constitute an interference with their freedom of expression.

However, the Court notes that the subject matter of the policy and, consequently, the sole ground for the investigation and discharge of the applicants, was their sexual orientation which is "an essentially private manifestation of human personality" (see the Dudgeon judgment cited above, p. 23, § 60). It considers that the freedom of expression element of the present case is subsidiary to the applicants' right to respect for their private lives which is principally at issue (see, *mutatis mutandis*, the Kokkinakis v. Greece judgment of 25 May 1993, Series A no. 260-A, p. 23, § 55, and the Larissis and Others v. Greece judgment of 24 February 1998, *Reports* 1998-I, p. 383, § 64).

128. Consequently, the Court considers that it is not necessary to examine the applicants' complaints under Article 10 of the Convention, either taken alone or in conjunction with Article 14.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

129. Finally, the applicants complained of a violation of Article 13 of the Convention, in that they had no effective remedy before a national authority in respect of the violations of the Convention of which they were victims. Article 13 reads, in so far as relevant, as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority…"

130. The Government maintained, referring to the Vilvarajah case (Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215), that proceedings by way of judicial review afforded an effective remedy to the applicants. The applicants were able to, and did, advance the substance of the Convention arguments before the domestic courts which were, in turn, relied upon by the applicants before this Court. Any difference between the judicial review test and the test under the Convention was not central to the issues in this case and the essential reasoning of the Court of Appeal mirrored that which underpinned the Convention margin of appreciation. Both the domestic courts and the Convention organs retained a supervisory role to ensure that the State did not abuse its powers or exceed its margin of appreciation.

131. The applicants submitted that Article 13 contained two minimum requirements. First, the relevant national authority had to have jurisdiction to examine the substance of an individual's complaint by reference to the Convention or other corresponding provisions of national law and, secondly, that authority had to have jurisdiction to grant a remedy if it accepted that the individual's complaint was well-founded. Moreover, the precise scope of the obligations under Article 13 would depend on the nature of the individual's complaint. The context of the present case was the

application of a blanket policy which interfered with the Article 8 rights of a minority group and not an assessment of an individual extradition or expulsion in the context of Article 3 as in the Soering and Vilvarajah cases (Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, and the Vilvarajah and Others judgment cited above).

132. In the applicants' view, the judicial review remedy did not meet the first of these requirements of Article 13 for two connected reasons. Since the Ministry of Defence policy was a blanket policy admitting of no exceptions, it was impossible for the domestic courts to consider the merits of the applicants' individual complaints. However, the impact of the policy on them varied from case to case. In contrast, the domestic courts could and indeed were bound to apply the "most anxious scrutiny" to the individual facts in the above-mentioned extradition and expulsion cases of Soering and Vilvarajah. Secondly, the domestic courts could not ask themselves whether a fair balance had been struck between the general interest and the applicants' rights. The domestic courts were confined to asking themselves whether it had been shown that the policy as a whole was irrational or perverse and the burden of proving irrationality was on the applicants. They were required to show that the policy-maker had "taken leave of his senses" and the applicants had to show that this high threshold had been crossed before the domestic courts could intervene. Moreover, the applicants pointed to the comments of the High Court and of the Court of Appeal as the best evidence that those courts lacked jurisdiction to deal with the substance of the applicants' Convention complaints. In this context, the Soering and Vilvarajah cases cited above could be distinguished because the test applied in judicial review proceedings concerning proposed extraditions and expulsions happened to coincide with the Convention test.

133. The applicants further contended that their judicial review proceedings did not comply with the second requirement of Article 13 because the domestic courts were not able to grant a remedy even though four out of the five judges who examined the applicants' case considered that the policy was not justified.

134. Although the applicants invoked Article 13 of the Convention in relation to all of their complaints, the Court recalls that it is the applicants' right to respect for their private lives which is principally at issue in the present case (see paragraph 127 above). In such circumstances, it is of the view that the applicants' complaints under Article 13 of the Convention are more appropriately considered in conjunction with Article 8.

135. The Court recalls that Article 13 guarantees the availability of a remedy at national level to enforce the substance of Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. Thus, its effect is to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief. However, Article 13 does not go so far as to require incorporation of the Convention or a particular form of remedy, Contracting States being afforded a margin of appreciation in conforming with their obligations under this provision. Nor does the effectiveness of a remedy for the purposes of Article 13 depend on the certainty of a favourable outcome for the applicant (see the Vilvarajah and Others judgment cited above, p. 39, § 122).

136. The Court has found that the applicants' right to respect for their private lives (see paragraph 112 above) was violated by the investigations conducted and by the discharge of the applicants pursuant to the policy of the Ministry of Defence against homosexuals in the armed forces. As was made clear by the High Court and the Court of Appeal in the judicial review proceedings, since the Convention did not form part of English law, questions as to whether the application of the policy violated the applicants' rights under Article 8 and, in particular, as to whether the policy had been shown by the authorities to respond to a pressing social need or to be proportionate to any legitimate aim served, were not questions to which answers could properly be offered. The sole issue before the domestic courts was whether the policy could be said to be "irrational".

137. The test of "irrationality" applied in the present case was that explained in the judgment of Sir Thomas Bingham MR: a court was not entitled to interfere with the exercise of an administrative discretion on substantive grounds save where the court was satisfied that the decision was unreasonable in the sense that it was beyond the range of responses open to a reasonable decision-maker. In judging whether the decision-maker had exceeded this margin of appreciation, the human rights context was important, so that the more substantial the interference with human rights, the more the court would require by way of justification before it was satisfied that the decision was reasonable.

It was, however, further emphasised that, notwithstanding any human rights context, the threshold of irrationality which an applicant was required to surmount was a high one. This is, in the view of the Court, confirmed by the judgments of the High Court and the Court of Appeal themselves. The Court notes that the main judgments in both courts commented favourably on the applicants' submissions challenging the reasons advanced by the Government in justification of the policy. Simon Brown LJ considered that the balance of argument lay with the applicants and that their arguments in favour of a conduct-based code were powerful (see paragraph 30 above).

Sir Thomas Bingham MR found that those submissions of the applicants were of "very considerable cogency" and that they fell to be considered in depth with particular reference to the potential effectiveness of a conduct-based code (see paragraph 37 above). Furthermore, while offering no conclusive views on the Convention issues raised by the case, Simon Brown LJ expressed the opinion that "the days of the policy were numbered" in light of the United Kingdom's Convention obligations (see paragraph 31 above), and Sir Thomas Bingham MR observed that the investigations and the discharge of the applicants did not appear to show respect for their private lives. He considered that there might be room for argument as to whether there had been a disproportionate interference with their rights under Article 8 of the Convention (see paragraph 38 above).

Nevertheless, both courts concluded that the policy could not be said to be beyond the range of responses open to a reasonable decision-maker and, accordingly, could not be considered to be "irrational".

138. In such circumstances, the Court considers it clear that, even assuming that the essential complaints of the applicants before this Court were before and considered by the domestic courts, the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention.

The present applications can be contrasted with the cases of Soering and Vilvarajah cited above. In those cases, the Court found that the test applied by the domestic courts in applications for judicial review of decisions by the Secretary of State in extradition and expulsion matters coincided with the Court's own approach under Article 3 of the Convention.

139. In such circumstances, the Court finds that the applicants had no effective remedy in relation to the violation of their right to respect for their private lives guaranteed by Article 8 of the Convention. Accordingly, there has been a violation of Article 13 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

140. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only

partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

141. The applicants submitted detailed claims for compensation in respect of pecuniary and non-pecuniary damage and for the reimbursement of their costs and expenses. However, they required further information from the Government before they could complete their proposals.

142. The Government argued at the hearing that a finding of a violation would be sufficient just satisfaction or, in the alternative, that the submissions of the applicants were inflated. The Government also required further time to respond in detail to the applicants' definitive proposals.

143. The Court has already agreed to provide further time to the parties to submit their definitive just satisfaction proposals. Accordingly, the Court considers that the question raised under Article 41 is not yet ready for decision. It is, accordingly, necessary to reserve it and to fix the further procedure, account being taken of the possibility of an agreement between the parties (Rule 75 § 4 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;
2. *Holds* that no separate issue arises under Article 14 of the Convention taken in conjunction with Article 8;
3. *Holds* that there has been no violation of Article 3 of the Convention taken either alone or in conjunction with Article 14;
4. *Holds* that it is not necessary to examine the applicants' complaints under Article 10 of the Convention taken either alone or in conjunction with Article 14;
5. *Holds* that there has been a violation of Article 13 of the Convention;
6. *Holds* that the question of the application of Article 41 of the Convention is not ready for decision;

Consequently,

(a) *reserves* the said question;

(b) *invites* the parties to notify the Court of any agreement they may reach;

(c) *reserves* the further procedure and *delegates* to the President the power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights building, Strasbourg, on 27 September 1999.

J.-P. COSTA
President

S. DOLLÉ
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly concurring, partly dissenting opinion of Mr Loucaides is annexed to this judgment.

J-P.C.
S.D.

PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE LOUCAIDES

I agree with the majority on all points except as regards the finding that there has been a violation of Article 8 of the Convention by reason of the applicants' discharge from the armed forces on account of their homosexuality.

In this respect I have been convinced by the argument of the Government that particular problems might be posed by the communal accommodation arrangements in the armed forces. The applicants would have to share single-sex accommodation and associated facilities (showers, toilets, etc.) with their heterosexual colleagues. To my mind, the problems in question are in substance analogous to those which would result from the communal accommodation of male members of the armed forces with female members. What makes it necessary for males not to share accommodation and other associated facilities with females is the difference in their sexual orientation. It is precisely this difference between homosexuals and heterosexuals which makes the position of the Government convincing.

I find the answer given by the majority regarding this aspect of the case unsatisfactory. The Court noted (at paragraph 103 of the judgment) that the HPAT considered that "separate accommodation for homosexuals would not be warranted or wise" and the Court found that, in any case, "it ha[d] not been shown that the conduct codes and disciplinary rules ... could not adequately deal with any behavioural issues arising on the part either of homosexuals or of heterosexuals". The fact that separate accommodation is not "warranted or wise" does not justify communal accommodation if such accommodation is really problematic. On the other hand, "conduct codes and disciplinary rules" cannot change the sexual orientation of people and the relevant problems which – for the purposes of the issue under consideration – in the analogous case of women makes it incumbent to accommodate them separately from male soldiers. It is the compulsory living together of groups of people of different sexual orientation which creates the problem. I should add here that if homosexuals had a right to be members of the armed forces their sexual orientation could become known either through them disclosing it or manifesting it in some way.

The aim of not allowing homosexuals in the armed forces was to ensure the operational effectiveness of the armed forces and to this extent the resulting interferences pursued the legitimate aims of "the interests of national security" and "the prevention of disorder". This was accepted by the Court. My disagreement with the majority relates to the question of whether the interference in the present case can be considered "necessary in a democratic society" for the aim in question. The majority underlined the principle that when the relevant restrictions to a Convention right concern a most intimate part of an individual's private life there must exist particularly

serious reasons before the interferences can satisfy the requirements of Article 8 of the Convention. However, I agree with the Government that the narrow margin of appreciation which is applied to cases involving intimate private-life matters is widened in cases like the present, in which the legitimate aim of the relevant restriction relates to the operational effectiveness of the armed forces and, therefore, to the interests of national security. This, I think, is the logical connotation of the principle that in assessing the pressing social need in cases of interferences with the right to respect for an individual's private life from the standpoint of the protection of national security, the State has a wide margin of appreciation (see the Leander v. Sweden judgment of 26 March 1987, Series A no. 116, p. 25, § 59).

Regard must also be had to the principle that limitations incapable of being imposed on civilians may be placed on certain of the rights and freedoms of members of the armed forces (see the Kalaç v. Turkey judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, p. 1209, § 28).

I believe that the Court should not interfere simply because there is a disagreement with the necessity of the measures taken by a State. Otherwise the concept of the margin of appreciation would be meaningless. The Court may substitute its own view for that of the national authorities only when the measure is patently disproportionate to the aim pursued. I should add that the wider the margin of appreciation allowed to the State, the narrower should be the scope for interference by the Court.

I do not think that the facts of the present case justify our Court's interference. As I have already stated above, the sexual orientation of homosexuals does create the problems highlighted by the Government as a result of the communal accommodation with heterosexuals. There is nothing patently disproportionate in the approach of the Government. On the contrary, it was in the circumstances reasonably open to them to adopt the policy of not allowing homosexuals in the armed forces. This condition was made clear to the applicants before their recruitment. It was not imposed afterwards (cf. the Young, James and Webster v. the United Kingdom judgment of 13 August 1981, Series A no. 44, p. 25, § 62). In this respect it may be useful to add that the Convention does not guarantee the right to serve in the armed forces (see Marangos v. Cyprus, application no. 31106/96, decision on admissibility, 3 December 1997, p. 14, unpublished).

In the circumstances, I find that the applicants' discharge on account of their homosexuality in pursuance of the Ministry of Defence policy was justified under Article 8 § 2 of the Convention, as being necessary in a democratic society in the interests of national security and the prevention of disorder.

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

CASE OF SALGUEIRO DA SILVA MOUTA v. PORTUGAL

(*Application no. 33290/96*)

JUDGMENT

STRASBOURG

21 December 1999

FINAL

21/03/2000

In the case of Salgueiro da Silva Mouta v. Portugal,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Mr M. PELLONPÄÄ, *President*,
Mr G. RESS,
Mr A. PASTOR RIDRUEJO,
Mr L. CAFLISCH,
Mr J. MAKARCZYK,
Mr I. CABRAL BARRETO,
Mrs N. VAJIĆ, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 28 September and 9 December 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 33290/96) against the Portuguese Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Portuguese national, Mr João Manuel Salgueiro da Silva Mouta ("the applicant"), on 12 February 1996.

2. On 20 May 1997 the Commission decided to give notice of the application to the Portuguese Government ("the Government") and invited them to submit observations in writing on its admissibility and merits. The Government submitted their observations on 15 October 1997 after an extension of the time allowed and the applicant replied on 6 January 1998.

3. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998, and in accordance with Article 5 § 2 thereof, the application was examined by the Court.

4. In accordance with Rule 52 § 1 of the Rules of Court, the President of the Court, Mr L. Wildhaber, assigned the case to the Fourth Section. The Chamber constituted within that Section included *ex officio* Mr I. Cabral Barreto, the judge elected in respect of Portugal (Article 27 § 2 of the Convention and Rule 26 § 1 (a)), and Mr M. Pellonpää, President of the Section (Rule 26 § 1 (a)). The other members designated by the latter to complete the Chamber were Mr G. Ress, Mr. A Pastor Ridruejo, Mr L. Caflisch, Mr J. Makarczyk and Mrs N. Vajić (Rule 26 § 1 (b)).

5. On 1 December 1998 the Chamber declared the application admissible, considering that the complaints lodged by the applicant under Articles 8 and 14 of the Convention should be examined on the merits[1].

6. On 15 June 1999 the Chamber decided to hold a hearing in private on the merits of the case. The hearing took place in the Human Rights Building, Strasbourg, on 28 September 1999.

There appeared before the Court:

(a) *for the Government*
Mr A. HENRIQUES GASPAR, Deputy Attorney-General, *Agent*,
Mr P. GUERRA, Lecturer, Legal Service Training College, *Adviser*;

(b) *for the applicant*
Ms T. COUTINHO, Lawyer, *Counsel*,
Mr R. GONÇALVES, Trainee Lawyer, *Adviser*.

The applicant also attended the hearing.

The Court heard addresses by Ms Coutinho and Mr Henriques Gaspar, and also their replies to questions put by one of the judges.

7. In accordance with the decision of the President of the Chamber of 28 September 1999, the applicant filed an additional memorial on 8 October 1999 in respect of his claims under Article 41 of the Convention. The Government replied on 28 October 1999.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is a Portuguese national born in 1961. He lives in Queluz (Portugal).

9. In 1983 the applicant married C.D.S. On 2 November 1987 they had a daughter, M. The applicant separated from his wife in April 1990 and has since then been living with a man, L.G.C. Following divorce proceedings instituted by C.D.S., the divorce decree was pronounced on 30 September 1993 by the Lisbon Family Affairs Court (*Tribunal de Família*).

10. On 7 February 1991, during the divorce proceedings, the applicant signed an agreement with C.D.S. concerning the award of parental responsibility (*poder paternal*) for M. Under the terms of that agreement

1. *Note by the Registry*. The Court's decision is obtainable from the Registry.

C.D.S. was to have parental responsibility and the applicant a right to contact. However, the applicant was unable to exercise his right to contact because C.D.S. did not comply with the agreement.

11. On 16 March 1992 the applicant sought an order giving him parental responsibility for the child. He alleged that C.D.S. was not complying with the terms of the agreement signed on 7 February 1991 since M. was living with her maternal grandparents. The applicant submitted that he was better able to look after his child. In her memorial in reply C.D.S. accused L.G.C. of having sexually abused the child.

12. The Lisbon Family Affairs Court delivered its judgment on 14 July 1994 after a period in which the applicant, M., C.D.S., L.G.C. and the child's maternal grandparents had been interviewed by psychologists attached to the court. The court awarded the applicant parental responsibility, dismissing as unfounded – in the light of the court psychologists' reports – C.D.S.'s allegations that L.G.C. had asked M. to masturbate him. It also found, again in the light of the court psychologists' reports, that statements made by M. to that effect appeared to have been prompted by others. The court added:

> "The mother continues to be most uncooperative and it is wholly improbable that her attitude will change. She has repeatedly failed to comply with the Court's decisions. The finding is inescapable that [the mother] has not shown herself capable at present of providing M. with conditions conducive to the balanced and calm life she needs. The father is at present better able to do so. In addition to providing the economic and living conditions necessary to have the child with him, he has shown himself capable of providing her with the balanced conditions she needs and of respecting her right to maintain regular and sustained contact with her mother and maternal grandparents."

13. M. stayed with the applicant from 18 April to 3 November 1995, when she was allegedly abducted by C.D.S. The applicant reported the abduction and criminal proceedings are pending in that connection.

14. C.D.S. appealed against the Family Affairs Court's judgment to the Lisbon Court of Appeal (*Tribunal da Relação*), which gave judgment on 9 January 1996, reversing the lower court's judgment and awarding parental responsibility to C.D.S., with contact to the applicant. The judgment was worded as follows.

> "In the proceedings for the award of parental responsibility for the child M., born on 2 November 1987, daughter of [the applicant] and C.D.S., the decision given on 7 February 1991 confirmed the agreement between the parents as to parental responsibility for the child, contact and the amount of maintenance payable by the father, since custody of M. was awarded to the mother.
>
> On 16 March 1992 [the applicant] applied for a variation of the order granting parental responsibility, alleging that the child was not living with her mother in accordance with what had been decided, but with her maternal grandparents, which – he argued – was unsatisfactory. It was for that reason that the custody arrangements

should be varied so as to allow him to have his daughter and apply to the mother the contact and maintenance arrangements which had hitherto been applied to him.

The child's mother not only opposed the application lodged by the applicant, but also relied on evidence supporting her contention that the child should not remain in the company of her father because he was a homosexual and was cohabiting with another man. After a number of steps had been taken in connection with those proceedings, the following decision was given on 14 July 1994:

'1. Custody and care of the child is awarded to the father, in whom parental responsibility shall be vested.

2. The child may see her mother on alternate weekends, from Friday to Monday. Her mother shall collect her from school on the Friday and bring her back to school on Monday morning before lessons start.

3. The child may also see her mother every Tuesday and Wednesday; her mother shall fetch her from school after lessons and bring her back the following morning.

4. The child shall spend Christmas Eve and Christmas Day alternately with her father and her mother.

5. The child shall spend the Easter holidays with her mother.

6. During the school summer holidays the child shall spend thirty days with her mother. The dates must be agreed on with the father at least sixty days beforehand.

7. The mother shall pay the father maintenance of 30,000 escudos per month, payable before the 8th of every month. Those maintenance payments shall be adjusted once annually on the basis of the inflation index for the previous year published by the INE (National Institute of Statistics).'

That decision specifically governed arrangements applicable to the year 1994. C.D.S., who was dissatisfied with the decision, appealed. She had previously appealed against the decision appearing on page 238, which dismissed an application for a stay of the proceedings, and the decision given at the hearing of 29 April 1994 on the application for an examination of the document appearing on page 233; both those appeals were adjourned and did not have the effect of staying the proceedings.

The appellant sets out the following grounds in her appeal:

…

In his pleadings [the applicant] submitted that the judgment of the first-instance court should be upheld.

State Counsel attached to the Court of Appeal has recommended that the decision be set aside, but not on the grounds relied on by the appellant.

After examining the case, we shall give our decision.

We shall first examine the following facts, which the first-instance court considered to be established.

1. The child, M., who was born on 2 November 1987, is the daughter of [the applicant] and C.D.S.

2. Her parents married on 2 April 1983.

3. Divorce was granted on 30 September 1993 and their marriage dissolved.

4. The parents have been living separately since April 1990, when [the applicant] left his home to go and live with another man, whose first name is L.

5. On 7 March 1991 the Loures Court gave a decision in case no. 1101/90 confirming the following agreement on the exercise of parental responsibility for the child:

'I. The mother shall have custody of the child.

II. The father may visit his daughter whenever he likes provided that he does not disrupt her schooling.

III. The child shall spend alternate weekends and Christmas and Easter with her father.

IV. The child shall spend the father's holidays with him unless those holidays coincide with those of the mother, in which case the child shall spend fifteen days with each parent.

V. On the weekends which the child spends with her father, he shall collect her from her mother's house on Saturday at about 10 a.m. and bring her back on Sunday at about 8 p.m.

VI. The child shall go to a kindergarten as soon as possible, the enrolment fees to be paid by the father.

VII. The father shall pay maintenance of 10,000 escudos per month, which shall be adjusted once annually by the same percentage as the net increase in his salary. That sum shall be paid into the account of the child's mother – account no. …– before the 5th day of the following month.

VIII. The father shall also pay half his daughter's kindergarten fees.

IX. The father shall pay half of any special expenses for his child's health.'

6. From April 1992 the child stopped seeing her father on the agreed terms, against his wishes.

7. Until January 1994 the child lived with her maternal grandparents [name] at Camarate [address].

8. From that date the child went to live with her mother and her mother's boyfriend [address] in Lisbon.

9. She continued, however, to stay overnight at her maternal grandparents' house from time to time.

10. On schooldays when the child did not stay overnight with her grandparents, her mother used to drive her to her grandparents' house where she used to stay after school from 5 p.m.

11. During that school year M. was in the first year primary at … school, for which the fees came to 45,400 escudos per month.

12. Her mother has been cohabiting with J. for at least two years.

13. J., who is a business manager, works in the imports and exports sector, the major part of his activity being in Germany where he has immigrant status. His income amounts to some 600,000 escudos per month.

14. The mother, C.D.S., is the manager of DNS, the partners of which are her boyfriend and his brother, J.P.

15. She has been registered with the State agency for employment and vocational training since 17 February 1994.

16. Her expenses are paid for jointly by herself and her boyfriend.

17. She states that she pays 120,000 escudos in rent and spends approximately 100,000 escudos per month on food.

18. The father, João Mouta, is in a homosexual relationship with L.G.C., with whom he has been living since April 1990.

19. He is the head of his sector at A., and his net monthly income, plus commission, comes to just over 200,000 escudos.

20. The child is very close to her maternal grandmother, who is a Jehovah's Witness.

21. Following her failure to comply with the decision referred to in paragraph 5, the child's mother was ordered, on 14 May 1993, to pay a fine of 30,000 escudos because since April 1992 she had been refusing to allow the father to exercise his 'right to contact with his daughter in accordance with the decision given'.

22. On 25 June 1994, after interviewing the father and mother both individually and together, and M. without her parents or her maternal grandmother being present, and the maternal grandmother and the father's partner individually, and performing a psychological examination of M., the court psychologists drew up the following report:

'M. is a communicative child of normal intellectual development for her age and above average intelligence. She is very attached to her father and mother, and the

conflict between her parents is a source of some insecurity. She would like her parents to live closer together because she finds it difficult to understand why she has to live with her grandparents and not see her father or to accept this. She has a very good relationship with her father, who is very affectionate and attentive towards his daughter. Both [the applicant] and his ex-wife are affectionate and flexible parents and both invest in their daughter's upbringing and emotional security. The reasons for their separation were subsequently a source of substantial conflict between them, exacerbated by M.'s maternal grandmother, who does not accept [the applicant's] lifestyle and unconsciously tries to keep him away from his daughter. To sum up, both parents are capable of overseeing their daughter's satisfactory psychoaffective development, but we do not feel that it is right for her to live with her grandmother, who exacerbates the conflict between the two parties and fuels it by trying to keep [the applicant] away because she does not accept his lifestyle.'

23. On 16 August 1993 M. told the psychologist and her father that the latter's partner had asked her, while her father was out, to go into the bathroom with him, that he had locked the door and asked her to masturbate him (she made gestures imitative of masturbation) and then told her that she did not need to wash her hands and that she should not say anything to her father. The psychologist stated that the manner in which the child had related that episode had made her doubt the truthfulness of the story, which might have been suggested by repeated promptings. She added that while the daughter was describing the episode, the applicant had been understanding and asked for clarification, which confirmed that the father and daughter had a good relationship.

24. During the interview with the psychologist on 6 December 1993 the child stated that she was still living with her maternal grandmother and that from time to time she stayed with her mother where she would sleep on a sofa in the living room because there was no bedroom for her.

25. In a report dated 17 January 1994, drawn up following a meeting between the daughter and her father, the psychologist concluded that 'although M. has observed during her meetings with her father that he is living with another man, her parental images have been fully assimilated and she presents no problem relating to psychosexual identity, be it her own or that of her parents'.

26. Dr V., a psychiatrist, stated, after interviewing the boyfriend of [the applicant], the child's father, that in his opinion the partner was well adjusted and of satisfactory emotional and cognitive development. He found nothing abnormal about the boyfriend either as an individual or in terms of his relationship with the child's father. He considered it wholly improbable that the episode related by the child, as described in paragraph 23, had really occurred.

27. The final report drawn up by the court psychologists, dated 12 April 1994, indicated that M. was suffering from a degree of insecurity due in part to the conflict between her mother's side of the family and her father, and that she had a defensive attitude which manifested itself in a refusal to confront potentially stressful situations. The child is aware that her family opposes her meetings with her father, their opposition being justified by the child's description of an episode which had allegedly occurred between her and her father's boyfriend, L.G.C., in which L.G.C. had asked her to masturbate him. With regard to that account, it is difficult to imagine how a 6-year-old child could relate in detail an episode which had occurred several years

earlier. The experts conclude in their report that the fact that M. had described in detail the above-mentioned masturbation episode did not mean that it had actually occurred. They reiterate that the father is a very affectionate father, full of understanding and kindness towards his daughter, while also imposing on her, satisfactorily and instructively, limits which were necessary and made her feel secure.

The experts also reiterate that the child's mother is a very affectionate mother, but rather permissive, which is not conducive to a feeling of security, although she is capable of improving. They also conclude that it is not advisable for the child to live with her grandmother because the religious fanaticism present in her environment not only condemns the father, but excludes him on grounds of the individual and emotional choices he has made. This has contributed to sowing confusion in the child's mind and exacerbating her sense of conflict and anxiety, thus compromising her healthy psychoaffective development.

28. At the hearing on 24 January 1994 the following interim decision was given with the agreement of both parents: (I) M. could spend every Saturday from 10 a.m. to 10 p.m. with her father, (II) to that end, her father would fetch her from her mother's house accompanied by her paternal grandmother and/or her paternal great-grandmother.

29. The mother did not allow her daughter to see her father on the terms fixed by the above-mentioned decision.

30. On 22 April 1994 the child psychiatry department of D. Estefânea Hospital decided that M. should be monitored because her feelings of anxiety were such as might inhibit her psychoaffective development.

Those facts, found at first instance, are considered to have been definitively established, without prejudice to the possibility of considering a further factor in delivering this judgment. With regard to the other appeals, since the mother has not submitted any pleadings they are considered to be inoperative under Articles 292 § 1 and 690 § 2 of the Code of Civil Procedure. Apart from the fact that factual evidence has not been submitted, these aspects appear to us to be sufficient to give a ruling here as we understand that the lower court ruled on the essential issue of the case, that is to which of the two parents custody of the child should be awarded. The shortcomings in the decision referred to by State Counsel, although relevant, do not warrant setting it aside.

Let us now examine the appeal:

Article 1905 § 1 of the Civil Code provides that in cases of divorce, judicial separation of persons and possessions, declarations of nullity or annulment of marriage, child custody, maintenance and the conditions of payment are governed by agreement between the parents, that agreement being subject to confirmation by the court; confirmation is refused if the agreement is contrary to the child's interests, including the child's interest in maintaining a very close relationship with the non-custodial parent. Paragraph 2 adds that, in the absence of an agreement, the court shall decide, while protecting the child's interests, including his or her interest in maintaining a very close relationship with the non-custodial parent, it being possible to award custody of the child to one or other parent or, if one of the cases provided for in Article 1918 applies, to a third party or to an educational or welfare establishment.

The Guardianship Act also deals with this point. Section 180(1) of that Act provides that any award of parental responsibility must be in the child's interests.

A judgment of the Lisbon Court of Appeal of 24 April 1974, summarised in *BMJ* (*Bulletin of the Ministry of Justice*) no. 236, p. 189, states: 'The Convention on the Rights of the Child – Resolution of 20 November 1989 of the General Assembly of the United Nations – proclaims with rare concision that children, for the full and harmonious development of their personality, require love and understanding; they should, as far as possible, grow up under the protection and responsibility of their parents and, in any event, in a climate of affection and psychological and material security, with young children not being separated from their mother save in exceptional cases.'

We do not have the slightest hesitation in supporting that declaration, which fully corresponds to the realities of life. Despite the importance of paternal love, a young child needs the care which only the mother's love can provide. We think that M., who is now aged 8, still needs her mother's care. See on this point the judgment of the Porto Court of Appeal of 7 June 1988, in *BMJ* no. 378, p. 790, in which that court held that 'in the case of young children, that is until 7 or 8 years of age, the emotional tie to the mother is an essential factor in the child's psychological and emotional development, given that the special needs of tenderness and attentive care at this age can rarely be replaced by the father's affection and interest'.

The relationship between M. and her parents is a decisive factor in her emotional well-being and the development of her personality, particularly as it has been demonstrated that she is deeply attached to her parents, just as it has been shown that both of them are capable of guiding the child's psychoaffective development.

In the official record of the decision of 5 July 1990 awarding parental responsibility, [the applicant] acknowledged that the appellant was capable of looking after their daughter and suggested that custody be awarded to the mother, a statement he repeated in the present proceedings to vary that order, as recorded in the transcript of the hearing of 15 June 1992, declaring that he wished to waive his initial application for custody of the child because she was living with her mother again. M.'s father expresses the wish that his daughter not stay with her maternal grandparents, referring to the numerous difficulties he encounters when trying to see his daughter, given the conduct of the appellant and her mother who do all they can to keep him away from his daughter because they do not accept his homosexuality.

Section 182 of the Guardianship Act provides that previous arrangements can be varied if the agreement or final decision is not complied with by both parents or if subsequent circumstances make it necessary [to vary] the terms. Consideration needs to be given, however, to whether there is a justified ground for varying the decision awarding custody of the child to her mother.

On examining the content of the initial application for a variation of the order it can be seen that emphasis is placed on the fact that the child was living with her maternal grandparents who are Jehovah's Witnesses. The truth of the matter, however, is that [the applicant] has not produced any evidence to prove that this religion is harmful and has merely stressed the grandparents' stubborn refusal to allow the father and daughter to see each other. To the Court's knowledge, the beliefs of Jehovah's Witnesses do not incite to evil practices, although fanaticism does exist.

Are there adequate reasons for withdrawing from the mother the parental responsibility which was granted her with the parents' agreement?

There is ample evidence in this case that the appellant habitually breaches the agreements entered into by her with regard to the father's right to contact and that she shows no respect for the courts trying the case, since on several occasions, and without any justification, she has failed to attend interviews to which she has been summoned in the proceedings. We think, however, that her conduct is due not only to [the applicant]'s lifestyle, but also to the fact that she believed the indecent episode related by the child, implicating the father's partner.

On this point, which is particularly important, we agree that it is not possible to accept as proven that such an episode really occurred. However, we cannot rule out the possibility that it did occur. It would be going too far – since there is no conclusive evidence – to assert that the boyfriend of M.'s father would never be capable of the slightest indecency towards M. Thus, although it cannot be asserted that the child told the truth or that she was not manipulated, neither can it be concluded that she was telling an untruth. Since there is evidence to support both scenarios, it would be wrong to give greater credence to one than the other.

In the same way, the accepted principle in cases involving awards of parental responsibility is that the child's interests are paramount, completely irrespective of the – sometimes selfish – interests of the parents. In order to establish what is in the child's interests, a court must in every case take account of the dominant family, educational and social values of the society in which the child is growing up.

As we have already stated and as established case-law authority provides**,** having regard to the nature of things and the realities of daily life, and for reasons relating to human nature, custody of young children should as a general rule be awarded to the mother unless there are overriding reasons militating against this (see the Evora Court of Appeal's judgment of 12 July 1979, in *BMJ* no. 292, p. 450).

In the instant case parental responsibility was withdrawn from the mother despite the fact that it had been awarded her, we repeat, following an agreement between the parents, and without sufficient evidence being produced to cast doubt on her ability to continue exercising that authority. The question which therefore arises, and this should be stressed, is not really which of the two parents should be awarded custody of M., but rather whether there are reasons for varying what was agreed.

Even if that were not the case, however, we think that custody of the child should be awarded to the mother.

The fact that the child's father, who has come to terms with his homosexuality, wishes to live with another man is a reality which has to be accepted. It is well known that society is becoming more and more tolerant of such situations. However, it cannot be argued that an environment of this kind is the healthiest and best suited to a child's psychological, social and mental development, especially given the dominant model in our society, as the appellant rightly points out. 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; such are the dictates of human nature and let us remember that it is [the applicant] himself who acknowledged this when, in his initial application of 5 July 1990, he stated that he had definitively left the marital home to go and live with a boyfriend, a decision which is not normal according to common criteria.

No doubt is being cast on the father's love for his daughter or on his ability to look after her during the periods for which she is entrusted to his care, for it is essential that they do see each other if the objectives set out above are to be met, that is ensuring the child's well-being and the development of her personality. M. needs to visit her father if her feelings of anxiety and insecurity are to be dissipated. When children are deprived of contact with their father, their present and future development and psychological equilibrium are put at risk. The mother would be wise to try to understand and accept this if she is not to cast doubt on her own ability to exercise parental responsibility.

At present, the failure to comply with the decision confirming the contact arrangements does not amount to a sufficient reason for withdrawing from the appellant the parental responsibility awarded to her by that decision.

Accordingly, we reverse the judgment of the lower court as regards the child's permanent residence with her father, without prejudice to the father's right to contact during the periods which will be stipulated below.

It should be impressed upon the father that during these periods he would be ill-advised to act in any way that would make his daughter realise that her father is living with another man in conditions resembling those of man and wife.

For all the foregoing reasons the Court of Appeal reverses the impugned decision and rules that the appellant, C.D.S., shall continue to exercise parental responsibility for her daughter, M.

The contact arrangements shall be established as follows:

1. The child may see her father on alternate weekends from Friday to Monday. To that end the father shall fetch his daughter from school at the end of classes on the Friday and bring her back on Monday morning before classes start.

2. The father may visit his daughter at school on any other day of the week provided that he does not disrupt her schooling.

3. The child shall spend the Easter holidays alternately with her father and her mother.

4. The Christmas holidays shall be divided into two equal parts: half to be spent with the father and the other half with the mother, but in such a way that the child can spend Christmas Eve and Christmas Day with one and New Year with the other alternately.

5. During the summer holidays the child shall spend thirty days with her father during the latter's holidays, but if that period coincides with the mother's holidays the child shall spend fifteen days with each of them.

6. During the Easter, Christmas and summer holidays the father shall fetch the child from the mother's house and bring her back between 10 a.m. and 1 p.m. unless the parents agree on different times.

7. In accordance with the date of this decision, the child shall spend the next Easter and Christmas holidays with the parent with whom she did not spend those holidays in 1995.

8. The matter of maintenance payable by the father and the manner of payment shall be examined by the Third Section of the Third Chamber of the Lisbon Family Affairs Court in case no. 3821/A, which has been adjourned pending the present decision regarding the child's future.

Costs are awarded against the respondent."

15. One of the three Court of Appeal judges gave the following separate opinion:

"I voted in favour of this decision, with the reservation that I do not consider it constitutionally lawful to assert as a principle that a person can be stripped of his family rights on the basis of his sexual orientation, which – accordingly – cannot, as such, in any circumstances be described as abnormal. The right to be different should not be treated as a 'right' to be ghettoised. It is not therefore a matter of belittling the fact that [the applicant] has come to terms with his sexuality and consequently of denying him his right to bring up his daughter, but rather, since a decision has to be given, of affirming that it cannot be declared in our society and in our era that children can come to terms with their father's homosexuality without running the risk of losing their reference models."

16. No appeal lay against that decision.

17. The right to contact granted to the applicant by the judgment of the Lisbon Court of Appeal was never respected by C.D.S.

18. The applicant therefore lodged an application with the Lisbon Family Affairs Court for enforcement of the Court of Appeal's decision. On 22 May 1998, in connection with those proceedings, the applicant received a copy of a report drawn up by the medical experts attached to the Lisbon Family Affairs Court. He learnt from this that M. was in Vila Nova de Gaia in the north of Portugal. The applicant made two unsuccessful attempts to see his daughter. The enforcement proceedings are apparently still pending.

II. RELEVANT DOMESTIC LAW

19. Article 1905 of the Civil Code provides:

"1. In the event of divorce …, child custody, maintenance and the terms of payment shall be determined by agreement between the parents, which is subject to confirmation by the ... court

…

2. In the absence of an agreement, the court shall decide on the basis of the interests of the child, including the child's interest in maintaining a very close relationship with the non-custodial parent ..."

20. Certain provisions of the Guardianship Act are also relevant to the instant case.

Section 180

"1. ... a decision as to the exercise of parental responsibility shall be made on the basis of the interests of the child, custody of whom may be awarded to one of the parents, a third party or an educational or welfare establishment.

2. Contact arrangements shall be made unless, exceptionally, this would not be in the child's interests ..."

Section 181

"If one of the parents does not comply with the agreement or decision reached in respect of the child's situation, the other parent may apply to the court for enforcement ..."

Section 182

"If the agreement or final decision is not complied with by both the father and the mother or if fresh circumstances make it necessary to vary the terms, one of the parents or the guardian may apply to the ... court for variation of the award of parental responsibility ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

21. The applicant complained that the Lisbon Court of Appeal had based its decision to award parental responsibility for their daughter, M., to his ex-wife rather than to himself exclusively on the ground of his sexual orientation. He alleged that this constituted a violation of Article 8 of the Convention taken alone and in conjunction with Article 14.

The Government disputed that allegation.

22. Under Article 8 of the Convention,

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Court notes at the outset that the judgment of the Court of Appeal in question, in so far as it set aside the judgment of the Lisbon Family Affairs Court of 14 July 1994 which had awarded parental responsibility to the applicant, constitutes an interference with the applicant's right to respect for his family life and thus attracts the application of Article 8. The Convention institutions have held that this provision applies to decisions awarding custody to one or other parent after divorce or separation (see the Hoffmann v. Austria judgment of 23 June 1993, Series A no. 255-C, p. 58, § 29; see also Irlen v. Germany, application no. 12246/86, Commission decision of 13 July 1987, Decisions and Reports 53, p. 225).

That finding is not affected by the Government's submission that since the judgment of the Court of Appeal did not ultimately vary what had been decided by friendly settlement between the parents on 7 February 1991, there was no interference with the rights of Mr Salgueiro da Silva Mouta.

The Court observes in that connection that the application lodged – successfully – by the applicant with the Lisbon Family Affairs Court was based on, among other things, the fact that his ex-wife had failed to comply with the terms of that agreement (see paragraph 11 above).

A. Alleged violation of Article 8 taken in conjunction with Article 14

23. Given the nature of the case and the allegations of the applicant, the Court considers it appropriate to examine it first under Article 8 taken in conjunction with Article 14, according to which

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

24. Mr Salgueiro da Silva Mouta stressed at the outset that he had never disputed the fact that his daughter's interests were paramount, one of the main ones consisting in seeing her father and being able to live with him. He argued, nonetheless, that the Court of Appeal's judgment, in awarding parental responsibility to the mother exclusively on the basis of the father's sexual orientation, amounted to an unjustifiable interference with his right to respect for his family life. The applicant submitted that the decision in issue had been prompted by atavistic misconceptions which bore no relation to the realities of life or common sense. In doing so, he argued, the Court of Appeal had discriminated against him in a manner prohibited by Article 14 of the Convention.

The applicant pointed out that judgment had been given in his favour by the court of first instance, that court being the only one to have had direct knowledge of the facts of the case since the Court of Appeal had ruled solely on the basis of the written proceedings.

25. The Government acknowledged that Article 8 could apply to the situation in question, but only as far as the applicant's right to respect for his family life with his child was concerned. They stressed, however, that no act had been done by a public authority which could have interfered with the applicant's right to the free expression and development of his personality or the manner in which he led his life, in particular his sexual life.

With regard to family life, however, the Government pointed out that, as far as parental responsibility was concerned, the Contracting States enjoyed a wide margin of appreciation in respect of the pursuit of the legitimate aims set out in paragraph 2 of Article 8 of the Convention. They added that in this field, in which the child's interests were paramount, the national authorities were naturally better placed than the international court. The Court should not therefore substitute its own interpretation of things for that of the national courts, unless the measures in question were manifestly unreasonable or arbitrary.

In the instant case the Lisbon Court of Appeal had taken account, in accordance with Portuguese law, of the child's interests alone. The intervention of the Court of Appeal had been prescribed by law (Article 1905 § 2 of the Civil Code and sections 178 to 180 of the Guardianship Act). Moreover, it had pursued a legitimate aim, namely the protection of the child's interests, and was necessary in a democratic society.

The Government concluded that the Court of Appeal, in reaching its decision, had had regard exclusively to the overriding interests of the child and not to the applicant's sexual orientation. The applicant had not therefore been discriminated against in any way.

26. The Court reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations (see the Hoffmann judgment cited above, p. 58, § 31).

It must be determined whether the applicant can complain of such a difference in treatment and, if so, whether it was justified.

1. Existence of a difference in treatment

27. The Government disputed the allegation that in the instant case the applicant and M.'s mother had been treated differently. They argued that the Lisbon Court of Appeal's decision had been mainly based on the fact that, in the circumstances of the case, the child's interests would be better served by awarding parental responsibility to the mother.

28. The Court does not deny that the Lisbon Court of Appeal had regard above all to the child's interests when it examined a number of points of fact and of law which could have tipped the scales in favour of one parent rather than the other. However, the Court observes that in reversing the decision of the Lisbon Family Affairs Court and, consequently, awarding parental responsibility to the mother rather than the father, the Court of Appeal introduced a new factor, namely that the applicant was a homosexual and was living with another man.

The Court is accordingly forced to conclude that there was a difference of treatment between the applicant and M.'s mother which was based on the applicant's sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "*notamment*") (see the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, pp. 30-31, § 72).

2. Justification for the difference in treatment

29. In accordance with the case-law of the Convention institutions, a difference of treatment is discriminatory within the meaning of Article 14 if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see the Karlheinz Schmidt v. Germany judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24).

30. The decision of the Court of Appeal undeniably pursued a legitimate aim, namely the protection of the health and rights of the child; it must now be examined whether the second requirement was also satisfied.

31. In the applicant's submission, the wording of the judgment clearly showed that the decision to award parental responsibility to the mother was based mainly on the father's sexual orientation, which inevitably gave rise to discrimination against him in relation to the other parent.

32. The Government submitted that the decision in question had, on the contrary, merely touched on the applicant's homosexuality. The considerations of the Court of Appeal to which the applicant referred, when viewed in context, were merely sociological, or even statistical, observations. Even if certain passages of the judgment could arguably have been worded differently, clumsy or unfortunate expressions could not in themselves amount to a violation of the Convention.

33. The Court reiterates its earlier finding that the Lisbon Court of Appeal, in examining the appeal lodged by M.'s mother, introduced a new factor when making its decision as to the award of parental responsibility, namely the applicant's homosexuality (see paragraph 28 above). In determining whether the decision which was ultimately made constituted

discriminatory treatment lacking any reasonable basis, it needs to be established whether, as the Government submitted, that new factor was merely an *obiter dictum* which had no direct effect on the outcome of the matter in issue or whether, on the contrary, it was decisive.

34. The Court notes that the Lisbon Family Affairs Court gave its decision after a period in which the applicant, his ex-wife, their daughter M., L.G.C. and the child's maternal grandparents had been interviewed by court psychologists. The court had established the facts and had had particular regard to the experts' reports in reaching its decision.

The Court of Appeal, ruling solely on the basis of the written proceedings, weighed the facts differently from the lower court and awarded parental responsibility to the mother. It considered, among other things, that "custody of young children should as a general rule be awarded to the mother unless there are overriding reasons militating against this (see paragraph 14 above). The Court of Appeal further considered that there were insufficient reasons for taking away from the mother the parental responsibility awarded her by agreement between the parties.

However, after that observation the Court of Appeal added "Even if that were not the case ... we think that custody of the child should be awarded to the mother" (ibid.). The Court of Appeal then took account of the fact that the applicant was a homosexual and was living with another man in observing that "The child should live in ... a traditional Portuguese family" and that "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" (ibid.).

35. It is the Court's view that the above passages from the judgment in question, far from being merely clumsy or unfortunate as the Government maintained, or mere *obiter dicta*, suggest, quite to the contrary, that the applicant's homosexuality was a factor which was decisive in the final decision. That conclusion is supported by the fact that the Court of Appeal, when ruling on the applicant's right to contact, warned him not to adopt conduct which might make the child realise that her father was living with another man "in conditions resembling those of man and wife" (ibid.).

36. The Court is therefore forced to find, in the light of the foregoing, that the Court of Appeal made a distinction based on considerations regarding the applicant's sexual orientation, a distinction which is not acceptable under the Convention (see, *mutatis mutandis*, the Hoffmann judgment cited above, p. 60, § 36).

The Court cannot therefore find that a reasonable relationship of proportionality existed between the means employed and the aim pursued; there has accordingly been a violation of Article 8 taken in conjunction with Article 14.

B. Alleged violation of Article 8 taken alone

37. In view of the conclusion reached in the preceding paragraph, the Court does not consider it necessary to rule on the allegation of a violation of Article 8 taken alone; the arguments advanced in this respect are essentially the same as those examined in respect of Article 8 taken in conjunction with Article 14.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

39. The applicant requested the Court to award him "just satisfaction" without, however, quantifying his claim. In the circumstances the Court considers that the finding of a violation set out in the present judgment constitutes in itself sufficient just satisfaction in respect of the damage alleged.

B. Costs and expenses

40. The applicant requested reimbursement of the costs incurred in lodging his application, including those of himself and his advisers attending the hearing before the Court, namely 224,919 Portuguese escudos (PTE), 5,829 French francs, 11,060 Spanish pesetas and 67 German marks, that is a total sum of PTE 423,217.

He also requested reimbursement of the fees billed by his lawyer and by the adviser who had assisted her in preparing for the hearing before the Court, that is PTE 2,340,000 and PTE 340,000 respectively.

41. The Government left the matter to the Court's discretion.

42. The Court is not satisfied that all the costs claimed were necessary and reasonable. Making an equitable assessment, it awards the applicant an aggregate sum of PTE 350,000 under that head.

As regards fees, the Court considers that the sums claimed are also excessive. Making an equitable assessment and having regard to the circumstances of the case, it decides to award PTE 1,500,000 for the work done by the applicant's lawyer and PTE 300,000 for that done by her adviser.

C. Default interest

43. According to the information available to the Court, the statutory rate of interest applicable in Portugal at the date of adoption of the present judgment is 7% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention taken in conjunction with Article 14;

2. *Holds* that there is no need to rule on the complaints lodged under Article 8 of the Convention taken alone;

3. *Holds* that the present judgment constitutes in itself sufficient just satisfaction for the damage alleged;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
      (i) 350,000 (three hundred and fifty thousand) Portuguese escudos in respect of costs;
      (ii) 1,800,000 (one million eight hundred thousand) Portuguese escudos in respect of fees;
   (b) that simple interest at an annual rate of 7% shall be payable from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* the remainder of the claim for just satisfaction.

Done in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 December 1999.

Vincent BERGER
Registrar

Matti PELLONPÄÄ
President

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF KARNER v. AUSTRIA

(Application no. 40016/98)

JUDGMENT

STRASBOURG

24 July 2003

FINAL

24/10/2003

In the case of Karner v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr P. LORENZEN,
Mr G. BONELLO,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr V. ZAGREBELSKY, *judges*,
Mr C. GRABENWARTER, ad hoc *judge*,
and Mr S. NIELSEN, *Deputy Section Registrar*,

Having deliberated in private on 7 November 2002 and 3 July 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 40016/98) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mr Siegmund Karner ("the applicant"), on 24 July 1997.

2. The applicant was represented by Lansky & Partner, a law firm in Vienna. The Austrian Government ("the Government") were represented by their Agent, Mr H. Winkler.

3. The applicant alleged, in particular, that the Supreme Court's decision not to recognise his right to succeed to a tenancy after the death of his companion amounted to discrimination on the ground of his sexual orientation in breach of Article 14 of the Convention taken in conjunction with Article 8.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court).

6. By a decision of 11 September 2001 the Chamber declared the application partly admissible.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

8. On 7 December 2001 the President of the Chamber granted ILGA-Europe (The European Region of the International Lesbian and Gay Association), Liberty and Stonewall leave to intervene as third parties (Article 36 § 2 of the Convention and Rule 61 § 3). The third parties were represented by Mr R. Wintemute.

9. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1955 and lived in Vienna.

11. From 1989 the applicant lived with Mr W., with whom he had a homosexual relationship, in a flat in Vienna, which the latter had rented a year earlier. They shared the expenses on the flat.

12. In 1991 Mr W. discovered that he was infected with the Aids virus. His relationship with the applicant continued. In 1993, when Mr W. developed Aids, the applicant nursed him. In 1994 Mr W. died after designating the applicant as his heir.

13. In 1995 the landlord of the flat brought proceedings against the applicant for termination of the tenancy. On 6 January 1996 the Favoriten District Court (*Bezirksgericht*) dismissed the action. It considered that section 14(3) of the Rent Act (*Mietrechtsgesetz*), which provided that family members had a right to succeed to a tenancy, was also applicable to a homosexual relationship.

14. On 30 April 1996 the Vienna Regional Civil Court (*Landesgericht für Zivilrechtssachen*) dismissed the landlord's appeal. It found that section 14(3) of the Rent Act was intended to protect persons who had lived together for a long time without being married against sudden homelessness. It applied to homosexuals as well as to persons of opposite sex.

15. On 5 December 1996 the Supreme Court (*Oberster Gerichtshof*) granted the landlord's appeal, quashed the lower court's decision and terminated the lease. It found that the notion of “life companion” (*Lebensgefährte*) in section 14(3) of the Rent Act was to be interpreted as at the time it was enacted, and the legislature's intention in 1974 was not to include persons of the same sex.

16. On 26 September 2000 the applicant died.

17. On 11 November 2001 the applicant's lawyer informed the Court of the applicant's death and that his mother had waived her right to succeed to

the estate. He asked the Court not to strike the application out of its list before the public notary handling the applicant's estate had traced other heirs.

18. On 10 April 2002 the applicant's lawyer informed the Court that the public notary had instigated enquiries in order to trace previously unknown heirs who might wish to succeed to the estate.

II. RELEVANT DOMESTIC LAW

19. Section 14 of the Rent Act (*Mietrechtsgesetz*) reads as follows:

> "Right to a tenancy in the event of death
>
> (1) The death of the landlord or a tenant shall not terminate a tenancy.
>
> (2) On the death of the main tenant of a flat, the persons designated in subsection (3) as being entitled to succeed to the tenancy shall do so, to the exclusion of other persons entitled to succeed to the estate, unless they have notified the landlord within fourteen days of the main tenant's death that they do not wish to continue the tenancy. On succeeding to the tenancy, the new tenants shall assume liability for the rent and any obligations that arose during the tenancy of the deceased main tenant. If more than one person is entitled to succeed, they shall succeed jointly to the tenancy and become jointly and severally liable.
>
> (3) The following shall be entitled to succeed to the tenancy for the purposes of subsection (2): a spouse, a life companion, relatives in the direct line including adopted children, and siblings of the former tenant, in so far as such persons have a pressing need for accommodation and have already lived in the accommodation with the tenant as members of the same household. For the purposes of this provision, 'life companion' shall mean a person who has lived in the flat with the former tenant until the latter's death for at least three years, sharing a household on an economic footing like that of a marriage; a life companion shall be deemed to have lived in the flat for three years if he or she moved into the flat together with the former tenant at the outset."

THE LAW

I. JURISDICTION OF THE COURT

20. The Government requested that the application be struck out of the list of cases in accordance with Article 37 § 1 of the Convention, since the applicant had died and there were no heirs who wished to pursue the application.

21. The applicant's counsel emphasised that the case involved an important issue of Austrian law and that respect for human rights required

its continued examination, in accordance with Article 37 § 1 *in fine*. Article 37 § 1 of the Convention reads as follows:

> "1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
>
> (a) the applicant does not intend to pursue his application; or
>
> (b) the matter has been resolved; or
>
> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
>
> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

22. The Court notes that in a number of cases in which an applicant died in the course of the proceedings it has taken into account the statements of the applicant's heirs or of close family members expressing the wish to pursue the proceedings before the Court (see, among other authorities, *Deweer v. Belgium*, judgment of 27 February 1980, Series A no. 35, pp. 19-20, §§ 37-38; *X v. the United Kingdom*, judgment of 5 November 1981, Series A no. 46, p. 15, § 32; *Vocaturo v. Italy*, judgment of 24 May 1991, Series A no. 206-C, p. 29, § 2; *G. v. Italy*, judgment of 27 February 1992, Series A no. 228-F, p. 65, § 2; *Pandolfelli and Palumbo v. Italy*, judgment of 27 February 1992, Series A no. 231-B, p. 16, § 2; *X v. France*, judgment of 31 March 1992, Series A no. 234-C, p. 89, § 26; and *Raimondo v. Italy*, judgment of 22 February 1994, Series A no. 281-A, p. 8, § 2).

23. On the other hand, it has been the Court's practice to strike applications out of the list of cases in the absence of any heir or close relative who has expressed the wish to pursue an application (see *Scherer v. Switzerland*, judgment of 25 March 1994, Series A no 287, pp. 14-15, § 31; *Öhlinger v. Austria*, no. 21444/93, Commission's report of 14 January 1997, § 15, unreported; *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII). Thus, the Court has to determine whether the application in the present case should also be struck out of the list. In formulating an appropriate answer to this question, the object and purpose of the Convention system as such must be taken into account.

24. The Court reiterates that, while Article 33 (former Article 24) of the Convention allows each Contracting State to refer to the Court (Commission) "any alleged breach" of the Convention by another Contracting State, a person, non-governmental organisation or group of individuals must, in order to be able to lodge a petition in pursuance of Article 34 (former Article 25), claim "to be the victim of a violation ... of the rights set forth in the Convention or the Protocols thereto". Thus, in contrast to the position under Article 33 – where, subject to the other conditions laid down, the general interest attaching to the observance of the

Convention renders admissible an inter-State application – Article 34 requires that an individual applicant should claim to have been actually affected by the violation he alleges (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 90-91, §§ 239-40, and *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, pp. 17-18, § 33). Article 34 does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against a law *in abstracto* simply because they feel that it contravenes the Convention (see *Norris v. Ireland*, judgment of 26 October 1988, Series A no. 142, pp. 15-16, § 31, and *Sanles Sanles v. Spain* (dec.), no. 48335/99, ECHR 2000-XI).

25. While under Article 34 of the Convention the existence of a "victim of a violation", that is to say, an individual applicant who is personally affected by an alleged violation of a Convention right, is indispensable for putting the protection mechanism of the Convention into motion, this criterion cannot be applied in a rigid, mechanical and inflexible way throughout the whole proceedings. As a rule, and in particular in cases which primarily involve pecuniary, and, for this reason, transferable claims, the existence of other persons to whom that claim is transferred is an important criterion, but cannot be the only one. As the Court pointed out in *Malhous* (decision cited above), human rights cases before the Court generally also have a moral dimension, which must be taken into account when considering whether the examination of an application after the applicant's death should be continued. All the more so if the main issue raised by the case transcends the person and the interests of the applicant.

26. The Court has repeatedly stated that its "judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties" (see *Ireland v. the United Kingdom*, cited above, p. 62, § 154, and *Guzzardi v. Italy*, judgment of 6 November 1980, Series A no. 39, p. 31, § 86). Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States.

27. The Court considers that the subject matter of the present application – the difference in treatment of homosexuals as regards succession to tenancies under Austrian law – involves an important question of general interest not only for Austria but also for other States Parties to the Convention. In this connection the Court refers to the submissions made by ILGA-Europe, Liberty and Stonewall, whose intervention in the proceedings as third parties was authorised as it highlights the general

importance of the issue. Thus, the continued examination of the present application would contribute to elucidate, safeguard and develop the standards of protection under the Convention.

28. In these particular circumstances, the Court finds that respect for human rights as defined in the Convention and the Protocols thereto requires a continuation of the examination of the case (Article 37 § 1 *in fine* of the Convention) and accordingly rejects the Government's request for the application to be struck out of its list.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

29. The applicant claimed to have been a victim of discrimination on the ground of his sexual orientation in that the Supreme Court, in its decision of 5 December 1996, had denied him the status of "life companion" of the late Mr W. within the meaning of section 14 of the Rent Act, thereby preventing him from succeeding to Mr W.'s tenancy. He relied on Article 14 of the Convention taken in conjunction with Article 8, which provide as follows:

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 8

"1. Everyone has the right to respect for his private and family life [and] his home ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Applicability of Article 14

30. The applicant submitted that the subject matter fell within the scope of Article 8 § 1 as regards the elements of private life, family life and home.

31. The Government, referring to *Röösli v. Germany* (no. 28318/95, Commission decision of 15 May 1996, Decisions and Reports 85-A, p. 149), submitted that the subject matter of the present case did not come within the ambit of Article 8 § 1 as regards the elements of "private and family life". The issue whether it came within the ambit of the "home"

element could be left open because, in any event, there had been no breach of Article 14 of the Convention taken in conjunction with Article 8.

32. The Court reiterates that Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to the "rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of one or more of such provisions, and to this extent it is autonomous, there can be no room for its application unless the facts of the case fall within the ambit of one or more of the latter (see *Petrovic v. Austria*, judgment of 27 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 585, § 22).

33. The Court has to consider whether the subject matter of the present case falls within the ambit of Article 8. The Court does not find it necessary to determine the notions of "private life" or "family life" because, in any event, the applicant's complaint relates to the manner in which the alleged difference in treatment adversely affected the enjoyment of his right to respect for his home guaranteed under Article 8 of the Convention (see *Larkos v. Cyprus* [GC], no. 29515/95, § 28, ECHR 1999-I). The applicant had been living in the flat that had been let to Mr W. and if it had not been for his sex, or rather, sexual orientation, he could have been accepted as a life companion entitled to succeed to the lease, in accordance with section 14 of the Rent Act.

Therefore, Article 14 of the Convention applies.

B. Compliance with Article 14 taken in conjunction with Article 8

34. The applicant submitted that section 14 of the Rent Act aimed to provide surviving cohabitants with social and financial protection from homelessness but did not pursue any family- or social-policy aims. That being so, there was no justification for the difference in treatment of homosexual and heterosexual partners. Accordingly, he had been the victim of discrimination on the ground of his sexual orientation.

35. The Government accepted that in respect of succession to the tenancy the applicant had been treated differently on the ground of his sexual orientation. They maintained that that difference in treatment had an objective and reasonable justification, as the aim of the relevant provision of the Rent Act had been the protection of the traditional family.

36. ILGA-Europe, Liberty and Stonewall submitted as third-party interveners that a strong justification was required when the ground for a distinction was sex or sexual orientation. They pointed out that a growing number of national courts in European and other democratic societies required equal treatment of unmarried different-sex partners and unmarried same-sex partners, and that that view was supported by recommendations and legislation of European institutions, such as Protocol No. 12 to the

Convention, recommendations by the Parliamentary Assembly of the Council of Europe (Recommendations 1470 (2000) and 1474 (2000)), the European Parliament (Resolution on equal rights for homosexuals and lesbians in the EC, OJ C 61, 28 February 1994, p. 40; Resolution on respect for human rights in the European Union 1998-1999, A5-0050/00, § 57, 16 March 2000) and the Council of the European Union (Directive 2000/78/EC, OJ L 303/16, 27 November 2000).

37. The Court reiterates that, for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Petrovic*, cited above, p. 586, § 30). Furthermore, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention (see *Burghartz v. Switzerland,* judgment of 22 February 1994, Series A no. 280-B, p. 29, § 27; *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24; *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 29, ECHR 1999-IX; *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 94, ECHR 1999-VI; *Fretté v. France*, no. 36515/97, §§ 34 and 40, ECHR 2002-I; and *S.L. v. Austria*, no. 45330/99, § 36, ECHR 2003-I). Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification (see *Smith and Grady*, cited above, § 90, and *S.L. v. Austria*, cited above, § 37).

38. In the present case, after Mr W.'s death, the applicant sought to avail himself of the right under section 14(3) of the Rent Act, which he asserted entitled him as a surviving partner to succeed to the tenancy. The court of first instance dismissed an action by the landlord for termination of the tenancy and the Vienna Regional Court dismissed the appeal. It found that the provision in issue protected persons who had been living together for a long time without being married against sudden homelessness and applied to homosexuals as well as to heterosexuals.

39. The Supreme Court, which ultimately granted the landlord's action for termination of the tenancy, did not argue that there were important reasons for restricting the right to succeed to a tenancy to heterosexual couples. It stated instead that it had not been the intention of the legislature when enacting section 14(3) of the Rent Act in 1974 to include protection for couples of the same sex. The Government now submit that the aim of the provision in issue was the protection of the traditional family unit.

40. The Court can accept that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment (see *Mata Estevez v. Spain* (dec.), no. 56501/00, ECHR 2001-VI, with further references). It remains to be ascertained

whether, in the circumstances of the case, the principle of proportionality has been respected.

41. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of section 14 of the Rent Act. The Court cannot see that the Government have advanced any arguments that would allow such a conclusion.

42. Accordingly, the Court finds that the Government have not offered convincing and weighty reasons justifying the narrow interpretation of section 14(3) of the Rent Act that prevented a surviving partner of a couple of the same sex from relying on that provision.

43. Thus, there has been a violation of Article 14 of the Convention taken in conjunction with Article 8.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

45. The applicant's lawyer claimed 7,267 euros (EUR) as compensation for pecuniary damage caused by the applicant's having to return the flat, which he had renovated, have recourse to an estate agent and renovate a new flat. He also claimed EUR 7,267 for non-pecuniary damage due to the anxiety suffered by the applicant.

46. The Government argued that the claim for pecuniary damage was not supported by any receipts. As to the claim for non-pecuniary damage, it had only been made after the applicant's death. In the absence of any injury to any heirs, it was unnecessary to determine whether such a claim could form part of the applicant's estate.

47. The Court considers that in the absence of an injured party no award can be made under Article 41 of the Convention as regards the claims for

pecuniary and non-pecuniary damage. Accordingly, the Court rejects these claims.

B. Costs and expenses

48. The applicant's lawyer claimed EUR 13,027.75 for costs and expenses incurred in the Convention proceedings.

49. The Government considered this request to be excessive and that any award under that head should not exceed EUR 1,453.46.

50. The Court, making an assessment on an equitable basis, decides that EUR 5,000 shall be paid to the applicant's estate in respect of costs and expenses, plus any tax that may be chargeable.

C. Default interest

51. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Rejects* by six votes to one the Government's request that the application be struck out of the list of cases;

2. *Holds* by six votes to one that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;

3. *Holds* by six votes to one
(a) that the respondent State is to pay the applicant's estate, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) in respect of costs and expenses, plus any tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

4. *Dismisses* unanimously the remainder of the claims for just satisfaction.

Done in English, and notified in writing on 24 July 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Grabenwarter is annexed to this judgment.

C.L.R.
S.N.

DISSENTING OPINION OF JUDGE GRABENWARTER

1. I voted against the majority's decision to reject the Government's request that the application be struck out of the list of cases, for the following reasons.

The Court has decided on a number of occasions to permit a successor in title to continue Convention proceedings when an applicant has died. In the present case, however, it appears that there are no heirs, with the result that Article 37 § 1 of the Convention is in issue.

2. Under Article 37 § 1 of the Convention the Court may at any stage of the proceedings decide to strike an application out of the list of cases where the circumstances lead to the conclusion that the applicant does not intend to pursue his application. However, the Court should continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

I agree with the majority that discrimination against homosexuals in general, and in the field of tenancy legislation in particular, forms an important aspect of respect for human rights. This does not, however, in itself justify the continued examination of a case after the death of an applicant in proceedings under Article 34 of the Convention. The reasoning of the majority is rather short as the reference to case-law concerning the continuation of proceedings when there are heirs does not apply in this case.

At the outset, I agree with the majority that, despite the death of the applicant and the absence of a formal successor in title, the Court may in exceptional cases continue the examination of a case. I also agree that the general importance of the case may be of relevance in this respect.

3. However, I do not share the opinion that the present case is one of "general importance" for these purposes. In taking up the wording of earlier judgments in a different context, the majority suggest that it suffices if the continuation of the examination would "contribute to elucidate, safeguard and develop the standards of protection under the Convention" (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 62, § 154, and *Guzzardi v. Italy*, judgment of 6 November 1980, Series A no. 39, p. 31, § 86). While it is true that judgments also serve these purposes, it is not in line with the character of the Convention system (which is primarily designed to protect individuals) to continue proceedings without an applicant on the ground that this contributes to elucidating, safeguarding and developing the standards of protection under the Convention. This rather general criterion is met by the majority of the cases declared admissible, at least by those where the alleged violation is caused by domestic law or general practice and not by the practice applied in the particular case. "General importance" needs to be read in a narrower sense.

The judgment gives no reason for the "general importance" of the case other than the reference to the submissions of a third party, whose intervention "highlights the general importance of the issue". The fact that third parties applied to intervene is an indication of a certain general interest in the case, but it does not mean that the case is of a general importance (see Rule 61 § 3 of the Rules of Court and Article 36 § 2 of the Convention for the criteria for third-party interventions).

In this connection, reference must be made to a recent judgment of the Fourth Section of the Court in *Sevgi Erdoğan v. Turkey* (striking out) (no. 28492/95, 29 April 2003), paragraph 38 of which reads as follows:

> "In the light of the foregoing, and given the impossibility of establishing any communication with the applicant's close relatives or statutory heirs, the Court considers that her representative cannot meaningfully continue the proceedings before it (see, *mutatis mutandis*, *Ali v. Switzerland*, judgment of 5 August 1998, *Reports of Judgments and Decisions* 1998-V, pp. 2148-49, § 32). The Court would also point out that it has already had occasion to rule on the issue raised by the applicant under Article 3 in its examination of other applications against Turkey (see, among many other authorities, *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI; *Büyükdağ v. Turkey*, no. 28340/95, 21 December 2000; and, as the most recent example, *Algür v. Turkey*, no. 32574/96, 22 October 2002). Having regard to those considerations, the Court concludes that it is no longer justified to continue the examination of the application."

Sevgi Erdoğan shows that, while a question of general importance may attach to, for example, cases involving gross violations of human rights (such as the execution of someone following a death sentence before this Court has given judgment), even treatment that may fall under Article 3 of the Convention does not in itself justify continuing the examination of an application. Therefore, it is hard to see why a violation of Article 14 of the Convention taken in conjunction with Article 8 should be seen differently unless there are other reasons.

It appears from *Sevgi Erdoğan* that a prior judgment on the same issue may be relevant in considering whether an application should be struck out of the list of cases under Article 37 § 1 of the Convention. The majority do not rely on that argument. If they had done so they could not have supported the continuation of the proceedings for the following reason. If the Court has not yet decided a particular issue, the question arises whether it would be difficult to bring a similar case before the Court. It follows, however, from the submissions of the applicant's lawyer that there are a number of parallel cases in Austria, especially in Vienna, that could easily be brought before the Austrian courts and hence before this Court. Against the background of the decision of the Austrian Supreme Court in this case, it may even be doubtful whether future applicants would have to introduce a remedy before that court in order to fulfil the requirements of Article 35 of the Convention. In sum, I do not think that it would be especially difficult to bring a parallel case before the European Court of Human Rights.

Both the lack of general importance of the present case and the lack of any particular difficulty in bringing a parallel case before the Court lead me to the conclusion that the present application should have been struck out of the list of cases. The European Court of Human Rights is not a constitutional court which decides on a case-by-case basis which cases it deems expedient to examine on the basis of a general criterion such as the one provided by the majority.

At any rate, the Chamber broke new ground with this decision, which is unprecedented in the case-law of the Court. It refers to a number of cases at paragraph 23 of the judgment, although not *Sevgi Erdoğan*, and then proceeds to decide this case differently. In my view, this is a clear case in which Article 30 of the Convention applies: the judgment has a "result inconsistent with a judgment previously delivered by the Court". It also raises a serious question affecting the interpretation of the Convention. The Chamber should then have relinquished jurisdiction in favour of the Grand Chamber.

4. Were the applicant still alive, I would have voted in favour of finding a violation of Article 14 of the Convention taken in conjunction with Article 8. I only voted against finding a violation as a consequence of my vote on the Government's request to strike the application out of the list of cases.

5. I also voted against the award of just satisfaction under Article 41 of the Convention. However, this is not only a matter of consistency. The decision on that point again shows the problems which arise if one strains the natural wording of the Convention. Article 41 tells us that just satisfaction can only be awarded to an "injured party". This reflects again the notion that the Convention system serves to protect individuals. In this case we have no injured party any more, and there is still some doubt about whether heirs might still turn up (see paragraph 18 of the judgment). To award the specified sum to the applicant's "estate" where there are no heirs does not solve the problem. In the (probable) event that no heir is found, the estate will pass to the State (Article 760 of the Civil Code, *ABGB*), which means that the Contracting Party will have to pay the money from one pocket to the other.

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF L. and V. v. AUSTRIA

(Applications nos. 39392/98 and 39829/98)

JUDGMENT

STRASBOURG

9 January 2003

FINAL

09/04/2003

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

In the case of L. and V. v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mr G. BONELLO,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER, *judges*,

and Mr S. NIELSEN, *Deputy Section Registrar*,

Having deliberated in private on 5 December 2002,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 39392/98 and 39829/98) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Austrian nationals, Mr G.L. and Mr A.V. ("the applicants"), on 20 June and 10 December 1997 respectively.

2. The applicants were represented by Mr H. Graupner, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Mr H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicants alleged, in particular, that the maintenance in force of Article 209 of the Austrian Criminal Code, which penalised homosexual acts of adult men with consenting adolescents between 14 and 18 years of age, and their convictions under that provision violated their right to respect for their private life and were discriminatory.

4. The applications were transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The applications were allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section.

7. By a decision of 22 November 2001 the Chamber declared the applications partly admissible.

8. The applicants filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicants were born in 1967 and 1968 respectively and live in Vienna.

A. The first applicant

10. On 8 February 1996 the Vienna Regional Criminal Court (*Landesgericht für Strafsachen*) convicted the first applicant under Article 209 of the Criminal Code (*Strafgesetzbuch*) of homosexual acts with adolescents and sentenced him to one year's imprisonment suspended on probation for a period of three years. Relying mainly on the first applicant's diary, in which he had made entries about his sexual encounters, the court found it established that between 1989 and 1994 the first applicant had had, in Austria and in a number of other countries, homosexual relations either by way of oral sex or masturbation with numerous persons between 14 and 18 years of age, whose identity could not be established.

11. On 5 November 1996 the Supreme Court (*Oberster Gerichtshof*), upon the first applicant's plea of nullity, quashed the judgment regarding the offences committed abroad.

12. On 29 January 1997 the Vienna Regional Criminal Court resumed the proceedings, which had been discontinued as far as the offences committed abroad were concerned, and found the first applicant guilty under Article 209 of the Criminal Code of the offences committed in Austria, sentencing him to eleven months' imprisonment suspended on probation for a period of three years.

13. On 27 May 1997 the Supreme Court dismissed the first applicant's plea of nullity in which he had complained that the application of Article 209 of the Criminal Code violated his right to respect for his private life and his right to non-discrimination and had suggested that the Supreme Court request the Constitutional Court to review the constitutionality of that provision.

14. On 31 July 1997 the Vienna Court of Appeal (*Oberlandesgericht*), upon the first applicant's appeal, reduced the sentence to eight months' imprisonment suspended on probation for a period of three years.

B. The second applicant

15. On 21 February 1997 the Vienna Regional Criminal Court convicted the second applicant under Article 209 of the Criminal Code of homosexual acts with adolescents, and on one minor count of misappropriation. It sentenced him to six months' imprisonment suspended on probation for a period of three years. The Court found it established that on one occasion the second applicant had had oral sex with a 15-year-old.

16. On 22 May 1997 the Vienna Court of Appeal dismissed the second applicant's appeal on points of law, in which he had complained that Article 209 of the Criminal Code was discriminatory and violated his right to respect for his private life and had suggested that the Court of Appeal request the Constitutional Court to review the constitutionality of that provision. It also dismissed his appeal against sentence. The decision was served on 3 July 1997.

II. RELEVANT DOMESTIC LAW AND BACKGROUND

A. The Criminal Code

17. Any sexual acts with persons under 14 years of age are punishable under Articles 206 and 207 of the Criminal Code.

18. Article 209 of the Criminal Code, in the version in force at the material time, read as follows:

> "A male person who after attaining the age of 19 fornicates with a person of the same sex who has attained the age of 14 but not the age of 18 shall be sentenced to imprisonment for between six months and five years."

19. This provision was aimed at consensual homosexual acts, as any sexual act of adults with persons up to 19 years of age are punishable under Article 212 of the Criminal Code if the adult abuses a position of authority (parent, employer, teacher, doctor, etc.). Any sexual acts involving the use of force or threats are punishable as rape, pursuant to Article 201, or sexual coercion pursuant to Article 202 of the Criminal Code. Consensual heterosexual or lesbian acts between adults and persons over 14 years of age are not punishable.

20. Offences under Article 209 were regularly prosecuted, an average of sixty criminal proceedings being opened per year, out of which a third resulted in a conviction. As regards the penalties applied, a term of imprisonment usually exceeding three months was imposed in 65 to 75% of the cases, of which 15 to 25% were not suspended on probation. According to information given by the Federal Minister of Justice in reply to a parliamentary question, in the year 2001 three persons were serving a term of imprisonment based only or mainly on a conviction under Article 209 of the Criminal Code and four others were held in detention on remand in proceedings relating exclusively to charges under Article 209.

21. On 10 July 2002, following the Constitutional Court's judgment of 21 June 2002 (see below), Parliament decided to repeal Article 209. It also introduced Article 207b, which penalises sexual acts with a person under 16 years of age if that person is for certain reasons not mature enough to understand the meaning of the act and the offender takes advantage of this immaturity or if the person under 16 is in a predicament and the offender takes advantage of that situation. Article 207b also penalises inducing persons under 18 years of age to engage in sexual activities in return for payment. Article 207b applies irrespective of whether the sexual acts at issue are heterosexual, homosexual or lesbian. The above amendment, published in the Official Gazette (*Bundesgesetzblatt*) no. 134/2002, came into force on 14 August 2002.

22. According to the transitional provisions, the amendment does not apply to criminal proceedings in which the judgment at first instance has already been given. It does exceptionally apply, subject to the principle of the application of the more favourable law, where a judgment is set aside, *inter alia*, following the reopening of the proceedings or in the context of a renewal of the proceedings following the finding of a violation of the Convention by the European Court of Human Rights. Apart from these situations, convictions under Article 209 remain unaffected by the amendment.

B. Proceedings before the Constitutional Court

23. In a judgment of 3 October 1989, the Constitutional Court found that Article 209 of the Criminal Code was compatible with the principle of equality under constitutional law and in particular with the prohibition on gender discrimination contained therein. That judgment was given upon the complaint of a person who subsequently brought his case before the Commission (see *Zukrigl v. Austria*, no. 17279/90, Commission decision of 13 May 1992, unreported).

24. The relevant passage of the Constitutional Court's judgment reads as follows:

> "The development of the criminal law in the last few decades has shown that the legislature is striving to apply the system of criminal justice in a significantly more restrictive way than before in pursuance of the efforts it is undertaking in connection with its policy on the treatment of offenders, which have become known under the general heading of 'decriminalisation'. This means that it leaves offences on the statute book or creates new offences only if such punishment of behaviour harmful to society is still found absolutely necessary and indispensable after the strictest criteria have been applied. The criminal provision which has been challenged relates to the group of acts declared unlawful in order to protect – in so far as strictly necessary – a young, maturing person from developing sexually in the wrong way. ('Homosexual acts are only offences of relevance to the criminal law inasmuch as a dangerous strain must not be placed by homosexual experiences upon the sexual development of young males ...' Pallin, in Foregger/Nowakowski (publishers), *Wiener Kommentar zum Strafgesetzbuch*, 1980, paragraph 1 on Article 209 ...) Seen in this light, it is the conviction of the Constitutional Court that from the point of view of the principle of equality contained in Article 7 § 1 of the Federal Constitution and Article 2 of the Basic Law those legislating in the criminal sphere cannot reasonably be challenged for taking the view, by reference to authoritative expert opinions coupled with experience gained, that homosexual influence endangers maturing males to a significantly greater extent than girls of the same age, and concluding that it is necessary to punish under the criminal law homosexual acts committed with young males, as provided for under Article 209 of the Criminal Code. This conclusion was also based on their views of morality, which they wanted to impose while duly observing the current policy on criminal justice which aims at moderation and at restricting the punishment of offences (while carefully weighing up all the manifold advantages and disadvantages). Taking everything into account, we are dealing here with a distinction which is based on factual differences and therefore constitutionally admissible from the point of view of Article 7 § 1 of the Federal Constitution read in conjunction with Article 2 of the Basic Law."

25. On 29 November 2001 the Constitutional Court dismissed the Innsbruck Regional Court's request to review the constitutionality of Article 209 of the Criminal Code.

26. The Regional Court had argued, *inter alia*, that Article 209 violated Articles 8 and 14 of the Convention as the theory that male adolescents ran a risk of being recruited into homosexuality on which the Constitutional Court had relied in its previous judgment had since been refuted. The Constitutional Court found that the issue was *res judicata*. It noted that the fact that it had already given a ruling on the same provision did not prevent it from reviewing it anew, if there was a change in the relevant circumstances or different legal argument. However, the Regional Court had failed to give detailed reasons for its contention that relevant scientific knowledge had changed to such an extent that the legislator was no longer entitled to set a different age-limit for consensual homosexual relations than for consensual heterosexual or lesbian relations.

27. On 21 June 2002, upon a further request for review made by the Innsbruck Regional Court, the Constitutional Court found that Article 209 of the Criminal Code was unconstitutional.

28. The Regional Court had argued, firstly, as it had done previously, that Article 209 of the Criminal Code violated Articles 8 and 14 of the Convention and, secondly, that it was incompatible with the principle of equality under constitutional law and with Article 8 of the Convention, as a relationship between male adolescents aged between 14 and 19 was first legal, but became punishable as soon as one reached the age of 19 and became legal again when the second one reached the age of 18. The Constitutional Court held that the second argument differed from the arguments which it had examined in its judgment of 3 October 1989 and that it was therefore not prevented from considering it. It noted that Article 209 concerned only consensual homosexual relations between men aged over 19 and adolescents between 14 and 18. In the 14 to 19 age bracket homosexual acts between persons of the same age (for instance two 16-year-olds) or of persons with a one- to five-year age difference were not punishable. However, as soon as one partner reached the age of 19, such acts constituted an offence under Article 209 of the Criminal Code. They became legal again when the younger partner reached the age of 18. Given that Article 209 did not only apply to occasional relations but also covered ongoing relationships, it led to rather absurd results, namely a change of periods during which the homosexual relationship of two partners was first legal, then punishable and then legal again and could therefore not be considered to be objectively justified.

C. Parliamentary debate

29. In the spring of 1995 the Social Democratic Party, the Green Party and the Liberal Party brought motions in Parliament to repeal Article 209 of the Criminal Code. They argued in particular that in the 1970s the legislator had justified this provision on the theory that male adolescents were at a risk of being recruited into homosexuality while female adolescents were not. However, modern science had shown that sexual orientation was already established at the beginning of puberty. Moreover, different ages of consent were not in line with European standards. In this connection they referred in particular to Recommendation 924 (1981) of the Parliamentary Assembly of the Council of Europe which had advocated equal ages of consent for heterosexual and homosexual relations. Protection of juveniles against sexual violence and abuse was sufficiently afforded by other provisions of the Criminal Code, irrespective of their sexual orientation.

30. Subsequently, on 10 October 1995, a sub-committee of the Legal Affairs Committee of Parliament heard evidence from eleven experts in various fields such as medicine, sexual science, Aids prevention, developmental psychology, psychotherapy, psychiatry, theology, law and human rights law. Nine were clearly in favour of repealing Article 209, an important argument for the experts in the fields of medicine, psychology and psychiatry being that sexual orientation was, in the majority of cases, established before the age of puberty, which disproved the theory that male adolescents were recruited into homosexuality by homosexual experiences. Another recurring argument was that penalising homosexual relations made Aids

prevention more difficult. Two experts were in favour of keeping Article 209: one simply stated that he considered it necessary for the protection of male adolescents; the other considered that despite the fact that there was no such thing as being recruited into homosexuality, not all male adolescents were already sure of their sexual orientation and it was therefore better to give them more time to establish their identity.

31. On 27 November 1996 Parliament held a debate on the motion to repeal Article 209 of the Criminal Code. Those speakers who were in favour of repealing Article 209 relied on the arguments of the majority of the experts heard in the sub-committee. Of those speakers who were in favour of keeping Article 209, some simply expressed their approval while others emphasised that they still considered the provision necessary for those male adolescents who were not sure of their sexual orientation. There was an equal vote at the close of the debate (ninety-one to ninety-one). Consequently, Article 209 remained on the statute book.

32. On 17 July 1998 the Green Party again brought a motion before Parliament to repeal Article 209 of the Criminal Code. The ensuing debate followed much the same lines as before. The motion was rejected by eighty-one votes to twelve.

33. On 10 July 2002 Parliament decided to repeal Article 209 of the Criminal Code (see paragraph 21 above).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

34. The applicants complained of the maintenance in force of Article 209 of the Criminal Code, which criminalises homosexual acts of adult men with consenting adolescents between the ages of 14 and 18, and of their convictions under that provision. Relying on Article 8 of the Convention taken alone and in conjunction with Article 14, they alleged that their right to respect for their private life had been violated and that the contested provision was discriminatory, as heterosexual or lesbian relations between adults and adolescents in the same age bracket were not punishable.

Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 provides:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

35. Given the nature of the complaints, the Court deems it appropriate to examine the case directly under Article 14 taken in conjunction with Article 8.

36. It is not in dispute that the present case falls within the ambit of Article 8, concerning as it does a most intimate aspect of the applicants' private life (see, for instance, *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, p. 21, § 52, and *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 90, ECHR 1999-VI). Article 14 is therefore applicable.

37. The applicants submitted that, following the Court's admissibility decision in the present case, the Austrian Constitutional Court declared Article 209 of the Criminal Code to be unconstitutional and that subsequently Parliament decided to repeal this provision. However, the Constitutional Court's judgment, which is based on other grounds than those relied on in the present application, has not acknowledged, let alone afforded redress for, the alleged breach of the Convention. Moreover, their convictions still stood. The applicants therefore argued that they were still victims, within the meaning of Article 34 of the Convention, of the violation alleged. Nor can it be said that merely repealing the contested legislation has resolved the matter within the meaning of Article 37 § 1 (b) of the Convention.

38. The applicants asserted that in Austria, like in the majority of European countries, heterosexual and lesbian relations between adults and consenting adolescents over 14 years of age were not punishable. They submitted that, in the context of consensual relations with adults, there was nothing to indicate that adolescents needed more protection against homosexual relations than against heterosexual or lesbian relations. Not only was Article 209 of the Criminal Code unnecessary for protecting male adolescents in general, it also hampered homosexual adolescents in their development by attaching a social stigma to their relations with adult men and to their sexual orientation in general. In this connection, the applicants, referring to the Court's case-law, contended that any interference with a person's sexual life and any difference in treatment based on sex or sexual orientation required particulary weighty reasons (see *Smith and Grady*, cited above, § 94, and *A.D.T. v. the United Kingdom*, no. 35765/97, § 36, ECHR 2000-IX).

39. This was all the more true in a field where a European consensus existed to reduce the age of consent for homosexual relations. Despite the fact that a European consensus had been growing ever since the introduction of their applications, the Government had failed to come forward with any valid justification for upholding, until very recently, a different age of consent for male homosexual relations than for heterosexual or lesbian relations. In particular, the applicants pointed out that in April 1997, in September and December 1998, and again in July 2001, the European Parliament had requested Austria to repeal Article 209. Similarly, in November 1998, the Human Rights Committee, set up under the International Covenant on Civil and Political Rights, had found that Article 209 was discriminatory. The Parliamentary Assembly of the Council of Europe had issued two recommendations in 2000 advocating equal ages of consent for heterosexual, lesbian and homosexual relations and a number of member States of the Council of Europe had recently introduced equal ages of consent.

40. Further, the applicants pointed out that the Commission, in *Sutherland v. the United Kingdom* (no. 25186/94, Commission's report of 1 July 1997, unpublished) had departed from its earlier case-law relied on by the Government. In their view, the difference between the present applications and *Sutherland* was not decisive, as the fact that under the United Kingdom law in force at the material time the adolescent partner was also punishable was only referred to by the Commission as a subsidiary argument. As to the Government's further argument that Article 209 had been considered necessary for the protection of male adolescents, they submitted that the great majority of scientific experts whose evidence had been heard in Parliament in 1995 had disagreed with this view.

41. The Government drew attention to the recent amendment of the Criminal Code. They asserted that, in the applicants' cases, there were no changes as a result of the new legal position. The Government therefore stated that their position remained unchanged and maintained their previous submissions.

42. The Government referred to the Constitutional Court's judgment of 3 October 1989 and to the case-law of the Commission (see Zukrigl, decision cited above, and *H.F. v. Austria*, no. 22646/93, Commission decision of 26 June 1995, unreported), pointing out that the Commission had found no indication of a violation of Article 8 of the Convention either taken alone or in conjunction with Article 14 in respect of Article 209 of the Austrian Criminal Code. As to *Sutherland* (cited above), the Government pointed out that there was an important difference, namely that under Article 209 the adolescent participating in the offence was not punishable. Moreover, they referred to the fact that, in 1995, Parliament had heard numerous experts and had discussed Article 209 extensively with a view to abolishing it, but had decided to uphold it, as the provision was still considered necessary, within the meaning of Article 8 § 2 of the Convention, for the protection of male adolescents.

43. The Court notes at the outset that, following the Constitutional Court's judgment of 21 June 2002, Article 209 of the Criminal Code was repealed on 10 July 2002. The amendment in question came into force on 14 August 2002. However, this development does not affect the applicants' status as victim within the meaning of Article 34 of the Convention. In this connection, the Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a victim unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for instance, *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI). In the present case it is sufficient to note that the applicants were convicted under the contested provision and that their respective convictions remain unaffected by the change in the law. Thus, as the applicants rightly pointed out, it cannot be said that the matter has been resolved within the meaning of Article 37 § 1 (b) of the Convention.

44. According to the Court's established case-law, a difference in treatment is discriminatory for the purposes of Article 14 if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". However, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B,

pp. 32-33, § 24; *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 29, ECHR 1999-IX; and *Fretté v. France*, no. 36515/97, §§ 34 and 40, ECHR 2002-I).

45. The applicants complained of a difference in treatment based on their sexual orientation. In this connection, the Court reiterates that sexual orientation is a concept covered by Article 14 (see *Salgueiro da Silva Mouta*, cited above, § 28). Just like differences based on sex (see *Karlheinz Schmidt*, cited above, ibid., and *Petrovic v. Austria*, judgment of 27 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 587, § 37), differences based on sexual orientation require particularly serious reasons by way of justification (see *Smith and Grady*, cited above, § 90).

46. The Government asserted that the contested provision served to protect the sexual development of male adolescents. The Court accepts that the aim of protecting the rights of others is a legitimate one. It remains to be ascertained whether there existed a justification for the difference of treatment.

47. The Court observes that in previous cases relied on by the Government which related to Article 209 of the Austrian Criminal Code, the Commission found no violation of Article 8 of the Convention either taken alone or in conjunction with Article 14. However, the Court has frequently held that the Convention is a living instrument, which has to be interpreted in the light of present-day conditions (see, for instance, *Fretté*, cited above, ibid.) In *Sutherland*, the Commission, having regard to recent research according to which sexual orientation is usually established before puberty in both boys and girls and to the fact that the majority of member States of the Council of Europe have recognised equal ages of consent, explicitly stated that it was "opportune to reconsider its earlier case-law in the light of these modern developments" (Commission's report cited above, §§ 59-60). It reached the conclusion that in the absence of any objective and reasonable justification the maintenance of a higher age of consent for homosexual acts than for heterosexual ones violated Article 14 taken in conjunction with Article 8 (ibid., § 66).

48. Furthermore, the Court considers that the difference between *Sutherland* and the present case, namely that here the adolescent partner participating in the proscribed homosexual acts was not punishable, is not decisive. This element was only a secondary consideration in the Commission's report (ibid., § 64).

49. What is decisive is whether there was an objective and reasonable justification why young men in the 14 to 18 age bracket needed protection against sexual relationships with adult men, while young women in the same age bracket did not need such protection against relations with either adult men or women. In this connection the Court reiterates that the scope of the margin of appreciation left to the Contracting State will vary according to the circumstances, the subject matter and the background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, for instance, *Petrovic*, cited above, § 38, and *Fretté*, cited above, § 40).

50. In the present case the applicants pointed out, and this has not been contested by the Government, that there is an ever growing European consensus to apply equal ages of consent for heterosexual, lesbian and homosexual relations. Similarly, the Commission observed in

Sutherland (cited above) that "equality of treatment in respect of the age of consent is now recognised by the great majority of member States of the Council of Europe" (loc. cit., § 59).

51. The Government relied on the Constitutional Court's judgment of 3 October 1989, which had considered Article 209 of the Criminal Code necessary to avoid "a dangerous strain ... be[ing] placed by homosexual experiences upon the sexual development of young males". However, this approach has been outdated by the 1995 parliamentary debate on a possible repeal of that provision. As was rightly pointed out by the applicants, the vast majority of experts who gave evidence in Parliament clearly expressed themselves in favour of an equal age of consent, finding in particular that sexual orientation was in most cases established before the age of puberty and that the theory that male adolescents were "recruited" into homosexuality had thus been disproved. Notwithstanding its knowledge of these changes in the scientific approach to the issue, Parliament decided in November 1996, that is, shortly before the applicants' convictions, in January and February 1997 respectively, to keep Article 209 on the statute book.

52. To the extent that Article 209 of the Criminal Code embodied 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 differential treatment any more than similar negative attitudes towards those of a different race, origin or colour (see *Smith and Grady*, cited above, § 97).

53. In conclusion, the Court finds that the Government have not offered convincing and weighty reasons justifying the maintenance in force of Article 209 of the Criminal Code and, consequently, the applicants' convictions under this provision.

54. Accordingly, there has been a violation of Article 14 of the Convention taken in conjunction with Article 8.

55. Having regard to the foregoing considerations, the Court does not consider it necessary to rule on the question whether there has been a violation of Article 8 taken alone.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

57. The applicants each requested 1,000,000 Austrian schillings, equivalent to 72,672.83 euros (EUR), as compensation for non-pecuniary damage. They asserted that they had suffered feelings of distress and humiliation due to the maintenance in force of Article 209 of the Criminal Code and, in particular, the criminal proceedings against them resulting in their convictions, which stigmatised them as sexual offenders. Furthermore, the first applicant

submitted that he suffered from epilepsy, which had increased his anxiety and suffering during the trial, and that he had lost his work as a result of his conviction.

58. The Government contended that the finding of a violation would in itself afford the applicants sufficient just satisfaction for any non-pecuniary damage sustained.

59. The Court observes that, in a number of cases concerning the maintenance in force of legislation penalising homosexual acts between consenting adults, it considered that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained (see *Dudgeon v. the United Kingdom* (Article 50), judgment of 24 February 1983, Series A no. 59, pp. 7-8, § 14; *Norris v. Ireland*, judgment of 26 October 1988, Series A no. 142, pp. 21-22, § 50; and *Modinos v. Cyprus*, judgment of 22 April 1993, Series A no. 259, p. 12, § 30). However, in a case which concerned a conviction for homosexual acts with a number of consenting adults (*A.D.T. v. the United Kindgom*, cited above, §§ 43-45), the Court awarded 10,000 pounds sterling (GBP) in respect of non-pecuniary damage. Similarily, in cases which concerned investigations in respect of the applicants resulting in their discharge from the army on account of their homosexuality, the Court awarded GBP 19,000 to each applicant for non-pecuniary damage (see *Smith and Grady v. the United Kingdom* (just satisfaction), nos. 33985/96 and 33986/96, § 13, ECHR 2000-IX).

60. In the present case, the Court notes that Article 209 of the Criminal Code has recently been repealed and that the applicants have therefore in part achieved the objective of their application. However, they were convicted under Article 209. The Court considers that the criminal proceedings and, in particular, the trial during which details of the applicant's most intimate private life were laid open in public, have to be considered as profoundly destabilising events in the applicants' lives which had and, it cannot be excluded, continue to have a significant emotional and psychological impact on each of them (see *Smith and Grady* (just satisfaction), ibid.). Making an assessment on an equitable basis, the Court awards the applicants EUR 15,000 each.

B. Costs and expenses

61. The applicants requested a total amount of EUR 65,590.93. This sum is composed of EUR 5,633.53 for costs and expenses incurred by the first applicant in the domestic proceedings, EUR 1,655.12 for costs and expenses incurred by the second applicant in the domestic proceedings and EUR 58,302.28 for costs and expenses incurred by both applicants in the Convention proceedings.

62. Further, the applicants, in their submissions of 3 August 2002, asserted that following the Court's judgment further costs will have to be incurred in order to remove the consequences flowing from the violation of the Convention. They argued in particular that – in case of a finding of a violation by the Court – they will be entitled, pursuant to Article 363a of the Code of Criminal Procedure, to have the criminal proceedings reopened in order to have their convictions set aside and to have them removed from their criminal records. The applicants therefore requested the Court to rule that the respondent State was obliged to pay any future costs necessary for removing the consequences of the violation at issue and to reserve the fixing of the exact amount to a separate decision.

63. The Government asserted that the amount claimed by the applicants was excessive. They submitted, in particular, that the applicants had failed to submit a detailed statement of costs as regards the domestic proceedings. Moreover, the second applicant had also been convicted of misappropriation. Accordingly, the domestic proceedings had not only been instituted for the offence under Article 209 of the Criminal Code. Further, the Government asserted that the applicants' counsel had not correctly applied the lawyers' fees as regards the Convention proceedings, and argued that it had not been necessary to submit two separate applications. The Government considered that a total amount of EUR 5,813.83 for costs and expenses would be appropriate as regards the first applicant and a total amount of EUR 4,142.35 as regards the second applicant.

64. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see *Smith and Grady* (just satisfaction), cited above, § 28, with further references).

65. As to the costs of the domestic proceedings, the Court notes that the applicants each submitted a bill of fees by the lawyer who represented them in the criminal proceedings, which indicates a lump sum for their defence. The diffence in the amounts claimed by the applicants is explained by the fact that, in the first applicant's case, two sets of criminal proceedings were instituted, as his first conviction had been partly set aside by the Supreme Court. The Court observes that in the first applicant's case the proceedings related only to Article 209 of the Criminal Code. The Court therefore finds that the entire costs were actually and necessarily incurred. Moreover, it finds that the amount claimed is reasonable and awards it in full, that is EUR 5,633.53. In the second applicant's case the Court, making allowance for the fact that the criminal proceedings against him related mainly to Article 209 but also to a minor count of misappropriation, awards EUR 1,500.

66. As to the costs of the Convention proceedings, the Court considers them to be excessive. Making an assessment on an equitable basis, the Court awards each applicant EUR 5,000.

67. The total amount awarded in respect of costs and expenses is, therefore, EUR 10,633.53 as regards the first applicant and EUR 6,500 as regards the second applicant.

68. As to the applicants' request for future costs linked to removing the consequences of the violation of the Convention found, the Court considers that such a claim is speculative. The Court notes in particular that both applicants were sentenced to a prison term suspended on probation in 1997 and that the three-year probationary period has already expired. What remains is the entry of their convictions in their criminal records. In this situation it is open to doubt whether there will be any need for the applicants to have the criminal proceedings against them reopened, as the respondent State may well choose other means to have their convictions expunged. The respondent State may for instance decide to grant the applicants a pardon and have their convictions removed from their criminal records. Having regard to these circumstances, the Court dismisses the applicants' claim for future costs.

C. Default interest

69. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;

2. *Holds* that there is no need to rule on the complaints lodged under Article 8 of the Convention taken alone;

3. *Holds*
   (a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage and 10,633.53 (ten thousand six hundred and thirty-three euros fifty-three cents) in respect of costs and expenses;
   (b) that the respondent State is to pay the second applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage and EUR 6,500 (six thousand five hundred euros) in respect of costs and expenses;
   (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 9 January 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF S.L. v. AUSTRIA

(Application no. 45330/99)

JUDGMENT

STRASBOURG

9 January 2003

FINAL

09/04/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of S.L. v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mr G. BONELLO,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER, *judges*,
and Mr S. NIELSEN, *Deputy Section Registrar*,

Having deliberated in private on 5 December 2002,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 45330/99) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mr S.L. ("the applicant"), on 19 October 1998.

2. The applicant was represented by Mr H. Graupner, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicant alleged that the maintenance in force of Article 209 of the Austrian Criminal Code, which penalised homosexual acts of adult men with consenting adolescents between fourteen and eighteen years of age, violated his right to respect for his private life and was discriminatory.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section.

6. By a decision of 22 November 2001 the Court declared the application admissible.

7. The applicant filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1981 and lives in Bad Gastein (Austria).

9. At about the age of eleven or twelve the applicant began to be aware of his sexual orientation. While other boys were attracted by women, he realised that he was emotionally and sexually attracted by men, in particular by men who are older than himself. At the age of fifteen he was sure of his homosexuality.

10. The applicant submits that he lives in a rural area where homosexuality is still taboo. He suffers from the fact that he cannot live his homosexuality openly and - until he reached the age of eighteen - could not enter into any fulfilling sexual relationship with an adult partner for fear of exposing that person to criminal prosecution under Article 209 of the Criminal Code (*Strafgesetzbuch*), of being obliged to testify as a witness on the most intimate aspects of his private life and of being stigmatised by society should his sexual orientation become known.

II. RELEVANT DOMESTIC LAW AND BACKGROUND

A. The Criminal Code

11. Any sexual acts with persons under fourteen years of age are punishable under Articles 206 and 207 of the Criminal Code.

12. Article 209 of the Criminal Code, in the version in force at the material time, read as follows:

> "A male person who after attaining the age of nineteen fornicates with a person of the same sex who has attained the age of fourteen years but not the age of eighteen years shall be sentenced to imprisonment for between six months and five years."

13. This provision was aimed at consensual homosexual acts, as any sexual act of adults with persons up to nineteen years of age are punishable under Article 212 of the Criminal Code if the adult abuses a position of authority (parent, employer, teacher, doctor, etc.). Any sexual acts involving the use of force or threats are punishable as rape, pursuant to Article 201, or sexual coercion pursuant to Article 202 of the Criminal Code. Consensual heterosexual or lesbian acts between adults and persons over fourteen years of age are not punishable.

14. Offences under Article 209 were regularly prosecuted, an average of sixty criminal proceedings being opened per year, out of which a third resulted in a conviction. As regards the penalties applied, a term of imprisonment usually exceeding three months was imposed in 65 to 75% of

the cases, of which 15 to 25% were not suspended on probation. According to information given by the Federal Minister for Justice in reply to a parliamentary request, in the year 2001 three persons were serving a term of imprisonment based only or mainly on a conviction under Article 209 of the Criminal Code and four others were held in detention on remand in proceedings relating exclusively to charges under Article 209.

15. On 10 July 2002, following the Constitutional Court's judgment of 21 June 2002 (see below), Parliament decided to repeal Article 209 of the Criminal Code. In addition, it introduced Article 207b of the Criminal Code, which penalises sexual acts with a person under sixteen years of age if that person is for certain reasons not mature enough to understand the meaning of the act and the offender takes advantage of this immaturity or if the person under sixteen years of age is in a predicament and the offender takes advantage of that situation. Further Article 207b penalises inducing persons under eighteen years of age to engage in sexual activities by payment. Article 207b applies irrespective of whether the sexual acts at issue are heterosexual, homosexual or lesbian. The above amendment, published in the Official Gazette (*Bundesgesetzblatt*) no. 134/2002, entered into force on 14 August 2002.

B. Proceedings before the Constitutional Court

16. In a judgment of 3 October 1989, the Constitutional Court found that Article 209 of the Criminal Code was compatible with the principle of equality under constitutional law and in particular with the prohibition on gender discrimination contained therein. That judgment was given upon the complaint of a person who subsequently brought his case before the Commission (*Z. v. Austria*, no. 17279/90, Commission decision of 13 May 1992, unreported).

17. The relevant passage of the Constitutional Court's judgment reads as follows:

> "The development of the criminal law in the last few decades has shown that the legislature is striving to apply the system of criminal justice in a significantly more restrictive way than before in pursuance of the efforts it is undertaking in connection with its policy on the treatment of offenders, which have become known under the general heading of "decriminalisation". This means that it leaves offences on the statute book or creates new offences only if such punishment of behaviour harmful to society is still found absolutely necessary and indispensable after the strictest criteria have been applied. The criminal provision which has been challenged is included in the group of acts considered unlawful in order to protect - to an extent thought to be unavoidable - a young, maturing person from developing sexually in the wrong way. ('Homosexual acts are only offences of relevance to the criminal law inasmuch as a dangerous strain must not be placed by homosexual experiences upon the sexual development of young males ...' *Pallin* in *Foregger/Nowakowski* (publishers), Vienna commentary to the Criminal Code, 1980, para. 1 on Article 209 ...). Seen in this light, it is the conviction of the Constitutional Court that from the point of view of the

> principle of equality contained in section 7 para. 1 of the Federal Constitutional Law and section 2 of the Basic Constitutional Act those legislating on the criminal law cannot reasonably be challenged for taking the view, by reference to authoritative expert opinions coupled with experience gained, that homosexual influence endangers maturing males to a significantly greater extent than girls of the same age, and concluding that it is necessary to punish under the criminal law homosexual acts committed with young males, as provided for under Article 209 of the Penal Code. This conclusion was also based on their views of morality, which they wanted to impose while duly observing the current policy on criminal justice which aims at moderation and at restricting the punishment of offences (while carefully weighing up all the manifold advantages and disadvantages). Taking everything into account, we are dealing here with a distinction which is based on factual differences and therefore constitutionally admissible from the point of view of section 7 para. 1 of the Federal Constitutional Law, in conjunction with section 2 of the Basic Constitutional Act."

18. On 29 November 2001 the Constitutional Court dismissed the Innsbruck Regional Court's request to review the constitutionality of Article 209 of the Criminal Code.

19. The Regional Court had argued, *inter alia*, that Article 209 violated Articles 8 and 14 of the Convention as the theory that male adolescents ran a risk of being recruited into homosexuality on which the Constitutional Court had relied in its previous judgment, had since been refuted. The Constitutional Court found that the issue was *res judicata*. It noted that the fact that it had already given a ruling on the same provision did not prevent it from reviewing it anew, if there was a change in the relevant circumstances or different legal argument. However, the Regional Court had failed to give detailed reasons for its contention that relevant scientific knowledge had changed to such an extent that the legislator was no longer entitled to set a different age limit for consensual homosexual relations than for consensual heterosexual or lesbian relations.

20. On 21 June 2002, upon a further request for review made by the Innsbruck Regional Court, the Constitutional Court found that Article 209 Criminal Code was unconstitutional.

21. The Regional Court had argued, firstly, as it had done previously, that Article 209 of the Criminal Code violated Articles 8 and 14 of the Convention and, secondly, that it was incompatible with the principle of equality under constitutional law and with Article 8 of the Convention, as a relationship between male adolescents between fourteen and nineteen years of age was first legal, but became punishable as soon as one reached the age of nineteen and became legal again when the second one reached the age of eighteen. The Constitutional Court held that the second argument differed from the arguments which it had examined in its judgment of 3 October 1989 and that it was therefore not prevented from considering it. It noted that Article 209 concerned only consensual homosexual relations between men aged over nineteen and adolescents between fourteen and eighteen years of age. In the fourteen-to nineteen-year age bracket homosexual acts between persons of the same age (for instance two sixteen-

year-olds) or of persons with a one-to five-year age difference were not punishable. However, as soon as one partner reached the age of nineteen, such acts constituted an offence under Article 209 of the Criminal Code. They became legal again when the younger partner reached the age of eighteen. Given that Article 209 did not only apply to occasional relations but also covered ongoing relationships, it led to rather absurd results, namely a change of periods during which the homosexual relationship of two partners was first legal, than punishable and then legal again and could therefore not be considered to be objectively justified.

C. Parliamentary debate

22. In the spring of 1995 the Social Democratic Party, the Green Party and the Liberal Party brought motions in Parliament to repeal Article 209 of the Criminal Code. They argued in particular that the legislator in the 1970s had justified this provision on the theory that male adolescents were at a risk of being recruited into homosexuality while female adolescents were not. However, modern science had shown that sexual orientation was already established at the beginning of puberty. Moreover, different ages of consent were not in line with European standards. In this respect they referred in particular to Recommendation 924/1981 of the Parliamentary Assembly of the Council of Europe which had advocated equal ages of consent for heterosexual and homosexual relations. Protection of juveniles against sexual violence and abuse was sufficiently afforded by other provisions of the Criminal Code, irrespective of their sexual orientation.

23. Subsequently, on 10 October 1995, a sub-committee of the Legal Affairs Committee of Parliament heard evidence from eleven experts in various fields such as medicine, sexual science, AIDS prevention, developmental psychology, psychotherapy, psychiatry, theology, law and human-rights law. Nine were clearly in favour of repealing Article 209, an important argument for the experts in the fields of medicine, psychology and psychiatry being that sexual orientation was, in the majority of cases, established before the age of puberty, which disproved the theory that male adolescents were recruited into homosexuality by homosexual experiences. Another recurring argument was that penalising homosexual relations made AIDS prevention more difficult. Two experts were in favour of keeping Article 209: one simply stated that he considered it necessary for the protection of male adolescents; the other considered that despite the fact that there was no such thing as being recruited into homosexuality, not all male adolescents were already sure of their sexual orientation and it was therefore better to give them more time to establish their identity.

24. On 27 November 1996 Parliament held a debate on the motion to repeal Article 209 of the Criminal Code. Those speakers who were in favour of repealing Article 209 relied on the arguments of the majority of the

experts heard in the sub-committee. Of those speakers who were in favour of keeping Article 209, some simply expressed their approval while others emphasised that they still considered the provision necessary for those male adolescents who were not sure of their sexual orientation. There was an equal vote at the close of the debate (91 to 91). Consequently, Article 209 remained on the statute book.

25. On 17 July 1998 the Green Party again brought a motion before Parliament to repeal Article 209 of the Criminal Code. The ensuing debate followed much the same lines as before. The motion was rejected by 81 votes to 12.

26. On 10 July 2002 Parliament decided to repeal Article 209 of the Criminal Code (see paragraph 15 above).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

27. The applicant complained about the maintenance in force of Article 209 of the Criminal Code which criminalises homosexual acts of adult men with consenting adolescents between fourteen and eighteen years of age. Relying on Article 8 of the Convention, taken alone and in conjunction with Article 14, he alleged that his right to respect for his private life had been violated and that the contested provision was discriminatory, as heterosexual or lesbian relations between adults and adolescents in the same age bracket were not punishable.

Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

28. Given the nature of the complaints, the Court deems it appropriate to examine the case directly under Article 14, taken together with Article 8.

29. It is not in dispute that the present case falls within the ambit of Article 8, concerning as it does a most intimate aspect of the applicant's private life (see, for instance, *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, p. 21, § 52; *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 90, EHCR 1999-VI). Article 14 therefore applies.

30. The applicant asserted that in Austria, like in the majority of European countries, heterosexual and lesbian relations between adults and consenting adolescents over fourteen years of age were not punishable. He submitted that there was nothing to indicate that adolescents needed more protection against consensual homosexual relations with adults than against such heterosexual or lesbian relations. While not being necessary for protecting male adolescents in general, Article 209 of the Criminal Code also hampered homosexual adolescents in their development by attaching social stigma to their relations with adult men and to their sexual orientation in general. In this connection, the applicant, referring to the Court's case-law, asserted that any interference with a person's sexual sphere and any difference in treatment based on sex or sexual orientation requires particularly weighty reasons (see *Smith and Grady v. the United Kingdom*, cited above, § 94, and *A.D.T v. the United Kingdom*, no. 35765/97, § 36, 31 July 2000, unreported).

31. This was all the more true in a field where a European consensus existed to reduce the age of consent for homosexual relations. Despite the fact that a European consensus had been growing ever since the introduction of his application, the Government had failed to come forward with any valid justification for upholding, until very recently, a different age of consent for homosexual relations than for heterosexual or lesbian relations. In particular, the applicant pointed out that in April 1997, in September and December 1998 and again in July 2001, the European Parliament had requested Austria to repeal Article 209. Similarly, the Human Rights Committee, set up under the International Covenant on Civil and Political Rights, has found that Article 209 was discriminatory. The Parliamentary Assembly of the Council of Europe issued two recommendations in 2000 advocating equal ages of consent for heterosexual, lesbian and homosexual relations and a number of member States of the Council of Europe have recently introduced equal ages of consent.

32. Further, the applicant pointed out that the Commission, in the Sutherland case (*Sutherland v. the United Kingdom*, no. 25186/94, Commission's report of 1 July 1997, unreported) had departed from its earlier case-law relied on by the Government. In his view, the difference between the present application and the Sutherland case is not decisive, as the fact that under United Kingdom law in force at the material time, the adolescent partner was also punishable was only referred to by the Commission as a subsidiary argument. As to the Government's further

argument that Article 209 was still considered necessary for the protection of male adolescents, he submitted that the great majority of scientific experts whose evidence had been heard in Parliament in 1995 had disagreed with this view.

33. The Government drew attention to the recent amendment of the Criminal Code. They asserted that the applicant, who has always claimed to be attracted by men older than himself, runs no risk of being punished for any homosexual relations under the newly created section 207b of the Criminal Code. The Government therefore stated that their position remained unchanged and maintained their previous submissions.

34. The Government referred to the Constitutional Court's ruling of 3 October 1989 and to the case-law of the Commission (cf. *Z. v. Austria*, no. 17279/90, Commission decision of 13 May 1992, unreported, and *H.F. v. Austria*, no. 22646/93, Commission decision of 26 June 1995, unreported) pointing out that the Commission had found no indication of a violation either of Article 8 alone or taken in conjunction with Article 14 of the Convention in respect of Article 209 of the Austrian Criminal Code. As to the aforementioned case of *Sutherland v. the United Kingdom*, the Government pointed out that there was an important difference, namely that under Article 209 of the Austrian Criminal Code, the adolescent participating in the offence was not punishable. Moreover, they referred to the fact that, in 1995, the Austrian Parliament had heard numerous experts and had discussed Article 209 extensively with a view to abolishing it, but had decided to uphold it, as the provision was still considered necessary, within the meaning of Article 8 § 2 of the Convention, for the protection of male adolescents.

35. The Court notes at the outset that, following the Constitutional Court's judgment of 21 June 2002, Article 209 of the Criminal Code has been repealed. The amendment in question entered into force on 14 August 2002. However, this development does not affect the applicant's status as a victim within the meaning of Article 34 of the Convention. In this connection, the Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a victim unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for instance, *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI). In the admissibility decision of 22 November 2001 in the present case, the Court accepted that the applicant, who has always asserted that he felt attracted by men older than himself, was prevented by Article 209 of the Criminal Code from entering into any sexual relationship corresponding to his disposition. Accordingly, it found that he was directly affected by the maintenance in force of Article 209 until he attained the age of eighteen. Having regard to the present situation, the Court considers that the Constitutional Court's judgment, which is based on other grounds than

those relied on in the present application, has not acknowledged let alone afforded redress for the alleged breach of the Convention. Nor can it be said that the "matter has been resolved" within the meaning of Article 37 § 1 (b) of the Convention. The present case differs from the Sutherland case which has been struck off the Court's list upon the request of the parties, who had reached a settlement following a change in domestic law (*Sutherland v. the United Kingdom* [GC], no. 25186/94, 27 March 2001, unreported).

36. According to the Court's established case-law, a difference in treatment is discriminatory for the purposes of Article 14 if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". Moreover, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see the *Karlheinz Schmidt v. Germany* judgment of 18 July 1994, Series A no. 291-B, pp. 32–33, § 24; *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 29, ECHR 1999-IX and *Fretté v. France*, no. 36515/97, §§ 34 and 40, ECHR 2002-I).

37. The applicant complained about a difference in treatment based on his sexual orientation. In this connection, the Court reiterates that sexual orientation is a concept covered by Article 14 (see the above-cited *Salgueiro da Silva Mouta v. Portugal* case, § 28). Just like differences based on sex, (see the *Karlheinz Schmidt v. Germany* judgment, ibid. and the *Petrovic v. Austria* judgment of 27 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 587, § 37), differences based on sexual orientation require particularly serious reasons by way of justification (see the above-cited *Smith and Grady v. the United Kingdom* case, § 90).

38. The Government asserted that the contested provision served to protect the sexual development of male adolescents. The Court accepts that the aim of protecting the rights of others is a legitimate one. It remains to be ascertained whether there existed a justification for the difference of treatment.

39. The Court observes that in previous cases relied on by the Government which related to Article 209 of the Austrian Criminal Code, the Commission found no violation of either Article 8 of the Convention alone or taken together with Article 14. However, the Court has frequently held that the Convention is a living instrument, which has to be interpreted in the light of present-day conditions (see, for instance, the above-cited *Fretté v. France* case, ibid.) In the Sutherland case, the Commission, having regard to recent research according to which sexual orientation is usually established before puberty in both boys and girls and to the fact that the majority of member States of the Council of Europe have recognised equal ages of consent, explicitly stated that it was "opportune to reconsider its earlier case-law in the light of these modern developments" (*Sutherland*

v. the United Kingdom, Commission's report, cited above, §§ 59-60). It reached the conclusion that in the absence of any objective and reasonable justification the maintenance of a higher age of consent for homosexual than for heterosexual acts violated Article 14 taken together with Article 8 of the Convention (ibid., § 66).

40. Furthermore, the Court considers that the difference between the Sutherland case and the present case, namely that the adolescent partner participating in the proscribed homosexual acts was not punishable, is not decisive. This element was only a secondary consideration in the Commission's report (*ibid*., § 64).

41. What is decisive is whether there was an objective and reasonable justification why young men in the fourteen-to eighteen-year age bracket needed protection against any sexual relationship with adult men, while young women in the same age bracket did not need such protection against relations with either adult men or women. In this connection the Court reiterates that the scope of the margin of appreciation left to the Contracting State will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, for instance, *Petrovic v. Austria*, cited above, § 38, and *Fretté v. France*, cited above, § 40).

42. In the present case the applicant pointed out, and this has not been contested by the Government, that there was an ever growing European consensus to apply equal ages of consent for heterosexual, lesbian and homosexual relations. Similarly, the Commission observed in the above-mentioned Sutherland case that "equality of treatment in respect of the age of consent is now recognised by the great majority of Member States of the Council of Europe" (*ibid*., § 59).

43. The Government relied on the Constitutional Court's judgment of 3 October 1989, which had considered Article 209 of the Criminal Code necessary for avoiding "that a dangerous strain .. be placed by homosexual experiences upon the sexual development of young males". However, this approach has been out-dated by the 1995 Parliamentary debate on a possible repeal of that provision. As was rightly pointed out by the applicant, the vast majority of experts heard in Parliament clearly expressed themselves in favour of an equal age of consent, finding in particular that sexual orientation was in most cases established before the age of puberty and that the theory that male adolescents were "recruited" into homosexuality had thus been disproved. Notwithstanding its knowledge of these changes in the scientific approach to the issue, Parliament decided in November 1996 to keep Article 209 on the statute book.

44. To the extent that Article 209 of the Criminal Code embodied 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 differential treatment any more than similar negative attitudes towards those of a different race, origin or colour (see *Smith and Grady v. the United Kingdom*, cited above, § 97).

45. In conclusion, the Court finds that the Government have not offered convincing and weighty reasons justifying the maintenance in force of Article 209 of the Criminal Code.

46. Accordingly, there has been a violation of Article 14 of the Convention taken in conjunction with Article 8.

47. Having regard to the foregoing considerations, the Court does not consider it necessary to rule on the question whether there has been a violation of Article 8 taken alone.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

49. The applicant requested 1 million Austrian schillings (ATS), equivalent to 72,672.83 euros (EUR) as compensation for non-pecuniary damage. He asserted that he was hampered in his sexual development. He reiterates that he felt particularly attracted by men older than himself but that Article 209 of the Criminal Code made any consensual sexual relationship with men over nineteen years of age an offence. Moreover, Article 209 generally stigmatised his sexual orientation as being contemptible and immoral. Thus, he suffered feelings of distress and humiliation during all of his adolescence.

50. The Government did not comment.

51. The Court observes that, in a number of cases concerning the maintenance in force of legislation penalising homosexual acts between consenting adults, it considered that the finding of a violation in itself constituted sufficient just satisfaction for any non-pecuniary damage suffered (see the *Dudgeon v. the United Kingdom* judgment (just satisfaction) of 24 February 1983, Series A no. 59, pp. 7-8, § 14; the *Norris v. Ireland* judgment of 26 October 1988, Series A no. 142, pp. 21-22, § 50; and the *Modinos v. Cyprus* judgment of 22 April 1993, Series A no. 259, p. 12, § 30).

52. Nevertheless the Court notes that the judgments in the above-cited cases were given between twenty and ten years ago. The Court considers it appropriate to award just satisfaction for non-pecuniary damage in a case like the present one, even though Article 209 of the Criminal Code has recently been repealed and the applicant has therefore achieved in part the objective of his application. In fact, the Court attaches weight to the fact that the applicant was prevented from entering into relations corresponding to his disposition until he reached the age of eighteen. Making an assessment on an equitable basis, the Court awards the applicant EUR 5,000.

B. Costs and expenses

53. The applicant requested a total amount of EUR 30,305.34 for costs and expenses incurred in the Strasbourg proceedings.

54. The Government did not comment.

55. The Court finds the applicant's claim excessive. Making an assessment on an equitable basis, the Court awards EUR 5,000 for costs and expenses.

C. Default interest

56. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention;

2. *Holds* unanimously that there is no need to rule on the complaints lodged under Article 8 of the Convention alone.

3. *Holds*

(a) by 4 votes to 3 that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) in respect of non-pecuniary damage;

(b) unanimously that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) in respect of costs and expenses;

(c) unanimously that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 January 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinion is annexed to this judgment:

(a) parly dissenting opinion of Mrs Vajić, joined by Mrs Botoucharova and Mr Kovler.

C.R.
S.N.

PARTLY DISSENTING OPINION OF JUDGE VAJIĆ JOINED BY JUDGES BOTOUCHAROVA AND KOVLER

In the present case I do not share the opinion of the majority on the question of compensation to be awarded to the applicant for non-pecuniary

damage under Article 41 of the Convention. Taking account of the facts of the present case I do not see any reason to depart from the established case-law of the Court concerning the maintenance in force of legislation penalising homosexual acts between consenting adults (see the *Dudgeon v. the United Kingdom* judgment (just satisfaction) of 24 February 1983, Series A no. 59, pp.7-8, § 14; the *Norris v. Ireland* judgment of 26 October 1988, Series A no. 142, pp. 21-22, § 50; the *Modinos v. Cyprus* judgment of 22 April 1993, Series A no. 259, p. 12, § 30) in which no non-pecuniary damage was awarded. This is all the more so as Austria has voluntarily taken steps to modify the situation by changing the law in question (i.e. its Criminal Code, see § 15 of the judgment) thus bringing it in line with the requirements of the Convention and its case-law. This being so and having regard to the nature of the breach found, I am of the opinion that in relation to the applicant's claim for non-pecuniary damage the present judgment constitutes in itself adequate just satisfaction for the purposes of Article 41.

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF WODITSCHKA and WILFLING v. AUSTRIA

(Application nos. 69756/01 and 6306/02)

JUDGMENT

STRASBOURG

21 October 2004

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Woditschka and Wilfling v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

and Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mr V. ZAGREBELSKY,
Mrs E. STEINER,
Mr K. HAJIYEV, *judges*,
Mr S. QUESADA, *Deputy Section Registrar*,

Having deliberated in private on 30 September 2004,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (no. 69756/01 and no. 6306/03) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Austrian nationals, Mr Michael Woditschka ("the first applicant") and Mr Wolfgang Wilfling ("the second applicant"), on 13 May 2001 and on 23 January 2002, respectively.

2. The applicants were represented by Mr H. Graupner, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. On 10 October 2002 and 21 March 2002, respectively, the Court decided to communicate the applications to the Government. On 12 June 2003 it decided to examine the merits of the applications at the same time as its admissibility pursuant to Article 29 § 3 of the Convention.

THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

A. The first applicant

4. The first applicant was born in 1979 and lives in Vienna.

5. On 19 July 2000 the Vienna Regional Court (*Landesgericht für Strafsachen*) convicted the first applicant under section 209 of the Criminal

Code of having committed homosexual acts with an adolescent and sentenced him to a fine of ATS 4,500 (approximately EUR 330) with 75 days' imprisonment in default. The sentence was suspended on probation. The Regional Court found that, in September 1999, the first applicant, who was then twenty years old, had had about ten homosexual contacts with a sixteen-year-old. In determining the sentence the court had regard to the applicant's confession and his young age as a mitigating circumstance, as well as to the repetition of the offence as an aggravating circumstance.

6. On 13 November 2000 the Vienna Court of Appeal (*Oberlandesgericht*) dismissed the first applicant's appeal on points of law, in which he had complained that section 209 of the Criminal Code was discriminatory and violated his right to respect for his private life, and in which he had also suggested that the Court of Appeal request the Constitutional Court to review the constitutionality of that provision.

B. The second applicant

7. The second applicant was born in 1964 and lives in Traiskirchen.

8. On 7 August 2001 the Wiener Neustadt Regional Court ordered the second applicant's detention on remand on suspicion of having committed homosexual acts with an adolescent contrary to section 209 of the Criminal Code.

9. On 24 August 2001 the Wiener Neustadt Regional Court convicted the second applicant under section 209 of the Criminal Code and sentenced him to fifteen months' imprisonment, fourteen of which were suspended on probation. It found that, from March 2001 until his arrest, the second applicant had a homosexual relationship with a seventeen-year-old. In determining the sentence the court had regard to the applicant's confession as a mitigating circumstance, as well as to the repetition of the offence and a previous conviction as aggravating circumstances.

10. On 7 September 2001 the second applicant was released from detention on remand.

11. On 23 October 2001 the Vienna Court of Appeal (*Oberlandesgericht*) dismissed the second applicant's appeal on points of law, in which he had complained that section 209 of the Criminal Code was discriminatory and violated his right to respect for his private life, and in which he had also suggested that the Court of Appeal request the Constitutional Court to review the constitutionality of that provision. Upon the Public Prosecutor's appeal it changed the sentence to the effect that only ten out of fifteen months of imprisonment were suspended on probation.

12. Subsequently the second applicant was granted a stay of the execution of his sentence. On 7 July 2002 he requested a pardon and a further stay of execution pending the decision on his request for pardon. On

11 July 2002 the Wiener Neustadt Regional Court granted a further stay of execution.

13. On 23 September 2002 the Federal President, upon the second applicant's request, granted him a remission of the remaining sentence.

II. RELEVANT DOMESTIC LAW

14. Article 209 of the Criminal Code, in the version in force at the material time, read as follows:

> "A male person who after attaining the age of 19 fornicates with a person of the same sex who has attained the age of 14 but not the age of 18 shall be sentenced to imprisonment for between six months and five years."

15. On 21 June 2002, upon a request for review made by the Innsbruck Regional Court, the Constitutional Court found that Article 209 of the Criminal Code was unconstitutional.

16. On 10 July 2002 Parliament decided to repeal Article 209. That amendment, published in the Official Gazette (*Bundesgesetzblatt*) no. 134/2002, came into force on 14 August 2002.

17. The Court notes that the legal situation has remained unchanged since 9 January 2003, when it gave its *L. and V. v. Austria* judgment (nos. 39392/98 and 39829/98, ECHR 2003-I). For a more detailed description of the law, the Constitutional Court's judgments concerning Article 209 of the Criminal Code and the parliamentary debate relating to the issue, it therefore refers to the said judgment (§§ 17-33).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

18. The applicants complained of the maintenance in force of Article 209 of the Criminal Code, which criminalised homosexual acts of adult men with consenting adolescents between the ages of 14 and 18, and of their convictions under that provision. Relying on Article 8 of the Convention taken alone and in conjunction with Article 14, they alleged that their right to respect for their private life had been violated and that the contested provision was discriminatory, as heterosexual or lesbian relations between adults and adolescents in the same age bracket were not punishable.

Article 8 of the Convention provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 provides:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

19. The Government contested that argument.

A. Admissibility

20. The Court observes that the two applications raise the same legal issue. It therefore decides to join them.

21. The Court considers that the applications are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It finds further that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

22. The Government noted that the present case raised the same issue as the *L. and V. v. Austria* judgment and repeated the arguments they had submitted in that case (see *L. and V. v. Austria*, cited above, § 42).

23. Further, the Government noted that the repeal of Article 209 of the Criminal Code which intervened after the applicants' conviction had become final did not change their legal position. However, the second applicant had been granted a remission of his sentence.

24. The applicants agreed that their position was not affected by the change in law. They pointed out that the Constitutional Court's judgment of 21 June 2002 which was based on other grounds than those relied on in the present case, had not acknowledged, let alone afforded redress for, the alleged breach of the Convention. Their convictions still stood and they had no right to any form of compensation. In particular, the second applicant had no right to compensation for the 32 days spent in pre-trial detention. They were, therefore, still victims within the meaning of Article 34, of the violation alleged.

25. Moreover, the applicants repeated the arguments relied on by the applicants in the *L. and V*. case (§§ 39-40).

26. The Court observes that the present case raises the same issue as *L. and V. v. Austria* (cited above). It notes in particular that, like the

applicants in the *L. and V.* case the applicants in the present case were convicted under Article 209 of the Criminal Code.

27. The Court reiterates its finding in *L. and V.* that the fact that Article 209 of the Criminal Code has been repealed does not affect the applicants' victim status (ibid., § 43). It sees no reason to deviate from this position in the present case.

28. In the *L. and V.* case the Court found a violation of Article 14 of the Convention taken in conjunction with Article 8 on the ground that the Government had not offered convincing and weighty reasons justifying the maintenance in force of Article 209 of the Criminal Code and, consequently, the applicants' convictions under this provision (ibid., § 53). Further it found that it was not necessary to rule on the question whether there has been a violation of Article 8 taken alone (§ 55).

29. The Court sees nothing to distinguish the present case from the above precedent. It notes that the parties have not submitted any new argument which would require it to deviate from its previous finding.

30. Accordingly, the Court finds that there has been a violation of Article 14 taken in conjunction with Article 8.

31. Moreover, the Court does not consider it necessary to rule on the question whether there has been a violation of Article 8 alone.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

32. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

33. Both applicants requested compensation for non-pecuniary damage. The first applicant claimed 75,000 euros (EUR), asserting that he had suffered feelings of distress and humiliation due to the maintenance in force of Article 209 of the Criminal Code and, in particular, the criminal proceedings against him resulting in his conviction, which stigmatised him as a sexual offender. The second applicant claimed EUR 150,000. He pointed out that, in addition to the general distress and humiliation, he particularly suffered from having been deprived of his liberty during 32 days of pre-trial detention. Moreover, he contended that his detention caused the bankruptcy of his enterprise. Although he could not specify the pecuniary damage caused, this should be taken into account when awarding non-pecuniary damage.

34. The Government contended that the applicants' claims were excessive.

35. The Court, having regard to the amounts awarded in *L. and V.* considers that, in the first applicant's case, an award of EUR 15,000 is appropriate. In the second applicant's case, the Court making an assessment on an equitable basis and, in particular, taking into account his pre-trial detention, awards EUR 20,000.

B. Costs and expenses

36. The first applicant also claimed a total amount of EUR 15,306.80 for costs and expenses, composed of EUR 7,888.86 in respect of the domestic proceedings and EUR 7,417.94 in respect of the Convention proceedings.

The second applicant claimed a total amount of EUR 29,635.58 for costs and expenses, composed of EUR 12,478.80 in respect of the domestic proceedings and EUR 17,156.78 in respect of the Convention proceedings.

37. Moreover, both applicants requested the Court to make an award of any future costs which may become necessary to remove the consequences flowing from the violation of the Convention, in particular to have their convictions set aside and to have them removed from the criminal records.

38. The Government found that the applicants' claims were excessive. In particular, as regards the Convention proceedings they pointed out that the present case was simply a follow-up case to *L. and V.* Further, they considered that the claim for future costs was of a speculative nature.

39. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum.

40. In the present case, the Court considers that the costs of the domestic proceedings, which related entirely to Article 209 of the Criminal Code, were actually and necessarily incurred. It notes that the difference in the sums claimed is explained by the fact that additional legal acts were required with regard to the second applicant's pre-trial detention and with regard to the stay of the execution of his sentence. The Court therefore awards EUR 7,888 to the first applicant and EUR 12,478 to the second applicant.

41. As to the costs of the Convention proceedings, the Court takes into account that the present case is a follow-up case to *L. and V.*, Moreover, the applicants in the present case were represented by the same lawyer as the applicants in *L. and V.* Making an assessment on an equitable basis, it awards each applicant EUR 3,000.

42. In respect of costs and expenses, the total amount awarded to the first applicant is, therefore, EUR 10,888, the total amount awarded to the second applicant, is EUR 15,478.

43. As to the applicants' request for future costs linked to removing the consequences of the violation found, the Court, referring to the reasons given in *L. and V.* (cited above, § 68), considers that the applicants' claim is speculative. It is therefore dismissed.

C. Default interest

44. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;

2. *Declares* the applications admissible;

3. *Holds* that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;

4. *Holds* that there is no need to examine the complaint under Article 8 of the Convention alone:

5. *Holds*
   (a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage and EUR 10,888 (ten thousand eight hundred and eighty-eight euros) for costs and expenses, plus any tax that may be chargeable;
   (b) that the respondent State is to pay the second applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage and EUR 15,478 (fifteen thousand four hundred and seventy eight euros) for costs and expenses, plus any tax that may be chargeable;
   (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 21 October 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago QUESADA
Deputy Registrar

Christos ROZAKIS
President

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF LADNER v. AUSTRIA

(Application no. 18297/03)

JUDGMENT

STRASBOURG

3 February 2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ladner v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President,*
Mr L. LOUCAIDES,
Mrs F. TULKENS,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges,*
and Mr S. NIELSEN, *Section Registrar,*

Having deliberated in private on 13 January 2005,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 18297/03) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Austrian national, Mr Franz Ladner ("the applicant"), on 3 June 2003.

2. The applicant was represented by Mr H. Graupner, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. On 22 September 2003 the Court decided to communicate the applicant's complaint that the maintenance in force of Article 209 of the Criminal Code and his conviction under this provision discriminated him in the enjoyment of his private life to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1964 and lives in Vienna.

5. On 14 February 2001 the Vienna Regional Criminal Court (*Landesgericht für Strafsachen*) ordered the applicant's detention on remand on suspicion of having committed homosexual acts with adolescents

contrary to Article 209 of the Criminal Code. The applicant was released on 27 February 2001.

6. Also on 14 February 2001 the investigating judge ordered a search of the applicant's premises, as he was also suspected of owning child pornographic material. A number of video-tapes were seized but the suspicion was not confirmed and the subsequent proceedings were conducted for charges under Article 209 alone.

7. On 24 September 2001 the Regional Court decided to discontinue the proceedings on the condition of payment of a penalty of 20,000 Austrian schillings. The Public Prosecutor's Office appealed against this decision.

8. On 11 December 2001 the Vienna Court of Appeal (*Oberlandesgericht*) quashed the Regional Court's decision and referred the case back to it.

9. On 15 January 2002 the Regional Court convicted the applicant under Article 209 of the Criminal Code and sentenced him to three months' imprisonment suspended on probation. It found that, between 1994 and 2001, the applicant had performed homosexual acts with four different adolescents.

10. On 3 December 2002 the Vienna Court of Appeal dismissed the applicant's appeal on points of law. It referred to the Constitutional Court's judgment of 21 June 2002 which had found that Article 209 of the Criminal Code was unconstitutional. However, the amendment of the law, which had repealed Article 209 did not apply to proceedings, in which the first instance court's judgment had already been given before its entry into force on 14 August 2002. The decision was served on the applicant on 4 July 2003.

11. The applicant's petition for a pardon was of no avail.

12. On 3 April 2003 the Federal Minister of Justice replied to questions put by members of Parliament concerning the granting of a pardon in cases of convictions under Article 209. In these questions the applicant's case was referred to by the file number and the date of the final decision. The Minister stated, without mentioning the applicant's name, that he had denied a pardon in this case, as the conduct of the person concerned would also qualify as an offence under the newly introduced Article 207b, as in one case that person had taken advantage of the adolescent's predicament, i.e. the fact that the latter had, following a conflict with his parents, temporarily lived in that person's apartment.

II. RELEVANT DOMESTIC LAW

13. Any sexual acts with persons under 14 years of age are punishable under Articles 206 and 207 of the Criminal Code

Article 209 of the Criminal Code, in the version in force at the material time, read as follows:

> "A male person who after attaining the age of 19 fornicates with a person of the same sex who has attained the age of 14 but not the age of 18 shall be sentenced to imprisonment for between six months and five years."

14. On 21 June 2002, upon a request for review made by the Innsbruck Regional Court, the Constitutional Court found that Article 209 of the Criminal Code was unconstitutional.

15. On 10 July 2002 Parliament decided to repeal Article 209. That amendment, published in the Official Gazette (*Bundesgesetzblatt*) no. 134/2002, came into force on 14 August 2002.

16. The Court notes that the legal situation has remained unchanged since 9 January 2003, when it gave its *L. and V. v. Austria* judgment (nos. 39392/98 and 39829/98, ECHR 2003-I). For a more detailed description of the law, the Constitutional Court's judgments concerning Article 209 of the Criminal Code and the parliamentary debate relating to the issue, it therefore refers to the said judgment (§§ 17-33).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

17. The applicant complained of the maintenance in force of Article 209 of the Criminal Code, which criminalised homosexual acts of adult men with consenting adolescents between the ages of 14 and 18, and of his conviction under that provision. Relying on Article 8 of the Convention taken alone and in conjunction with Article 14, he alleged that his right to respect for his private life had been violated and that the contested provision was discriminatory, as heterosexual or lesbian relations between adults and adolescents in the same age bracket were not punishable.

Article 8 of the Convention provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language,

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. Admissibility

18. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

19. Noting that Article 209 of the Criminal Code had meanwhile been repealed, the Government refrained from making observations.

20. The applicant relied on the Court's finding in *L. and V. v. Austria* (cited above).

21. The Court observes that the present case raises the same issue as *L. and V.* It notes in particular that, like in *L. and V.*, the applicant was convicted under Article 209 of the Criminal Code.

22. The Court reiterates its finding in *L. and V.* that the fact that Article 209 of the Criminal Code has been repealed does not affect the applicant's victim status (ibid., § 43). Noting, in particular, that the applicant's conviction still stands despite the repeal of Article 209, it sees no reason to deviate from this position in the present case.

23. In the *L. and V.* case the Court found a violation of Article 14 of the Convention taken in conjunction with Article 8 on the ground that the Government had not offered convincing and weighty reasons justifying the maintenance in force of Article 209 of the Criminal Code and, consequently, the applicants' convictions under this provision (ibid., § 53). Further it found that it was not necessary to rule on the question whether there had been a violation of Article 8 taken alone (§ 55).

24. The Court sees nothing to distinguish the present case from the above precedent. It notes that the parties have not submitted any new argument which would require it to deviate from its previous finding.

25. Accordingly, the Court finds that there has been a violation of Article 14 taken in conjunction with Article 8.

26. Having regard to the foregoing considerations, the Court does not consider it necessary to rule on the question whether there has been a violation of Article 8 taken alone.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

27. The applicant complained that his rights under Article 3 of the Convention had been violated, alleging that the Minister of Justice, in his reply to questions put by members of Parliament (see paragraph 12 above) described him as a sexual abuser who exploited his partners.

28. Having regard to the context of the Minister's statement and, in particular, the fact that he did not mention the applicant's name, the Court considers that the treatment complained of does not reach the minimum level of severity required for any ill-treatment to fall within the scope of Article 3.

29. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

31. The applicant claimed 300 euros (EUR) in respect of pecuniary damage, namely for video tapes, which were seized and erroneously destroyed by the authorities. Moreover, he requested EUR 100,000 for non-pecuniary damage, asserting that he had suffered feelings of distress and humiliation due to the maintenance in force of Article 209 and the Criminal Code, his conviction under this provision and his pre-trial detention.

32. The Government asserted that the applicant's claim for non-pecuniary damage was excessive.

33. The Court does not discern any causal link between the violation found and the pecuniary damage alleged. It notes, in particular, that the video tapes at issue were not seized in the context of the charges under Article 209 of the Criminal Code. Therefore, applicant's claim has to be rejected.

34. As to non-pecuniary damage, the Court notes that the applicants in *L. and V.* (cited above), who had both been convicted under Article 209 of the Criminal Code but had not suffered any deprivation of liberty in this context, were each awarded EUR 15,000 under this head (ibid., § 60). In the recent case of *Woditschka and Wilfling v. Austria* (no. 69756/01 and 6306/02, 21 October 2004) the first applicant, who had been convicted

under Article 209 but had not been deprived of his liberty was granted the same amount while the second applicant was granted EUR 20,000 having regard to the fact that in addition to his conviction he had suffered 32 days of pre-trial detention. Having regard to these cases and noting that the applicant in the present case has been convicted under Article 209 and has been held in pre-trial detention for thirteen days, the Court considers that an amount of EUR 17,500, plus any tax that may be chargeable, is appropriate in respect of non-pecuniary damage.

B. Costs and expenses

35. The applicant also claimed EUR 22,116.42, including VAT, for the costs and expenses incurred before the domestic courts and EUR 7,284.32, including VAT, for those incurred before the Court.

36. The Government commented that the bill of costs relating to the domestic proceedings was not sufficiently detailed to assess whether all costs were necessarily incurred.

37. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum.

38. In the present case, the Court considers that the applicant's claim concerning costs and expenses for the domestic proceedings is excessive. The amounts claimed and awarded in comparable cases (*L. and V.*, cited above, and in *Woditschka and Wilfling*, cited above) varied according to the circumstances between EUR 1,500 and 12,478. Making an assessment on an equitable basis, the Court awards the applicant EUR 10,000.

39. As to the costs of the Convention proceedings, the Court takes into account that the present case is a follow-up case to L. and V. Moreover, the applicant was represented by the same lawyer as the applicant's in L. and V. Making an assessment on an equitable basis, the Court awards the applicant EUR 3,000 under this head.

40. In sum, the Court awards the applicant EUR 13,000 for costs and expenses. This sum includes the tax that may be charged.

C. Default interest

41. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declared* the complaint under Article 8 taken alone and in conjunction with Article 14 admissible and the remainder of the application inadmissible;

2. *Held* that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention;

3. *Held* that there is no need to examine the complaint under Article 8 of the Convention alone;

4. *Held*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 17,500 (seventeen thousand five hundred euros) in respect of non-pecuniary damage plus any tax that may be chargeable on that amount and EUR 13,000 (thirteen thousand euros) for costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismissed* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 3 February 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF WOLFMEYER v. AUSTRIA

(Application no. 5263/03)

JUDGMENT

STRASBOURG

26 May 2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Wolfmeyer v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr P. LORENZEN,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 3 May 2005,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 5263/03) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mr Thomas Wolfmeyer ("the applicant"), on 30 January 2003.

2. The applicant was represented by Mr H. Graupner, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. On 22 September 2003 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1968 and lives in Bludenz.

5. In May 2000 the Feldkirch Regional Court (*Landesgericht*) opened criminal proceedings against the applicant on suspicion of having committed homosexual acts with adolescents contrary to Article 209 of the Criminal Code.

6. On 23 November 2000 the Regional Court, after having held a trial, convicted the applicant under Article 209 of the Criminal Code and sentenced him to six months' imprisonment suspended on probation. It found that, in 1997, he had performed homosexual acts with two adolescents.

7. Upon the applicant's appeal, the Innsbruck Court of Appeal (*Oberlandesgericht*) requested the Constitutional Court (*Verfassungs-gerichtshof*) to review the constitutionality of Article 209.

8. On 29 November 2001 the Constitutional Court dismissed this request (see paragraph 22 below).

9. On 20 December 2001 the Innsbruck Court of Appeal filed a new request for review of the constitutionality of Article 209.

10. On 21 June 2002 the Constitutional Court gave a judgment holding that Article 209 of the Criminal Code was unconstitutional (see paragraph 23 below).

11. The amendment repealing Article 209 entered into force on 14 August 2002. While, according to the transitional provisions, Article 209 remained applicable in all cases in which the judgment at first instance had already been given before the entry into force of the amendment, it could no longer be applied in the applicant's case since it had been the case in point (*Anlaßfall*) before the Constitutional Court.

12. On 17 July 2002 the Innsbruck Court of Appeal, noting that the Constitutional Court had repealed Article 209 as unconstitutional, acquitted the applicant. This decision was served on him on 12 August 2002.

13. On 20 September 2002 the Feldkirch Regional Court dismissed the applicant's request for reimbursement of his defence costs holding that under Article 393a (3) of the Code of Criminal Procedure (*Strafprozeßordnung*) no right to compensation existed if the accused was not punishable on grounds which occurred after the indictment was filed.

14. On 12 November 2002 the Innsbruck Court of Appeal partly granted the applicant's appeal, awarding him reimbursement of a total amount of 1,839.38 euros (EUR) for costs and expenses. It found that the Regional Court had wrongly applied Article 393a (3) of the Code of Criminal Procedure. The applicant's case had been the case in point before the Constitutional Court leading to the repeal of Article 209 of the Criminal Code. His case had to be treated as if Article 209 had never existed. Consequently, it could not be said that he was acquitted on grounds which occurred after the indictment.

15. The court found that the applicant's defence costs including the costs relating to the proceedings before the Constitutional Court, in which the applicant, as an interested party (*mitbeteiligte Partei*), had made detailed submissions, had been necessarily incurred. However, the law provided that only a maximum amount of EUR 1,091 was to be reimbursed as

contribution to the defence costs. In addition EUR 748,38 were awarded for cash expenses.

II. RELEVANT DOMESTIC LAW

A. The Criminal Code

16. Any sexual acts with persons under 14 years of age are punishable under Articles 206 and 207 of the Criminal Code.

17. Article 209 of the Criminal Code, in the version in force at the material time, read as follows:

> "A male person who after attaining the age of 19 fornicates with a person of the same sex who has attained the age of 14 but not the age of 18 shall be sentenced to imprisonment for between six months and five years."

18. This provision was aimed at consensual homosexual acts, as any sexual act of adults with persons up to 19 years of age are punishable under Article 212 of the Criminal Code if the adult abuses a position of authority (parent, employer, teacher, doctor, etc.). Any sexual acts involving the use of force or threats are punishable as rape, pursuant to Article 201, or sexual coercion pursuant to Article 202 of the Criminal Code. Consensual heterosexual or lesbian acts between adults and persons over 14 years of age are not punishable.

19. On 10 July 2002, following the Constitutional Court's judgment of 21 June 2002 (see paragraph 23 below), Parliament decided to repeal Article 209. That amendment, published in the Official Gazette (*Bundesgesetzblatt*) no. 134/2002, came into force on 14 August 2002.

B. The Constitutional Court's judgments

1. The judgment of 3 October 1989

20. In a judgment of 3 October 1989, the Constitutional Court found that Article 209 of the Criminal Code was compatible with the principle of equality under constitutional law and in particular with the prohibition on gender discrimination contained therein.

21. The relevant passage of the Constitutional Court's judgment reads as follows:

> "The development of the criminal law in the last few decades has shown that the legislature is striving to apply the system of criminal justice in a significantly more restrictive way than before in pursuance of the efforts it is undertaking in connection with its policy on the treatment of offenders, which have become known under the general heading of 'decriminalisation'. This means that it leaves offences on the statute

book or creates new offences only if such punishment of behaviour harmful to society is still found absolutely necessary and indispensable after the strictest criteria have been applied. The criminal provision which has been challenged relates to the group of acts declared unlawful in order to protect – in so far as strictly necessary – a young, maturing person from developing sexually in the wrong way. ('Homosexual acts are only offences of relevance to the criminal law inasmuch as a dangerous strain must not be placed by homosexual experiences upon the sexual development of young males ...' Pallin, in Foregger/Nowakowski (publishers), *Wiener Kommentar zum Strafgesetzbuch*, 1980, paragraph 1 on Article 209 ...) Seen in this light, it is the conviction of the Constitutional Court that from the point of view of the principle of equality contained in Article 7 § 1 of the Federal Constitution and Article 2 of the Basic Law those legislating in the criminal sphere cannot reasonably be challenged for taking the view, by reference to authoritative expert opinions coupled with experience gained, that homosexual influence endangers maturing males to a significantly greater extent than girls of the same age, and concluding that it is necessary to punish under the criminal law homosexual acts committed with young males, as provided for under Article 209 of the Criminal Code. This conclusion was also based on their views of morality, which they wanted to impose while duly observing the current policy on criminal justice which aims at moderation and at restricting the punishment of offences (while carefully weighing up all the manifold advantages and disadvantages). Taking everything into account, we are dealing here with a distinction which is based on factual differences and therefore constitutionally admissible from the point of view of Article 7 § 1 of the Federal Constitution read in conjunction with Article 2 of the Basic Law."

2. The judgment of 29 November 2001

22. On 29 November 2001 the Constitutional Court dismissed the Innsbruck Regional Court's request to review the constitutionality of Article 209 of the Criminal Code.

The Regional Court had argued, *inter alia*, that Article 209 violated Articles 8 and 14 of the Convention as the theory that male adolescents ran a risk of being recruited into homosexuality on which the Constitutional Court had relied in its previous judgment had since been refuted. The Constitutional Court found that the issue was *res judicata*. It noted that the fact that it had already given a ruling on the same provision did not prevent it from reviewing it anew, if there was a change in the relevant circumstances or different legal argument. However, the Regional Court had failed to give detailed reasons for its contention that relevant scientific knowledge had changed to such an extent that the legislator was no longer entitled to set a different age-limit for consensual homosexual relations than for consensual heterosexual or lesbian relations.

3. The judgment of 21 June 2002

23. On 21 June 2002, upon a further request for review made by the Innsbruck Regional Court, the Constitutional Court found that Article 209 of the Criminal Code was unconstitutional.

The Regional Court had argued, firstly, as it had done previously, that Article 209 of the Criminal Code violated Articles 8 and 14 of the Convention and, secondly, that it was incompatible with the principle of equality (*Gleichheitsgrundsatz*) as guaranteed by Article 7 § 1 of the Federal Constitution, as a relationship between male adolescents aged between 14 and 19 was first legal, but became punishable as soon as one reached the age of 19 and became legal again when the second one reached the age of 18.

The Constitutional Court held that the second argument differed from the arguments which it had examined in its judgment of 3 October 1989 and that it was therefore not prevented from considering it. It noted that Article 209 concerned consensual homosexual relations between men aged over 19 and adolescents between 14 and 18. In the 14 to 19 age bracket homosexual acts between persons of the same age (for instance two 16-year-olds) or of persons with a one- to five-year age difference were not punishable. However, as soon as one partner reached the age of 19, such acts constituted an offence under Article 209 of the Criminal Code. They became legal again when the younger partner reached the age of 18. Given that Article 209 did not only apply to occasional relations but also covered ongoing relationships, it led to rather absurd results, namely a change of periods during which the homosexual relationship of two partners was first legal, then punishable and then legal again and could therefore not be considered to be objectively justified.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

24. The applicant complained about Article 209 of the Criminal Code and about the conduct of criminal proceedings against him under this provision. Relying on Article 8 of the Convention taken alone and in conjunction with Article 14, he alleged that his right to respect for his private life had been violated and that the contested provision was discriminatory, as heterosexual or lesbian relations between adults and adolescents in the same age bracket were not punishable.

Article 8 reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society

in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 provides:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. Admissibility

25. The Government argued that the applicant could not claim to be a victim of the alleged violation within the meaning of Article 34 of the Convention. Following the Constitutional Court's judgment of 21 June 2002, he was acquitted by the Innsbruck Court of Appeal and was awarded a contribution to his defence costs.

26. The Government conceded that the Constitutional Court, when repealing Article 209 of the Criminal Code, did not rely on the argument that the contested provision violated Articles 8 and 14 of the Convention. However, the reasons given by the Innsbruck Court of Appeal for the applicant's acquittal and for granting him a contribution to his defence costs showed that it considered Article 209 to be unconstitutional and in breach of the Convention. In essence, the applicant was treated as if Article 209 had never been applicable to the facts underlying the charge.

27. The applicant argued that neither the Constitutional Court's judgment of 21 June 2002 nor his acquittal and the subsequent costs order acknowledged, let alone provided redress, for the violation of the Convention. In particular, the acquittal could not remove the discrimination which lay in the mere conduct of criminal proceedings against him under Article 209 of the Criminal Code. He had suffered the humiliation and public exposure of the first instance proceedings and conviction. Living in a small provincial town in the most conservative region of Austria, he had lost his employment as a result. Moreover, he did not receive any redress for non-pecuniary damage sustained and had to bear the greater part of his necessary defence costs. It was therefore incorrect to say that he was put in a position as if Article 209 had never been applicable.

28. The Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as victim unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for instance, *Dalban v. Romania* [GC], no. 28114/95, § 43, ECHR 1999-VI).

29. It is true that Article 209 of the Criminal Code was repealed by the Constitutional Court and the applicant was subsequently acquitted.

However, in the case of *S.L. v. Austria*, concerning an applicant who had never been prosecuted under Article 209 but was, on account of his sexual orientation, directly affected by the maintenance in force of that provision, the Court has already noted that the Constitutional Court's judgment has not acknowledged let alone afforded redress for the alleged breach of the Convention (no. 45330/99, § 35, ECHR 2003-I (extracts).

30. Indeed the Constitutional Court did not rely on the argument of alleged discrimination of homosexual as compared to heterosexual or lesbian relationships, but rather on the lack of coherence and objective justification of the provision in other respects (see paragraph 23 above). The Government did not contest this. Instead they argue that the applicant's acquittal and the subsequent costs order contain at least an implicit acknowledgement of the breach of the Convention.

31. The Court does not share this view. It observes that neither the applicant's acquittal nor the subsequent costs order contains any statement acknowledging at least in substance the violation of the applicant's right not to being discriminated against in the sphere of his private life on account of his sexual orientation. Even if they did, the Court finds that neither of them provided adequate redress as required by its case law.

32. In this connection it is crucial for the Court's consideration that in the present case the maintenance in force of Article 209 of the Criminal Code in itself violated the Convention (*S.L. v. Austria*, cited above, § 45) and, consequently, the conduct of criminal proceedings under this provision.

33. The applicant had to stand trial and was convicted by the first instance court. In such circumstances, it is inconceivable how an acquittal without any compensation for damages and accompanied by the reimbursement of a minor part of the necessary defence costs could have provided adequate redress (see, *mutatis mutandis*, *Dalban*, cited above, § 44). This is all the more so as the Court itself has awarded substantial amounts of compensation for non-pecuniary damage in comparable cases, having particular regard to the fact that the trial during which details of the applicants' most intimate private life were laid open to the public, had to be considered as a profoundly destabilising event in the applicants' lives (*L. and V. v. Austria*, nos. 39392/98 and 39829/98, § 60, ECHR 2003-I).

34. In conclusion, the Court finds that the applicant's acquittal which did not acknowledge the alleged breach of the Convention and was not accompanied by adequate redress did not remove the applicant's status as a victim within the meaning of Article 34 of the Convention.

35. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

36. The applicant referred to the Court's judgments in *L. and V. v. Austria* (cited above) and *S.L. v. Austria* (cited above) and repeated the arguments relied on by the applicants in these cases. The Government did not submit observations on the merits.

37. In these cases, the Court found a violation of Article 14 of the Convention taken in conjunction with Article 8 on the ground that the respondent Government had not offered convincing and weighty reasons justifying the maintenance in force of Article 209 of the Criminal Code (*S.L. v. Austria*, cited above, § 45) and consequently, the applicants' convictions under this provision (*L. and V. v. Austria,* cited above, § 53). Further, it found that it was not necessary to rule on the question whether there has been a violation of Article 8 taken alone (*S.L. v. Austria*, § 47 and *L. and V. v. Austria*, § 55).

38. The present case differs from *L. and V. v. Austria* in that the applicant was acquitted following the repeal of Article 209, while the convictions of applicants L. and V. continue to stand despite the said repeal. In this context, the Court refers to its above finding that the applicant's position as a victim has not been removed by his acquittal. There are no other elements which would distinguish the present case from the above precedent. As was already noted above, in the case of *S.L. v. Austria*, the finding of a violation was based on the mere maintenance in force of Article 209 of the Criminal Code. The repeal of that provision was not considered to affect the applicant's victim status.

39. Accordingly, the Court considers that the maintenance in force of Article 209 of the Criminal Code and the conduct of the criminal proceedings against the applicant on the basis of that provision amounted to a violation of Article 14 taken in conjunction with Article 8.

40. Having regard to the foregoing considerations, the Court does not consider it necessary to rule on the question whether there has been a violation of Article 8 alone.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

42. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage. He argued that the maintenance in force of Article 209 of the Criminal Code until 2002 and the conduct of criminal proceedings against him stigmatised him as a sexual offender and treated his sexual orientation as being inferior and contemptible. In particular he was subject to humiliation and public exposure during the trial before the Feldkirch Regional Court.

43. The Government opposed the applicant's claim.

44. The Court will have regard to the amounts awarded under the head of non-pecuniary damage in comparable cases.

Most of them concern cases in which the applicants' convictions still stand despite the repeal of Article 209. The Court, having regard to this factor and to the suffering caused by the trial, awarded the following amounts: in *L. and V. v. Austria,* EUR 15,000 to each applicant (cited above, § 60); in *Woditschka and Wilfling v. Austria,* the same amount to the first applicant and EUR 20,000, to the second applicant who had in addition suffered a month of pre-trial detention (nos. 69756/01 and 6306/02, § 35, 21 October 2004); in *Ladner v. Austria*, EUR 17,500 taking into account the applicant's pre-trial detention of thirteen days (no. 18297/03, § 34, 3 February 2005).

In the case of *S.L.* who was affected by the mere maintenance in force of the contested provision but had never been prosecuted, the Court awarded EUR 5,000 (cited above, § 52).

45. The present applicant had to stand trial and was convicted at first instance. The Court considers that the acquittal, although it has to be taken into account in the assessment of non-pecuniary damage, cannot make undone the suffering associated with the public exposure of most intimate aspects of the applicant's private life or the loss of his employment. As was already noted, no redress for non-pecuniary damage was provided at the domestic level.

46. Having regard to the amounts granted in the above comparable cases, the Court, making an assessment on an equitable basis, awards the applicant EUR 10,000 for non-pecuniary damage.

B. Costs and expenses

47. The applicant also claimed EUR 27,739.70, including VAT, for the costs and expenses incurred before the domestic courts. The sum does not include the amount which was reimbursed at the domestic level. The applicant pointed out that the Innsbruck Court of Appeal in its costs order of 12 November 2002 considered that his defence costs had been necessarily incurred.

Moreover, the applicant claimed EUR 4,245, including VAT, for costs and expenses incurred before the Court.

48. The Government submitted that the statement presented by the applicant was based on the correct figures in accordance with the Autonomous Remuneration Guidelines for Lawyers but listed a number of separate items which were already covered by the standard rates.

49. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum (see, among many others, *L. and V. v. Austria*, cited above, § 64).

50. As to the costs of the domestic proceedings, the Court finds that they were actually and necessarily incurred. It remains to be assessed whether they were reasonable as to quantum. The Court observes in particular that the present case, apart from the criminal proceedings, included two sets of proceedings before the Constitutional Court (see paragraphs 22-23 above). The Innsbruck Court of Appeal observed in its costs order of 12 November 2002 that the applicant had made detailed submissions in these proceedings.

51. The Court, therefore, accepts that the applicant's costs in the domestic proceedings were higher than the costs of the applicants in the above comparable cases, which varied between EUR 1,500 and EUR 12,478, according to the circumstances (see *L and V. v. Austria*, cited above, § 65; and *Woditschka and Wilfling*, cited above, § 40) . Nevertheless, it considers that the costs claimed are excessive. It therefore awards an amount of EUR 15,000.

52. As to the costs of the Convention proceedings, the Court takes into account that the case is a follow-up case to *L. and V. v. Austria*. Moreover, the applicant in the present case was represented by the same lawyer. Making an assessment on an equitable basis, the Court awards the applicant EUR 3,000 under this head.

53. In sum, the Court awards the applicant EUR 18,000 for costs and expenses.

C. Default interest

54. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;

3. *Holds* that there is no need to examine the complaint under Article 8 of the Convention alone;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 10,000 (ten-thousand euros) in respect of non-pecuniary damage and EUR 18,000 (eighteen-thousand euros) in respect of costs and expenses, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 May 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN	Christos ROZAKIS
Registrar	President

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF H.G. and G.B. v. AUSTRIA

(Applications nos. 11084/02 and 15306/02)

JUDGMENT

STRASBOURG

2 June 2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of H.G. and G.B. v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mrs S. BOTOUCHAROVA,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 12 May 2005,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (no. 11084/02 and 15306/02) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Austrian nationals, Mr H.G. ("the first applicant") and Mr. G.B. ("the second applicant"), on 10 March 2002 and 12 April 2002, respectively.

2. The applicants were represented by Mr H. Graupner, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. On 30 April 2002 and 16 May 2002, respectively, the Court decided to communicate the applications to the Government. On 12 June 2003 it decided to examine the merits of the applications at the same time as its admissibility pursuant to Article 29 § 3 of the Convention.

THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

A. The first applicant

4. On 1 September 2001 the Innsbruck Regional Court (*Landesgericht*) ordered the first applicant's detention on remand on suspicion of having committed homosexual acts with adolescents contrary to Article 209 of the Criminal Code.

5. On 3 December 2001 the Innsbruck Regional Court convicted the first applicant under Article 209 of the Criminal Code and sentenced him to eighteen months' imprisonment. It found that, from July 2001 until his arrest, the first applicant had had sexual relations with three different male minors born in 1986 and 1987 respectively. In determining the sentence the court had regard to the first applicant's confession as a mitigating circumstance and to his previous convictions as aggravating circumstance.

6. On 6 December 2001 the first applicant started to serve his sentence of imprisonment at Garsten prison. On 1 September 2002 the first applicant was granted early release from detention.

B. The second applicant

7. On 25 September 2000 the Wels Regional Court convicted the second applicant under Article 209 of the Criminal Code and sentenced him to three months' imprisonment, suspended for a probation period of three years. It found that on 3 June 1998 the second applicant had had a sexual encounter with a male minor born in 1981. Referring to Article 41 § 1 of the Criminal Code the court found that the conditions for an extraordinary mitigation of sentence (*ausserordentliche Strafmilderung*) were met, i.e. a sentence below the statutory level of punishment could be pronounced. Having regard to all the circumstances of the case, in particular that the offence had merely been attempted, the court found that a suspended term of imprisonment was commensurate to the second applicant's guilt.

8. On 14 December 2000 the second applicant appealed, arguing, *inter alia*, that Article 209 of the Criminal Code was unconstitutional in that it did not comply with Article 8 of the Convention read in conjunction with Article 14.

9. On 20 February 2001 the Linz Court of Appeal dismissed the second applicant's appeal. The Court stated that it had no doubts about the constitutionality of Article 209 of the Criminal Code and referred in this respect to the Constitutional Court's case-law.

II. RELEVANT DOMESTIC LAW

10. Any sexual acts with persons under 14 years of age are punishable under Articles 206 and 207 of the Criminal Code.

Article 209 of the Criminal Code, in the version in force at the material time, read as follows:

> "A male person who after attaining the age of 19 fornicates with a person of the same sex who has attained the age of 14 but not the age of 18 shall be sentenced to imprisonment for between six months and five years."

11. On 21 June 2002, upon a request for review made by the Innsbruck Regional Court, the Constitutional Court found that Article 209 of the Criminal Code was unconstitutional.

12. On 10 July 2002 Parliament decided to repeal Article 209. That amendment, published in the Official Gazette (*Bundesgesetzblatt*) no. 134/2002, came into force on 14 August 2002.

13. The Court notes that the legal situation has remained unchanged since 9 January 2003, when it gave its *L. and V. v. Austria* judgment (nos. 39392/98 and 39829/98, ECHR 2003-I). For a more detailed description of the law, the Constitutional Court's judgments concerning Article 209 of the Criminal Code and the parliamentary debate relating to the issue, it therefore refers to the said judgment (§§ 17-33).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

14. The applicants complained of the maintenance in force of Article 209 of the Criminal Code, which criminalised homosexual acts of adult men with consenting adolescents between the ages of 14 and 18, and of their convictions under that provision. Relying on Article 8 of the Convention taken alone and in conjunction with Article 14, they alleged that their right to respect for their private life had been violated and that the contested provision was discriminatory, as heterosexual or lesbian relations between adults and adolescents in the same age bracket were not punishable.

Article 8 of the Convention provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 provides:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

15. The Government contested that argument.

A. Admissibility

16. The Court observes that the two applications raise the same legal issue. It therefore decides to join them.

17. As regards the first applicant the Government submitted that he failed to exhaust domestic remedies as required by Article 35 of the Convention since he has not appealed against the Innsbruck Regional Court's judgment of 3 December 2001 to the Innsbruck Court of Appeal. Although the applicant's conviction was based on an unambiguous legal provision, Article 209 of the Criminal Code, the Innsbruck Court of Appeal could have applied for a review of the constitutionality of this provision before the Constitutional Court and did so in another case.

18. The first applicant submitted that an appeal to the Court of Appeal against the Regional Court's judgment was, in the circumstances of the case, no effective remedy. Before the Court the first applicant does not complain about any procedural shortcoming of the criminal proceedings against him but only about their result. In this respect the first applicant emphasised that he himself could not apply to the Constitutional Court for a review of the constitutionality of Article 209 of the Criminal Code. Such an application could only be filed by the Court of Appeal on its own motion and there was no right of the parties to request a court of appeal to file such a request.

19. The Court recalls that the purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions. Thus the complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic bodies, and in compliance with the formal requirements and time-limits laid down in domestic law. However, the only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the

requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied. Moreover, the application of this rule must make due allowance for the context. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case (*Henaf v. France*, no. 65436/01, 27 November 2003, §§ 30-32 with further references).

20. The Court observes that the first applicant did not file a plea of nullity against his conviction. Although in criminal proceedings an appeal to a court of appeal is in principle an efficient remedy to be exhausted, the Court nevertheless must take the particular circumstances of the present case into account. It observes first that the first applicant complains about a breach of Article 8 of the Convention alone and read in conjunction with Article 14, i.e. about the legal basis for his conviction, but not about the proceedings leading thereto.

21. It might be left open whether in general an applicant is dispensed of making use of the remedy of an appeal under the Austrian Code of Criminal Procedure in the absence of a complaint about procedural shortcomings and when Austrian domestic courts - such as in the present case - apply unambiguous legal provisions, because, in view of the state of the Constitutional Court's case-law on Article 209 of the Criminal Code at the time of the first applicant's conviction, such an appeal must have been deemed as devoid of any prospect of success. In this respect the Court observes that the Constitutional Court had examined the constitutionality of Article 209 of the Criminal Code in a judgment of 3 October 1989 and had found that this provision was in conformity with the Austrian Constitution. Subsequently, on 29 November 2001, the Constitutional Court dismissed a request by the Innsbruck Court of Appeal for a fresh review of the constitutionality of Article 209 of the Criminal Code finding that the issue was *res judicata* (see as to the development of the Constitutional Court's case-law *L. and V. v. Austria*, nos. 39398/98 and 39829/98, 9 January 2003, §§ 23-28). It was only a few days later, on 3 December 2001, that the applicant was convicted of the offence under Article 209 of the Criminal Code. Applying Article 35 of the Convention with the necessary degree of flexibility and without excessive formalism, the Court cannot reasonably expect the first applicant to have appealed against the Regional Court's judgment of 3 December 2001.

22. The Court, therefore, concludes that the first applicant has complied with his obligation to exhaust domestic remedies. The Government have not raised a preliminary objection as regards the second applicant's application.

23. The Court considers that the applications are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

24. The Government noted that the present case raised the same issue as the *L. and V. v. Austria* judgment and repeated the arguments they had submitted in that case (see *L. and V. v. Austria*, cited above, § 42).

25. Further, the Government noted that the repeal of Article 209 of the Criminal Code which intervened after the applicants' conviction had become final did not change their legal position**.**

26. The applicants agreed that their position was not affected by the change in law. They pointed out that the Constitutional Court's judgment of 21 June 2002 which was based on other grounds than those relied on in the present case, had not acknowledged, let alone afforded redress for, the alleged breach of the Convention. Their convictions still stood and they had no right to any form of compensation. In particular, the first applicant had no right to compensation for the period of one year spent in detention. They were, therefore, still victims within the meaning of Article 34, of the violation alleged.

27. Moreover, the applicants repeated the arguments relied on by the applicants in the *L. and V*. case (§§ 39-40).

28. The Court observes that the present case raises the same issue as *L. and V. v. Austria* (cited above). It notes in particular that, like the applicants in the *L. and V*. case the applicants in the present case were convicted under Article 209 of the Criminal Code.

29. The Court reiterates its finding in *L. and V*. that the fact that Article 209 of the Criminal Code has been repealed does not affect the applicants' victim status (ibid., § 43). It sees no reason to deviate from this position in the present case.

30. In the *L. and V*. case the Court found a violation of Article 14 of the Convention taken in conjunction with Article 8 on the ground that the Government had not offered convincing and weighty reasons justifying the maintenance in force of Article 209 of the Criminal Code and, consequently, the applicants' convictions under this provision (ibid., § 53). Further it found that it was not necessary to rule on the question whether there had been a violation of Article 8 taken alone (§ 55).

31. The Court sees nothing to distinguish the present case from the above precedent. It notes that the parties have not submitted any new argument which would require it to deviate from its previous finding.

32. Accordingly, the Court finds that there has been a violation of Article 14 taken in conjunction with Article 8.

33. Having regard to the foregoing considerations, the Court does not consider it necessary to rule on the question whether there has been a violation of Article 8 taken alone.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

35. Both applicants requested compensation for non-pecuniary damage. The first applicant claimed 500,000 euros (EUR), asserting that he had suffered feelings of distress and humiliation due to the maintenance in force of Article 209 of the Criminal Code and, in particular, the criminal proceedings against him resulting in his conviction, which stigmatised him as a sexual offender. In addition to the general distress and humiliation, he particularly suffered from having been deprived of his liberty during one year of detention, which had lasted from 1 September 2001 until 1 September 2002. The second applicant claimed EUR 100,000, pointing out that he had also suffered feelings of distress and humiliation.

36. The Government contended that the applicants' claims were excessive.

37. Having regard to the amounts awarded in *L. and V.*, the Court considers that, in the first applicant's case, an award of EUR 75,000 is appropriate, in particular, taking into account his detention. In the second applicant's case, the Court, making an assessment on an equitable basis, awards EUR 15,000.

B. Costs and expenses

38. The first applicant claimed a total amount of EUR 20,741.73 for costs and expenses, composed of EUR 2,107.90, including VAT, in respect of the domestic proceedings and EUR 18,633.83, including VAT, in respect of the Convention proceedings.

The second applicant claimed a total amount of EUR 18,662.91 for costs and expenses, composed of EUR 8,424.37, including VAT, in respect of the domestic proceedings and EUR 10,238.54, including VAT, in respect of the Convention proceedings.

39. Moreover, both applicants requested the Court to make an award of any future costs which may become necessary to remove the consequences flowing from the violation of the Convention, in particular to have their convictions set aside and to have them removed from the criminal records.

40. The Government found that the applicants' claims were excessive. In particular, as regards the Convention proceedings they pointed out that the present case was simply a follow-up case to *L. and V*. Further, they considered that the claim for future costs was of a speculative nature.

41. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum.

42. In the present case, the Court considers that the costs of the domestic proceedings, which related entirely to Article 209 of the Criminal Code, were actually and necessarily incurred. It notes that the difference in the sums claimed is explained by the fact that the first applicant benefited from legal aid as regards his trial and his pre-trial detention.

The Court therefore awards the sums claimed in full, i.e. EUR 2,107.90 to the first applicant and EUR 8,424.37 to the second applicant.

43. As to the costs of the Convention proceedings, the Court takes into account that the present case is a follow-up case to *L. and V*., Moreover, the applicants in the present case were represented by the same lawyer as the applicants in *L. and V*. Making an assessment on an equitable basis, it awards each applicant EUR 3,000.

44. In respect of costs and expenses, the total amount awarded to the first applicant is, therefore, EUR 5,107.90, the total amount awarded to the second applicant is EUR 11,424.37.

45. As to the applicants' request for future costs linked to removing the consequences of the violation found, the Court, referring to the reasons given in *L. and V*. (cited above, § 68), considers that the applicants' claim is speculative. It is therefore dismissed.

C. Default interest

46. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Decides* unanimously to join the applications;

2. *Declares* unanimously the applications admissible;

3. *Holds* unanimously that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;

4. *Holds* unanimously that there is no need to examine the complaint under Article 8 of the Convention alone:

5. *Holds*
   (a) by 5 votes to 2 that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 75,000 (seventy five thousand euros) in respect of non-pecuniary damage and EUR 5,107.90 (five thousand one hundred and seven euros ninety cents) for costs and expenses;
   (b) unanimously that the respondent State is to pay the second applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage and EUR 11,424.37 (eleven thousand four hundred and twenty four euros thirty-seven cents) for costs and expenses;
   (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 2 June 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinion is annexed to this judgment:

- Dissenting opinion of Judges Botoucharova and Hajiyev.

C.L.R.

S.N.

DISSENTING OPINION OF JUDGES BOTOUCHAROVA AND HAJIYEV

We share the conclusion of the Chamber in finding a violation of Article 14 of the Convention taken in conjunction with Article 8 in these cases. However, we regret that we are unable to accept the amount of 75 000 euros in respect of non-pecuniary damage for the first applicant as it does not follow the Court's case-law for non-pecuniary loss in comparable cases under Article 41.

We would recall that under Article 41 just satisfaction will be afforded by the Court only "if necessary" (see, inter alia, the Dudgeon judgment of 24 February 1983, Series A no. 59, p.7., par. 11). In exercising the discretion thus conferred on it, the Court will have regard to what is equitable in all the circumstances of the case (Silver and Others (Article 50), 24 October 1983, Series A no. 67, para 9). In our view the notion of "equity" has not been respected in the case of the first applicant.

The present case is but one following the case of *L. and V. v. Austria* in which the Court has found a violation of the same kind and it comes after Austria has repealed its law relating to the criminalising of homosexual acts of adult men with consenting adolescents between the ages of 14 and 18. The Court would in such circumstances take that fact into account and follow the award made in the leading case. The Court is free to adjust the amount it awards following the particular circumstances of a case. Still, if deciding to award an excessive sum when deciding on non-pecuniary damage given in equity it should explain the reasons which prompted it to depart from its own established case-law. As this is not the case and as at the same time the amount is not adequate to the character of the violation found, we cannot agree with the majority.

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF R. H. v. AUSTRIA

(Application no. 7336/03)

JUDGMENT

STRASBOURG

19 January 2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of R. H. v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 13 December 2005,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 7336/03) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mr R. H. ("the applicant"), on 3 June 2002.

2. The applicant was represented by Mr H. Graupner, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Winkler, former Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. On 2 May 2003 the Court decided to communicate the application to the Government. On 12 June 2003, under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1965 and lives in Vienna.

5. On 9 December 1998 the Vienna Regional Court (*Landesgericht*) ordered the applicant's detention on remand on suspicion of having committed homosexual acts with adolescents contrary to Article 209 of the Criminal Code.

6. On 8 April 1999 the presiding judge of the competent chamber of the Regional Court scheduled the applicant's trial for 21 April 1999. On the first day of the trial, on 21 April 1999, the applicant was released from detention on remand and the hearing was adjourned in order to summon a witness residing in the Slovak Republic to the trial. At the hearing of 14 July 1999 the witnesses summoned in Slovakia did not appear. On 16 July 1999 the Regional Court sent letters rogatory requesting the summoning of these witnesses to the competent court in Bratislava. A further hearing was held on 24 November 1999 and the trial again adjourned.

7. On 15 December 1999 the Bratislava District Court II informed the Regional Court that the summons could not be served on the witnesses.

8. On 31 January 2000 the Regional Court requested the applicant to submit addresses to which the summons could be sent. On 15 May 2000 the applicant gave such information in respect of two of the witnesses.

9. On 20 December 2000 the Regional Court again sent letters rogatory to the Slovakian judicial authority to hear one witness. It appears that the Slovakian courts did not succeed in obtaining statements of that witness.

10. On 21 November 2001 a further hearing in the trial against the applicant took place. The Regional Court read out statements of three witnesses made at the pre-trial stage. The applicant's counsel objected to the reading out of the statements. No witnesses were heard.

11. On the same day, the Regional Court convicted the applicant on several counts of the offence under Section 209 of the Penal Code and sentenced him to six months' imprisonment suspended on probation for three years. The applicant was acquitted as regards other charges.

12. On 8 January 2002 the Public Prosecutor filed an appeal against the sentence and, on 25 January 2002, the applicant filed an appeal on points of law and fact, as well as against the sentence. The applicant argued, *inter alia*, that Article 209 of the Criminal Code was unconstitutional in that it did not comply with Article 8 of the Convention read in conjunction with Article 14 and that the reading out of the statement of the witnesses at the trial violated his right to a fair hearing under Article 6 of the Convention.

13. On 8 April 2002 the Vienna Court of Appeal, after a public hearing, dismissed the applicant's appeal but granted the Public Prosecutor's appeal and increased the sentence to nine months' imprisonment, out of which six months were suspended on probation.

II. RELEVANT DOMESTIC LAW

14. Any sexual acts with persons under 14 years of age are punishable under Articles 206 and 207 of the Criminal Code.

Article 209 of the Criminal Code, in the version in force at the material time, read as follows:

> "A male person who after attaining the age of 19 fornicates with a person of the same sex who has attained the age of 14 but not the age of 18 shall be sentenced to imprisonment for between six months and five years."

15. On 21 June 2002, upon a request for review made by the Innsbruck Regional Court, the Constitutional Court found that Article 209 of the Criminal Code was unconstitutional.

16. On 10 July 2002 Parliament decided to repeal Article 209. That amendment, published in the Official Gazette (*Bundesgesetzblatt*) no. 134/2002, came into force on 14 August 2002.

17. The Court notes that the legal situation has remained unchanged since 9 January 2003, when it gave its *L. and V. v. Austria* judgment (nos. 39392/98 and 39829/98, ECHR 2003-I). For a more detailed description of the law, the Constitutional Court's judgments concerning Article 209 of the Criminal Code and the parliamentary debate relating to the issue, it therefore refers to the said judgment (§§ 17-33).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

18. The applicant complained of the maintenance in force of Article 209 of the Criminal Code, which criminalised homosexual acts of adult men with consenting adolescents between the ages of 14 and 18, and of his convictions under that provision. Relying on Article 8 of the Convention taken alone and in conjunction with Article 14, he alleged that his right to respect for his private life had been violated and that the contested provision was discriminatory, as heterosexual or lesbian relations between adults and adolescents in the same age bracket were not punishable.

Article 8 of the Convention provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. Admissibility

19. The Government did not comment on that point.

20. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that they are not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

21. The Court observes that the present case raises the same issue as *L. and V. v. Austria* (cited above). It notes in particular that, like the applicants in the *L. and V.* case the applicant in the present case was convicted under Article 209 of the Criminal Code.

22. In the *L. and V.* case the Court found a violation of Article 14 of the Convention taken in conjunction with Article 8 on the ground that the Government had not offered convincing and weighty reasons justifying the maintenance in force of Article 209 of the Criminal Code and, consequently, the applicants' convictions under this provision (ibid., § 53). Further it found that it was not necessary to rule on the question whether there had been a violation of Article 8 taken alone (§ 55).

23. The Court sees nothing to distinguish the present case from the above precedent. Accordingly, it finds that there has been a violation of Article 14 taken in conjunction with Article 8.

24. Having regard to the foregoing considerations, the Court does not consider it necessary to rule on the question whether there has been a violation of Article 8 taken alone.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

25. The applicant complained that the criminal proceedings against him had been unfair in that the Regional Court which convicted him had only relied on written statements of witnesses which had been read out at the trial. He relies on Article 6 which insofar as relevant reads as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ...hearing. ....
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

A. Admissibility

26. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

27. The Government submitted that the Regional Court had acted correctly when it had read out at the trial the statements of the witnesses made before the investigating judge. The Regional Court had made repeated efforts to have summons for hearings before it served on these witnesses and only when it had become clear that the witnesses could not be heard during the trial the Regional Court decided to read out in court their statements. Moreover, the judgment of the Regional Court was not exclusively based on the statements of the witnesses from Slovakia. In addition the Regional Court had heard five other witnesses which corroborated these statements.

28. This is disputed by the applicant. He submits that it had been correct to read out the statement of the witnesses, which had not appeared before the trial court. However, the Court had proceeded to the reading out of the statement without having given the applicant the opportunity to question the witnesses at an earlier stage. In such circumstances, the trial court should not have relied on the statements as decisive items of evidence. In his view the statements of the further witnesses heard had no particular relevance for the finding of guilt.

29. Having regard to its above conclusion on the complaint under Article 14 read in conjunction with Article 8 of the Convention, the Court finds that there is no need to examine this part of the application. It observes that in the case of *Wolfmeyer v. Austria* (no. 5263/03, 26.5.2005, § 32) - which also concerned criminal proceedings under Article 209 of the Criminal Code – it found that even if Mr Wolfmeyer had eventually been acquitted of the charges under Article 209 of the Criminal Code, he could still claim to be the victim of an alleged breach of Article 14 read in conjunction with Article 8 of the Convention. What mattered was not a conviction under Article 209 of the Criminal Code but the mere fact that criminal proceedings under this provision had been instituted at all. Thus, for the purpose of the present application it is irrelevant whether or not the criminal proceedings against the applicant respected the guarantees of Article 6 of the Convention because, in any event, the Court has found above that such proceedings should not have been instituted in the first place. In those circumstances the Court considers that no separate issue needs to be examined under Article 6 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

31. The applicant claimed 100,000 euros (EUR) as compensation for non-pecuniary damage, asserting that he had suffered feelings of distress and humiliation due to the maintenance in force of Article 209 of the Criminal Code and, in particular, the criminal proceedings against him resulting in his conviction, which stigmatised him as a sexual offender. In addition to the general distress and humiliation, the distress he had suffered was increased by the fact that the criminal proceedings against him had been unfair.

32. The Government contended that the applicant's claim was excessive.

33. Having regard to the amounts awarded in *L. and V.* the Court considers that an award of EUR 35,000 is appropriate, in particular, taking into account his detention from 9 December 1998 until 21 April 1999.

B. Costs and expenses

34. The applicant claimed a total amount of EUR 15,821.45 for costs and expenses, composed of EUR 5,851.10, including VAT, in respect of the domestic proceedings and EUR 9,970.35, including VAT, in respect of the Convention proceedings.

35. Moreover, the applicant requested the Court to make an award of any future costs which may become necessary to remove the consequences flowing from the violation of the Convention, in particular to have his convictions set aside and to have it removed from the criminal records.

36. The Government found that the applicant's claim was excessive. In particular, as regards the Convention proceedings they pointed out that the present case was simply a follow-up case to *L. and V.* Further, they considered that the claim for future costs was of a speculative nature.

37. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum.

38. In the present case, the Court considers that the costs of the domestic proceedings, which related entirely to Article 209 of the Criminal Code,

were actually and necessarily incurred. The Court therefore awards the sums claimed in full, i.e. EUR 5,851.10.

39. As to the costs of the Convention proceedings, the Court takes into account that the present case is a follow-up case to *L. and V*., Moreover, the applicant in the present case was represented by the same lawyer as the applicants in *L. and V*. Making an assessment on an equitable basis, it awards EUR 3,000.

40. In respect of costs and expenses, the total amount awarded to the applicant is, therefore, EUR 8,851.10.

41. As to the applicant's request for future costs linked to removing the consequences of the violation found, the Court, referring to the reasons given in *L. and V*. (cited above, § 14), considers that the applicant's claim is speculative. It is therefore dismissed.

C. Default interest

42. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* the application admissible unanimously;

2. *Holds* unanimously that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention;

3. *Holds* unanimously that there is no need to examine the complaint either under Article 8 of the Convention alone or under Article 6 of the Convention;

4. *Holds* by four votes to three that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 35,000 (thirty five thousand euros) in respect of non-pecuniary damage;
5. *Holds* unanimously that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 8,851.10 (eight thousand eight hundred and fifty one euros ten cents) for costs and expenses;

6. *Holds* unanimously that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 January 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of the Court, the joint dissenting opinion of Judges Botoucharova, Kovler and Hajiyev is annexed to this judgment.

S.N.
C.R.

JOINT DISSENTING OPINION OF JUDGES BOTOUCHAROVA, KOVLER AND HAJIYEV

We share the conclusion of the Chamber in finding a violation of Article 14 of the Convention taken in conjunction with Article 8 in this case. However, we are unable to accept the amount awarded in respect of non-pecuniary damage for the reasons already expressed in the Dissenting opinion of Judges Botoucharova and Hajiyev in cases of H.G. and G.B. v. Austria (nos. 11084/02 and 15306/02, 2 June 2005).

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

CASE OF BĄCZKOWSKI AND OTHERS v. POLAND

(Application no. 1543/06)

JUDGMENT

STRASBOURG
3 May 2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Bączkowski and Others v. Poland,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Ms L. MIJOVIĆ,
Mr J. ŠIKUTA,
Mrs P. HIRVELÄ, *judges*
and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 3 April 2007

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 1543/06) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Tomasz Bączkowski, Mr Robert Biedroń, Mr Krzysztof Kliszczyński, Ms Inga Kostrzewa, Mr Tomasz Szypuła and by the Foundation for Equality (*Fundacja Równości*), on 16 December 2005.

2. The applicants were represented before the Court by Professor Zbigniew Hołda, a lawyer practising in Warszawa.

3. The respondent Government were represented by their Agent, Mr Jakub Wołąsiewicz of the Ministry of Foreign Affairs.

4. The applicants complained that their right to peaceful assembly had been breached by the way in which the domestic authorities had applied relevant domestic law to their case. They alleged that they had not had at their disposal any procedure which would have allowed them to obtain a final decision before the date of the planned assemblies. They also complained that they had been treated in a discriminatory manner in that they had been refused permission to organise the assemblies whilst other persons had received such permissions.

5. By a decision of 5 December 2006, the Court declared the application admissible. It decided to join to the merits of the case the examination of the Government's preliminary objections.

6. The applicants filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. Preparation of the assemblies

7. The applicants, a group of individuals and the Foundation for Equality (of whose executive committee the first applicant is also a member empowered to act on its behalf in the present case), wished to hold, within the framework of Equality Days organised by the Foundation and planned for 10-12 June 2005, an assembly (a march) in Warsaw with a view to alerting public opinion to the issue of discrimination against minorities - sexual, national, ethnic and religious - and also against women and disabled persons.

8. On 10 May 2005 the organisers held a meeting with the Director of the Safety and Crisis Management Unit of Warsaw City Council. During this meeting an initial agreement was reached as to the itinerary of the planned march.

9. On 11 May 2005 Mr Bączkowski obtained an instruction of the Warsaw Mayor's Office on "requirements which organisers of public assemblies have to comply with under the Road Traffic Act" if the assembly was to be regarded as an "event" (*impreza*) within the meaning of Article 65 of that Act.

10. On 12 May 2005 the organisers requested the City Council Road Traffic Office for permission to organise the march, the itinerary of which would lead from the buildings of Parliament (*Sejm*) to the Assembly Place (*Plac Defilad*) in the centre of Warsaw.

11. On 3 June 2005 the Traffic Officer, acting on behalf of the Mayor of Warsaw, refused permission for the march, relying on the organisers' failure to submit a "traffic organisation plan" (*"projekt organizacji ruchu"*) within the meaning of Article 65 (a) of the Road Traffic Act, which they had allegedly been ordered to submit.

12. On the same day the applicants informed the Mayor of Warsaw about stationary assemblies they intended to hold on 12 June 2005 in seven different squares of Warsaw. Four of these assemblies were intended to protest about discrimination against various minorities and to support actions of groups and organisations combating discrimination. The other three planned assemblies were to protest about discrimination against women.

13. On 9 June 2005 the Mayor gave decisions banning the stationary assemblies to be organised by Mr Bączkowski, Mr Biedroń, Mr Kliszczyński, Ms Kostrzewa, Mr Szypuła, and another person, Mr N. (who is not an applicant), who are active in various

non-governmental organisations acting for the benefit of persons of homosexual orientation. In his decision the Mayor relied on the argument that assemblies held under the provisions of the Assemblies Act of 1990 (*Ustawa o zgromadzeniach*) had to be organised away from roads used for road traffic. If they were to use roads, more stringent requirements applied. The organisers wished to use cars carrying loudspeakers. They had failed to indicate where and how these cars would park during the assemblies so as not to disturb the traffic and how the movement of persons and these cars between the sites of the assemblies would be organised.

14. Moreover, as there had been a number of requests submitted to organise other assemblies on the same day, the tenor of which ran counter to the ideas and intentions of the applicants, permission had to be refused in order to avoid any possible violent clashes between the participants of various demonstrations.

15. On the same day the municipal authorities, acting on the Mayor's behalf, allowed the three planned assemblies concerning discrimination against women to be held as requested by the applicants.

16. On the same day the same authorities permitted six other demonstrations to be organised on 12 June 2005. The themes of these assemblies were as follows: “For more stringent measures against persons convicted of paedophilia”, “Against any legislative work on the law on partnerships”, “Against propaganda for partnerships”, “Education in Christian values, a guarantee of a moral society”, “Christians respecting God's and nature's laws are citizens of the first rank”, “Against adoption of children by homosexual couples”.

2. Meetings held on 11 June 2005

17. On 11 June 2005, despite the decision given on 3 June 2005, the march took place. It followed the itinerary as planned in the original request of 12 May 2006. The march, attended by approximately 3,000 people, was protected by the police.

18. Apart from the march, nine stationary assemblies were held on the same day under permissions given by the Mayor on 9 June 2005 (see paragraphs 15-16 above).

3. Appellate proceedings

a) The march

19. On 28 June 2005 the applicant Foundation appealed to the Local Government Appellate Board against the decision of 3 June 2005, refusing permission for the march. It was argued that the requirement to submit “a traffic organisation plan” lacked any legal basis and that the applicants had never been requested to submit such a document prior to the refusal. It was

also argued that the decision amounted to an unwarranted restriction of freedom of assembly and that it had been dictated by ideological reasons, incompatible with the tenets of democracy.

20. On 22 August 2005 the Board quashed the contested decision, finding that it was unlawful. The Board observed that under the applicable provisions of administrative procedure the authorities were obliged to ensure that parties to administrative proceedings had an opportunity of effectively participating in them. In the applicant's case this obligation had not been respected in that the case file did not contain any evidence to show that the applicant Foundation had been informed of its procedural right to have access to the case file.

The Board's decision further read, *inter alia*:

> "In the written grounds of the decision complained of, the first-instance authority refers to the fact that the traffic organisation plan is not to be found in the case file. Under section 65 (a) item 3 (9), an organiser of a demonstration is obliged to develop, in co-operation with the police, such a project, if he or she was obliged to do so by the authority. However, in the case file there is not as much as a mention that the organisers were obliged to submit such a project. (...) The document on the procedure for obtaining permission to organise an event which was served on the organisers did not contain information on such an obligation either.
>
> Having regard to the fact that the organisers' request concerned a march to be held on 11 June 2005 and having also taken into account the fact that the appeal was received by the Board's Office [together with the case file] on 28 June 2005, the proceedings had already become on that latter date devoid of purpose. "

b) The assemblies

21. On 10 June 2005 the applicants appealed to the Mazowsze Governor against the Mayor's refusals of 9 June 2005 of permission to hold six out of the eight planned assemblies. They argued that the ban on the assemblies breached their freedom of assembly guaranteed by the Constitution and that the assemblies were to be entirely peaceful. They submitted that the assemblies did not pose any threat to either public order or to morals. They contested the argument relied on in the decision that they were obliged to submit a document on the planned itinerary between the places where assemblies were to be held, arguing that they only intended to organise stationary assemblies, not any movement of persons between them and that they should not be responsible for any organisation or supervision of such movement.

22. On 17 June 2005 the Mazowsze Governor gave six identical decisions by which he quashed the contested refusals to hold the assemblies given on 9 June 2005.

It was first observed that these decisions breached the law in that the parties had been served only with copies of the decisions, not with originals

as required by law on administrative procedure. It was further noted that the Mayor had informed the media of his decisions before they had been served on the applicants, which was manifestly in breach of principles of administrative procedure.

23. It was further observed that the 1990 Act of Assemblies was a guarantee of freedom of assembly both in respect of organisation of assemblies and participation therein. The Constitution clearly guaranteed the freedom of assembly, not a right. It was not for the State to create a right to assembly; its obligation was limited to securing that assemblies be held peacefully. This way the applicable law did not provide for any permit for an assembly to be held.

24. The Governor noted that the requirement to submit a permit to occupy a part of the road, based on the provisions of the Road Traffic Act, lacked any legal basis in the provisions of the Assemblies Act. The Mayor had assumed that the demonstration would occupy a part of the road, but had failed to take any steps to clarify whether this had really been the organisers' intention, while he was obliged to do so by the law.

It was further observed that a decision banning an assembly had to be regarded as a method of last resort because it radically restricted freedom of expression. The principle of proportionality required that any restriction of constitutionally protected freedoms be permitted only insofar as it was dictated by the concrete circumstances of a particular case.

25. The Governor noted in this connection that the Mayor's reliance on the threat of violence between the demonstrations organised by the applicants and the counter-demonstrations planned by other persons and organisations for the same day could not be countenanced. It would have been tantamount to accepting that the administration endorsed the intentions of organisations which clearly and deliberately intended to breach public order, whereas the protection of freedom of expression guaranteed by the Assemblies Act should be an essential task of the public powers.

26. He further discontinued the proceedings as they had become devoid of purpose, the assemblies having taken place on 11 June 2005.

4. Translation of an interview with the Mayor of Warsaw published in "Gazeta Wyborcza" of 20 May 2005

27. "E. Siedlecka: The Assemblies Act says that the freedom of assembly can only be restricted if a demonstration might entail a danger to life or limb, or a major danger to property. Did the organisers of the march write anything in their registration request that would show that there is such a danger?

Mayor of Warsaw: I don't know, I haven't read the request. But I will ban the demonstration regardless of what they have written. I am not for discrimination on the ground of sexual discrimination, for example by

ruining people's professional careers. But there will be no public propaganda of homosexuality.

E. S. What you do in this case is exactly discrimination: you make it impossible for people to use their freedom only because they have a specific sexual orientation.

MoW: I do not forbid them to demonstrate, if they want to demonstrate as citizens, not as homosexuals.

E. S.: Everything seems to suggest that – like last year – the Governor will set your prohibition aside. And if the organisers appeal to the administrative court, they will win, because preventive restrictions on freedom of assembly are unlawful. But the appellate proceedings will last some time and the date for which the march is planned will pass. Is this what you want?

MoW: We will see whether they win or lose. I will not let myself be persuaded to give my permission for such a demonstration.

E. S.: Is this correct that the exercise of people's constitutional rights depended on the views of powers that be?

MoW: In my view, propaganda of homosexuality is not tantamount to exercising one's freedom of assembly".

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. Relevant provisions of the Constitution

28. Article 57 of the Constitution reads:

> The freedom of peaceful assembly and participation in such assemblies shall be ensured to everyone. Limitations upon such freedoms may be imposed by statute.

29. Article 79 § 1 of the Constitution, which entered into force on 17 October 1997, provides as follows:

> "In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Court for a judgment on the conformity with the Constitution of a statute or another normative act on the basis of which a court or an administrative authority has issued a final decision on his freedoms or rights or on his obligations specified in the Constitution."

30. Article 190 of the Constitution, insofar as relevant, provides as follows:

> "1. Judgments of the Constitutional Court shall be universally binding and final.
>
> 2. Judgments of the Constitutional Court, ... shall be published without delay.
>
> 3. A judgment of the Constitutional Court shall take effect from the day of its publication; however, the Constitutional Court may specify another date for the end of

the binding force of a normative act. Such time-limit may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. ...

2. The Assemblies Act

31. Pursuant to section 1 of the 1990 Assemblies Act, everyone has the right to freedom of peaceful assembly. A gathering of at least fifteen persons, called in order to participate in a public debate or to express an opinion on a given issue is to be regarded as an assembly within the meaning of the Act.

32. Under section 2, freedom of assembly can only be restricted by statutes and where it is necessary for the protection of national security or public safety, for the protection of health or morals or for the protection of the rights and freedoms of others.

33. All decisions concerning the exercise of freedom of assembly must be taken by the local municipalities where the assembly is to be held. These decisions can be appealed against to the Governor.

34. Under section 3 of the Act, the municipality must be informed by the organisers of the intention to hold a public gathering organised in the open air for an indeterminate number of persons. Under section 7, such information must be submitted to the municipality not earlier than thirty days before the planned date of the demonstration and not later than three days before it. Such information must contain the names and addresses of the organisers, the aim and programme of the demonstration, its place, date and time as well as information about the itinerary if the demonstration is intended to proceed from one place to another.

35. Pursuant to section 8, the municipality shall refuse permission for the demonstration if its purpose is in breach of the Act itself or of provisions of the Criminal Code, or if the demonstration might entail a danger to life or limb, or a major danger to property.

36. A first-instance refusal of permission to hold a demonstration must be served on the organisers within three days of the date on which a relevant request has been submitted and not later than three days before the planned date of the demonstration. An appeal against such a refusal must be lodged within three days of the date of its service. The lodging of such an appeal does not have a suspensive effect on the refusal of permission to hold the demonstration.

37. A decision given by the appellate authority must be served on the organisers within three days of the date on which the appeal was submitted.

3. The Road Traffic Act

38. Under section 65 of the Road Traffic Act of 1997, as amended in 2003, the organisers of sporting events, contests, assemblies and other

events which may obstruct road traffic are obliged to obtain permission for the organisation of such assemblies.

39. Under section 65 read together with section 65 (a) of the Act, organisers of such events are obliged to comply with various administrative obligations specified in a list contained in this provision and numbering nineteen items, including the obligation to submit a traffic organisation plan to the authorities.

40. These provisions were repealed as a result of the judgment of the Constitutional Court, referred to below.

4. Judgment of the Constitutional Court of 18 January 2006

41. In its judgment of 18 January 2006 the Constitutional Court examined the request submitted to it by the Ombudsman to determine the compatibility with the Constitution of the requirements imposed on organisers of public events by the provisions of the Road Traffic Act in so far as they impinged on freedom of assembly, arguing that they amounted to an excessive limitation of that freedom.

42. The Constitutional Court observed that the essence of the constitutional problem was whether the requirements imposed by section 65 of the Act were compatible with freedom of expression as formulated by the Constitution and developed by the Assemblies Act. It noted that the 1990 Assemblies Act was based on the premise that the exercise of this freedom did not require any authorisations or licences issued by the State. As it was a freedom, the State was obliged to refrain from hindering its exercise and to ensure that it was enjoyed by various groups despite the fact that their views might not be shared by the majority.

43. Accordingly, the Assemblies Act provided for a system based on nothing more than the registration of an assembly to be held.

The Court observed that subsequently the legislature, when it enacted the Road Traffic Act, had incorporated various administrative requirements which were difficult to comply with into the procedure created for the organisation of sporting events, contests and assemblies, thus replacing the registration system by a system based on permission. In doing so, it placed assemblies within the meaning of the Assemblies Act on a par with events of a commercial character or organised for entertainment purposes. This was incompatible with the special position that freedom of expression occupied in a democratic society and rendered nugatory the special place that assemblies had in the legal system under the Constitution and the Assemblies Act. The Court also had regard to the fact that the list of requirements imposed by the Road Traffic Act contained as many as nineteen various administrative obligations. The restrictions on freedom of assembly imposed by that Act were in breach of the requirement of proportionality applicable to all restrictions imposed on the rights guaranteed by the Constitution.

44. The Court concluded that section 65 of the Road Traffic Act was incompatible with the Constitution in so far as it applied to assemblies.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Whether the applicants can claim to have the status of victims

45. The Government contended by way of a preliminary submission that the applicants could not claim to be victims of a violation of the Convention within the meaning of Article 34. It transpired from the written grounds of the second-instance administrative decisions that the appellate authorities had fully shared the applicants' arguments and had quashed the contested decisions in their entirety. The Governor, in his decision of 17 June 2005 (see paragraph 22 above), had gone even further in that he had stressed that prohibiting an assembly on the ground of a threat of violence between the demonstrators and counter-demonstrators would have been tantamount to accepting that the authorities endorsed the intentions of organisations which deliberately intended to breach the public order. When quashing the contested decisions, the appellate authorities had stated that their assessment had been made bearing in mind the applicants' freedom of assembly. As these decisions had eventually been found unjustified, the applicants could not claim to have a victim status.

46. The Government were of the view that as the applicants had not claimed to have sustained any pecuniary or non-pecuniary damage, the domestic authorities had not been under an obligation to offer them any redress. A decision or measure favourable to the applicant was not in principle sufficient to deprive him of his status as a "victim" unless the national authorities had acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (*Eckle v. Germany*, judgment of 15 July 1982, Series A no. 51, § 66).

47. The applicants submitted that the authority relied on by the Government, the *Eckle v. Germany* case, was of little relevance to the case at hand. They reiterated that it was only when those two conditions were cumulatively satisfied that the subsidiary nature of the protective mechanism of the Convention precluded examination of an application (see *Scordino v. Italy (dec.)*, no. 36813/97, 27 March 2003). In their case it could not be said that those two conditions had been satisfied. No redress had ever

been afforded at domestic level for any of the breaches of the Convention alleged in their application.

48. The Court reiterates that in its decision on the admissibility of the application it joined to the merits of the case the examination of whether the applicants could claim to be victims of a breach of their rights (see paragraph 5 above). The Court confirms its approach.

B. Exhaustion of domestic remedies

49. The Government submitted that the applicants had had at their disposal procedures capable of remedying the alleged breach of their freedom of assembly. Section 7 of the Assemblies Act provided for time-limits which should be respected by persons wishing to organise an assembly under the provisions of this Act. A request for a decision about an assembly to be held had to be submitted to the municipality not earlier than thirty days before the planned date of the demonstration and no later than three days before it.

50. If the applicants had considered that the provisions on the basis of which the domestic decisions in their cases had been given had been incompatible with the Constitution, it had been open to them to challenge these provisions by lodging a constitutional complaint provided for by Article 79 of the Constitution. Thus, the applicants could have obtained the aim they sought to attain before the Court, namely an assessment of whether the contested regulations as applied to their case had infringed their rights guaranteed by the Convention.

51. The Government recalled that the Court had held that the Polish constitutional complaint could be recognised as an effective remedy where the individual decision, which allegedly violated the Convention, had been adopted in a direct application of an unconstitutional provision of national legislation (*Szott-Medyńska v. Poland* (dec.), no. 47414/99, 9 October 2003). The Government concluded that the applicants should have had recourse to this remedy.

52. The applicants disagreed. They submitted that because of the specific nature of their case, a remedy that had not been capable of providing them with a judicial or administrative review of the ban on holding their assemblies before 11 June 2005 could not be regarded as effective. Therefore, any subsequent review by the Constitutional Court would not have served any practical purpose.

53. In any event, even if it were to be accepted that an *ex post facto* review could be contemplated as a remedy to be used in their case, the applicants were of the view that it would have been ineffective also for other reasons. A constitutional complaint under Polish law was a remedy available only when a possibility existed to apply for the re-opening of the original proceedings in the light of a favourable ruling of the Constitutional

Court. This condition alone would have rendered this remedy ineffective since, in view of the specific and concrete nature of the redress sought by the applicants, the reopening of their case would have been an entirely impracticable and untimely solution. Furthermore, the quashing of the final decisions would have been futile as the decisions of 3 and 9 June 2005 had already been quashed by the Self-Government Board of Appeal and the Governor of Mazowsze Province on 22 August and 17 June 2005, respectively.

54. The Court reiterates that in its decision on the admissibility of the application it joined to the merits of the case the examination of the question of exhaustion of domestic remedies (see paragraph 5 above). The Court confirms its approach to the exhaustion issue.

II. THE MERITS OF THE CASE

A. Alleged violation of Article 11 of the Convention

55. The applicants complained that their right to peaceful assembly had been breached by the way in which the domestic authorities had applied the relevant domestic law to their case. They invoked Article 11 of the Convention which reads:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

1. The arguments of the parties

56. The Government were of the view that there had been no interference with the applicants' rights guaranteed by Article 11 of the Convention. They referred in this respect to their submissions concerning the applicants' victim status (see paragraphs 45-48 above).

57. The Government did not contest the fact that the second-instance decisions of the domestic authorities had been given after the date for which the assemblies had been planned. However, the applicants had been aware of the time-limits provided by the applicable laws for the submission of requests for permission to hold an assembly.

58. The applicants complained that their right to peaceful assembly had been breached by the way in which the domestic authorities had applied the relevant domestic law to their case. It followed from the very character of the freedom of assembly that the requirements which laws imposed on organisers of public meetings should be restricted to a reasonable minimum and to those of a technical character.

59. Under the 1990 Assemblies Act the authorities could ban the organisation of an assembly only when its purpose ran counter to provisions of criminal law or when it might entail danger to life or limb or a major danger to property. On the other hand, the requirements that could be imposed on organisers of assemblies once the authorities classified the assembly to be held as an "event" under the Road Traffic Act went much further. They lacked precision, leaving the decision as to whether the organisers satisfied them entirely to the discretion of the authorities.

60. In the applicants' view, the Mayor's refusals lacked proper justification. The assemblies to be held were of a peaceful character, their aim being to draw the society's attention to the situation of various groups of persons discriminated against, in particular persons of homosexual orientation. The relevant requests had complied with the very limited requirements laid down by the Assemblies Act. As to the Equality March, the refusal had been motivated by the alleged failure of the applicants to submit the project of traffic organisation which the authorities had never required to be submitted prior to this refusal. These assemblies had lawful aims and there had been no special grounds, such as a major danger to property or danger to life or limb, which could justify the refusals.

2. The Court's assessment

61. As has been stated many times in the Court's judgments, not only is democracy a fundamental feature of the European public order but the Convention was designed to promote and maintain the ideals and values of a democratic society. Democracy, the Court has stressed, is the only political model contemplated in the Convention and the only one compatible with it. By virtue of the wording of the second paragraph of Article 11, and likewise of Articles 8, 9 and 10 of the Convention, the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that may claim to spring from "democratic society" (see *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, §§ 86-89, ECHR 2003-II; *Christian Democratic Peoples Party v. Moldova*, 28793/02, 14 May 2006).

62. While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes are also important to the proper functioning of democracy. For pluralism is also built on the genuine

recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 92, 17 February 2004).

63. Referring to the hallmarks of a "democratic society", the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context, it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see *Young, James and Webster v. the United Kingdom*, 13 August 1981, Series A no. 44, p. 25, § 63, and *Chassagnou and Others v. France* [GC], nos. 25088/95 and 28443/95, ECHR 1999-III, p. 65, § 112).

64. In *Informationsverein Lentia and Others v. Austria* (judgment of 24 November 1993, Series A no. 276) the Court described the State as the ultimate guarantor of the principle of pluralism (see the judgment of 24 November 1993, Series A no. 276, p. 16, § 38). A genuine and effective respect for freedom of association and assembly cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 nor with that of the Convention in general. There may thus be positive obligations to secure the effective enjoyment of these freedoms (see *Wilson & the National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, § 41, ECHR 2002-V; *Ouranio Toxo v. Greece*, no. 74989/01, 20 October 2005, § 37). This obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation.

65. In this connection, the Court reiterates that according to the Convention organs' constant approach, the word "victim" of a breach of rights or freedoms denotes the person directly affected by the act or omission which is in issue (see *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, § 27, and *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, § 41).

66. Turning to the circumstances of the present case, the Court observes that the authorities banned the planned march and the six stationary assemblies. The appellate authorities, in their decisions of 17 June and 22 August 2005, quashed the first-instance decisions and criticised them for

being poorly justified and in breach of the applicable laws. These decisions were given after the dates on which the applicants had planned to hold the demonstrations.

67. The Court acknowledges that the assemblies were eventually held on the planned dates. However, the applicants took a risk in holding them given the official ban in force at that time. The assemblies were held without a presumption of legality, such a presumption constituting a vital aspect of effective and unhindered exercise of the freedom of assembly and freedom of expression. The Court observes that the refusals to give authorisation could have had a chilling effect on the applicants and other participants in the assemblies. It could also have discouraged other persons from participating in the assemblies on the ground that they did not have official authorisation and that, therefore, no official protection against possible hostile counter-demonstrators would be ensured by the authorities.

68. Hence, the Court is of the view that, when the assemblies were held, the applicants were negatively affected by the refusals to authorise them. The Court observes that legal remedies available to them could not ameliorate their situation as the relevant decisions were given in the appellate proceedings after the date on which the assemblies were held. The Court refers in this respect to its finding concerning Article 13 of the Convention (see paragraph 84 below). There has therefore been an interference with the applicants' rights guaranteed by Article 11 of the Convention.

69. An interference will constitute a breach of Article 11 unless it is "prescribed by law", pursues one or more legitimate aims under paragraph 2 and is "necessary in a democratic society" for the achievement of those aims.

70. In this connection, the Court observes that on 22 August 2005 the Local Government Appellate Board found the decision of 3 June 2005 unlawful (see paragraph 20 above). Likewise, on 17 June 2005 the Mazowsze Governor quashed the refusals of 9 June 2005, finding that they breached the applicants' freedom of assembly (see paragraphs 22 – 26)**.** The Court concludes that the interference with the applicants' right to freedom of peaceful assembly was therefore not prescribed by law.

71. In the context of the examination of the lawfulness of the interference complained of, the Court notes, in addition, the relevance of the judgment of the Constitutional Court given on 18 January 2006. That Court found that the provisions of the Road Traffic Act applied also in the applicants' case were incompatible with the constitutional guarantees of the freedom of assembly. It observed that the restrictions on the exercise of this freedom imposed by the impugned provisions were in breach of the proportionality principle applicable to all restrictions imposed on the exercise of rights guaranteed by the Constitution (see paragraphs 39-42 above).

The Court is well aware that under the applicable provisions of the Constitution these provisions lost their binding force after the events concerned in the present case (see paragraph 30 above). However, it is of the view that the Constitutional Court's ruling that the impugned provisions were incompatible with the freedom of assembly guaranteed by the Constitution cannot but add force to its own above conclusion concerning the lawfulness of the interference complained of in the present case.

72. Having regard to this conclusion, the Court does not need to verify whether the other two requirements (legitimate aim and necessity of the interference) set forth in Article 11 § 2 have been complied with.

73. The Court therefore dismisses the Government's preliminary objection regarding the alleged lack of victim status on the part of the applicants and concludes that there has been a violation of Article 11 of the Convention.

B. Alleged violation of Article 13 of the Convention

74. The applicants further complained that Article 13 of the Convention had been breached in their case because they had not had at their disposal any procedure which would have allowed them to obtain a final decision prior to the date of the planned demonstrations.

Article 13 of the Convention reads:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

1. The arguments of the parties

75. The Government reiterated their submissions concerning the question of exhaustion of domestic remedies. In particular, the applicants should have lodged a constitutional complaint to challenge the provisions on the basis of which the decisions in their case had been given.

76. The applicants complained that, when the first-instance decisions had banned the holding of the assemblies, they had not had at their disposal any procedure which would have allowed them to obtain a final decision before the date on which it was planned to hold them. This was so because if a refusal was issued, the second-instance authority could only quash this decision and could not issue a new one. This meant that the organisers had to start the procedure all over again. In fact, that was how the relevant procedural provisions had been applied in the applicants' case.

77. The applicants submitted that pursuant to section 7 of the Assemblies Act, a request for approval of an assembly to be organised could be submitted thirty days before the planned date at the earliest. That meant that it was impossible to submit such a request earlier. Under Polish law, if the

authorities considered that the planned assembly was to be regarded as an "event" covered by the provisions of the Road Traffic Act as applicable at the relevant time, it was altogether impossible to comply with the thirty-day time-limit, given the unreasonably onerous requirements to submit numerous documents relating to the traffic organisation aspects of such an assembly which could be imposed on the organisers under that Act.

78. The applicants concluded that in any event, the State should create such procedure, a special one if need be, which would make it possible for organisers of public meetings to have the whole procedure completed within the time-frame set out in the Act, i.e. from 30 to 3 days prior to the planned date, and, importantly, before the day on which the assembly was planned to be held.

2. The Court's assessment

79. The Court reiterates that the effect of Article 13 is to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they comply with their obligations under this provision (see, among many other authorities, *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, pp. 1869-70, § 145).

In the present case the Court found that the applicants' rights under Article 11 were infringed (see paragraph 73 above). Therefore, they had an arguable claim within the meaning of the Court's case-law and were thus entitled to a remedy satisfying the requirements of Article 13.

80. As regards the Governments' reliance on an individual constitutional complaint, the Court first notes that in the context of Polish administrative procedure, two-tiered judicial review of second-instance administrative decisions is available. Only a judgment of the Supreme Administrative Court is considered to constitute a final decision in connection with which a constitutional complaint is available. In the present case, the applicants, having obtained decisions of the second-instance administrative bodies essentially in their favour, in that the refusal of permissions had been quashed, had no legal interest in bringing an appeal against these decisions to the administrative courts. Hence, the way to the Constitutional Court was not open to them.

81. Further, the Court accepts that the administrative authorities ultimately acknowledged that the first-instance decisions given in the applicants' case had been given in breach of the applicable laws. However, the Court emphasises that they did so after the dates on which the applicants planned to hold the demonstrations. The Court notes that the present case is similar to that of *Stankov and the United Macedonian Organisation Ilinden* (*Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*

(nos. 29221/95 and 29225/95, Commission decision of 29 June 1998, unreported) in which the former Commission held that "it [had been] undisputed that had the applicants attempted [an appeal against the refusal of the district court to examine the appeal against the mayoral ban], the proceedings would have lasted for at least several months and any favourable outcome would have resulted long after the date of a planned meeting or manifestation". In other words, bearing in mind that the timing of the rallies was crucial for their organisers and participants and that the organisers had given timely notices to the competent authorities, the Court considers that, in the circumstances, the notion of an effective remedy implied the possibility to obtain a ruling before the time of the planned events.

82. In this connection, the Court is of the view that such is the nature of democratic debate that the timing of public meetings held in order to voice certain opinions may be crucial for the political and social weight of such a meeting. Hence, the State authorities may, in certain circumstances, refuse permission to hold a demonstration, if such a refusal is compatible with the requirements of Article 11 of the Convention, but cannot change the date on which the organisers plan to hold it. If a public assembly is organised after a given social issue loses its relevance or importance in a current social or political debate, the impact of the meeting may be seriously diminished. The freedom of assembly – if prevented from being exercised at a propitious time – can well be rendered meaningless.

83. The Court is therefore of the view that it is important for the effective enjoyment of the freedom of assembly that the applicable laws provide for reasonable time-limits within which the State authorities, when giving relevant decisions, should act. The applicable laws provided for the time-limits for the applicants for the submission of their requests for permission. In contrast, the authorities were not obliged by any legally binding time-frame to give their final decisions before the planned date of the demonstration**.** The Court is therefore not persuaded that the remedies available to the applicants in the present case, all of them being of a *post-hoc* character, could provide adequate redress in respect of the alleged violations of the Convention.

84. Therefore, the Court finds that the applicants have been denied an effective domestic remedy in respect of their complaint concerning a breach of their freedom of assembly. Consequently, the Court dismisses the Government's preliminary objection regarding the alleged non-exhaustion of domestic remedies and concludes that there has been a violation of Article 13 in conjunction with Article 11 of the Convention.

C. Alleged violation of Article 14 in conjunction with Article 11 of the Convention

85. The applicants complained that they had been treated in a discriminatory manner in that they had been refused permission to organise the march and some of the assemblies. They relied on Article 11 read together with Article 14 of the Convention which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

1. The arguments of the parties

86. The Government submitted that the applicants had challenged the administrative decisions given in their cases on 3 and 9 June 2005. In the former, the Traffic Officer, acting on behalf of the Mayor of Warsaw, had refused permission for the march, relying on the organisers' failure to submit a "traffic organisation plan" within the meaning of section 65 (a) of the Road Traffic Act. In the latter, the Mayor had relied on the argument that the applicants had failed to comply with more stringent requirements imposed by the law on organisers of assemblies held on roads used for road traffic.

87. The Government were of the view that these decisions had been sufficiently reasoned and that their reasoning had been based on section 65 of the Road Traffic Act. It could not, in their opinion, be assumed that the decisions banning the assemblies had been influenced by the personal opinions held by the Mayor of Warsaw as presented in an interview published in "Gazeta Wyborcza" of 20 May 2005. The facts of the case had not indicated that any link existed between the Mayor's views expressed in the press and the official decisions given in the applicants' case.

88. The Government argued that in the instant case no provisions, acts or omissions of the public authorities had exposed the applicants to treatment less favourable than that to which other persons in an analogous situation would have been subjected. There had been no indication that this treatment had been based on any prohibited ground. Consequently, the applicants had not suffered discrimination in the enjoyment of their freedom of assembly contrary to Article 14 of the Convention.

89. The applicants stressed that they had been required to submit the "traffic organisation plan", while other organisations had not been requested to do so. In the absence of particularly serious reasons by way of justification and in the absence of any reasons provided by the Government for such differences in treatment, the selective application of the requirement to submit such a plan had sufficiently demonstrated that they had been discriminated against.

90. The applicants further argued that they had been treated in a discriminatory manner essentially because they were refused permission to organise the demonstrations on 12 June 2005, while other organisations and persons had received relevant permissions. This difference of treatment had not pursued a legitimate aim, the more so as the Mayor and his collaborators had made it plain to the public that they would ban the demonstrations because of the homosexual orientation of the organisers, regardless of any legal grounds.

91. The applicants further argued that the decisions of 3 and 9 June 2005 had been formally issued in the name of the Mayor of Warsaw. They referred to the interview with the Mayor published in May 2005 in which he had stated that he would ban the assemblies irrespective of what the organisers had submitted in their requests for permission. They submitted that it could not be reasonably concluded that there had been no link between the statements made by the Mayor and the decisions subsequently given in his name. They emphasised that the practical outcome of the proceedings in their case had been consistent with the tenor of the Mayor's statements.

92. The applicants observed that the Government's argument about the lack of a causal link between the opinions publicly expressed by the Mayor and the administrative decisions given in his name amounted to implying that at the relevant time decisions had been issued in the Mayor's office with no regard to his opinions expressed publicly in his capacity as head of the municipal administration.

2. The Court's assessment

93. The Court has repeatedly held that Article 14 is not autonomous but has effect only in relation to Convention rights. This provision complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among many other authorities, *Van Raalte v. Netherlands*, judgment of 21 February 1997, *Reports* 1997-I, p. 184, § 33; *Gaygusuz v. Austria*, judgment of 16 September 1996, *Reports* 1996-IV, § 36).

94. It is common ground between the parties that the facts of the case fall within the scope of Article 11 of the Convention. Hence, Article 14 is applicable to the circumstances of the case.

95. The Court first notes that the first-instance administrative decisions concerned in the present case did not refer to any direct motive that could be qualified as one of the forbidden grounds for discrimination within the

Convention meaning of the term. These decisions focused on technical aspects of the organisation of the assemblies and on compliance with these requirements (see paragraphs 11 and 13 above). It has been established that in the proceedings before the Traffic Officer the applicants had been requested to submit a "traffic organisation plan" and that their request had been refused because of a failure to submit such a plan. At the same time, the Court notes that it has not been shown or argued that other organisers had likewise been required to do this.

96. The Court further notes that the decision of 3 June 2005, refusing permission for the march organised by the applicants, was given by the Road Traffic Officer, acting on behalf of the Mayor of Warsaw. On 9 June 2005 the municipal authorities, acting on the Mayor's behalf, gave decisions banning the stationary assemblies to be organised by the first five applicants, referring to the need to avoid any possible violent clashes between the participants of the various demonstrations to be held on 12 June 2005. It is also not in dispute that on the same day the same authorities gave permission for other groups to stage six counter-demonstrations on the same date.

97. The Court cannot speculate on the existence of motives, other than those expressly articulated in the administrative decisions complained of, for the refusals to hold the assemblies concerned in the present case. However, it cannot overlook the fact that on 20 May 2005 an interview with the Mayor was published in which he stated that he would refuse permission to hold the assemblies (see paragraph 27 above).

98. The Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest, in particular as regards politicians themselves (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV; *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236). However, the exercise of the freedom of expression by elected politicians, who at the same time are holders of public offices in the executive branch of the government, entails particular responsibility. In certain situations it is a normal part of the duties of such public officials to take personally administrative decisions which are likely to affect the exercise of individual rights, or that such decisions are given by public servants acting in their name. Hence, the exercise of the freedom of expression by such officials may unduly impinge on the enjoyment of other rights guaranteed by the Convention (as regards statements by public officials, amounting to declarations of a person's guilt, pending criminal proceedings, see *Butkevičius v. Lithuania*, no. 48297/99, § 53, ECHR 2002-II (extracts); see also *Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A no. 308, p. 16, §§ 35-36; *Daktaras v. Lithuania*, no. 42095/98, §§ 41-44, ECHR 2000-X). When exercising their freedom of expression they may be required to show restraint, bearing in mind that their views can be regarded

as instructions by civil servants, whose employment and careers depend on their approval.

99. The Court is further of the view, having regard to the prominent place which freedom of assembly and association hold in a democratic society, that even appearances may be of a certain importance in the administrative proceedings where the executive powers exercise their functions relevant for the enjoyment of these freedoms (see, *mutatis mutandis*, *De Cubber v. Belgium*, judgment of 26 October 1984, Series A no. 86, p. 14, § 26). The Court is fully aware of the differences between administrative and judicial proceedings. It is true that it is only in respect of the latter that the Convention stipulates, in its Article 6, the requirement that a tribunal deciding on a case should be impartial from both a subjective and objective point of view (*Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports* 1997-I, § 73; *Warsicka v. Poland*, §§ 34-37, no. 2065/03*,* 16 January 2007*).*

100. However, in the present case the Court considers that in the assessment of the case it cannot disregard the strong personal opinions publicly expressed by the Mayor on issues directly relevant for the decisions regarding the exercise of the freedom of assembly. It observes that the decisions concerned were given by the municipal authorities acting on the Mayor's behalf after he had made known to the public his opinions regarding the exercise of the freedom of assembly and "propaganda of homosexuality" (see paragraph 27 above). It is further noted that the Mayor expressed these views when a request for permission to hold the assemblies was already pending before the municipal authorities. The Court is of the view that it may be reasonably surmised that his opinions could have affected the decision-making process in the present case and, as a result, impinged on the applicants' right to freedom of assembly in a discriminatory manner."

101. Having regard to the circumstances of the case seen as a whole, the Court is of the view that there has been a violation of Article 14 in conjunction with Article 11 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

103. The applicants did not claim any compensation for damage in connection with the violation of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objections;

2. *Holds* that there has been a violation of Article 11 of the Convention;

3. *Holds* that there has been a violation of Article 13 in conjunction with Article 11 of the Convention;

4. *Holds* that there has been a violation of Article 14 in conjunction with Article 11 of the Convention.

Done in English, and notified in writing on 3 May 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T. L. EARLY
Registrar

Nicolas BRATZA
President

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 17116/90

S.

against

SWITZERLAND

REPORT OF THE COMMISSION

(adopted on 14 January 1993)

TABLE OF CONTENTS

I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant, a Swiss citizen born in 1950, is a businessman residing in Zurich. Before the Commission he is represented by Mr. L.A. Minelli, a lawyer practising at Forch in Switzerland.

3. The application is directed against Switzerland. The Government are represented by their Agent, Mr. O. Jacot-Guillarmod, Deputy Director of the Federal Office of Justice, and their Deputy Agent,

Mr. Ph. Boillat, Head of the European Law and International Affairs Section of the Federal Office of Justice.

4. The application concerns the applicant's complaints under Article 6 para. 1 of the Convention of the length of the criminal proceedings instituted against him; and that his conviction for showing a film breached his right to respect for private life and to freedom of expression within the meaning of Articles 8 and 10 of the Convention, respectively.

B. The proceedings

5. The application was introduced on 6 August 1990 and registered on 4 September 1990.

6. On 27 May 1991 the Commission decided to communicate the application to the respondent Government and invite them to submit written observations on the admissibility and merits of the application.

7. The Government's observations were received by letter dated 7 September 1991 and the applicant's observations by letter dated 10 October 1991.

8. On 11 May 1992 the Commission declared the application admissible insofar as it related to the applicant's complaints under Article 6 para. 1 of the Convention about the length of the proceedings, and his complaints under Articles 8 and 10 of the Convention about his criminal conviction for showing a film. The remaining complaints were declared inadmissible.

9. In additional observations of 10 July 1992 the Government submitted that the applicant had not complied with the requirements of Article 26 of the Convention, but the Commission found no basis for applying Article 29 of the Convention.

10. After declaring the case admissible, the Commission, acting in accordance with Article 28 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present report

11. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C. A. NØRGAARD, President
J. A. FROWEIN

S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A. S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M. P. PELLONPÄÄ

12. The text of this Report was adopted on 14 January 1993 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

13. The purpose of the Report, pursuant to Article 31 of the Convention, is:

i) to establish the facts, and

ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

14. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application as Appendix II.

15. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

16. The applicant runs a sex shop in Zurich for homosexual persons. He sells magazines, books, video films and other objects. Clients know of the shop from advertisements in specialised magazines or from meeting places for homosexuals. From the street the nature of the shop is not discernible.

17. In a room at the back of the shop the applicant showed video films to certain persons. The films were changed every one or two weeks. Persons knew of these films by word of mouth. Thus, between 21 and 23 November 1983 the applicant showed the film "New York City", lasting 120 minutes and consisting almost exclusively of sexual acts.

Entry to the film was open to any male person interested who paid an entrance fee of 15 SFr or bought sex magazines for over 50 SFr and showed a membership card. Altogether nine persons saw the film.

a) Proceedings before the Zurich District Court

18. On 23 November 1983, following a search of the premises, the Zurich District Attorney's Office (Bezirksanwaltschaft) confiscated the film "New York City", the video recorder, and film takings of 60 SFr. Criminal proceedings were then instituted against the applicant. On 28 November 1983 the applicant was questioned by the police.

19. On 15 March 1984 the Zurich District Attorney's Office issued a penal order (Strafbefehl) convicting the applicant of publishing obscene material contrary to Section 204 of the Swiss Penal Code (Strafgesetzbuch; see below, Relevant domestic law and practice). The applicant was also convicted of driving under the influence of alcohol. For both offences he was fined 6,000 SFr.

20. Upon the applicant's objection (Einspruch), proceedings were instituted before the Zurich District Court (Bezirksgericht). On 27 June 1984 the Court convicted the applicant of driving under the influence of alcohol and imposed a fine of 1,000 SFr. With regard to the offence of publishing obscene material the Court acquitted the applicant.

21. In its decision the District Court considered that the nature of the shop was not discernible from the street. Persons wishing to see the film had to disclose that they were homosexuals or show their membership card. There was also a control in that unwanted persons had no access. Thus the Court considered that only a small circle of persons could see the film, namely those who knew of it and wanted to see it.

22. The Court observed that a young plain clothes policeman had seen the film after paying 15 SFr. The Court considered here the applicant's submissions according to which he had thought the man to be homosexual; he had left the film room very quickly. The fact that the applicant still remembered this client's conduct led the Court to conclude that the applicant had effective control over his clients.

23. Given the small circle of viewers it could not be said, in the Court's view, that the obscene material had been made "public" within the meaning of Section 204 of the Penal Code. The applicant had undertaken all the necessary precautions to ensure that no viewers were unintentionally confronted with the material.

b) Proceedings before the Zurich Court of Appeal

24. The Zurich Public Prosecutor's Office appealed against the decision of the District Court to the Court of Appeal (Obergericht) of

the Canton of Zurich.

25. On 18 January 1985, after conducting a hearing, the Court of Appeal convicted the applicant of publishing obscene material contrary to Section 204 para. 1 of the Penal Code, and of driving under the influence of alcohol, and imposed a fine of 4,000 SFr.

26. In its judgment the Court of Appeal considered that Section 204 envisages the protection of the public in a wider sense. The Court noted the conditions of access to the backroom of the applicant's shop and the fact that the membership card stated no particulars of the bearer. It also noted the applicant's submissions that he himself could tell whether or not a person was homosexual. The Court continued:

[Translation]

> "The qualification of publicity does not fall away merely by applying a restriction to the group of viewers. Rather, the latter must clearly be circumscribed and subject to control ... The applicant's film projection occurred - contrary to the view of the lower court - publicly as it was accessible, not to an objectively limited number of a few persons, but an unlimited number of persons, namely all homosexuals and bisexuals. Given the above-mentioned circumstances, the circle of viewers was therefore not sufficiently subject to control ... Moreover, the accused could not determine merely on the basis of the appearance of a person who, when a first-time client, could not be personally known to him, whether he was a homosexual person ... Thus, the applicant, without further ado, granted a plain clothes policeman, who was investigating the sex shop, entry to the obscene film at issue as he incorrectly took him to be a homosexual."

[German]

> "Das Merkmal der Öffentlichkeit entfällt nicht schon durch die Anordnung irgendeiner Begrenzung des Zuschauerkreises, sondern erst, wenn dieser eindeutig umschrieben und überprüfbar ist ... Die fragliche Filmvorführung des Angeklagten erfolgte - entgegen der Ansicht der Vorinstanz - öffentlich, weil sie nicht lediglich einem objektiv begrenzten Kreis von wenigen Personen, sondern einem unbeschränkten Personenkreis, nämlich allen Homo- und Bisexuellen zugänglich war. Der Zuschauerkreis war aufgrund der oben erwähnten Umstände insbesondere nicht genügend überprüfbar ... Zudem konnte der Angeklagte nicht lediglich aufgrund der Erscheinung einer Person, die ihm zumindest als erstmaliger Kunde persönlich nicht bekannt sein konnte, beurteilen, ob es sich um einen Homosexuellen handle. So gewährte der Angeklagte ohne weiteres auch einem jungen Polizeibeamten in zivil, der eine Überprüfung des Sex-Shops vornahm, Zutritt zum fraglichen

unzüchtigen Film, weil er ihn fälschlicherweise für einen Homosexuellen hielt."

27. In its decision the Court also dismissed the applicant's request to hear the policeman as a witness, inter alia as it would be impracticable to have to hear as a witness every official who had participated during the investigations.

c) Proceedings before the Zurich Court of Cassation

28. Against this decision the applicant filed a plea of nullity (Nichtigkeitsbeschwerde) with the Court of Cassation (Kassationsgericht) of the Canton of Zurich. In its decision of 25 November 1985 the Court of Cassation upheld the plea of nullity and quashed the previous decision on the ground that the Court of Appeal should have heard the policeman as a witness (see above para. 27). Its decision was served on the applicant on 27 December 1985.

d) Proceedings before the Zurich Court of Appeal

29. Proceedings were then resumed before the Court of Appeal of the Canton of Zurich which on 28 August 1986 invited the parties to the appeal hearing on 21 October 1986. On 29 October 1986 the Court of Appeal convicted the applicant of the offence of publishing obscene material and of driving under the influence of alcohol and imposed a fine of 4,000 SFr. The decision was served on the applicant on 17 February 1987.

e) Proceedings before the Zurich Court of Cassation

30. On 2 March 1987 the applicant filed a plea of nullity against this decision, complaining inter alia of a breach of Article 10 of the Convention. He also complained of the length of the proceedings. The applicant asked the Court of Cassation to adjourn the proceedings until the European Court had decided on the case of Müller and others v. Switzerland (Eur. Court H.R., judgment of 24 May 1988, Series A no. 133), and the Federal Court had given its decision in another case concerning the applicant. On 24 March 1987 the Public Prosecutor's Office filed its observations.

31. On 2 May 1988 the Court of Cassation convicted the applicant of driving under the influence of alcohol and imposed a fine of 800 SFr. It acquitted him of the offence of publishing obscene material.

32. In its decision numbering 27 pages the Court dismissed the applicant's request for adjourning the proceedings as it was unclear when the European Court would give its judgment in the Müller Case.

33. The Court moreover found that it was not up to the Convention States to define what fell under Article 10 of the Convention. Rather, freedom of expression comprised the freedom of individual

communication, including the showing of pornographic films. The decision continues:

[Translation]

> "According to the facts underlying the contested conviction there was no danger that persons without or even against their intention would have been confronted with the incriminated film. Admittedly the purchase or delivery of the membership card, entitling the bearer to enter the projection room, did not involve serious difficulties ... So it can indeed not be said that it was a closed private group of persons. On the other hand, there can be no doubt that the sex shop in question and, a fortiori, the adjacent separate projection room could only be visited by persons who came with the knowledge of what was awaiting them and intending to see this kind of film ... If in fact the only issue is whether adults, who in full knowledge of its content want to see the film at issue, are indirectly to be hindered by means of the criminal prosecution of the applicant, no 'pressing social need' can be discerned for such a manner of proceeding. If it were an urgent necessity to protect the individual from his wish to see obscene publications, one would consequently also have to punish the private showing of such films, which however is not the case."

[German]

> "Nach dem der angefochtenen Verurteilung zugrundeliegenden Sachverhalt bestand keine Gefahr dafür, dass Personen ohne oder gar gegen ihre Absicht mit dem inkriminierten Film konfrontiert worden wären. Zwar ist davon auszugehen, dass der Erwerb bzw. die Aushändigung des Kundenausweises, welcher den Inhaber zum Betreten des Vorführraumes berechtigte, mit keinen grossen Schwierigkeiten verbunden war ..., so dass in der Tat nicht von einem geschlossenen, privaten Personenkreis gesprochen werden kann. Auf der anderen Seite besteht aber kein Zweifel daran, dass der fragliche Sex-Shop und somit erst recht der dazu gehörende separate Vorführraum nur von Personen aufgesucht wurde, die in Kenntnis des sie Erwartenden und mit der Absicht, diese Art von Film zu besichtigen, kamen ... Wenn es faktisch also nur darum gehen kann, erwachsene Personen, welche in Kenntnis des Inhaltes den fraglichen Film sehen wollen, durch strafrechtliche Verfolgung des Beschwerdeführers indirekt daran zu hindern, so kann ein 'dringendes soziales Bedürfnis' für ein solches Vorgehen nicht erkannt werden. Hält man es für dringend erforderlich, den einzelnen vor seinem Wunsch zur Betrachtung unzüchtiger Veröffentlichungen zu schützen, so müsste folgerichtigerweise auch die völlig geschlossene, private Vorführung deartiger Filme bestraft werden, was jedoch nicht der Fall ist."

f) Proceedings before the Federal Court

34. On 9 May 1988 the Zurich Public Prosecutor's Office filed a plea of nullity against this decision with the Federal Court (Bundesgericht). On 19 June 1988 the applicant filed his observations thereupon.

35. On 20 September 1988 the Federal Court upheld the plea of nullity, quashed the decision of the Court of Cassation, and sent the case back to that court for a new judgment. The decision was served on the applicant on 14 November 1988.

36. In its decision, the Federal Court stated with reference to Article 10 of the Convention and the case-law of the European Court of Human Rights:

[Translation]

> "There is no reason why the morals of adult persons (among whom there are also persons who are unstable and easily influenced) and thus the morals of society as a whole should not also be protected. In any event, this opinion lies within the margin of appreciation which the European Court has granted to the Convention States. It duly considers the different points of view which can prevail in a democratic society with regard to the necessity of protecting morals."

[German]

> "Es ist nicht einzusehen, wieso nicht auch die Moral erwachsener Personen (unter denen sich ebenfalls labile und leicht beeinflussbare Menschen befinden) und damit die gesamtgesellschaftliche Moral schützenswert sein sollten. Jedenfalls liegt diese Ansicht im Rahmen des vom Europäischen Gerichtshof den Vertragsstaaten eingeräumten Ermessens, welches den verschiedenen Standpunkten Rechnung trägt, die in einer demokratischen Gesellschaft hinsichtlich der Erfordernisse des Schutzes der Moral vorherrschen können."

37. The Federal Court then considered the Court's judgment in the Müller case (see Eur. Court H.R., loc. cit.). It continued:

[Translation]

> "The difference from the case to be decided today is that in the present case no adults were confronted against their will, and no young persons were confronted with the incriminated film 'New York City'. But also in such cases punishment is legitimate. As explained above, Section 204 of the Penal Code concerns the protection of public decency and morals. No obscene objects should be propagated and publicly displayed. To achieve this aim a prohibitory norm was enacted and endowed with penal sanctions.

Such a penal norm is necessary as the protection aimed at could not (at least not with the same efficiency) be achieved in a different manner."

[German]

"Der Unterschied zum heute zu beurteilenden Fall besteht darin, dass in casu keine Erwachsenen gegen ihren Willen und keine Jugendlichen mit dem inkriminierten Film 'New York City' konfrontiert wurden. Aber auch in Fällen dieser Art ist eine Bestrafung zulässig. Wie oben dargelegt, geht es beim Art. 204 StGB um den Schutz der öffentlichen Sittlichkeit und Moral. Es soll verhindert werden, dass unzüchtige Gegenstände verbreitet und öffentlich zur Schau gestellt werden können. Um dieses Ziel zu erreichen, wurde eine Verbotsnorm aufgestellt und diese mit strafrechtlichen Sanktionen ausgestattet. Eine solche Strafnorm ist notwendig, weil der angestrebte Schutz auf andere Weise gar nicht (oder jedenfalls nicht in gleich wirksamer Weise) erreicht werden könnte."

38. Finally, the Federal Court regarded it as an abuse of rights (rechtsmissbräuchlich) for the applicant to invoke the right to freedom of expression although he was clearly only interested in substantial financial profits from sex business.

39. The Court thus found that it violated Federal law if Section 204 of the Penal Code was not applied on the grounds that it did not comply with Article 10 of the Convention.

g) Proceedings before the Zurich Court of Cassation

40. Proceedings were resumed before the Zurich Court of Cassation. On 3 April 1989 the Zurich Court of Cassation convicted the applicant of publishing obscene material. In addition to the fine imposed on the applicant on 2 May 1988 he was fined 2,500 SFr. The decision was served on 13 April 1989.

41. In its decision, the Court of Cassation stated that it was unnecessary to adjourn the proceedings. It further noted that the Federal Court had not expressed itself on the issue whether the applicant's acquittal was still possible on the basis of an interpretation of Section 204 of the Penal Code which complied with Federal law. However, the Court of Cassation considered that undoubtedly (unzweifelhaft) the Federal Court had referred the case back to the Court of Cassation in order to convict the applicant (zur Verurteilung des Beschwerdeführers) according to Section 204.

h) Proceedings before the Federal Court

42. The applicant then filed a public law appeal (staatsrechtliche Beschwerde) with the Federal Court in which he complained under

Article 6 of the Convention of a breach of equality of arms. He also complained of a violation of Articles 8 and 10 of the Convention. On 31 January 1990 the Federal Court dismissed the appeal. The decision was served on the applicant on 16 February 1990.

43. The Court noted that the applicant had correctly not complained that Section 204 of the Penal Code contradicted the Convention (see below, Relevant domestic law and practice). To the extent that he complained of an indirect violation of Articles 8 and 10 of the Convention the Court declared the public law appeal inadmissible as the appropriate remedy would be the plea of nullity to the Federal Court. In this respect, the Federal Court noted that it had already previously decided on the compatibility in the instant case of the applicant's conviction with Article 10 of the Convention.

B. Relevant domestic law and practice

a) Section 204 of the Swiss Penal Code

44. Section 204 of the Swiss Penal Code provides:

[Translation]

> "1. Anyone who makes or has in his possession any writings, pictures, films or other items which are obscene, with a view to trading in them, distributing them or displaying them in public, or who, for the above purposes, imports, transports or exports such items or puts them into circulation in any way, or who openly or secretly deals in them or publicly distributes or displays them or by way of trade supplies them for hire, or who announces or makes known in any way, with a view to facilitating such prohibited circulation or trade, that anyone is engaged in any of the aforesaid punishable activities, or who announces or makes known how or through whom such items may be directly or indirectly procured, shall be imprisoned or fined.
>
> 2. Anyone supplying or displaying such items to a person under the age of 18 shall be imprisoned or fined.
>
> 3. The court shall order the destruction of the items."

[German]

> "1. Wer unzüchtige Schriften, Bilder, Filme oder andere unzüchtige Gegenstände herstellt oder vorrätig hält, um damit Handel zu treiben, sie zu verbreiten oder öffentlich auszustellen, wer solche Gegenstände zu den genannten Zwecken einführt, befördert oder ausführt oder sonstwie in Verkehr bringt, wer solche Gegenstände öffentlich oder geheim verkauft, verbreitet, öffentlich ausstellt oder gewerbsmässig ausleiht, wer, um die verbotene Verbreitung oder den verbotenen Vertrieb

zu fördern, ankündigt oder sonstwie bekannt gibt, dass sich eine Person mit den genannten strafbaren Handlungen befasst, wer ankündigt oder bekannt gibt, wie und durch wen die genannten Gegenstände unmittelbar oder mittelbar bezogen werden können, wird mit Gefängnis oder mit Busse bestraft.

2. Wer solche Gegenstände einer Person unter 18 Jahren übergibt oder vorzeigt, wird mit Gefängnis oder mit Busse bestraft.

3. Der Richter lässt die unzüchtigen Gegenstände vernichten."

45. The Federal Court has interpreted the notion "public" as requiring that an indeterminate group of persons, not subject to control (unbestimmter, unkontrollierter Personenkreis), has access to the obscene material. The agreement of the persons concerned is irrelevant (see Arrêts du Tribunal Fédéral suisse [ATF] 100 IV 237, 96 IV 68, 87 IV 84). In ATF 116 IV 276ff, the Federal Court considered that cinema projections of so-called "soft pornography" no longer contravened Section 204 of the Penal Code, "if it is ensured that the cinema visitor knows in advance about the character of the film, and access is prohibited to persons below 18 years of age" ("wenn gewährleistet ist, dass der Kinobesucher im voraus über den Charakter des Films aufgeklärt wird und noch nicht 18jährigen Personen der Zutritt untersagt ist", loc. cit. p. 281).

46. The Swiss Penal Code has meanwhile been revised. Section 197 para. 1 now states that whoever displays inter alia pornographic films to persons under 16 years of age will be punished with imprisonment or a fine. Section 197 para. 2 imposes a fine on persons who display such films in public; no punishment is imposed if the film is displayed in a closed room and an indication is given in advance to the visitors as to the pornographic character of the film. According to Section 197 para. 3, whoever displays films showing sexual acts with children, animals, human excrements, or violence, will be punished with a fine or imprisonment.

b) Remedies to the Federal Court

47. According to Section 113 para. 3 of the Federal Constitution (Bundesverfassung) the Federal Court cannot examine whether a Federal Act (Bundesgesetz), such as the Penal Code, complies as such with the Constitution or the Convention. Complaints about violations by cantonal authorities of the Constitution or the Convention must in the last resort be filed with the Federal Court by means of a public law appeal (Section 84 of the Federal Judiciary Act, Organisationsgesetz). The incorrect application of a Federal Act must be raised in a plea of nullity (Section 268 of the Federal Act on Criminal Procedure, Bundesstrafprozessordnung). Where it is complained that a judge, by incorrectly interpreting a Federal Act, has breached the Convention, this complaint is considered as one of an indirect violation of the Convention (mittelbare Konventionsverletzung) which must be raised in

a plea of nullity (see ATF 116 I a 74 f, 112 IV 133).

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

48. The Commission has declared admissible the applicant's complaints under Articles 8 and 10 (Art. 8, 10) of the Convention about his criminal conviction for showing a film and his complaints under Article 6 para. 1 (Art. 6-1) of the Convention about the length of the proceedings.

B. Points at issue

49. Accordingly, the issues to be determined are:

- whether there has been a violation of Article 10 (Art. 10) of the Convention;

- whether there has been a violation of Article 8 (Art. 8) of the Convention;

- whether there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

C. Article 10 (Art. 10) of the Convention

50. The applicant complains that his conviction for showing the film "New York City" breached his right to freedom of expression within the meaning of Article 10 (Art. 10) of the Convention. He submits that Section 204 of the Penal Code is not sufficiently precise to serve as a legal basis for such a conviction. The conviction was unnecessary, given the fact that only persons who intended to see the film could do so and young persons were not allowed in. The applicant also refers to the recent case ATF 116 IV 276 of the Federal Court (see above para. 45).

51. Article 10 (Art. 10) of the Convention states:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of

others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

52. The Government submit that the recent case ATF 116 IV 276 of the Federal Court did not concern homosexual obscene material as in the present case. They furthermore refer to a decision by the Commission (No. 16564/90 Dec. 8.4.91, to be published in D.R.), finding that a conviction for renting or selling obscene video films would correspond to a pressing social need and be proportionate to the legitimate aim pursued under Article 10 (Art. 10).

a) Interference with the applicant's right

53. It is undisputed between the parties, and the Commission accepts, that the right to freedom of expression, as enshrined in Article 10 (Art. 10) of the Convention, comprised the showing of the film at issue.

54. The applicant's conviction for showing the film constituted an interference by a public authority with the exercise of his rights under Article 10 para. 1 (Art. 10-1). The Commission's next task is therefore to examine whether this interference was justified under Article 10 para. 2 (Art. 10-2).

b) Legal basis for the interference

55. The Commission finds that Section 204 of the Swiss Penal Code was sufficiently precise to enable the applicant to foresee the consequences which the showing of the film would entail. The interference at issue was therefore "prescribed by law" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

c) Aim of the interference

56. The measure furthermore aimed at the "protection of ... morals" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

d) Necessity of the interference

57. Finally, the Commission must examine whether the interference was "necessary in a democratic society" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention. The term implies that the interference must comply with a "pressing social need". In determining whether an interference is "necessary in a democratic society" the Convention organs must also take into account that a margin of appreciation is left to the Contracting States (see Eur. Court H.R., Barthold judgment of 25 March 1985, Series A no. 90, pp. 24 et seq., para. 55; Markt Intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989, Series A no. 165, pp. 19 et seq., para. 33).

58. The Commission further recalls that it is not possible to find a uniform conception of morals. The latter may vary from time to time and from place to place. In principle, State authorities are in a better position to give an opinion on the exact content of the requirements of morals as well as on the "necessity" of a "restriction" or "penalty" intended to meet them (see Eur. Court H.R., Handyside judgment of 7 December 1976, Series A no. 24, p. 22, para. 48; Open Door and Dublin Well Woman judgment of 29 October 1992, Series A no. 246, para. 68).

59. In this context, it is of particular relevance whether or not the obscene material at issue was displayed to the general public. Thus, in the case of Müller and Others v. Switzerland, in which the Court found no violation of Article 10 (Art. 10) of the Convention, emphasis was placed on the fact that "the paintings were displayed in an exhibition which was unrestrictedly open to - and sought to attract - the public at large" (see Eur. Court H.R., Series A no. 133, p. 22, para. 36).

60. The Commission has in a previous case considered a complaint under Article 10 (Art. 10) of the Convention relating to a conviction for selling obscene video films. That case concerned a chain of video shops which were open to the general public. The Commission found that a "conviction for renting or selling the video films ... would correspond to a pressing social need and would be proportionate to the legitimate aim pursued within the meaning of the Convention organs' case-law" (see No. 16564/90, X. and Y. v. Switzerland, Dec. 8.4.91 to be published in D.R.).

61. In the present case the Commission notes that the film was open to any adult willing to see it. Details as to the film programme were passed on by word of mouth among the interested persons. In fact, the showing of the film was part of the applicant's business activities. At the time concerned the applicant regularly showed films at the back of his shop, changing them every one or two weeks. An entrance fee for the films was charged. By placing advertisements for his shop in specialised magazines, the applicant attempted to attract customers.

62. The Commission notes that the nature of the applicant's shop was not discernible from the street. Moreover, it was very unlikely that the projection room adjacent to the shop would be visited by persons who were unaware of the subject matter of the film. There was no danger of adults being confronted with the film against or without their intention to see it. It is furthermore undisputed that minors had no access to the film, as there was a control in the shop ensuring that such persons had no access.

63. The Commission notes in this respect the decision of the Zurich District Court of 27 June 1984, acquitting the applicant, according to which it could not be said that the obscene material had been made "public" within the meaning of Section 204 of the Penal Code (see above

paras. 21 et seq.). The decision of the Zurich Court of Cassation on 2 May 1988, also acquitting the applicant, concluded that nobody would be confronted with the obscene material against his will (see above, para. 33).

64. It is true that it is primarily for the domestic authorities to undertake an assessment as to the protection of the morals of adult persons, since morals vary and the domestic authorities are better qualified for such an assessment. The Commission here notes in particular the Federal Court's decision of 20 September 1988 (see above, para. 36).

65. In the Commission's opinion, the present case does not concern the protection of morals of adult persons in Swiss society in general, since no adult was confronted unintentionally or against his will with the film. Where this is so, there must be particularly compelling reasons justifying the interference at issue. In the present case, no such reasons have been provided by the Government.

66. In these circumstances, the applicant's conviction did not correspond to a "pressing social need". It follows that the interference was disproportionate to the aim pursued and could not be considered "necessary in a democratic society" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

Conclusion

67. The Commission concludes, by 12 votes to 5, that there has been a violation of Article 10 (Art. 10) of the Convention.

D. Article 8 (Art. 8) of the Convention

68. The applicant complains under Article 8 (Art. 8) of the Convention that, as the nature of the shop was not discernible from the street, the prohibition to show the film on his own premises breached his right to respect for private life.

69. Article 8 (Art. 8) of the Convention states:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

70. The Commission has already examined the applicant's complaints

about the prohibition to show the film at issue under Article 10 (Art. 10) of the Convention. It finds it unnecessary also to examine the complaint under Article 8 (Art. 8) of the Convention.

Conclusion

71. The Commission concludes, by a unanimous vote, that it is not necessary to examine the complaint under Article 8 (Art. 8) of the Convention.

E. Article 6 para. 1 (Art. 6-1) of the Convention

72. The applicant further complains that the criminal proceedings against him were not conducted within a reasonable time. He relies on Article 6 para. 1 (Art. 6-1) of the Convention which includes the following provision:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by (a) ... tribunal ..."

73. The Government consider that the proceedings did not attain an unreasonable length.

a) Period to be considered

74. The applicant submits that the period to be considered under Article 6 para. 1 (Art. 6-1) of the Convention commenced on 23 November 1983 with the search of his premises and ended on 16 February 1990 when the judgment of the Federal Court was served.

75. The Government agree that the relevant period commenced on 23 November 1983 but contend that it ended on 13 April 1989 when the judgment of the Zurich Court of Cassation was served on the applicant.

76. The Commission considers that the period to be examined under Article 6 para. 1 (Art. 6-1) of the Convention commenced on 23 November 1983, the date when the applicant's premises were searched.

77. As regards the end of this period, the Commission notes that on 3 April 1989 the Zurich Court of Cassation convicted the applicant of publishing obscene material. Against this decision the applicant filed a public law appeal with the Federal Court, complaining inter alia under Article 6 (Art. 6) of the Convention of a breach of equality of arms in the previous proceedings. On 31 January 1990 the Federal Court dealt in substance with this complaint and dismissed it.

78. Nevertheless, the Federal Court could have upheld the applicant's public law appeal and quashed the conviction pronounced by the Zurich Court of Cassation. The period to be examined under Article 6 para. 1

(Art. 6-1) of the Convention thus ended on 16 February 1990, when the applicant received the judgment of the Federal Court of 31 January 1990.

79. Accordingly, the period to be examined under Article 6 para. 1 (Art. 6-1) of the Convention, commencing on 23 November 1983 and ending on 16 February 1990, lasted 6 years, 2 months and 24 days.

b) Relevant criteria

80. The Commission recalls that the reasonableness of the length of criminal proceedings must be assessed in the light of the particular circumstances of the case and with the help of the following criteria: the complexity of the case, the conduct of the applicant and the conduct of the authorities dealing with the case (see Eur. Court H.R., Vernillo judgment of 20 February 1991, Series A no. 198, p. 12, para. 29).

81. In the applicant's view, the case involved no complex issues and he did not contribute to the length.

82. The Government submit that the case was complex; that parts of the proceedings had to be repeated; and that the applicant requested an adjournment.

c) Complexity of the case

83. The Commission observes that the applicant was convicted of the offence of publishing obscene material and of driving under the influence of alcohol. With regard to the former offence, the Swiss courts had to interpret Section 204 of the Swiss Penal Code as to whether or not the applicant's activities had occurred publicly.

84. The Commission considers that this issue was not in itself so complex as to justify the length of the proceedings under Article 6 para. 1 (Art. 6-1).

d) Applicant's conduct

85. As regards the applicant's conduct, the Commission recalls that Article 6 (Art. 6) of the Convention does not require a defendant in criminal proceedings actively to cooperate with the judicial authorities. Neither can any reproach be levelled against him for having made full use of the remedies available under domestic law. Nevertheless, such conduct constitutes an objective fact, not capable of being attributed to the respondent Government, which is to be taken into account when determining whether or not the proceedings lasted longer than the reasonable time referred to in Article 6 para. 1 (Art. 6-1) (see Eur. Court H.R., Eckle judgment of 15 July 1982, Series A no. 51, p. 36, para. 82).

86. In the present case, the appeals filed by the applicant contributed to some extent to the length of the proceedings.

87. Moreover, in his plea of nullity of 2 March 1987 the applicant requested the Zurich Court of Cassation not to proceed in his case pending the outcome of other proceedings (see above para. 30).

88. Thus, the impression given by the applicant, at least during part of the proceedings, was that it was of no relevance to him whether or not the proceedings were concluded within a reasonable time within the meaning of Article 6 para. 1 (Art. 6-1).

e) Conduct of the authorities

89. The Commission has next examined the conduct of the Swiss authorities.

90. The Commission has found no substantial periods of inactivity until 1986: after the applicant's premises had been searched on 23 November 1983, the District Attorney's Office issued a penal order on 15 March 1984, the District Court decided on 27 June 1984, the Court of Appeal on 18 January 1985, the Court of Cassation on 25 November 1985, and the Court of Appeal on 29 October 1986.

91. There are also no substantial periods of inactivity between 1988 and 1990: after the Court of Cassation had given its decision on 2 May 1988, the Federal Court decided on 20 September 1988, the Court of Cassation on 3 April 1989, and the Federal Court again on 31 January 1990.

92. Thus, between 1983 and 1986, and between 1988 and 1990 the Swiss authorities conducted the proceedings without undue delay.

93. There remains a comparatively lengthy period of approximately 18 months between the decision of the Court of Appeal of 29 October 1986, and the decision of the Court of Cassation on 2 May 1988, which acquitted the applicant.

94. During this period the decision of the Court of Appeal was served on 17 February 1987, the applicant filed a plea of nullity on 2 March 1987 and the Court of Cassation acquitted him on 2 May 1988. The time between March 1987 and May 1988 can in part be explained by the preparation of the comparatively lengthy decision numbering 27 pages which acquitted the applicant.

95. Although these delays could probably have been avoided, they are not sufficiently serious to warrant the conclusion that the total duration of the proceedings exceeded the "reasonable time" referred to in Article 6 para. 1 (Art. 6-1) of the Convention.

Conclusion

96. The Commission concludes, by 15 votes to 2, that there has been no violation of Article 6 para. 1 (Art. 6-1) of the Convention.

F. Recapitulation

97. The Commission concludes, by 12 votes to 5, that there has been a violation of Article 10 (Art. 10) of the Convention (para. 67).

98. The Commission concludes, by a unanimous vote, that it is not necessary to examine the complaint under Article 8 (Art. 8) of the Convention (para. 71).

99. The Commission concludes, by 15 votes to 2, that there has been no violation of Article 6 para. 1 (Art. 6-1) of the Convention (para. 96).

Secretary to the Commission President of the Commission

(H.C. KRÜGER) (C.A. NØRGAARD)

DISSENTING OPINION OF MR. E. BUSUTTIL, JOINED BY MR. A. WEITZEL AND MRS. J. LIDDY AS REGARDS ARTICLE 10 OF THE CONVENTION

I am unable to share the opinion of the majority both in regard to Article 10 and in regard to Article 6 para. 1 of the Convention.

Article 10

It is of course true that the right to freedom of expression is here stated in extremely broad terms, purporting as it does to include the freedom "to receive and impart information and ideas", thereby making it virtually impossible to argue against the applicability of the Article in a particular case. Nevertheless, one may be left to wonder in the particular circumstances of this case if a pornographic video film depicting homosexual acts for some one hundred and twenty minutes to the accompaniment of protracted moaning is indeed what the founding fathers of the Convention understood by freedom of expression.

Assuming, nevertheless, that we are here confronted with an interference with the freedom of the applicant to "impart information and ideas", it is unquestionably in line with the established case-law of the Convention organs that the national authorities have a certain margin of appreciation in assessing whether the interference with freedom of expression corresponded to a pressing social need and, in particular, whether the restriction complained of was proportionate to the legitimate aim pursued. Where the aim pursued is the protection of morals, the margin of appreciation enjoyed by the national authorities is a wide one, as the Court acknowledged in its most recent judgment on the subject (See Eur. Court H.R. Open Door and Dublin Well

Woman v. Ireland, 29 October 1992, Series A no. 246, § 68), since there is no uniform European conception of morals and the requirements of morals vary from time to time and from place to place. By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle better placed than international organs to pronounce on the exact content of these requirements as well as on the necessity of a restriction or penalty intended to meet them (see Eur. Court H.R., Müller et al. v. Switzerland, 24 May 1988, Series A, no. 133, p. 22, § 35).

The Commission itself, as recently as 8 April 1991, was of the opinion in a case relating to a conviction for selling or renting obscene video films that "there can be no doubt that under normal circumstances the applicant's conviction for renting or selling the video films at issue would correspond to a pressing social need and would be proportionate to the legitimate aim pursued" (No. 16564/90, X. and Y. v. Switzerland, Dec. 8.4.91, as yet unpublished). The case was against the same respondent State, the video shops were situated in the same canton of Zurich, and the offenders were prosecuted under the same section (Section 204) of the Swiss Penal Code. In the present case, however, the Commission has come to the conclusion that there was no pressing social need to interfere with the applicant's freedom of expression in that the video film in question was not open to viewing by the general public as in the earlier case.

For myself, I find this distinction difficult to draw for a number of reasons. For one thing, the film in question here was open to any adult male person willing to pay to see it. Secondly, the applicant attempted to attract clients by placing adverts in specialised magazines. Finally, the projection of the film was part and parcel of the applicant's business activities for which an entrance fee of 15 SFr was charged, a fee no higher than the normal entrance fee charged in cinemas.

Accordingly, it seems to me that, if the conviction in the earlier case introduced on 24 February 1990 and decided on 8 April 1991 corresponded to a pressing social need, the social need was necessarily the same in the present case introduced on 6 August 1990, only five months later than the earlier case but decided as late as 14 January 1993.

In the result, I am of the opinion that there has been no violation of Article 10 in the present case.

Article 6 para. 1

In regard to Article 6 para. 1, on the other hand, I find it extraordinary that criminal proceedings relating to the offences of publishing obscene material and of drunken driving, involving simple legal issues, should have taken six and a quarter year to conclude in any Convention State, least of all in a Convention State where

everything else runs on time.

The Convention organs have constantly held that it is the duty of Contracting States so to organise their legal systems as to avoid undue length in court proceedings, particularly criminal proceedings. To me, the attempt by the majority to justify such length by arguing that the applicant himself had on 2 March 1987 requested the Court of Cassation to adjourn the proceedings until the European Court had decided on the case of Müller et al. v. Switzerland is not very convincing, since a period of three years and three months (not in itself a short period in criminal proceedings) had already gone by before the applicant requested the adjournment and the request was accompanied by the complaint as to the length of proceedings.

Accordingly, I consider that there has been a violation of Article 6 para. 1 of the Convention.

APPENDIX I

HISTORY OF PROCEEDINGS

Date	Item
6 August 1990	Introduction of the application
4 September 1990	Registration of the application
Examination of Admissibility	
27 May 1991	Commission's decision to invite the Government to submit observations on the admissibility and merits of the application
7 September 1991	Government's observations
10 October 1991	Applicant's observations in reply
11 May 1992	Commission's decision to declare the application admissible
Examination of the merits	
10 July 1992) 17 October 1992)	Commission's consideration of the state of proceedings
7 January 1993	Commission's deliberations on the merits and final vote
14 January 1993	Adoption of the Report

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Human Rights Committee

Fiftieth session

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4,

of the Optional Protocol to the International Covenant on Civil

and Political Rights

Fiftieth session

Communication No. 488/1992*

Submitted by: Nicholas Toonen

Victim: The author

State party: Australia

Date of communication: 25 December 1991 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 1994,

Having concluded its consideration of communication No. 488/1992, submitted to the Human Rights Committee by Mr. Nicholas Toonen under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Nicholas Toonen, an Australian citizen born in 1964, currently residing in Hobart in the state of Tasmania, Australia. He is a leading member of the Tasmanian Gay Law Reform Group and claims to be a victim of violations by Australia of articles 2, paragraph 1; 17; and 26 of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 The author is an activist for the promotion of the rights of homosexuals in Tasmania, one of Australia's six constitutive states. He challenges two provisions of the Tasmanian Criminal Code, namely, sections 122 (a) and (c) and 123, which criminalize various forms of sexual contact between men, including all forms of sexual contact between consenting adult homosexual men in private.

2.2 The author observes that the above sections of the Tasmanian Criminal Code empower Tasmanian police officers to investigate intimate aspects of his private life and to detain him, if they have reason to believe that he is involved in sexual activities which contravene the above sections. He adds that the Director of Public Prosecutions announced, in August 1988, that proceedings pursuant to sections 122 (a) and (c) and 123 would be initiated if there was sufficient evidence of the commission of a crime.

2.3 Although in practice the Tasmanian police has not charged anyone either with "unnatural sexual intercourse" or "intercourse against nature" (section 122) nor with "indecent practice between male persons" (section 123) for several years, the author argues that because of his long-term relationship with another man, his active lobbying of Tasmanian politicians and the reports about his activities in the local media, and because of his activities as a gay rights activist and gay HIV/AIDS worker, his private life and his liberty are threatened by the continued existence of sections 122 (a) and (c) and 123 of the Criminal Code.

2.4 Mr. Toonen further argues that the criminalization of homosexuality in private has not permitted him to expose openly his sexuality and to publicize his views on reform of the relevant laws on sexual matters, as he felt that this would have been extremely prejudicial to his employment. In this context, he contends that sections 122 (a) and (c) and 123 have created the conditions for discrimination in employment, constant stigmatization, vilification, threats of physical violence and the violation of basic democratic rights.

2.5 The author observes that numerous "figures of authority" in Tasmania have made either derogatory or downright insulting remarks about homosexual men and women over the past few years. These include statements made by members of the Lower House of Parliament, municipal councillors (such as "representatives of the gay community are no better than Saddam Hussein" and "the act of homosexuality is unacceptable in any society, let alone a civilized society"), of the church and of members of the general public, whose statements have been directed against the integrity and welfare of homosexual men and women in Tasmania (such as "[g]ays want to lower society to their level" and "You are 15 times more likely to be murdered by a homosexual than a heterosexual ..."). In some public meetings, it has been suggested that all Tasmanian homosexuals should be rounded up and "dumped" on an uninhabited island, or be subjected to compulsory sterilization. Remarks such as these, the author affirms, have had the effect of creating constant stress and suspicion in what ought to be routine contacts with the authorities in Tasmania.

2.6 The author further argues that Tasmania has witnessed, and continues to witness, a "campaign of official and unofficial hatred" against homosexuals and lesbians. This campaign has made it difficult for the Tasmanian Gay Law Reform Group to disseminate information about its activities and advocate the decriminalization of homosexuality. Thus, in September 1988, for example, the Group was refused permission to put up a stand in a public square in the city of Hobart, and the author claims that he, as a leading protester against the ban, was subjected to police intimidation.

2.7 Finally, the author argues that the continued existence of sections 122 (a) and (c) and 123 of the Criminal Code of Tasmania continue to have profound and harmful impacts on many people in Tasmania, including himself, in that it fuels discrimination and violence against and harassment of the homosexual community of Tasmania.

The complaint

3.1 The author affirms that sections 122 and 123 of the Tasmanian Criminal Code violate articles 2, paragraph 1; 17; and 26 of the Covenant because:

> (a) They do not distinguish between sexual activity in private and sexual activity in public and bring private activity into the public domain. In their enforcement, these provisions result in a violation of the right to privacy, since they enable the police to enter a household on the mere suspicion that two consenting adult homosexual men may be committing a criminal offence. Given the stigma attached to homosexuality in Australian society (and especially in Tasmania), the violation of the right to privacy may lead to unlawful attacks on the honour and the reputation of the individuals concerned;
>
> (b) They distinguish between individuals in the exercise of their right to privacy on the basis of sexual activity, sexual orientation and sexual identity;

(c) The Tasmanian Criminal Code does not outlaw any form of homosexual activity between consenting homosexual women in private and only some forms of consenting heterosexual activity between adult men and women in private. That the laws in question are not currently enforced by the judicial authorities of Tasmania should not be taken to mean that homosexual men in Tasmania enjoy effective equality under the law.

3.2 For the author, the only remedy for the rights infringed by sections 122 (a) and (c) and 123 of the Criminal Code through the criminalization of all forms of sexual activity between consenting adult homosexual men in private would be the repeal of these provisions.

3.3 The author submits that no effective remedies are available against sections 122 (a) and (c) and 123. At the legislative level, state jurisdictions have primary responsibility for the enactment and enforcement of criminal law. As the Upper and Lower Houses of the Tasmanian Parliament have been deeply divided over the decriminalization of homosexual activities and reform of the Criminal Code, this potential avenue of redress is said to be ineffective. The author further observes that effective administrative remedies are not available, as they would depend on the support of a majority of members of both Houses of Parliament, support which is lacking. Finally, the author contends that no judicial remedies for a violation of the Covenant are available, as the Covenant has not been incorporated into Australian law, and Australian courts have been unwilling to apply treaties not incorporated into domestic law.

The State party's information and observations

4.1 The State party did not challenge the admissibility of the communication on any grounds, while reserving its position on the substance of the author's claims.

4.2 The State party notes that the laws challenged by Mr. Toonen are those of the state of Tasmania and only apply within the jurisdiction of that state. Laws similar to those challenged by the author once applied in other Australian jurisdictions but have since been repealed.

The Committee's decision on admissibility

5.1 During its forty-sixth session, the Committee considered the admissibility of the communication. As to whether the author could be deemed a "victim" within the meaning of article 1 of the Optional Protocol, it noted that the legislative provisions challenged by the author had not been enforced by the judicial authorities of Tasmania for a number of years. It considered, however, that the author had made reasonable efforts to demonstrate that the threat of enforcement and the pervasive impact of the continued existence of these provisions on administrative practices and public opinion had affected him and continued to affect him personally, and that they could raise issues under articles 17 and 26 of the Covenant. Accordingly, the Committee was satisfied

that the author could be deemed a victim within the meaning of article 1 of the Optional Protocol, and that his claims were admissible ratione temporis.

5.2 On 5 November 1992, therefore, the Committee declared the communication admissible inasmuch as it appeared to raise issues under articles 17 and 26 of the Covenant.

The State party's observations on the merits and author's comments thereon

6.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 15 September 1993, the State party concedes that the author has been a victim of arbitrary interference with his privacy, and that the legislative provisions challenged by him cannot be justified on public health or moral grounds. It incorporates into its submission the observations of the government of Tasmania, which denies that the author has been the victim of a violation of the Covenant.

6.2 With regard to article 17, the Federal Government notes that the Tasmanian government submits that article 17 does not create a "right to privacy" but only a right to freedom from arbitrary or unlawful interference with privacy, and that as the challenged laws were enacted by democratic process, they cannot be an unlawful interference with privacy. The Federal Government, after reviewing the travaux préparatoires of article 17, subscribes to the following definition of "private": "matters which are individual, personal, or confidential, or which are kept or removed from public observation". The State party acknowledges that based on this definition, consensual sexual activity in private is encompassed by the concept of "privacy" in article 17.

6.3 As to whether sections 122 and 123 of the Tasmanian Criminal Code "interfere" with the author's privacy, the State party notes that the Tasmanian authorities advised that there is no policy to treat investigations or the prosecution of offences under the disputed provisions any differently from the investigation or prosecution of offences under the Tasmanian Criminal Code in general, and that the most recent prosecution under the challenged provisions dates back to 1984. The State party acknowledges, however, that in the absence of any specific policy on the part of the Tasmanian authorities not to enforce the laws, the risk of the provisions being applied to Mr. Toonen remains, and that this risk is relevant to the assessment of whether the provisions "interfere" with his privacy. On balance, the State party concedes that Mr. Toonen is personally and actually affected by the Tasmanian laws.

6.4 As to whether the interference with the author's privacy was arbitrary or unlawful, the State party refers to the travaux préparatoires of article 17 and observes that the drafting history of the provision in the Commission on Human Rights appears to indicate that the term "arbitrary" was meant to cover interferences which, under Australian law, would be covered by the concept of "unreasonableness". Furthermore, the Human Rights Committee, in its general comment 16 (32) on article 17, states that the "concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and

should be ... reasonable in the particular circumstances". a/ On the basis of this and the Committee's jurisprudence on the concept of "reasonableness", the State party interprets "reasonable" interferences with privacy as measures which are based on reasonable and objective criteria and which are proportional to the purpose for which they are adopted.

6.5 The State party does not accept the argument of the Tasmanian authorities that the retention of the challenged provisions is partly motivated by a concern to protect Tasmania from the spread of HIV/AIDS, and that the laws are justified on public health and moral grounds. This assessment in fact goes against the National HIV/AIDS Strategy of the Government of Australia, which emphasizes that laws criminalizing homosexual activity obstruct public health programmes promoting safer sex. The State party further disagrees with the Tasmanian authorities' contention that the laws are justified on moral grounds, noting that moral issues were not at issue when article 17 of the Covenant was drafted.

6.6 None the less, the State party cautions that the formulation of article 17 allows for some infringement of the right to privacy if there are reasonable grounds, and that domestic social mores may be relevant to the reasonableness of an interference with privacy. The State party observes that while laws penalizing homosexual activity existed in the past in other Australian states, they have since been repealed with the exception of Tasmania. Furthermore, discrimination on the basis of homosexuality or sexuality is unlawful in three of six Australian states and the two self-governing internal Australian territories. The Federal Government has declared sexual preference to be a ground of discrimination that may be invoked under ILO Convention No. 111 (Discrimination in Employment or Occupation Convention), and has created a mechanism through which complaints about discrimination in employment on the basis of sexual preference may be considered by the Australian Human Rights and Equal Opportunity Commission.

6.7 On the basis of the above, the State party contends that there is now a general Australian acceptance that no individual should be disadvantaged on the basis of his or her sexual orientation. Given the legal and social situation in all of Australia except Tasmania, the State party acknowledges that a complete prohibition on sexual activity between men is unnecessary to sustain the moral fabric of Australian society. On balance, the State party "does not seek to claim that the challenged laws are based on reasonable and objective criteria".

6.8 Finally, the State party examines, in the context of article 17, whether the challenged laws are a proportional response to the aim sought. It does not accept the argument of the Tasmanian authorities that the extent of interference with personal privacy occasioned by sections 122 and 123 of the Tasmanian Criminal Code is a proportional response to the perceived threat to the moral standards of Tasmanian society. In this context, it notes that the very fact that the laws are not enforced against individuals engaging in private, consensual sexual activity indicates that the laws are not essential to the protection of that society's moral standards. In the light of all the above, the State party concludes that the challenged laws are not reasonable in the circumstances, and that their interference with privacy is arbitrary. It notes that the repeal of the

laws has been proposed at various times in the recent past by Tasmanian governments.

6.9 In respect of the alleged violation of article 26, the State party seeks the Committee's guidance as to whether sexual orientation may be subsumed under the term "... or other status" in article 26. In this context, the Tasmanian authorities concede that sexual orientation is an "other status" for the purposes of the Covenant. The State party itself, after review of the travaux préparatoires, the Committee's general comment on articles 2 and 26 and its jurisprudence under these provisions, contends that there "appears to be a strong argument that the words of the two articles should not be read restrictively". The formulation of the provisions "without distinction of any kind, such as" and "on any ground such as" support an inclusive rather than exhaustive interpretation. While the travaux préparatoires do not provide specific guidance on this question, they also appear to support this interpretation.

6.10 The State party continues that if the Committee considers sexual orientation as "other status" for purposes of the Covenant, the following issues must be examined:

(a) Whether Tasmanian laws draw a distinction on the basis of sex or sexual orientation;

(b) Whether Mr. Toonen is a victim of discrimination;

(c) Whether there are reasonable and objective criteria for the distinction;

(d) Whether Tasmanian laws are a proportional means to achieve a legitimate aim under the Covenant.

6.11 The State party concedes that section 123 of the Tasmanian Criminal Code clearly draws a distinction on the basis of sex, as it prohibits sexual acts only between males. If the Committee were to find that sexual orientation is an "other status" within the meaning of article 26, the State party would concede that this section draws a distinction on the basis of sexual orientation. As to the author's argument that it is necessary to consider the impact of sections 122 and 123 together, the State party seeks the Committee's guidance on "whether it is appropriate to consider section 122 in isolation or whether it is necessary to consider the combined impact of sections 122 and 123 on Mr. Toonen".

6.12 As to whether the author is a victim of discrimination, the State party concedes, as referred to in paragraph 6.3 above, that the author is actually and personally affected by the challenged provisions, and accepts the general proposition that legislation does affect public opinion. However, the State party contends that it has been unable to ascertain whether all instances of anti-homosexual prejudice and discrimination referred to by the author are traceable to the effect of sections 122 and 123.

6.13 Concerning the issue of whether the differentiation in treatment in sections 122 and 123 is based on reasonable and objective criteria, the State

party refers, mutatis mutandis, to its observations made in respect of article 17 (paragraphs 6.4 to 6.8 above). In a similar context, the State party takes issue with the argument of the Tasmanian authority that the challenged laws do not discriminate between classes of citizens but merely identify acts which are unacceptable to the Tasmanian community. This, according to the State party, inaccurately reflects the domestic perception of the purpose or the effect of the challenged provisions. While they specifically target acts, their impact is to distinguish an identifiable class of individuals and to prohibit certain of their acts. Such laws thus are clearly understood by the community as being directed at male homosexuals as a group. Accordingly, if the Committee were to find the Tasmanian laws discriminatory which interfere with privacy, the State party concedes that they constitute a discriminatory interference with privacy.

6.14 Finally, the State party examines a number of issues of potential relevance in the context of article 26. As to the concept of "equality before the law" within the meaning of article 26, the State party argues that the complaint does not raise an issue of procedural inequality. As regards the issue of whether sections 122 and 123 discriminate in "equal protection of the law", the State party acknowledges that if the Committee were to find the laws to be discriminatory, they would discriminate in the right to equal protection of the law. Concerning whether the author is a victim of prohibited discrimination, the State party concedes that sections 122 and 123 do have an actual effect on the author and his complaint does not, as affirmed by the Tasmanian authorities, constitute a challenge in abstracto to domestic laws.

7.1 In his comments, the author welcomes the State party's concession that sections 122 and 123 violate article 17 of the Covenant but expresses concern that the argumentation of the Government of Australia is entirely based on the fact that he is threatened with prosecution under the aforementioned provisions and does not take into account the general adverse effect of the laws on himself. He further expresses concern, in the context of the "arbitrariness" of the interference with his privacy, that the State party has found it difficult to ascertain with certainty whether the prohibition on private homosexual activity represents the moral position of a significant portion of the Tasmanian populace. He contends that, in fact, there is significant popular and institutional support for the repeal of Tasmania's anti-gay criminal laws, and provides a detailed list of associations and groups from a broad spectrum of Australian and Tasmanian society, as well as a detailed survey of national and international concern about gay and lesbian rights in general and Tasmania's anti-gay statutes in particular.

7.2 In response to the Tasmanian authorities' argument that moral considerations must be taken into account when dealing with the right to privacy, the author notes that Australia is a pluralistic and multi-cultural society whose citizens have different and at times conflicting moral codes. In these circumstances it must be the proper role of criminal laws to entrench these different codes as little as possible; in so far as some values must be entrenched in criminal codes, these values should relate to human dignity and diversity.

7.3 As to the alleged violations of articles 2, paragraph 1, and 26, the author welcomes the State party's willingness to follow the Committee's guidance on the interpretation of these provisions but regrets that the State party has failed to give its own interpretation of these provisions. This, he submits, is inconsistent with the domestic views of the Government of Australia on these provisions, as it has made clear domestically that it interprets them to guarantee freedom from discrimination and equal protection of the law on grounds of sexual orientation. He proceeds to review recent developments in Australia on the status of sexual orientation in international human rights law and notes that before the Main Committee of the World Conference on Human Rights, Australia made a statement which "remains the strongest advocacy of ... gay rights by any Government in an international forum". The author submits that Australia's call for the proscription, at the international level, of discrimination on the grounds of sexual preference is pertinent to his case.

7.4 Mr. Toonen further notes that in 1994, Australia will raise the issue of sexual orientation discrimination in a variety of forums: "It is understood that the National Action Plan on Human Rights which will be tabled by Australia in the Commission on Human Rights early next year will include as one of its objectives the elimination of discrimination on the grounds of sexual orientation at an international level".

7.5 In the light of the above, the author urges the Committee to take account of the fact that the State party has consistently found that sexual orientation is a protected status in international human rights law and, in particular, constitutes an "other status" for purposes of articles 2, paragraph 1, and 26. The author notes that a precedent for such a finding can be found in several judgements of the European Court of Human Rights. b/

7.6 As to the discriminatory effect of sections 122 and 123 of the Tasmanian Criminal Code, the author reaffirms that the combined effect of the provisions is discriminatory because together they outlaw all forms of intimacy between men. Despite its apparent neutrality, section 122 is said to be by itself discriminatory. In spite of the gender neutrality of Tasmanian laws against "unnatural sexual intercourse", this provision, like similar and now repealed laws in different Australian states, has been enforced far more often against men engaged in homosexual activity than against men or women who are heterosexually active. At the same time, the provision criminalizes an activity practised more often by men sexually active with other men than by men or women who are heterosexually active. The author contends that in its general comment on article 26 and in some of its views, the Human Rights Committee itself has accepted the notion of "indirect discrimination". c/

7.7 Concerning the absence of "reasonable and objective criteria" for the differentiation operated by sections 122 and 123, Mr. Toonen welcomes the State party's conclusion that the provisions are not reasonably justified on public health or moral grounds. At the same time, he questions the State party's ambivalence about the moral perceptions held among the inhabitants of Tasmania.

7.8 Finally, the author develops his initial argument related to the link between the existence of anti-gay criminal legislation and what he refers to as "wider discrimination", i.e. harassment and violence against homosexuals and anti-gay prejudice. He argues that the existence of the law has adverse social and psychological impacts on himself and on others in his situation and cites numerous recent examples of harassment of and discrimination against homosexuals and lesbians in Tasmania. d/

7.9 Mr. Toonen explains that since lodging his complaint with the Committee, he has continued to be the subject of personal vilification and harassment. This occurred in the context of the debate on gay law reform in Tasmania and his role as a leading voluntary worker in the Tasmanian community welfare sector. He adds that more importantly, since filing his complaint, he lost his employment partly as a result of his communication before the Committee.

7.10 In this context, he explains that when he submitted the communication to the Committee, he had been employed for three years as General Manager of the Tasmanian AIDS Council (Inc.). His employment was terminated on 2 July 1993 following an external review of the Council's work which had been imposed by the Tasmanian government, through the Department of Community and Health Services. When the Council expressed reluctance to dismiss the author, the Department threatened to withdraw the Council's funding unless Mr. Toonen was given immediate notice. Mr. Toonen submits that the action of the Department was motivated by its concerns over his high profile complaint to the Committee and his gay activism in general. He notes that his complaint has become a source of embarrassment to the Tasmanian government, and emphasizes that at no time had there been any question of his work performance being unsatisfactory.

7.11 The author concludes that sections 122 and 123 continue to have an adverse impact on his private and his public life by creating the conditions for discrimination, continuous harassment and personal disadvantage.

Examination of the merits

8.1 The Committee is called upon to determine whether Mr. Toonen has been the victim of an unlawful or arbitrary interference with his privacy, contrary to article 17, paragraph 1, and whether he has been discriminated against in his right to equal protection of the law, contrary to article 26.

8.2 In so far as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of "privacy", and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws. The Committee considers that sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code "interfere" with the author's privacy, even if these provisions have not been enforced for a decade. In this context, it notes that the policy of the Department of Public Prosecutions not to initiate criminal proceedings in respect of private homosexual conduct does not amount to a guarantee that no actions will be brought against homosexuals in the future, particularly in the light of undisputed statements of the Director of Public Prosecutions of Tasmania in 1988 and those of members of the

Tasmanian Parliament. The continued existence of the challenged provisions therefore continuously and directly "interferes" with the author's privacy.

8.3 The prohibition against private homosexual behaviour is provided for by law, namely, sections 122 and 123 of the Tasmanian Criminal Code. As to whether it may be deemed arbitrary, the Committee recalls that pursuant to its general comment 16 (32) on article 17, the "introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances". a/ The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

8.4 While the State party acknowledges that the impugned provisions constitute an arbitrary interference with Mr. Toonen's privacy, the Tasmanian authorities submit that the challenged laws are justified on public health and moral grounds, as they are intended in part to prevent the spread of HIV/AIDS in Tasmania, and because, in the absence of specific limitation clauses in article 17, moral issues must be deemed a matter for domestic decision.

8.5 As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV. The Government of Australia observes that statutes criminalizing homosexual activity tend to impede public health programmes "by driving underground many of the people at the risk of infection". Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.

8.6 The Committee cannot accept either that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy. It further notes that with the exception of Tasmania, all laws criminalizing homosexuality have been repealed throughout Australia and that, even in Tasmania, it is apparent that there is no consensus as to whether sections 122 and 123 should not also be repealed. Considering further that these provisions are not currently enforced, which implies that they are not deemed essential to the protection of morals in Tasmania, the Committee concludes that the provisions do not meet the "reasonableness" test in the circumstances of the case, and that they arbitrarily interfere with Mr. Toonen's right under article 17, paragraph 1.

8.7 The State party has sought the Committee's guidance as to whether sexual orientation may be considered an "other status" for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view, the reference to

"sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of articles 17, paragraph 1, juncto 2, paragraph 1, of the Covenant.

10. Under article 2, paragraph 3 (a), of the Covenant, the author, as a victim of a violation of articles 17, paragraph 1, juncto 2, paragraph 1, of the Covenant, is entitled to a remedy. In the opinion of the Committee, an effective remedy would be the repeal of sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code.

11. Since the Committee has found a violation of Mr. Toonen's rights under articles 17, paragraph 1, and 2, paragraph 1, of the Covenant requiring the repeal of the offending law, the Committee does not consider it necessary to consider whether there has also been a violation of article 26 of the Covenant.

12. The Committee would wish to receive, within 90 days of the date of the transmittal of its views, information from the State party on the measures taken to give effect to the views.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ Official Records of the General Assembly, Forty-third Session, Supplement No. 40 (A/43/40), annex VI, general comment 16 (32), para. 4.

b/ Dudgeon v. the United Kingdom of Great Britain and Northern Ireland, judgment of 22 October 1981, paras. 64-70; Norris v. Ireland, judgment of 26 October 1988, paras. 39-47; Modinos v. Cyprus, judgment of 22 April 1993, paras. 20-25.

c/ The author refers to the Committee's views in case No. 208/1986 (Bhinder v. Canada), adopted on 9 November 1989, paras. 6.1 and 6.2 (see Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40), annex IX.E).

d/ These examples are documented and kept in the case file.

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* The text of an individual opinion submitted by Mr. Bertil Wennergren is appended.

Appendix

Individual opinion submitted by Mr. Bertil Wennergren under rule 94, paragraph 3, of the rules of procedure of the Human Rights Committee

I do not share the Committee's view in paragraph 11 that it is unnecessary to consider whether there has also been a violation of article 26 of the Covenant, as the Committee concluded that there had been a violation of Mr. Toonen's rights under articles 17, paragraph 1, and 2, paragraph 1, of the Covenant. In my opinion, a finding of a violation of article 17, paragraph 1, should rather be deduced from a finding of violation of article 26. My reasoning is the following.

Section 122 of the Tasmanian Criminal Code outlaws sexual intercourse between men and between women. While section 123 also outlaws indecent sexual contacts between consenting men in open or in private, it does not outlaw similar contacts between consenting women. In paragraph 8.7, the Committee found that in its view, the reference to the term "sex" in article 2, paragraph 1, and in article 26 is to be taken as including sexual orientation. I concur with this view, as the common denominator for the grounds "race, colour and sex" are biological or genetic factors. This being so, the criminalization of certain behaviour operating under sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code must be considered incompatible with article 26 of the Covenant.

Firstly, these provisions of the Tasmanian Criminal Code prohibit sexual intercourse between men and between women, thereby making a distinction between heterosexuals and homosexuals. Secondly, they criminalize other sexual contacts between consenting men without at the same time criminalizing such contacts between women. These provisions therefore set aside the principle of equality before the law. It should be emphasized that it is the criminalization as such that constitutes discrimination of which individuals may claim to be victims, and thus violates article 26, notwithstanding the fact that the law has not been enforced over a considerable period of time. The designated behaviour none the less remains a criminal offence.

Unlike the majority of the articles in the Covenant, article 17 does not establish any true right or freedom. There is no right to freedom or liberty of privacy, comparable to the right of liberty of the person, although article 18 guarantees a right to freedom of thought, conscience and religion as well as a right to manifest one's religion or belief in private. Article 17, paragraph 1, merely mandates that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, etc. Furthermore, the provision does not, as do other

articles of the Covenant, specify on what grounds a State party may interfere by way of legislation.

A State party is therefore in principle free to interfere by law with the privacy of individuals on any discretionary grounds, not just on grounds related to public safety, order, health, morals, or the fundamental rights and freedoms of others, as spelled out in other provisions of the Covenant. However, under article 5, paragraph 1, nothing in the Covenant may be interpreted as implying for a State a right to perform any act aimed at the limitation of any of the rights and freedoms recognized therein to a greater extent than is provided for in the Covenant.

The discriminatory criminal legislation at issue here is not strictly speaking "unlawful", but it is incompatible with the Covenant, as it limits the right to equality before the law. In my view, the criminalization operating under sections 122 and 123 of the Tasmanian Criminal Code interferes with privacy to an unjustifiable extent and, therefore, also constitutes a violation of article 17, paragraph 1.

A similar conclusion cannot, in my opinion, be reached on article 2, paragraph 1, of the Covenant, as article 17, paragraph 1 protects merely against arbitrary and unlawful interferences. It is not possible to find legislation unlawful merely by reference to article 2, paragraph 1, unless one were to reason in a circuitous way. What makes the interference in this case "unlawful" follows from articles 5, paragraph 1, and 26, and not from article 2, paragraph 1. I therefore conclude that the challenged provisions of the Tasmanian Criminal Code and their impact on the author's situation are in violation of article 26, in conjunction with articles 17, paragraph 1, and 5, paragraph 1, of the Covenant.

I share the Committee's opinion that an effective remedy would be the repeal of sections 122 (a) and (c) and 123, of the Tasmanian Criminal Code.

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HUMAN RIGHTS COMMITTEE
Seventy-eighth session
14 July - 8 August 2003

VIEWS

Communication No. 941/2000

Submitted by:	Mr. Edward Young (represented by counsel Ms. Michelle Hannon and Ms. Monique Hitter)
Alleged victim:	The author
State party:	Australia
Date of communication:	29 June 1999 (initial submission)
Document references:	Special Rapporteur's rule 91 decision, transmitted to the State party on 29 August 2000 (not issued in document form)
Date of adoption of Views:	6 August 2003

On 6 August 2003, the Human Rights Committee adopted its Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 941/2000. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Seventy-eighth session

concerning

Communication No. 941/2000**

Submitted by:	Mr. Edward Young (represented by counsel Ms. Michelle Hannon and Ms. Monique Hitter)
Alleged victim:	The author
State party:	Australia
Date of communication:	29 June 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 6 August 2003,

Having concluded its consideration of communication No. 941/2000, submitted to the Human Rights Committee on behalf of Mr. Edward Young under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

** The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Edward Young, an Australian citizen, born on 7 May 1935 and currently residing in the state of New South Wales. He claims to be a victim of a violation by Australia of article 26 of the Covenant. He is represented by counsel.

The facts as presented by the author

2.1 The author was in a same-sex relationship with a Mr. C for 38 years. Mr. C was a war veteran, for whom the author cared in the last years of his life. He died on 20 December 1998, at the age of 73. On 1 March 1999, the author applied for a pension under section 13 of the Veteran's Entitlement Act ("VEA") as a veteran's dependant. On 12 March 1999, the Repatriation Commission denied the author's application in that he was not a dependant as defined by the Act. In its decision the Commission sets out the relevant legislation as follows:

Section 11 of the Actstates:

> "dependant, in relation to a veteran (including a veteran who has died), means
>
> (a) the partner…"

Section 5E of the Act defines a "partner, in relation to a person who is a "member of a couple", [as] the other member of the couple."

The notion of couple is defined in section 5E(2):

> "a person is a "member of a couple" for the purposes of this Act if:
>
> (a) the person is legally married to another person and is not living separately and apart from the other person on a permanent basis; or
>
> (b) all of the following conditions are met:
>
> (i) the person is living with a person of the opposite sex (in this paragraph called the partner);
> (ii) the person is not legally married to the partner;
> (iii) the person and the partner are, in the Commission's opinion (…….), in a marriage-like relationship;
> (iv) the person and the partner are not within a prohibited relationship for the purposes of Section 23 B of the Marriage Act 1961."

The decision reads "The wording of Section 5E (2) (b) (i) – the text that I have highlighted - is unambiguous. I regret that I am therefore unable to exercise any discretion in this matter. This means that under legislation, you are not regarded as the late veteran's dependant. Because of this you are not entitled to claim a pension under the Act."

The author was also denied a bereavement benefit under the Act, as he was not considered to be a "member of a couple".[1]

2.2 On 16 March 1999, the author applied to the Veterans Review Board ("VRB") for a review of the Commission's decision. On 27 October 1999, the Board affirmed the Commission's decision, finding that the author was not a dependant as defined by the Act. In its decision the Board outlines the legislation as above and considers that it "has no discretion in its application of the Act and in this case it is bound to have regard to Section 11 of the Act. Hence, under the current legislation, the Board is required to affirm the decision under review in relation to the status of the applicant".

2.3 On 23 December 1999, the Human Rights and Equal Opportunity Commission ("HREOC") denied the author's complaint to that body, stating that as the author had been subjected to the automatic and non-discretionary operation of legislation, the Commission had no jurisdiction to intervene.

The complaint

3.1 The author complains that the State party's refusal, on the basis of him being of the same sex as his partner, that is, due to his sexual orientation, to provide him with a pension benefit violates his right to equal treatment before the law and is contrary to article 26. He concedes that article 26 does not compel a State party to enact particular legislation, but argues that where it does, the legislation must comply with article 26. The author recalls that in *Broeks v. the Netherlands*[2], *Zwaan de Vries v. the Netherlands*[3], and *Danning v. the Netherlands*[4], the Committee, in principle, found social security legislation to be subject to article 26. He also recalls that in *Toonen v. Australia*[5] the Committee recognized sexual orientation as a proscribed ground for differentiation under article 26.

3.2 The author argues that although he could have appealed to the Commonwealth Administrative Appeals Tribunal ("AAT") such an appeal would have had no prospect of success, as it would also have been bound by the provisions of the VEA.

The State party's submission on the admissibility and merits of the communication

4.1 By Note Verbale of 1 May 2001, the State party comments on the admissibility and merits of the communication. It considers the meaning of the rights protected under article 26 and distinguishes between "equality before the law" and "equal protection of the law". The

1 The author does not make any specific claim on this fact.

2 Case No. 172/1984, Views adopted on 9 April 1987.

3 Case No. 182/1984, Views adopted on 9 April 1987.

4 Case No. 180/1984, Views adopted on 9 April 1987.

5 Case No. 488/1992, Views adopted on 31 March 1994.

former, it contends, is not directed at legislation but rather exclusively at its enforcement and means that judges and administrative officials must not act arbitrarily in enforcing laws.[6] The latter, it argues, relates to the substance of the laws as well as their application.[7] Although the author refers to 'equality before the law' in his communication, the State party does not understand this to relate to an alleged breach of this aspect of article 26. Rather than alleging arbitrary action by judges or officials, the State party understands the author to be alleging that the law itself is discriminatory, and that he raises the issue of equal protection of the law under article 26.

4.2 The State party challenges the admissibility on three grounds. Firstly, it argues that the author is not a victim within the meaning of article 1 of the Optional Protocol, pursuant to which the Committee has indicated[8] that an author must provide evidence that he/she is personally affected by an act or omission by the State party. Although the State party endorses the decisions of the domestic authorities rejecting the author's application for a pension, it does not endorse the reasons articulated by these bodies for so disposing of it. It argues that a thorough examination of the facts and their application to the VEA reveals that no partner of Mr. C, whether homosexual or heterosexual, would have been entitled to the pension under the VEA. Consequently, the State party argues that neither the author's sexual orientation nor the sexual orientation of Mr. C is determinative of the issue.

4.3 The State party notes that the author applied for a pension under the VEA and that the eligibility provisions are dealt with in Division 2 of Part II of the VEA. Section 13 sets out the criteria for 'eligibility for pension'. According to the State party, in order to prove that he has been the subject of unlawful discrimination, the author must first establish that he is able to satisfy the entitlement provisions in section 13.

4.4 The State party explains that section 13 provides five separate grounds for entitlement to the pension. In particular, section 13(1) allows a dependant, including the partner, of a veteran to claim the pension where the veteran's death was 'war-caused'. The State party argues that the records of the Department of Veterans' Affairs do not show that Mr. C's death was 'war-caused', nor does the author allege that his death was 'war-caused'. Therefore, it submits that, no heterosexual or homosexual partner of Mr. C could have been entitled to the pension under subsection (1). The State party then goes on to apply the facts of the author's case to the other subsections of article 13 in an attempt to demonstrate that regardless of relationship, the author would not have been eligible for a pension, as Mr. C was not a veteranto whom one of the requisite provisions applied. It submits that since the author was in any event not entitled to that

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[6] The State party refers to the *travaux préparatoires* of the Covenant and its Views in the communications of Broeks v the Netherlands, Danning v the Netherlands, Zwaan de Vries v the Netherlands, supra.

[7] The State party refers to UN Doc. A/42/40, page 139, paragraphs 12.1 to 1.13 and the communications Broeks v. the Netherlands, Danning v the Netherlands and Zwaan de Vries v the Netherlands, supra.

[8] The State party refers to the following communications in an attempt to show that the author has not sufficiently demonstrated that he is a victim: J.H v. Canada, Case No. 187/1985, Decision adopted on 12 April 1985; Tadman et al v. Canada, Case No. 816/1998, Decision adopted on 29 October 1999; de Groot v Netherlands, Case No. 578/1994, Decision adopted on 14 July 1995; Toonen v Australia, supra.

benefit, he has not established a *prima facie* entitlement to the pension and therefore is not a victim for the purposes of article 1.

4.5 Secondly, the State party recalls the Committee's jurisprudence[9] and argues that the author has not sufficiently substantiated his case for the purposes of admissibility. To raise a prima facie case, the State party argues that the author must establish that he was denied a benefit that would have been available to a heterosexual partner of Mr. C as a matter of entitlement under law and refers back to its arguments in paragraphs 4.2 to 4.4 above. It submits that the author failed to evaluate properly all the facts of the case and the application of those facts to section 13 of the VEA, and that therefore he is unable to substantiate the claim that his lack of entitlement to the pension under the VEA is determined by a distinction based on sexual orientation in breach of article 26.

4.6 Thirdly, the State party argues that the author has not exhausted domestic remedies for the purposes of admissibility. In referring to the Committee's jurisprudence[10], the State party submits that the balance of opinion in the Views of the Committee is that a remedy must have no chance of success in order for an author to successfully claim that the particular remedy does not need to be exhausted before a communication can be declared admissible.

4.7 The State party submits that the author could have appealed the decision not to grant him the pension to the AAT and provides the following information on this tribunal. The AAT was created by Federal statute and has the power to affirm or quash a decision, and to remit the matter to the original decision-maker to make a new decision, vary a decision or replace the original decision with a new one. In exercising this power, the role of the AAT is to determine the 'correct or preferable decision' in relation to a particular matter. In performing its functions, the AAT as a matter of course conducts a thorough examination of all the facts. The AAT is not bound to use only the information available to the original decision-maker, and may consider information not known at the time of the original decision. A party to a matter heard by the AAT may seek judicial review of a decision in the Federal Court.

4.8 The State party submits that the AAT would in all likelihood have concluded that the author, like any heterosexual or homosexual partner of Mr. C, was not entitled to a pension under section 13 of the VEA. This decision would have been based on either: (1) the failure of Mr. C

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[9] The State party refers to the following reports of the Human Rights Committee in UN Documents A/48/40, paragraph 781; A/47/40, paragraph 625; A/46/40, paragraph 679; A/45/40, paragraph 608; A/44/40, paragraph 633; A/43/40, paragraph 654; A/39/40, paragraph 588; A/52/40, paragraph 478; A/51/40, paragraph 388; A/50/40, paragraph 500; Oló Bahamonde v Equatorial Guinea, Case No. 468/1991, Views adopted on 20 October 1993; J. A. M. B.-R. v. the Netherlands, Case No. 477/1991,Decision adopted on 7 April 1994.

[10] The State party refers to the following communications: Kelly v Jamaica, Case No. 537/1993, Views adopted on 17 July 1996; Henry et al. v Jamaica, Case No. 571/1994, Views adopted on 25 July 1996; Pereira, on behalf of Colamarco Patino v Panama, Case No. 437/1990, Decision adopted on 21 October 1994; G v Canada, Case No. 934/2000, Decision adopted on 17 July 2000; A v New Zealand, Case No. 754/1997, Views adopted on 15 July 1999; Mansur et al. v the Netherlands, Case No. 883/1999,Decision of 5 November 1999; Maille v France, Case No. 689/2000, Views adopted on 10 July 2000; and Gómez Vázquez v Spain, Case No. 701/1996, Views adopted on 20 July 2000.

to meet the requirements in section 13 of the VEA upon which partner entitlement to the pension depends, in particular those relating to serious disability or death caused as a result of war service (as outlined in para. 4.2 to 4.4); or (2) the author's failure to provide sufficient evidence of his allegedly de facto relationship with Mr. C (the State party provides further information on this argument in the merits). The State party submits that a decision of the AAT based on either or both of these grounds would not involve any distinction upon which a breach of article 26 could be founded and this matter would not have been brought to the Committee.

4.9 On the merits, the State party argues that, notwithstanding the reasons provided by the decision-making bodies in the author's case, the sexual orientation of Messrs C and the author was not determinative of the author's entitlement to the pension, and for the purposes of the Committee's consideration of the communication, the author's allegation lacks any merit. The State party supports this submission on two grounds. Firstly, the State party alleges that no heterosexual or homosexual partner of Mr. C would have been entitled to the pension under section 13 of the VEA. Secondly, the State party submits that in any case the author had failed to provide sufficient information to establish that he was in fact the partner of Mr. C. Therefore, and notwithstanding the author's inability to meet the eligibility criteria set out in the VEA, the State party submits that the decision-making bodies could not have been satisfied that the threshold requirement of establishing the existence of a *de facto* relationship had been met.

4.10 The State party submits that the author provided insufficient evidence in support of his claim that he was the *de facto* partner of Mr. C. Thus, on a proper application of the facts, as presented by the author to the relevant law, the State party submits that no distinction was made that was not based on or justified by reasonable and objective criteria. The State party underlines the importance of disbursing Government funds where they are most needed. Thus, it is common practice to impose eligibility criteria in relation to social security payments and the State party notes the Committee's recognition of the rights of States to subject the payment of social security benefits to eligibility criteria[11].

4.11 The State party explains that the criterion of properly evidencing the existence of a *de facto* relationship is one of the criteria that must be met before a person is entitled to a dependant's pension under the VEA. According to the State party, Mr. C did not indicate in correspondence with the Department that he was anything other than single.[12] The Department requires evidence of relationships to determine the entitlement to pension benefits. In this regard, the application form for a war widower's pension states:

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[11] The State party refers to Neefs v the Netherlands, Case No. 425/1990, Views adopted on 15 July 1994, as an example.

[12] The State party provides and refers to the following documents submitted by Mr. C to support this view (a) Claim for Service Pension by a Veteran or Mariner, pages 2, 3, 5 and 6; (b) Lifestyle Report, particularly Section 2 'Personal Relationships', in which there is no reference to a partner, and Section 4 'Recreation and Community Activities', in which Mr. C says that he rarely receives visitors either by friends or family; (c) Medical Examination – Psychiatric, in which there is no reference to a partner.

> "Please attach a copy of your marriage certificate or evidence of your relationship with the deceased veteran, unless you have previously supplied this material to the Department. "

4.12 The State party submits that, other than the author's application for a pension, the only evidence provided by the author is his name as Mr. C's partner on the latter's death certificate. It submits that information on New South Wales death certificates, including that relating to spouses, is not considered to be probative of the accuracy of the information. It is submitted that, in isolation, the information on the death certificate is insufficient to establish that the author was the partner of Mr. C for the purposes of the VEA. It further submits that the Department would note evidence of, for example, shared expenses, cohabitation or sharing of significant experiences, correspondence, benefaction under a will and statements from family or mutual friends or acquaintances.

4.13 The assessment of whether the author was in fact Mr. C's partner was no different from the assessment that would have applied to any heterosexual or homosexual person claiming to be the partner of a veteran. In the absence of additional evidence, the Department could not have been satisfied that the author was the partner of Mr. C. The State party submits that this application of the assessment process prevents an issue of equal protection of the law from arising. It also submits that there is no evidence of arbitrary actions on the part of officials in the Department that would support a finding that the author's guarantee of equality before the law has been breached (para. 4.1 above).

4.14 In conclusion, the State party submits that, the author failed to provide sufficient evidence of his status as a *de facto* partner of Mr. C and, this would have provided additional grounds for refusing to grant the author the pension. This refusal, according to the State party does not give rise to a breach of the author's rights under article 26.

Comments by the author

5.1 By submission of 17 August 2001, the author reiterates that he is a victim for the purposes of article 1 of the Optional Protocol in that he is a natural person who was personally affected by the fact that he was denied a pension by reason of his sexual orientation. He reiterates that both the Repatriation Commission and the VRB made it clear that the reason for rejection of his application was because his partner was not a member of the opposite sex, i.e. because of his sexual orientation.

5.2 The author notes that, although the State party submits that it does not affirm the reasons of the Repatriation Commission and the VRB for rejecting his application, it does not deny that sexuality is a criteria relevant to the granting of pensions under the VEA and that the author's sexuality prevents him from satisfying that criteria. He further argues that the State party does not contend that any other domestic bodies reviewing his application would make a different finding on his eligibility for a pension as a dependant.

5.3 With respect to the State party's argument that the author is not a victim because he could be denied a pension under the VEA based on a number of other criteria which do not relate to his sexuality, the author submits that his eligibility to meet these other criteria is not relevant to his status as a victim for the following reasons: even if he meets the criteria in sub-section 13 he would still not be entitled to a pension because he would not meet the definition of dependant. In the author's view, it is important to distinguish between cases such as Hoofdman v. the Netherlands,[13] where it is evident that an individual would not be entitled to some State benefit on grounds other than the discriminatory grounds proscribed by the Covenant, and cases where the entitlement to a benefit is arguable and requires a proper and fair hearing by an appropriate State administration body for the determination of eligibility.

5.4 The author argues that he had no opportunity to demonstrate whether or not he can meet the criteria of these sub-sections. He acknowledges that he could not meet the criteria in respect of certain subsections of section 13, which would entitle him to a pension, but he maintains that he has not yet been given the opportunity to establish that he meets the criteria under other subsections of section 13 which would also provide such an entitlement. He submits that, although in its submission the State party made assumptions about his ability to meet these various criteria, the State party has vested domestic bodies, including the VRB, with jurisdiction to determine whether the criteria in question have been met.

5.5 The author contends that, in making assumptions at this stage about his ability to meet these criteria, the State party again discriminates against him because citizens in heterosexual relationships seeking such a pension under the above-mentioned sub-sections would be able to meet criteria assessed by the Repatriation Commission, the VRB or other decision-making bodies. Such bodies review all the evidence regarding the matter. The author submits that the State party is yet to see the author's evidence or hear his arguments as to how he might meet these criteria. In addition, the author states that to require him to seek further review when it is clear it will not ultimately result in a different outcome is also discriminatory. He argues that he is being treated unequally under the law simply by being excluded on the basis of his sexuality even if he cannot establish that he meets the other criteria for a pension.

5.6 On the issue of exhaustion of domestic remedies, the author states that as the VRB clearly stated that it had no discretion to make a finding other than one which excludes the author from eligibility for a pension on the basis of his failure to meet with the definition of a dependant, it would not be open to the AAT or the Federal Court of Australia to make a different finding. According to the author, under Australian law when the meaning of a provision of a statute is clearly stated in that statute the decision-making body has no power to interpret it differently. Section 5(E) is very clear in requiring a person claiming to be a member of a couple, in order to be a partner and therefore a dependant under the Act, to be in a heterosexual relationship.

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[13] *Communication No. 602/1994, Views adopted on 3 November 1998*. In this case, the Committee held, on the merits, that "on the basis of the information before it, it appears that the author, even if he had been married to his partner rather than cohabitating with her without marriage, would not have been entitled to a pension under the AWW, since he was under 40 years of age, not unfit for work and had no unmarried children to care for. The matter before the Committee is thus confined to the entitlement to a temporary benefit only."

5.7 According to the author, this provision leaves no room for any decision-making bodies to exercise their discretion to include same sex partners within the definition even if the body thought it just and reasonable to do so. He argues that jurisprudence in relation to the interpretation of terms such as "partner", "spouse" and "couple" has failed to include same sex relationships even when there has been discretion to do so because the term has never been defined further. The author notes that the State party does not contend that the AAT or the Federal Court could have come to any different interpretation on this point. At best, he notes its claim that the AAT might have found other grounds in addition to the "discriminatory ground" to exclude the author from receiving a pension.

5.8 The author argues that the Committee's jurisprudence[14] only requires him to establish that seeking further review of the reasons articulated for denying a benefit would be futile. It does not require him to seek further domestic remedies on the basis that other decision-making bodies might find him ineligible on grounds which were not of concern to the decision-making bodies which had actually assessed his application. He further submits that no responsibility should be placed on him to seek a review of a decision in order to exhaust domestic remedies, other than in relation to that aspect of the decision which he claims violates the Covenant.

5.9 The author reiterates that he did attempt to have HREOC examine his claim that the limitation of pension payments under the Act to heterosexual partners of veterans was a breach of article 26 of the Covenant. He submits that, in its response, HROEC stated that the resources of the Commission do not permit it to conduct an examination of entitlements for same sex couples under the provisions of the VEA and that it was unable to investigate the matter on any other basis as it was not a matter where the decision-maker had any discretion in determining whether or not the author fell within the provisions of a dependant as defined by the VEA.

5.10 The author refutes the State party's contention that it was likely that had he appealed his case to the AAT it would have refused his application on grounds other than his sexuality. He contends that the State party is incorrect in its argument that he would not have been entitled to a pension under section 13 of the VEA, and argues that neither of the review bodies which were empowered to consider his application indicated that they had any concern with his ability to meet the criteria in the sub-sections of section 13. He states that Mr. C was not a smoker until he entered the army and that the effects of smoking contributed to his death. Under Australian jurisprudence, veterans who died from a smoking related illness have been found to have died from a war-caused injury, and satisfied section 13, if the reason for smoking was related to enlistment in the army. According to the author, applications for pensions under the VEA based on a war-caused injury by dependants of veterans have been accepted even when the connection between the veteran's death and his war-caused injury was made only posthumously.

[14] The author refers to: Barzhig v. France ,supra; Collins v. Jamaica, Case No. 356/1989, Views adopted on 12 May 1993; Maille v France, supra; and Gómez Vázquez v Spain, supra.

5.11 Finally, on the issue of exhaustion of domestic remedies, the author submits that he is of limited means, having no assets and receiving only a Department of Social Security pension, and is not in a financial position to pursue legal options.

5.12 On the merits, the author provides further argument on the issue of the evidence provided pertaining to his relationship with Mr. C. He submits that the suggestion that he was denied a pension because of his failure to provide sufficient evidence of his relationship with Mr. C is inconsistent with the written decisions of the Repatriation Commission and the VRB, which accepted the existence of his relationship with Mr. C. He submits that he could satisfy other review bodies of their relationship,[15] and argues that both decisions indicate that they denied the author's application because he could not meet the definition of dependant, that is, due to his sexual orientation. The VRB expressly accepted the existence of the author's relationship with Mr. C.[16]

5.13 The author argues that given the Australian, and particularly the Department of Defence and Veteran Affairs', attitudes to same-sex relationships, as demonstrated by the Department's refusal to recognise the validity of such relationships[17], it is not surprising that Mr. C responded the way he did on the documents referred to by the State party at paragraph 4.11. Nothing in these documents denies his relationship with Mr. C or amounts to evidence that there was no such relationship. There is no provision in any of the documents referred to which would have allowed Mr. C to describe his relationship with the author as there is no reference to "partner".

Supplementary submissions by the parties

6.1 On 7 February 2002, the State party informed the Committee that the mere fact that it does not respond to all of counsel's assertions and allegations does not mean that it accepts them as true and correct. It denies the author's allegation that by making assumptions about his ability to meet other criteria of the VEA, the Australian Government is again discriminating against him. It explains that it applied the author's factual circumstances to an examination of the eligibility of either a heterosexual or homosexual applicant for a pension under the VEA not in order to discriminate against the author but rather to answer the allegations made by him to the fullest extent possible. In its view, an examination of the criteria was necessary to answer the allegations and would have been undertaken regardless of the author's sex or sexual orientation.

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[15] The author provides a statement regarding his relationship with Mr. C and eight statements from others attesting to the existence of a genuine and longstanding relationship between them. In the author's further submission, of 2 April 2002, he submits that he does not request the Committee to make determinations of fact on this evidence but provides it only to refute the material provided by the State party.

[16] The author provides the decision which states that: "The Board……was sympathetic to his position of having had a long-term relationship with the late veteran". It then sets out the relevant provisions of the VEA relating to the definition of a dependant and states "under the current legislation the Board is required to affirm the decision under review in relation to the status of the applicant."

[17] The author provides his own summary of some Defence Department policies on recognition of same sex relationships.

6.2 On the author's argument that the requirement to seek further review when it is clear it will not result in a different outcome is ultimately also discriminatory, the State party submits that merely informing the Committee of the options that were available to the author is in no way discriminatory. The State party refutes the allegation that decisions of the domestic organs were in and of themselves discriminatory and argues that the author's application was given the same consideration as that of other applicants.

6.3 With respect to the author's claim that he was not given the opportunity to demonstrate whether or not he meets the criteria of section 13 of the VEA, the State party reiterates that the author was free to appeal the decision of the VRB to the AAT. In performing its functions, the AAT conducts a full review of the contested decision, and the author would have been entitled to demonstrate whether or not he met the section 13 criteria.[18]

6.4 The State party submits that while not coming to any conclusions as to the veracity of the additional evidence adduced by the author on this relationship with Mr. C, such evidence should have been presented to the AAT. The State party recalls that it is not the function of the Committee to act as a court or tribunal evaluating evidence.

7.1 On 2 April 2002, the author provided further comments on the State party's response. The author largely reiterates the arguments made in previous submissions. On his argument that he was discriminated against as he was not afforded the opportunity to have his ability to meet the criteria in section 13 assessed by the Repatriation Commission or the VRB, he argues that it was because his case was disposed of on the basis of his sexuality that his ability to meet the other criteria of the VEA was not assessed by a review body. A heterosexual applicant would have had the other criteria assessed by a review body thus removing the opportunity for the State party to undertake this assessment at this stage i.e. in its submission to the Committee.

7.2 In addition, the author states that he did not deny that he had a right to review in theory but argues that to require a person to pursue futile claims through a complex, time consuming and costly legal process which will ultimately result in the original decision being confirmed is discriminatory. The author maintains that the decisions of the Repatriation Commission and the VRB are discriminatory.

7.3 With respect to the information provided by him on the Australian Defence Force policies, the author maintains that this information demonstrates the attitude of the Defence Forces towards same-sex relationships generally. He also directs the Committee to the Defence Force website to support and substantiate his arguments on the Defence Forces attitude to same sex relationships. According to the author, it is clear from this website that a range of benefits are available to the families of Defence Force Personnel but only to "married" and "de facto" families of Defence Force personnel. The author submits that this excludes same sex partners.

[18] The State party provides copies of sections 25 and 43 of the Administrative Appeals Tribunal Act 1975, which describes the functions of the AAT.

8.1 On 16 May 2002, the State party reiterated that although it did not intend to comment further on the author's arguments, it did not necessarily accept the author's comments or allegations as true or correct.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its Rules of Procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

9.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a) of the Optional Protocol.

9.3 The Committee notes the State party's challenge to the admissibility of the communication on the ground that the author is not a victim as, regardless of the decisions of the domestic authorities, he has not established that he had a prima facie entitlement to a pension and therefore his sexual orientation is not determinative of the issue. The Committee recalls that an author of a communication is a victim within the meaning of article 1 of the Optional Protocol, if he/she is personally adversely affected by an act or omission of the State party. The Committee observes that the domestic authorities refused the author a pension on the basis that he did not meet the definition of being a "member of a couple" by not having lived with a "person of the opposite sex". In the Committee's view it is clear that at least those domestic bodies seized of the case, found the author's sexual orientation to be determinative of lack of entitlement. In that respect, the author has established that he is a victim of an alleged violation of the Covenant for purposes of the Optional Protocol.

9.4 The Committee notes the State party's argument that the author has not exhausted domestic remedies as he did not appeal his case to the AAT, which would likely have concluded that the author was not entitled to a pension on grounds other than (or in addition to) those relating to his sexual orientation and which would not involve any distinction upon which a breach of article 26 could be founded. The Committee notes that the State party does not claim that the AAT would (or even could) have arrived at a different outcome to that of the VRB but may merely have applied different reasoning to dispose of his claim. Moreover, the State party does not argue that the AAT could have come to a different interpretation of the impugned sections of the VEA (sections 5(E), 5(E) 2 and 11), on the basis of which the author's application was denied. Neither does it indicate any other domestic body (at either Federal or State level) to which he would have had recourse to challenge the legislation itself. The Committee also notes that it is clear from the legislation that the author would never have been in a position to draw a pension, regardless of whether he could meet all the other criteria under the VEA, as he was not living with a member of the opposite sex. The Committee recalls that domestic remedies need not be exhausted if they objectively have no prospect of success: where under applicable domestic laws the claim would inevitably be dismissed, or where established jurisprudence of the

highest domestic tribunals would preclude a positive result.[19] Taking into account the clear wording of the sections of the VEA in question, and noting that the State party itself admits that an appeal to the AAT would not have been successful, the Committee concludes that there were no effective remedies that the author might have pursued. As the Committee can find no other reason to consider the communication inadmissible it proceeds to a consideration of the merits.

Consideration of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The author's claim is that the State party's refusal to grant him a pension on the ground that he does not meet with the definition of "dependant", for having been in a same-sex relationship with Mr. C, violates his rights under article 26 of the Covenant, on the basis of his sexual orientation. The Committee notes the State party's argument that had the domestic authorities applied all the facts of the author's case to the VEA it would have found other reasons to dispose of the author's claim, reasons that apply to every applicant regardless of sexual orientation. The Committee also notes that the author contests this view that he did not have a prima facie right to a pension. On the arguments provided, the Committee observes that it is not clear whether the author would in fact have fulfilled the other criteria under the VEA, and it recalls that it is not for the Committee to examine the facts and evidence in this regard. However, the Committee notes that the only reason provided by the domestic authorities in disposing of the author's case was based on the finding that the author did not satisfy the condition of "living with a person of the opposite sex". For the purposes of deciding on the author's claim, this is the only aspect of the VEA at issue before the Committee.

10.3 The Committee notes that the State party fails specifically to refer to the impugned sections of the Act (sections 5(E), 5(E) 2 and 11) on the basis of which the author was refused a pension because he did not meet with the definition of a "member of a couple" by not "living with a member of the opposite sex". The Committee observes that the State party does not deny that the refusal of a pension on this basis is a correct interpretation of the VEA but merely refers to other grounds in the Act on which the author's application could have been rejected. The Committee considers, that a plain reading of the definition "member of a couple" under the Act suggests that the author would never have been in a position to draw a pension, regardless of whether he could meet all the other criteria under the VEA, as he was not living with a member of the opposite sex. The State party does not contest this. Consequently, it remains for the Committee to decide whether, by denying a pension under the VEA to the author, on the ground that he was of the same sex as the deceased Mr. C, the State party has violated article 26 of the Covenant.

[19] Barzhig v. France, supra.

10.4 The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation.[20] It recalls that in previous communications the Committee found that differences in the receipt of benefits between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry with all the entailing consequences.[21] It transpires from the contested sections of the VEA that individuals who are part of a married couple or of a heterosexual cohabiting couple (who can prove that they are in a "marriage-like" relationship) fulfill the definition of "member of a couple" and therefore of a "dependant", for the purpose of receiving pension benefits. In the instant case, it is clear that the author, as a same sex partner, did not have the possibility of entering into marriage. Neither was he recognized as a cohabiting partner of Mr. C, for the purpose of receiving pension benefits, because of his sex or sexual orientation. The Committee recalls its constant jurisprudence that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by Australia of article 26 of the Covenant.

12 Pursuant to article 2, paragraph 3(a), of the Covenant, the Committee concludes that the author, as a victim of a violation of article 26 is entitled to an effective remedy, including the reconsideration of his pension application without discrimination based on his sex or sexual orientation, if necessary through an amendment of the law. The State party is under an obligation to ensure that similar violations of the Covenant do not occur in the future.

13 Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The Committee is also requested to publish the Committee's Views.

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[20] Toonen v. Australia, supra.

[21] Danning v. the Netherlands, supra.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Appendix

Individual opinion by Committee members Mrs. Ruth Wedgwood and Mr. Franco DePasquale (concurring)

Many countries recognize a right of privacy in intimate relationships, enjoyed by all citizens regardless of sexual orientation. In 1994, this Committee grounded a similar right on Article 17 of the Covenant on Civil and Political Rights -- finding, in its views on Toonen v. Australia,[22] that Tasmanian penal statutes purporting to criminalize "unnatural sexual practices" amounted to an "arbitrary or unlawful interference with … privacy." In Toonan, the federal government of Australia represented to the Committee that the Tasmanian criminal law indeed amounted to "arbitrary interference with [Mr. Toonen's] privacy" and "cannot be justified" on policy grounds.[23] Laws penalizing homosexual activity had already been repealed in other Australian states, with the exception of Tasmania, and this Committee's decision seems to have served as a means for Australia to overcome barriers of federalism.

In Toonen, the author had complained that the Tasmanian criminal code did "not distinguish between sexual activity *in private* and sexual activity *in public* and bring[s] private activity *into the public domain*."[24] (Emphasis added.) The Committee's ruling was founded on the right to be left alone, where there are no reasonable safety, public order, health or moral grounds offered by the state party to justify the interference with privacy.

The current case of Edward Young v. Australia poses a broader question, where various states parties may have decided views -- namely, whether a state is obliged by the Covenant on Civil and Political Rights to treat long-term same-sex relationships identically to formal marriages and "marriage-like" heterosexual unions -- here, for the purpose of awarding pension benefits to the surviving dependents of military service personnel. Writ large, the case opens the general question of positive rights to equal treatment – whether a state must accommodate same-sex relationships on a par with more traditional forms of civil union.

On the facts and in the particular posture of this case, the Committee has concluded that the differentiation made by Australia between same-sex and heterosexual civil partners has not been sustained against Mr. Young's challenge. The trespass is not based on a right of privacy under Article 17, but rather on the claimed right to equality before the law under Article 26 of the Covenant.

But two observations must be made about the limits of the Committee's disposition of this case, pertinent to future practice.

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[22] Toonen v. Australia, Communication No. 488/1992, Views adopted on 4 April 1994.

[23] *Id.*, paragraph 6.2

[24] *Id.*, paragraph 3.1(a).

First, as a general matter, complainants should be held to their duty of exhausting local remedies, including full rights of local appeal, before any communication is judged on the merits by this Committee. We have no basis to assume that Australian courts would be unable or unwilling to interpret Australian statutory law in light of the treaty norms voluntarily adopted by Australia. Even if a legal system has not formally incorporated the Covenant within its domestic law, the Covenant may serve as a persuasive benchmark in making judgments about Parliamentary intent. The Committee should not assume that international law only operates from the outside on national legal systems. Nor can the Committee demand that rights must be incorporated by open citation of the Covenant. It is the substance, rather than the nomenclature that counts, and some national court systems may prefer to explain their choices in light of constitutional, common law, or civil law norms, even while protecting the substance of Covenant rights. Certainly if the volume of individual communications under the Optional Protocol of the Covenant continues to increase, the Committee will have to exercise greater discipline in consigning to the national courts the decisions that are properly theirs.

In this case, Mr. Young applied for a pension as a veteran's dependent, claiming status as the survivor of Mr. C. The Australian Repatriation Commission found that Mr. Young did not qualify as a statutory dependent under Australian law, despite a long domestic relationship described by Mr. Young.[25] On first appeal, the Australian Veterans Review Board affirmed the denial of benefits to Mr. Young. But the complainant did not take further available appeals to the Commonwealth Administrative Appeals Tribunal or to the Federal Court of Australia, and there is nothing in our record to show that these steps would have been futile.

Second, the posture of the instant case limits the reach of our decision. Australia has contested the admissibility of the communication only on the fact-specific claims (1) that Mr. C has not been shown to have suffered a "war-caused" death and hence would not be able to pass on pension rights to any dependent at all, and (2) that there is insufficient evidence of a durable relationship between Mr. Young and Mr. C.

In a case of this moment, it is perhaps surprising that Australia has not chosen to enter into any discussion, pro or con, on the merits of the claim made under Article 26 of the Covenant. Australia has offered no views concerning Mr. Young's argument that the distinction made by statute between same sex and heterosexual civil partners is unfounded, and the Committee has essentially entered a default judgment. Under Covenant jurisprudence, a state party must offer "reasonable and objective criteria" for making any distinction on grounds of sex or (according to our "guidance" to the state party in paragraph 8.7 of the Toonan case) on grounds of sexual orientation. Yet, as the Committee notes in paragraph 10.4 of the instant case of Mr. Young, "The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which

[25] Mr. Young stated that he was the companion of Mr. C for 38 years, beginning in 1960. Mr. C served in the Australian armed forces for a period of three years, during World War Two. The commission hearing officer expressed "regret that I am … unable to exercise any discretion in this matter." *Id.*, paragraph 2.2

would point to the existence of factors justifying such a distinction has been advanced." In every real sense, this is not a contested case.

Many governments and many people of good will share an interest in finding an appropriate moral and legal answer to the issues and controversies of equalizing various government entitlements between same-sex and heterosexual couples, including the disputed claim that there is a trans-jurisdictional right to recognition of gay marriage. There is an equally engaged debate within many democracies on whether military service should continue to be limited to heterosexual persons.

In the instant case, the Committee has not purported to canvas the full array of "reasonable and objective" arguments that other states and other complainants may offer in the future on these questions in the same or other contexts as those of Mr. Young. In considering individual communications under the Optional Protocol, the Committee must continue to be mindful of the scope of what it has, and has not, decided in each case.

[signed] Ruth Wedgwood
[signed] Franco DePasquale

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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Eighty-ninth session

12 - 30 March 2007

ANNEX*

Views of the Human Rights Committee under article 5, paragraph 4,

of the Optional Protocol to the International Covenant

on Civil and Political Rights

- Eighty-ninth session -

Communication No. 1361/2005

Submitted by: X (represented by counsel)

Alleged victim: The author

State party: Colombia

***Date of* communication**: 13 January 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 2007,

Having concluded its consideration of communication No. **1361/2005**, submitted on behalf of X under the Optional Protocol to the International Covenant on Civil and Political Rights,

Bearing in mind all the information submitted to it in writing by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication dated 13 January 2001 is a Colombian citizen. He claims to be the victim of violations by Colombia of articles 2, paragraph 1, 3, 5, paragraphs 1 and 2, 14, paragraph 1, 17 and 26 of the Covenant. The Optional Protocol entered into force for Colombia on 23 March 1976. The author is represented by counsel.

The facts as presented by the author

2.1 On 27 July 1993, the author's life partner Mr. Y died after a relationship of 22 years, during which they lived together for 7 years. On 16 September 1994, the author, who was economically dependent on his late partner, lodged an application with the Social Welfare Fund of the Colombian Congress, Division of Economic Benefits (the Fund), seeking a pension transfer.

2.2 On 19 April 1995, the Fund rejected the author's request, on the grounds that the law did not permit the transfer of a pension to a person of the same sex.

2.3 The author indicates that according to regulatory decree No. 1160 of 1989, "for the purposes of pension transfers, the person who shared married life with the deceased during the year immediately preceding the death of the deceased or during the period stipulated in the special arrangements shall be recognized as the permanent partner of the deceased"; the decree does not

specify that the two persons must be of different sexes. He adds that Act No. 113 of 1985 extended to the permanent partner the right to pension transfer on the death of a worker with pension or retirement rights, thus putting an end to discrimination in relation to benefits against members of a de facto marital union.

2.4 The author instituted an action for protection (*acción de tutela*) in Bogotá Municipal Criminal Court No. 65, seeking a response from the Benefits Fund of the Colombian Congress. On 14 April 1995, the Municipal Criminal Court dismissed the application on the grounds that there had been no violation of fundamental rights. The author appealed against this decision in Bogotá Circuit Criminal Court No. 50. On 12 May 1995, this court ordered the modification of the earlier ruling and called on the Procurator-General to conduct an investigation into errors committed by staff of the Fund.

2.5 In response to the refusal to grant him the pension, the author instituted an action for protection in Bogotá Circuit Criminal Court No. 18. This court rejected the application on 15 September 1995, finding that there were no grounds for protecting the rights in question. The author appealed against this decision to the Bogotá High Court, which upheld the lower court's decision on 27 October 1995.

2.6 The author indicates that all the actions for protection in the country are referred to the Constitutional Court for possible review, but that the present action was not considered by the Court. Since Decree No. 2591 provides that the Ombudsman can insist that the matter be considered, the author requested the Ombudsman to apply for review by the Constitutional Court. The Ombudsman replied on 26 February 1996 that, owing to the absence of express legal provisions, homosexuals were not allowed to exercise rights recognized to heterosexuals such as the right to marry or to apply for a pension transfer on a partner's death.

2.7 The author instituted proceedings in the Cundinamarca Administrative Court, which rejected the application on 12 June 2000, on the grounds of the lack of constitutional or legal recognition of homosexual unions as family units. The author appealed to the Council of State, which on 19 July 2000 upheld the ruling of the Administrative Court, arguing that under the Constitution, "the family is formed through natural or legal ties … between a man and a woman". This decision was notified by edict only on 17 October 2000, and became final on 24 October 2000.

2.8 The author considers that he has exhausted domestic remedies. He emphasizes that all the actions for protection in the country are referred to the Constitutional Court for possible review, but that the present action was not considered by the Court.

2.9 The author asks for his personal data and those of his partner to be kept confidential.

The complaint

3.1 Regarding the alleged violation of article 2, paragraph 1, the author states that he has suffered discrimination owing to his sexual orientation and his sex. He states that Colombia has failed to respect its commitment to guarantee policies of non-discrimination to all the inhabitants of its territory.

3.2 The author alleges a violation of article 3, since a partner of the same sex is being denied the rights granted to different-sex couples, without any justification. He states that he fulfilled the legal requirements for receiving the monthly pension payment to which he is entitled and that this payment was refused on the basis of arguments excluding him because of his sexual preference. He points out that if the pension request had been presented by a woman following the death of her male partner, it would have been granted, so that the situation is one of discrimination. The author considers that the State party violated article 3 by denying a partner of the same sex the rights which are granted to partners of different sexes.

3.3 The author also claims a violation of article 5, paragraphs 1 and 2, of the Covenant, because the actions of the State party displayed a failure to respect the principles of equality and non-discrimination. According to the author, the State party ignored the Committee's decisions regarding the prohibition of discrimination on grounds of sexual orientation, **(2)** and Colombian law was applied restrictively, preventing the author from obtaining the transfer of his partner's pension, thus putting his means of subsistence and his quality of life at risk.

3.4 Regarding the alleged violation of article 14, paragraph 1, the author maintains that his right to equality before the courts was not respected, since the Colombian courts rejected his request on several occasions because of his sex. He refers to the dissenting opinion of Judge Olaya Forero of the Administrative Court in the case, in which she stated that the Court was subjecting homosexuals to unequal treatment.

3.5 The author claims a violation of article 17, paragraph 1, alleging negative interference by the State party, which failed to recognize his sexual preference so that he was denied the fundamental right to a pension which would assure his subsistence. Regarding the alleged violation of article 17, paragraph 2, he maintains that his private life weighed more heavily in the decisions of the judicial authorities than the legal requirements for receipt of a pension. The judges had refused to grant protection or *amparo* on the sole grounds that he was a homosexual.

3.6 Regarding the violation of article 26, the author states that the State party, through the decision of the Benefits Fund and subsequently in the many court actions, had an opportunity to avoid discrimination based on sex and sexual orientation, but failed to do so. He claims that it is the duty of the State to resolve situations which are unfavourable to its inhabitants, whereas in his case the State had in fact worsened them by increasing his vulnerability in the difficult social circumstances prevailing in the country.

State party's observations on the admissibility and merits of the communication

4.1 In a note verbale dated 25 November 2005, the State party submitted its observations on the admissibility and merits of the communication.

4.2 Regarding the admissibility of the communication, the State party reviews in detail the remedies of which the author made use, concluding that these have been exhausted, with the exception of the special remedies of review or reconsideration, which he did not use in good time. The State party maintains that it is not for the Committee to examine the findings of fact or law reached by national courts, or to annul judicial decisions in the manner of a higher court. The State party considers that the author is seeking to use the Committee as a court of fourth instance.

4.3 Regarding domestic remedies, the State party notes that the Fund applied article 1 of Act No. 54 of 1990, which provides that "… for all civil law purposes, the man and the woman who form part of the de facto marital union shall be termed permanent partners". It concludes that Colombian legislation has not conferred recognition in civil law on unions between persons of the same sex. It also notes that the Cundinamarca Administrative Court considered that the systematic and consistent application of the 1991 Constitution together with other rules did not provide the administration with any grounds for granting the author's request. The State party points out that the system of administrative justice offers special remedies such as review and reconsideration, which the author could have sought, but which were not used in good time, as the deadlines laid down for doing so had passed.

4.4 Regarding the actions for protection instituted by the author, the State party considers that the purpose of the application lodged in Municipal Criminal Court No. 65 was not to protect the right to transfer of the pension but to protect the right of petition. Consequently, it considers that that remedy should not be viewed as one of those which offered the State an opportunity to try the alleged violation. The second action for protection did have the purpose of protecting some of the allegedly violated rights, and was denied by the judge on the grounds that the author was not in imminent danger and had another appropriate means of judicial protection.

4.5 Regarding the review of the rulings on protection by the Constitutional Court, the State party confirms that the rulings were submitted to the Court but not selected. It confirms that review by the Court is not mandatory, since the Court is not a third level in the protection procedure. It also forwards the comments made by the Ombudsman, who did not insist that the Constitutional Court should review the rulings in question. The State party refers to the Constitutional Court's ruling on a constitutional challenge to articles 1 and 2 (a) of Act No. 54 of 1990, "defining de facto marital unions and the property regime between permanent partners", and attaches part of the ruling. **(3)**

4.6 The State party concludes that the author has exhausted domestic remedies and that his disagreement with the decisions handed down prompted him to turn to the Committee as a court of fourth instance. The State party seeks to show that the decisions taken at the domestic level were based on the law and that the judicial guarantees set out in the Covenant were not ignored.

4.7 On the merits, the State party presented the following observations. Regarding the alleged violation of article 2, paragraph 1, of the Covenant, the State party maintains that the Committee is not competent to make comments on the violation of this article, since this refers to a general commitment to respect and provide guarantees to all individuals. It refers to the Committee's jurisprudence in communication No. 268/1987, *M.B.G. and S.P. v. Trinidad and Tobago*, and concludes that the author cannot claim a violation of this article in isolation if there is no violation of article 14, paragraph 1.

4.8 Regarding the alleged violation of article 3, the State party holds that this article does not have the scope claimed by the author, since this provision is designed to guarantee equal rights between men and women, in the context of the historical factors of discrimination to which women have been subjected. The State party refers to the ruling of the Constitutional Court in the case, and endorses the Court's observations, in particular the following. De facto marital unions of a heterosexual nature, insofar as they form a family, are recognized in law in order to guarantee them "comprehensive protection" and, in particular, ensure that "the man and the woman" have equal rights and duties (Constitution, arts. 42 and 43). A variety of social and legal factors were taken into account by the drafters of the law, and not only the mere question of whether a couple live together, particularly as living together may be a feature of couples and social groups of many different kinds or with several members, who may or may not be bound by sexual or emotional ties, and would not in itself oblige the drafters of the law to establish a property regime similar to that established under Act No. 54 of 1990. The legal definition of de facto marital union is sufficient to recognize and protect a group that formerly suffered from discrimination but does not

create a privilege which would be unacceptable from the constitutional point of view. The State party also refers to the views of the Ombudsman along the same lines, and concludes that there has been no violation of article 3 of the Covenant.

4.9 Regarding the alleged violation of article 5, paragraphs 1 and 2, the State party maintains that it has not been expressly substantiated, as the author has not specified in what way a State, a group or person was granted the right to engage in activities or perform acts aimed at the destruction of any of the rights and freedoms recognized in the Covenant.

4.10 The State party reiterates the statement of the Constitutional Court to the effect that the purpose of the rules governing this regime was simply to protect heterosexual unions, not to undermine other unions or cause them any detriment or harm, since no intent to harm homosexuals may be found in the rules. Regarding article 5, paragraph 2, the State party points out that none of the country's laws restricts or diminishes the human rights set out in the Covenant. On the contrary, there are provisions which, like Act No. 54 of 1990, extend rights in respect of social benefits and property to the permanent partners in de facto marital unions, though this is not provided for in article 23 of the Covenant, which refers to the rights of the couple within marriage.

4.11 Regarding the alleged violation of article 14, paragraph 1, the State party points out that court orders handed down in the course of proceedings or an action for protection are valid only *inter partes*. It considers that these allegations lack substance because all the court decisions adopted in relation to the applications made by the author display equality not only before the law but also vis-à-vis the judicial system. At no time were restrictions placed on his ability to go to law and make use of all the machinery available to him to invoke the rights he claimed had been violated. What the author calls violations do not represent some whim of the courts but the strict discharge of their judicial role under social security legislation, in which the duty of protection focuses on the family, viewed as a unit composed of a heterosexual couple, as the Covenant itself understands it in article 23.

4.12 Regarding the alleged violation of article 17, the State party maintains that the author has not explained the grounds on which he considers that this article was violated, or cited any evidence that he was the victim of arbitrary or unlawful interference with his privacy. Consequently, it considers that the author has not substantiated this part of his communication.

4.13 Regarding the alleged violation of article 26, the State party points out that it has already discussed the relevant points in relation to articles 3 and 14, since the same matters of fact and of law are involved. The State party concludes that no violation of the Covenant has taken place, and that the

communication should be declared inadmissible under article 2 of the Optional Protocol.

4.14 The State party does not oppose the author's request for his identity and that of his late partner to be kept confidential, although it does not agree with the author that such action is necessary.

Comments by the author

5.1 In his comments dated 26 January 2006, the author states that it can be seen from the State party's observations that Colombian legislation does not recognize that a person who has cohabited with another person of the same sex has any rights in relation to social benefits. He refers to the rulings of the Administrative Court and the Council of State. Regarding the State party's observation that he should have sought the remedies of review and reconsideration, he indicates that the jurisdiction for such remedies is the Council of State itself, which had already examined the issue and clearly and categorically concluded that there were no grounds for a claim under Colombian law. However, the judicial remedies relating to fundamental rights or human rights had also been exhausted through the action for protection. The author points out that the Ombudsman had declined to request the Constitutional Court to review the application for protection on the grounds that the application was inadmissible. He maintains that the State party's reply shows that there is no possibility of protection in this case under the country's Constitution, laws, regulations or procedures.

5.2 The author states that article 93 of the Constitution acknowledges that the views and decisions of international human rights bodies constitute guides to interpretation which are binding on the Constitutional Court. He maintains that under this provision the State party should have taken the Human Rights Committee into account as such a body, and in particular the Committee's decisions in case No. 488/1992, *Toonen v. Australia,* and case No. 941/2000, *Young v. Australia*.

5.3 The author concludes that domestic remedies have been exhausted and that Colombian legislation contains no remedy which would protect the rights of homosexual couples and halt the violation of their fundamental rights.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 The Committee notes that the State party considers that the author has exhausted domestic remedies.

6.2 Regarding the allegations relating to article 3, the Committee notes the author's arguments that a same-sex couple is denied the rights granted to different-sex couples, and that if the pension request had been submitted by a woman following the death of her male partner, the pension would have been granted - a discriminatory situation. However, the Committee points out that the author does not allege that discrimination is exercised in the treatment of female homosexuals in situations similar to his own. The Committee considers that the author has not sufficiently substantiated this complaint for the purposes of admissibility, and concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.3 Regarding the claims under article 5 of the Covenant, the Committee finds that this provision does not give rise to any separate individual right. **(4)** Thus, the claim is incompatible with the Covenant and inadmissible under article 3 of the Optional Protocol.

6.4 As to the claim under article 14, the Committee finds that it is not sufficiently substantiated for the purposes of article 2 of the Optional Protocol and this part of the complaint must therefore be declared inadmissible under article 2 of the Optional Protocol.

6.5 The Committee considers that the remainder of the author's complaint raises important issues in relation to articles 2, paragraph 1, 17 and 26 of the Covenant, declares it admissible and proceeds to examine the merits of the communication.

Consideration of the merits

7.1 The author claims that the refusal of the Colombian courts to grant him a pension on the grounds of his sexual orientation violates his rights under article 26 of the Covenant. The Committee takes note of the State party's argument that a variety of social and legal factors were taken into account by the drafters of the law, and not only the mere question of whether a couple live together, and that the State party has no obligation to establish a property regime similar to that established in Act No. 54 of 1990 for all the different kinds of couples and social groups, who may or may not be bound by sexual or emotional ties. It also takes note of the State party's claim that the purpose of the rules governing this regime was simply to protect heterosexual unions, not to undermine other unions or cause them any detriment or harm.

7.2 The Committee notes that the author was not recognized as the permanent partner of Mr. Y for pension purposes because court rulings based on Act No. 54 of 1990 found that the right to receive pension benefits was limited to members of a heterosexual de facto marital union. The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation. **(5)** It also recalls that in previous communications the Committee found that differences in benefit entitlements between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry or not, with all the ensuing consequences. **(6)** The Committee also notes that, while it was not open to the author to enter into marriage with his same-sex permanent partner, the Act does not make a distinction between married and unmarried couples but between homosexual and heterosexual couples. The Committee finds that the State party has put forward no argument that might demonstrate that such a distinction between same-sex partners, who are not entitled to pension benefits, and unmarried heterosexual partners, who are so entitled, is reasonable and objective. Nor has the State party adduced any evidence of the existence of factors that might justify making such a distinction. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author's right to his life partner's pension on the basis of his sexual orientation.

7.3 In the light of this conclusion, the Committee is of the view that it is not necessary to consider the claims made under articles 2, paragraph 1, and 17.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, considers that the facts before it disclose a violation by Colombia of article 26 of the Covenant.

9. In accordance with the provisions of article 2, paragraph 3 (a), of the Covenant, the Committee finds that the author, as the victim of a violation of article 26, is entitled to an effective remedy, including reconsideration of his request for a pension without discrimination on grounds of sex or sexual orientation. The State party has an obligation to take steps to prevent similar violations of the Covenant in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the

measures taken to give effect to these Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Sir Nigel Rodley and Mr. Ivan Shearer.

An individual opinion co-signed by Committee members Mr. Abdelfattah Amor and Mr. Ahmed Tawfik Khalil, is appended to the present document.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Rafael Rivas Posada did not participate in the adoption of the present decision.

Annex

Separate opinion by Mr. Abdelfattah Amor and Mr. Ahmed Tawfik Khalil (dissenting)

The author, X, lost his partner, who was of the same sex as him, after a 22-year relationship and having lived together for seven years. He considers that, like the surviving partners of heterosexual married or de facto couples, he is entitled to a survivor's pension, but the law of the State party does not allow this.

The Committee has upheld the author's claim, finding that he has suffered discrimination within the meaning of article 26 of the Covenant on grounds of sex or sexual orientation, inasmuch as the State party has failed to explain how "a distinction between same-sex partners and unmarried heterosexual

partners is reasonable and objective" and has not "adduced any evidence of the existence of factors that might justify making such a distinction".

On the basis of the Committee's conclusion, there is apparently no distinction or difference between same-sex couples and unmarried mixed-sex couples in respect of survivor's pensions, and for the State party to make such a distinction, unless it can be explained and substantiated, constitutes discrimination on grounds of sex or sexual orientation and amounts to a violation of article 26. Not surprisingly, then, the Committee calls on the State party to reconsider the author's request for a pension "without discrimination on grounds of sex or sexual orientation". The State party is further required, in the standard wording, "to take steps to prevent similar violations of the Covenant in the future".

The Committee's decision in fact repeats the conclusion reached in 2003 in *Young v. Australia* (communication No. 941/2000), in what is clearly a perspective of establishment and consolidation of consistent case law in this area, binding on all States parties to the Covenant.

We cannot subscribe either to this approach or to the Committee's conclusion, for several legal reasons.

In the first place article 26 does not explicitly cover discrimination on grounds of sexual orientation. Such discrimination might - conceivably - be covered, but only by the phrase "other status" at the end of article 26. Hence matters involving sexual orientation can be addressed under the Covenant only on an interpretative basis. Clearly any interpretation within reasonable limits, and to the extent that it does not distort the text or attribute to the text an intent other than that of its authors, can be derived from the text itself. There is reason to fear, as will be seen below, that the Committee has gone beyond mere interpretation.

Secondly, and still by way of introductory remarks, no interpretation, even one grounded in legal experience at the national level, can ignore current enforceable international law, which does not recognize any human right to sexual orientation. That is to say, the scope of the Committee's pioneering and standard-setting role should be circumscribed by legal reality.

The main point is that, whatever interpretation is given to article 26, it must relate to non-discrimination and not to the creation of new rights which are by no means clearly implied by the Covenant, not to say precluded given the context in which the instrument was conceived.

The Committee has always taken a very rigorous line in its efforts to interpret the concept of non-discrimination. Thus it finds that "not every differentiation based on the grounds listed in article 26 of the Covenant

amounts to discrimination, as long as it is based on reasonable and objective grounds" (*Jongenburger-Veerman v. Netherlands*, communication No. 1238/2004). In *O'Neill and Quinn v. Ireland* (communication No. 1314/2004) the Committee recalled its settled case law (see communications Nos. 218/1986 *Vos v. Netherlands*; 425/1990 *Doesburg Lannooij Neefs v. Netherlands*; 651/1995 *Snijders v. Netherlands*; and 1164/2003 *Abad Castell-Ruiz et al. v. Spain*), "that not every distinction constitutes discrimination, in violation of article 26, but that distinctions must be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate under the Covenant".

It is not always easy to assess whether the grounds for distinction or differentiation are reasonable and objective or whether the aim is legitimate under the Covenant, and the difficulties involved are naturally of varying magnitude. This is an area where interpretation is dogged by the risk of subjectivity, particularly when - consciously or not - it is locked into a teleological approach, for the issues that arise may then be only marginal to the Covenant or even, in some cases, lie outside it, which may mean that legal discourse gives way to other types of discourse that legitimately belong in non-legal domains or at best on the boundaries of the legal domain. Thus the establishing of similarities, analogies or equivalences between the situation of heterosexual married or de facto couples and homosexual couples may well entail not only observation of facts but also interpretation, and can therefore be of no help in construing the law in a reasonable and objective manner.

Provisions of the Covenant cannot be interpreted in isolation from one another, especially when the link between them is one that cannot reasonably be ignored, let alone denied. Thus the question of "discrimination on grounds of sex or sexual orientation" cannot be raised under article 26 in the context of positive benefits without taking account of article 23 of the Covenant, which stipulates that "the family is the natural and fundamental group unit of society" and that "the right of men and women of marriageable age to marry and found a family shall be recognized". That is to say, a couple of the same sex does not constitute a family within the meaning of the Covenant and cannot claim benefits that are based on a conception of the family as comprising individuals of different sexes.

What additional explanations must the State provide? What other evidence must it submit in order to demonstrate that the distinction drawn between a same-sex couple and a mixed-sex couple is reasonable and objective? The line of argument adopted by the Committee is in fact highly contentious. It starts from the premise that all couples, regardless of sex, are the same and are entitled to the same protection in respect of positive benefits. The consequence of this is that it falls to the State, and not to the author, to explain, justify and present evidence, as if this was some established and

undisputed rule, which is far from being the case. We take the view that in this area, where positive benefits are concerned, situations that are widespread can be presumed to be lawful - absent arbitrary decisions or manifest errors of assessment - and situations that depart from the norm must be shown to be lawful by those who so claim.

Similarly, and still in the context of interpreting Covenant provisions in the light of other Covenant provisions, we would point out that article 3, on equality between men and women, must be interpreted in the light of article 26, but cannot be applied to equality between heterosexual couples and homosexual couples.

On the other hand, there is no doubt that article 17, which prohibits interference with privacy, is violated by discrimination on grounds of sexual orientation. The Committee, both in its final comments on States parties' reports and in its Views on individual communications, has rightly and repeatedly found that protection against arbitrary or unlawful interference with privacy precludes prosecution and punishment for homosexual relations between consenting adults. Article 26, in conjunction with article 17, is fully applicable here because the aim in this case is precisely to combat discrimination, not to create new rights; but the same article cannot normally be applied in matters relating to benefits such as a survivor's pension for someone who has lost their same-sex partner. The situation of a homosexual couple in respect of survivor's pension, unless the problem is viewed from a cultural standpoint - and cultures are diverse and even, as regards certain social issues, opposed - is neither the same as nor similar to the situation of a heterosexual couple.

In sum, the law's flexibility yields many good things, but it can at times lead to extremes that strip an instrument of its substance and substitute something other, a content different from that intended by the author and different from that reflected in the spirit and letter of the text. The choices made in the process of interpretation are valid only in the context and within the limits of the provision being interpreted. Of course States still have the right and the capacity to establish new rights for the benefit of those under their jurisdiction. It is not for the Committee, in this regard, to substitute itself for States and make choices it is not entitled to make.

(*Signed*): Abdelfattah Amor

(*Signed*): Ahmed Tawfik Khalil

[Done in English, French and Spanish, the French text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

1. The name and surname of the author and his partner have been omitted in accordance with a request for confidentiality from one of the parties.

2. The author seems to be referring to the Committee's decisions in communications Nos. 488/1992, *Toonen v. Australia*, and 941/2000, *Young v. Australia*.

3. Constitutional Court, C-098 of 1996.

4. See communications Nos. 1167/2003, *Rayos v. Philippines*, Views of 27 July 2004, para. 6.8, and 1011/2001, *Madafferi and Madafferi v. Australia*, Views of 26 July 2004, para. 8.6.

5. See communication No. 941/2000, *Young v. Australia*, Views of 6 August 2003, para. 10.4.

6. See communications Nos. 180/1984, *Danning v. Netherlands*, Views of 9 April 1987, para. 14, and 976/2001, *Derksen and Bakker v. Netherlands*, Views of 1 April 2004, para. 9.2.

DECISION 14/1995: 13 MARCH 1995

ON THE LEGAL EQUALITY OF SAME SEX PARTNERSHIPS

IN THE NAME OF THE REPUBLIC OF HUNGARY!

In the matter of the petition seeking an *ex post facto* examination of the unconstitutionality of a legal rule, the Constitutional Court has made the following

DECISION.

1. The Constitutional Court rejects the petition seeking a determination of unconstitutionality and annulment of s. 10(1) of Act IV/1952 on Marriage, Family and Guardianship.

2. The Constitutional Court suspends its proceedings concerning the examination of constitutionality of art. 578/G of Act IV/1959 on the Civil Code, until 1 March 1996.

3. The Constitutional Court declares that it is unconstitutional that those legal regulations, which determine the rights and responsibilities of persons who live together outside marriage in an emotional, sexual and economic community and who publicly uphold their relationship, specify legal consequences only for those domestic partnerships currently defined in the Civil Code.

The Constitutional Court publishes this Decision in the *Hungarian Official Gazette*.

REASONING

SÓLYOM, P., delivering the Opinion of the Court:

I

The petitioner requested the constitutional review of s. 10(1) of Act IV/1952 on Marriage, Family and Guardianship, according to which "men and women of legal age may get married." The petitioner also initiated the review of art. 578/G of Act IV/1959 on the Civil Code which regulates the financial relations of those living in the same household and defines the notion of partners in a domestic partnership as "a woman and a man living together in a common household in an emotional and economic community outside a marriage."

In the petitioner's opinion, the two legal provisions in question constitute a negative discrimination on the basis of sex by making it impossible for persons of the same sex to get married and by not acknowledging their domestic partnership. Accordingly, the provisions in question violate both Art. 66(1) of the Constitution which declares the equality of men and women and Art. 70/A which prohibits negative discrimination on account of any criterion -- including sex.

II

The Constitutional Court points out that both in our culture and law, the institution of marriage is traditionally the union of a man and a woman. This union typically is aimed at giving birth to common children and bringing them up in the family in addition to being the framework for the mutual taking of care and assistance of the partners. The ability to procreate and give birth to children is neither the defining element nor the condition of the notion of marriage, but the idea that marriage requires the partners to be of different sexes is a condition that derives from the original and typical designation of marriage. The institution of marriage is constitutionally protected by the State also with respect to the fact that it promotes the establishment of families with common children. This is the reason why Art. 15 of the Constitution refers to the two subjects of protection together: "The Republic of Hungary protects the institutions of marriage and family."

From the wording of the most important international human rights documents, it can also be derived that the family is conceived of as the union of a man and a woman: the right to get married is defined as the right of men and the right of women, while in relation to other rights, the subjects of rights are "persons" without any such differentiation (art. 16 of the Universal Declaration of Human Rights 1948; art. 23 of the International Covenant on Civil and Political Rights 1966; and art. 12 of the European Convention on Human Rights 1950). The European Court of Human Rights has confirmed this interpretation (see *Rees*, ECtHR, Judgment of 17 October 1986, Series A, No. 106).

In recent decades in the culture which Hungary also shares, homosexuality has been decriminalized, and movements have been started to protest against negative discrimination with respect to homosexuals. In addition, changes can be observed in the traditional family model, especially in terms of the durability of marriages. All these are not reasons for the law to diverge

from the legal concept of marriage which has been preserved in traditions to this day, which is also common in today's laws and which, in addition, is in harmony with the notion of marriage according to public opinion and in everyday language. Today's constitutions -- among them the Hungarian concerning its provisions on marriage and the family -- consider marriage between a man and a woman as a value and protects it (Arts. 15, 67 and 70/J of the Hungarian Constitution).

The State can offer different legal options for traditional and for currently exceptional communities, through which it acknowledges and integrates such communities into different social relations. In doing this, the State does not have to follow the self-interpretation of the communities but it can maintain and support traditional institutions, as well as create new legal forms for acknowledging new phenomena and with this it can, at the same time, extend the boundaries of "normality" in public opinion. In determining the notion of marriage, the same requirements are valid as, for instance, in the case of determining the legal notion of "church:" *cf.* Constitutional Court in *Dec. 4/1993 (II.12) AB* (MK 1993/15 at 705; ABH 1993, 48 at 53; (1993) HCCR 000); and *Dec. 8/1993 (II.27) AB* (MK 1993/29; ABH 1993, 99; (1993) HCCR 000). In creating these legal institutions, the right of the affected person is not that the same institutions be available to everybody; instead, the constitutional requirement is that those affected are handled as equals and as persons of equal human dignity -- that is, their points of view are evaluated with like circumspection, attention, impartiality and fairness (*Dec. 9/1990 (IV.25) AB*: MK 1990/36 at 770-771; ABH 1990, 46 at 48; *Dec. 21/1990 (X.4) AB*: MK 1990/98 at 2082; ABH 1990, 73 at 78; (1990) HCCR 000). Equality between man and woman has a meaning if we acknowledge the natural differences between man and woman, and equality is realized with respect to this.

The Constitutional Court declares that since the institution of marriage has a special and explicit protection in the Constitution and since, according to the generally accepted legal notion,

marriage is the union of a man and a woman, men and women separately constitute homogeneous groups of legal subjects that have to be treated equally in order to prevent negative discrimination as regards marriage. The Constitution only requires equal regulation of the conditions of marriage between persons of different sexes, which excludes the legal possibility of marriage between persons of the same sex. On the basis of the above, the Constitutional Court has arrived at the conclusion that the challenged provision does not discriminate either in terms of sex or in terms of other conditions, and thus does not violate Art. 70/A of the Constitution.

The challenged provision cannot be related to Art. 66(1) of the Constitution, since the provision has no reference to the equality of men and women. The provision in the Family Act denying marriage to persons of the same sex, prohibits men and women equally from marrying persons of their own sex. Hence, the Constitutional Court rejects the petition seeking to establish the unconstitutionality and to annul of the contested provision of the Act on Marriage, Family and Guardianship.

III

An enduring union for life of two persons may constitute such values that it should be legally acknowledged on the basis of the equal personal dignity of the persons affected, irrespective of the sex of those living together. Equal treatment always has to be interpreted with respect to the social relations that are the subjects of legal regulation -- with special regard as to whether the law is taking into account the children born out of this union, the previous or subsequent marriages, or whether the law evaluates the close personal relationship in itself. Especially with respect to financial conditions and benefits that derive from the economic union,

the official incompatibility, and the exemptions and restrictions of criminal law and procedure concerning the „relatives," there is no constitutional reason to justify that the respective regulations should never be applicable to a permanent union of persons of the same sex. On the contrary: a constitutional reason is required for any discrimination according to the sex of those living in such a union.

Several provisions in Hungarian law recognise domestic partnership, and extend to it the legal provisions concerning marriage; but primarily the provisions on the relatives. The sole legal definition of domestic partnership can be found in art. 578/G(1) of the Civil Code. According to this definition, "the partners in a domestic partnership are a man and a woman living together in a common household, in an emotional and economic community, outside a marriage." In fact a domestic partnership typically exists between men and women and this is also what public opinion understands by this notion. But the legal recogniton of a domestic partnership has an incomparably shorter history than the institution of marriage. Judicial practice began to recognise domestic partnerships in the 1950s and such partnerships were incorporated into the important legal regulations, only between 1961 and 1977. The cohabitation of persons of the same sex, which in all respects is very similar to the cohabitation of partners in a domestic partnership -- involving a common household, as well as an emotional, economic and sexual relationship, and taking on all aspects of the relationship against third persons -- gives rise today, albeit to a lesser extent, to the same necessity for legal recognition just as it did in the fifties for those in a domestic partnership. The difference is that in a state under the rule of law, the problem also arises from the point of view of fundamental rights, and the Constitutional Court has the opportunity to fulfill its task of minority protection. The Constitution specially protects marriage

and not domestic partnership. In the latter case, the question of the partners' sex emerges as a question of negative discrimination.

From the point of view of judging possible discrimination -- that is, not treating persons as persons with equal dignity [Art. 70/A of the Constitution] -- it is decisive that the legal regulation of partners in a domestic partnership refers to such partners alone only in the most rare cases; it usually encompasses a certain circle of (close) relatives depending on the subject of the regulation. The Constitutional Court examined the legal provisions currently in force which define rights or responsibilities with respect to the partner in a domestic partnership, and found that usually it was not relevant whether the relationship was between persons of different sexes. When the law regulates domestic partnership together with relatives, the reason of the regulation is an emotional and/or economic relationship, presumed on the basis of formal family law relations, or, in the absence thereof -- like in cases of engaged couples or partners in a domestic partnership -- factually existing. The sex of partners and relatives may be significant when the regulation concerns a common child or -- more rarely -- if it concerns a marriage with another person. However, if these exceptional considerations do not apply, the exclusion from regulations covering both relatives and domestic partnership, living in a common household and in an emotional and economic union, is arbitrary and thus violates human dignity, therefore it is discrimination contrary to Art. 70/A of the Constitution. What is more, the provisions in question can only fullfil their task completely if they expand to cover these kinds of relationships as well. The rules of incompatibility (concerning for instance officials in economic chambers, bodies of the local governments, and courts) are incomplete if they do not apply to persons of the same sex who live together according to the critieria of a domestic partnership. The principles upon which one can refuse to give evidence or neglect to report a crime can be invoked in the case of persons

in an intimate relationship irrespective of their sex. Similarly, crimes against relatives cannot be judged more leniently just because the injured person is a person of the same sex. The benefits (social and social security) that can be given only on the basis of a domestic partnership cannot depend only on the sex of the two people living together.

The legislature has several options to provide all those who live in a relationship comparable to a domestic partnership, with an equal legal position in those legal relations where there is no constitutional reason for discrimination on the grounds of sex among those living in an intimate relationship. In order to achieve this aim, not only could the legislature remove from art. 578/G(1) of the Civil Code the restriction that partners in a domestic partnership must involve only a relationship of a man and a woman, but it could also provide for persons of the same sex the same legal position through a separate legal institution. (An institution of this kind was the one accepted in Denmark in 1989 for homosexuals, called a "registered partnership.") Instead of these general solutions, the legislature could also re-examine all provisions applying to partners in a domestic partnership, and expand them to all persons living in such an intimate relationship wherever the restriction to a heterosexual relationship has no legal ground. The legal notion, currently in force, of partners in a domestic partnership is defined by the Civil Code. The constitutionality of this cannot be determined on its own but it depends on whether the distribution of rights and duties among those who are in the same situation is done in a manner that respects the right to equal human dignity -- that is, realizing the equal treatment of persons and evaluating their points with like circumspection, attention, impartiality and fairness. The legislature can create a situation that is in harmony with the Constitution, while leaving untouched the legal notion of domestic partnership that is currently in force. Thus the Constitutional Court did not decide on the constitutionality and the annulment of the definition in

art. 578/G(1) of the Civil Code, but instead suspended its proceedings until 1 March 1996. If the legislature does not terminate the unconstitutional situation by this deadline, the Constitutional Court, in the framework of the available *ex post facto* review, can create a situation that is in harmony with the Constitution through the constitutional review of the Civil Code's notion of domestic partnership or through expanding the constitutional review to all provisions dealing with domestic partnership. The Constitutional Court applied the similar method in *Dec. 15/1993 (III.12) AB* (MK 1993/29; ABH, 1993, 112).

L e i t s ä t z e

zum Urteil des Ersten Senats vom 17. Juli 2002

- 1 BvF 1/01 -

- 1 BvF 2/01 -

1. Voraussetzung für die ausnahmsweise Zulässigkeit der Berichtigung eines Gesetzesbeschlusses ist dessen offensichtliche Unrichtigkeit. Diese kann sich nicht allein aus dem Normtext, sondern insbesondere auch unter Berücksichtigung des Sinnzusammenhangs und der Materialien des Gesetzes ergeben.

2. Teilt die Bundesregierung oder der Bundestag eine Materie in verschiedene Gesetze auf, um auszuschließen, dass der Bundesrat Regelungen verhindert, die für sich genommen nicht unter dem Vorbehalt seiner Zustimmung stehen, ist dies verfassungsrechtlich nicht zu beanstanden.

3. Die Einführung des Rechtsinstituts der eingetragenen Lebenspartnerschaft für gleichgeschlechtliche Paare verletzt Art. 6 Abs. 1 GG nicht. Der besondere Schutz der Ehe in Art. 6 Abs. 1 GG hindert den Gesetzgeber nicht, für die gleichgeschlechtliche Lebenspartnerschaft Rechte und Pflichten vorzusehen, die denen der Ehe gleich oder nahe kommen. Dem Institut der Ehe drohen keine Einbußen durch ein Institut, das sich an Personen wendet, die miteinander keine Ehe eingehen können.

4. Es verstößt nicht gegen Art. 3 Abs. 1 GG, dass nichtehelichen Lebensgemeinschaften verschiedengeschlechtlicher Personen und verwandtschaftlichen Einstandsgemeinschaften der Zugang zur Rechtsform der eingetragenen Lebenspartnerschaft verwehrt ist.

BUNDESVERFASSUNGSGERICHT
- 1 BVF 1/01
- 1 BVF 2/01 -

Verkündet
am 17. Juli 2002
Achilles
Amtsinspektorin
als Urkundsbeamtin
der Geschäftsstelle

IM NAMEN DES VOLKES

**In den Verfahren
zur verfassungsrechtlichen Prüfung**

des Gesetzes zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften vom 16. Februar 2001 (BGBl I S. 266), geändert durch Artikel 25 Sozialgesetzbuch - Neuntes Buch - (SGB IX) Rehabilitation und Teilhabe behinderter Menschen vom 19. Juni 2001 (BGBl I S. 1046), durch Artikel 10 Nr. 7 Gesetz zur Neugliederung, Vereinfachung und Reform des Mietrechts vom 19. Juni 2001 (BGBl I S. 1149) sowie durch Artikel 11 Gesetz zur Verbesserung des zivilgerichtlichen Schutzes bei Gewalttaten und Nachstellungen sowie zur Erleichterung der Überlassung der Ehewohnung bei Trennung vom 11. Dezember 2001 (BGBl I S. 3513),

I. Antragstellerinnen:
1. Sächsische Staatsregierung, vertreten durch den Ministerpräsidenten, Archivstraße 1, 01097 Dresden,
2. Landesregierung Freistaat Thüringen, vertreten durch den Ministerpräsidenten, Regierungsstraße 73, 99084 Erfurt,

- Bevollmächtigte: 1. Professor Dr. Thomas Würtenberger, Beethovenstraße 9, 79100 Freiburg,
2. Professor Dr. Johann Braun, Bischof-Wolfger-Straße 38, 94032 Passau -

- 1 BVF 1/01 -,

II. Antragstellerin: Bayerische Staatsregierung, vertreten durch den Ministerpräsidenten, Franz-Josef-Strauß-Ring 1, 80539 München,

Bevollmächtigter: - Professor Dr. Peter Badura, Rothenberg Süd 4, 82431 Kochel a. See -

- 1 BVF 2/01 -

hat das Bundesverfassungsgericht - Erster Senat - unter Mitwirkung

des Präsidenten Papier,
der Richterinnen Jaeger,
Haas,
der Richter Hömig,
Steiner,
der Richterin Hohmann-Dennhardt
und der Richter Hoffmann-Riem,
Bryde

auf Grund der mündlichen Verhandlung vom 9. April 2002 durch

U r t e i l

für Recht erkannt:

Das Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften vom 16. Februar 2001 (Bundesgesetzblatt I Seite 266) in der Fassung des Gesetzes vom 11. Dezember 2001 (Bundesgesetzblatt I Seite 3513) ist mit dem Grundgesetz vereinbar.

G r ü n d e :

A.

1 Die Normenkontrollanträge betreffen die Vereinbarkeit des Gesetzes zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften vom 16. Februar 2001 (BGBl I S. 266; im Folgenden: LPartDisBG), das am 1. August 2001 in Kraft getreten ist, mit dem Grundgesetz.

I.

2 Ziel des Gesetzes ist es, die Diskriminierung gleichgeschlechtlicher Paare abzubauen und ihnen die Möglichkeit zu eröffnen, ihrer Partnerschaft einen rechtlichen Rahmen zu geben. Hierzu ist mit der eingetragenen Lebenspartnerschaft ein familienrechtliches Institut für eine auf Dauer angelegte gleichgeschlechtliche Lebensgemeinschaft mit zahlreichen Rechtsfolgen geschaffen worden.

1. Im Jahre 2000 lebten mindestens 47.000 gleichgeschlechtliche Paare in der Bundesrepublik Deutschland zusammen (siehe Eggen, Gleichgeschlechtliche Lebensgemeinschaften, 2. Teil, in: Baden-Württemberg in Wort und Zahl 12/2001, S. 579 ff.). Nach einer von Buba und Vaskovics im Auftrag des Bundesministeriums der Justiz erstellten Studie aus dem Jahre 2000 unterscheiden sich gleichgeschlechtliche Paare in ihren Erwartungen an die Partnerschaft, deren Dauerhaftigkeit, ihre gegenseitige Unterstützungsbereitschaft und an das Einstehen füreinander nicht wesentlich von denen verschiedengeschlechtlicher Paare. Mehr als die Hälfte der in gleichgeschlechtlichen Lebensgemeinschaften lebenden Befragten äußerten den Wunsch, in einer rechtsverbindlichen Partnerschaft zu leben (Buba/Vaskovics, Benachteiligung gleichgeschlechtlich orientierter Personen und Paare, Studie im Auftrag des Bundesministeriums der Justiz, 2000, S. 75 ff., 117 ff.). Gleichgeschlechtlichen Paaren ist die Eingehung einer Ehe versagt. *3*

2. Die ersten parlamentarischen Initiativen zu einer gesetzlichen Regelung homosexueller Partnerschaften in der Bundesrepublik reichen bis in die 11. Legislaturperiode des Deutschen Bundestages zurück (vgl. den Entschließungsantrag der Fraktion DIE GRÜNEN vom 18. Mai 1990, BTDrucks 11/7197). 1994 forderte das Europäische Parlament in einer Entschließung die Mitgliedstaaten der Europäischen Union auf, die ungleiche Behandlung von Personen mit gleichgeschlechtlicher Orientierung in ihren jeweiligen Rechts- und Verwaltungsvorschriften zu vermeiden, und richtete an die Kommission den Appell, Homosexuellen den Zugang zur Ehe oder entsprechenden rechtlichen Regelungen zu eröffnen (vgl. Amtsblatt der Europäischen Gemeinschaften C 61 vom 28. Februar 1994, S. 40 f.; BTDrucks 12/7069, S. 4). Inzwischen existieren in mehreren europäischen Ländern Regelungen über gleichgeschlechtliche Partnerschaften (vgl. die Studie des Max-Planck-Instituts für ausländisches und internationales Privatrecht, hrsg. von Basedow u.a., Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften, 2000). Sie reichen von Partnerschaften in den skandinavischen Ländern, die in ihren Wirkungen der Ehe gleichgestellt sind, bis hin zum Pacte civil de solidarité (PACS) in Frankreich mit seiner Möglichkeit der Registrierung von gleichgeschlechtlichen wie verschiedengeschlechtlichen Lebensgemeinschaften, der im Vergleich zur Ehe weniger Rechtsfolgen entfaltet und leichter wieder aufgelöst werden kann. In den Niederlanden steht gleichgeschlechtlichen Paaren inzwischen die Ehe offen. *4*

Im Juli 2000 brachten die Fraktionen SPD und BÜNDNIS 90/DIE GRÜNEN den Entwurf eines Gesetzes zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften (BTDrucks 14/3751) in das Gesetzgebungsverfahren ein. Die FDP-Fraktion legte ebenfalls einen Gesetzentwurf vor (BTDrucks 14/1259). Nach erster Lesung beider Entwürfe, Überweisung an die Ausschüsse und Durchführung einer Sachverständigenanhörung empfahl der federführende Rechtsausschuss des Bundestages am 8. November 2000 die Ablehnung des Gesetzentwurfs der FDP und die Annahme des Entwurfs der Regierungsfraktionen, allerdings in einer in zwei Gesetze aufgegliederten Fassung: Zum einen als Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften mit den Regelungen zur eingetragenen Lebenspartnerschaft und zu den wesentlichen damit verbundenen Rechtsfolgen (LPartDisBG), zum anderen als Gesetz zur Ergänzung des Lebenspartnerschaftsgesetzes und anderer Gesetze (Lebenspartnerschaftsgesetzergänzungsgesetz - LPartGErgG) mit insbesondere verfahrensrechtlichen Ausführungsregelungen (BTDrucks 14/4545 mit Anlagen). Zugrunde lag dem die Absicht der Regierungsfraktionen, den ursprünglichen Gesetzentwurf in ein zustimmungsfreies und ein zustimmungspflichtiges Gesetz aufzuteilen. Demzufolge sollte in dem Entwurf des LPartDisBG auf die Benennung einer für die Eintragung der Lebenspartnerschaft zuständigen Behörde verzichtet werden (AusschussDrucks 14/508 [Ausschuss für Familie, Senioren, Frauen und Jugend] und 14/944 [Ausschuss für Arbeit und Sozialordnung]). Dies fand in den beratenden Ausschüssen mehrheitliche Zustimmung und auch Ausdruck in dem Bericht des Rechtsausschusses vom 9. November 2000 (BTDrucks 14/4550). In dem der Beschlussempfehlung des Rechtsausschusses beigefügten Text des Entwurfs eines LPartDisBG waren allerdings nicht alle Regelungen dementsprechend geändert worden. In dieser Textfassung wurde das LPartDisBG vom Bundestag angenommen *5*

(Plenarprotokoll 14/131, S. 12629 D) und passierte unverändert den Bundesrat, der den Vermittlungsausschuss nicht anrief und die Zustimmungsbedürftigkeit dieses Gesetzes nicht feststellte (Bundesrat, Plenarprotokoll, 757. Sitzung, S. 551 C, D).

6 Auf den Hinweis des Bundesministeriums der Justiz auf zwei nach seiner Auffassung offenbare Unrichtigkeiten in den Absätzen 3 und 4 von Art. 1 § 3 LPartDisBG willigten die Präsidenten des Bundestages und Bundesrates in eine Berichtigung der als unrichtig beanstandeten Bestimmungen ein. Ausfertigung und Verkündung des Gesetzes vom 16. Februar 2001 (BGBl I S. 266) erfolgten sodann in der berichtigten Fassung. Die gegen das In-Kraft-Treten des Gesetzes gerichteten Anträge auf Erlass einer einstweiligen Anordnung der Staatsregierungen der Freistaaten Bayern und Sachsen blieben vor dem Bundesverfassungsgericht erfolglos (vgl. Urteil vom 18. Juli 2001 - 1 BvQ 23/01 und 1 BvQ 26/01 -, NJW 2001, S. 2457).

7 Inzwischen gibt es in allen Bundesländern Ausführungsregelungen zum LPartDisBG mit Bestimmungen über die Zuständigkeiten in Lebenspartnerschaftsangelegenheiten und entsprechenden Verfahrensregelungen.

8 Das Lebenspartnerschaftsgesetzergänzungsgesetz wurde demgegenüber zwar vom Bundestag angenommen, hat aber bisher keine Zustimmung im Bundesrat gefunden (BTDrucks 14/4875). Der vom Bundestag angerufene Vermittlungsausschuss (BTDrucks 14/4878) hat darüber noch keinen Beschluss gefasst.

9 3. Das mit den Normenkontrollanträgen angegriffene Gesetz regelt die Begründung und Beendigung einer eingetragenen Lebenspartnerschaft für gleichgeschlechtliche Paare. Die Lebenspartnerschaft wird durch Vertragsschluss zweier gleichgeschlechtlicher Personen begründet, wobei die hierzu notwendigen Erklärungen vor der zuständigen Behörde abgegeben werden müssen (Art. 1 § 1 Abs. 1). Weitere Voraussetzung für die Begründung der Lebenspartnerschaft ist eine beiderseitige Erklärung über den Vermögensstand (Art. 1 § 1 Abs. 1 Satz 4). Auf Antrag eines oder beider Lebenspartner endet die Lebenspartnerschaft durch aufhebendes Urteil (Art. 1 § 15).

10 Die Lebenspartner sind einander zu Fürsorge und Unterstützung sowie zur gemeinsamen Lebensgestaltung verpflichtet. Sie tragen füreinander Verantwortung (Art. 1 § 2). Eine Geschlechtsgemeinschaft setzt das Gesetz nicht voraus. Die Rechtsfolgen der Lebenspartnerschaft sind zum Teil den Rechtsfolgen der Ehe nachgebildet, weichen aber auch von ihnen ab. So schulden die Lebenspartner einander Unterhalt. Dies gilt modifiziert auch bei Getrenntlebenden und nach Aufhebung der Partnerschaft (Art. 1 §§ 5, 12 und 16). Die Lebenspartner müssen sich zu ihrem Vermögensstand erklären, wobei sie zwischen der Ausgleichsgemeinschaft und einem Vertrag wählen können, der ihre vermögensrechtlichen Verhältnisse regelt (Art. 1 §§ 6 und 7). Sie können einen gemeinsamen Namen bestimmen (Art. 1 § 3). Dem Lebenspartner oder früheren Lebenspartner eines Elternteils, der mit dem Kind längere Zeit in häuslicher Gemeinschaft gelebt hat, steht ein Umgangsrecht zu (Art. 2 Nr. 12, § 1685 Abs. 2 BGB). Ein Lebenspartner gilt als Familienangehöriger des anderen (Art. 1 § 11). Eingeführt worden ist ein gesetzliches Erbrecht des Lebenspartners, das dem des Ehegatten entspricht (Art. 1 § 10). Auch im Sozialversicherungsrecht treten bei Eingehen der Lebenspartnerschaft Rechtsfolgen ein (Art. 3 §§ 52, 54 und 56). So werden etwa in der gesetzlichen Krankenversicherung Lebenspartner in die Familienversicherung aufgenommen (Art. 3 § 52 Nr. 4). Im Ausländerrecht werden die für eheliche Lebensgemeinschaften geltenden Familiennachzugsvorschriften auf gleichgeschlechtliche Lebenspartnerschaften entsprechend erstreckt (Art. 3 § 11). Das LPartDisBG räumt darüber hinaus dem Lebenspartner eines allein sorgeberechtigten Elternteils mit dessen Einvernehmen die Befugnis zur Mitentscheidung in Angelegenheiten des täglichen Lebens des Kindes, das "kleine Sorgerecht", ein (Art. 1 § 9).

11 Das angegriffene Gesetz und das noch nicht zustande gekommene Ergänzungsgesetz sehen keinen Versorgungsausgleich zwischen den Lebenspartnern für den Fall der Aufhebung ihrer Partnerschaft und keine Regelungen über eine Versorgung im Todesfall vor. Ebenso bleibt eine gemeinsame Adoption Minderjähriger ausgeschlossen. Steuerrechtliche und sozialhilferechtliche Regelungen sind im Ergänzungsgesetz vorgesehen, nicht aber im LPartDisBG enthalten.

II.

Mit ihren Normenkontrollanträgen rügen die Antragstellerinnen die Unvereinbarkeit des Gesetzes insgesamt und einzelner seiner Bestimmungen mit dem Grundgesetz. 12

1. Das Gesetz sei schon formell verfassungswidrig. 13

a) Durch die willkürliche Aufspaltung der ursprünglichen Gesetzesvorlage sei das Zustimmungsrecht des Bundesrates umgangen worden. Die Aufspaltung mache das Gesetz zum Torso und führe zu seiner Unvollziehbarkeit. Materiell-rechtliche Vorschriften, die zusammen gehörten, seien missbräuchlich auseinander gerissen worden. Dies betreffe die in Art. 1 § 5 LPartDisBG begründete Unterhaltsverpflichtung für Lebenspartner, für die wegen der Aufspaltung eine steuerliche Entlastung fehle. Aus der notwendigen Zusammengehörigkeit beider Regelungsbereiche folge nicht nur die Verfassungswidrigkeit dieser Vorschrift, sondern auch deren Zustimmungsbedürftigkeit. Außerdem seien die materiellen von den verfahrensrechtlichen Vorschriften nicht trennbar. Das LPartDisBG bedürfe der Vollziehung durch den Standesbeamten, denn es ziele mit seinen materiell-rechtlichen Regelungen auf eine ganz bestimmte Verfahrensgestaltung. Damit seien die Länder bei der Ausgestaltung des Verfahrensrechts weitgehend determiniert. Andererseits seien sie an eigenen Ausführungsgesetzen wegen Art. 74 Abs. 1 Nr. 2 GG gehindert. Abgesehen davon, dass das Personenstandsgesetz abschließend das Personenstandsrecht regele, enthalte das LPartDisBG keine ausdrückliche Öffnung für Länderregelungen. Außerdem sei im LPartGErgG zum Ausdruck gebracht worden, dass es nach Art. 72 Abs. 2 GG einer bundeseinheitlichen Regelung bedürfe. Bejahe man entgegen der Ansicht der Antragstellerinnen eine Regelungskompetenz der Länder für Ausführungsregelungen, verstoße das Gesetz auch deswegen gegen Art. 84 Abs. 1 GG, weil es auf Grund seiner materiell-rechtlichen Regelungen von den Ländern die Schaffung eines einheitlichen Verfahrensrechts verlange, obwohl dies von ihnen verfassungsrechtlich nicht gefordert werden könne. 14

Die Trennung eines Gesetzes in einen zustimmungsbedürftigen und einen nicht zustimmungsbedürftigen Teil im Laufe des Gesetzgebungsverfahrens führe zum Leerlaufen der Zustimmungsbedürftigkeit von Gesetzen. In Fortentwicklung der Rechtsprechung des Bundesverfassungsgerichts sei ein Bundesgesetz dann zustimmungsbedürftig, wenn es sich zwar auf die Regelungen materiell-rechtlicher Fragen beschränke, diese aber wegen ihrer Determinierungskraft den Ländern keinen Spielraum zur eigenverantwortlichen Gestaltung des Verwaltungsverfahrens mehr ließen. Dies sei bei dem angegriffenen Gesetz der Fall. 15

b) Außerdem enthalte das Gesetz weiterhin Regelungen, die der Zustimmung des Bundesrates bedurft hätten. Dies betreffe die Neuregelung des Art. 17 a EGBGB (ab dem 1. Januar 2002 Art. 17 b EGBGB; geändert durch Art. 10 Gesetz vom 11. Dezember 2001, BGBl I S. 3513), der mit seinem Verweis auf Art. 10 Abs. 2 EGBGB eine Zuständigkeit des Standesbeamten bestimme und deshalb zustimmungsbedürftig sei, weil er dem Standesbeamten eine rechtlich und qualitativ neue Verwaltungstätigkeit zuweise. Die Neuregelungen des Ausländergesetzes zum Nachzug von Lebenspartnern verliehen den Verfahrensvorschriften, auch wenn sie nicht ausdrücklich geändert worden seien, nunmehr eine wesentlich andere Bedeutung und Tragweite und führten zu einer qualitativ anderen Tätigkeit der Ausländerbehörden. Während diese bisher bei der Erteilung von Aufenthaltserlaubnissen Art. 6 GG in ihre Verhältnismäßigkeitsabwägung einzubeziehen hätten, gehe es bei Anträgen von Lebenspartnern allein um den in Art. 2 Abs. 1 in Verbindung mit Art. 1 Abs. 1 GG verbürgten Persönlichkeitsschutz. 16

c) Schließlich hätte das Gesetz nach den Beschlussfassungen in Bundestag und Bundesrat nicht berichtigt werden dürfen. Dass Art. 1 § 3 Abs. 3 und 4 LPartDisBG in der vom Bundestag beschlossenen Fassung noch die Zuständigkeit des Standesbeamten für die Entgegennahme der namensrechtlichen Erklärungen vorgesehen habe, sei kein Redaktionsversehen gewesen. Aus dem Bericht des Rechtsausschusses ergebe sich, dass im Gesetz lediglich die Behörde nicht benannt werden solle, die für die Eintragung der Lebenspartnerschaft zuständig sei. Art. 1 § 3 Abs. 3 und 4 LPartDisBG betreffe jedoch 17

weder die Eintragung einer Lebenspartnerschaft noch die Bestimmung eines Namens, sondern die Abwicklung beendeter Lebenspartnerschaften. Hierfür sei es sachgerecht, die Erklärungen vor dem Standesbeamten abzugeben, weil nach Beendigung der Lebenspartnerschaft wieder das Personenstandsgesetz des Bundes zur Anwendung gelange. Die Vorschrift sei Gegenstand der Debatte gewesen und in den Willen des Gesetzgebers aufgenommen worden. Die Berichtigung der Vorschrift sei deshalb verfassungswidrig und nichtig. Das Berichtigungsverfahren verstoße gegen das Demokratieprinzip. Die verkündete Gesetzesfassung entspreche nicht der beschlossenen Fassung. Dies habe zur Folge, dass wegen Unbeachtlichkeit der Berichtigung die nicht verkündete Rechtsvorschrift Gegenstand des Normenkontrollverfahrens sei, die mit ihrer Zuweisung einer Zuständigkeit an den Standesbeamten das Gesetz zustimmungsbedürftig mache.

2. Das Gesetz sei auch materiell verfassungswidrig. 18

a) Insbesondere stehe es mit dem nach Art. 6 Abs. 1 GG gebotenen Schutz von Ehe und Familie nicht in Einklang. Es wahre nicht das in dieser Grundrechtsnorm enthaltene Abstandsgebot, das sich insbesondere aus der Institutsgarantie des Art. 6 Abs. 1 GG und aus dem Schutz von Ehe und Familie als wertentscheidender Grundsatznorm herleite. Schon die Bezeichnung des Gesetzes lasse erkennen, dass mit ihm eine Gleichstellung der Lebenspartnerschaft mit der Ehe erreicht werden solle. Das LPartDisBG führe ein weitgehend mit Ehewirkungen ausgestattetes familienrechtliches Institut für gleichgeschlechtliche Paare ein und verletze damit Art. 6 Abs. 1 GG, der den Gesetzgeber daran hindere, die personenrechtlichen Beziehungen in Ehe und Familie wesentlich umzugestalten, und der verbiete, das Familienrecht gleichermaßen auf die Ehe und eine gleichgeschlechtliche Lebenspartnerschaft zu gründen. 19

Die Ehe werde als vitales Element der staatlichen Ordnung zur Gewährleistung der Bedingungen für die Pflege und Erziehung von Kindern im Interesse von Eltern und Kindern, aber auch der staatlichen Gemeinschaft besonders geschützt. Sie werde durch Nivellierung ihres besonderen Schutzes beraubt, wenn für andere Lebensgemeinschaften Parallelinstitute geschaffen würden, die der Ehe gleichkämen. Art. 6 Abs. 1 GG bestimme, dass die personen- und familienrechtlichen Beziehungen der Geschlechter nach dem Maß der Ehe geordnet werden sollten, soweit es um eine dauerhafte Lebensgemeinschaft gehe. Der Verfassungsauftrag gebiete, die Einheit und Selbstverantwortung der Ehe zu respektieren und zu fördern. Dies habe direktive Wirkungen für den gesamten Bereich des öffentlichen und privaten Rechts. Dabei verbiete es Art. 6 Abs. 1 GG nicht nur, die Ehe auch gleichgeschlechtlichen Lebensgemeinschaften zu öffnen, sondern auch, der Ehe ein Institut an die Seite zu stellen, welches ohne sachliche Notwendigkeit Strukturelemente der Ehe aufnehme, da dies eine Umgehung des Verbots darstellen würde. Das besondere Schutzgebot des Art. 6 Abs. 1 GG fordere einen klaren Abstand zwischen der Rechtsform der Ehe und der einer Lebenspartnerschaft. Die Ehe genieße einen Exklusivitätsschutz. Anderen Partnerschaften gewähre das Grundgesetz nur allgemeinen, nicht aber besonderen institutionellen Schutz. Diese Unterscheidung begründe ein Differenzierungsgebot und ein Abbildungsverbot für die rechtliche Ausgestaltung anderer Partnerschaften. Sie dürften nicht nach dem Vorbild der Ehe ausgestaltet werden, kein getreues Abbild der Ehe herstellen oder Regelungen übernehmen, die den Kern des Eherechts prägten. Dieses Gebot sei durch die weitgehende Annäherung der eingetragenen Lebenspartnerschaft an die Ehe verletzt. Scheinbare Abweichungen vom Eherecht, die das Gesetz enthalte, erwiesen sich bei näherem Zusehen als ehegleich. Einige wirkliche Unterschiede zur Ehe, die das Gesetz aufweise, ließen hingegen kein eigenständiges Konzept erkennen. Die Absicht des Gesetzgebers, mit dem LPartGErgG die Ehe zu kopieren, werde noch deutlicher durch die im LPartDisBG vorgesehenen Regelungen. Dies betreffe insbesondere die steuerrechtlichen Regelungen, die in ihrer Wirkung einem begrenzten Ehegattensplitting gleichkämen. 20

b) Art. 6 Abs. 1 GG sei auch dadurch verletzt, dass die Lebenspartnerschaft mangels entsprechender Regelung im LPartDisBG kein Ehehindernis sei. Damit lasse das Gesetz eine eingetragene Lebenspartnerschaft neben der Ehe zu, obwohl die Pflichtenbindungen in der eingetragenen Partnerschaft mit denen der Ehe unvereinbar seien. Hierin liege eine gravierende Beeinträchtigung der Ehe. 21

c) Darüber hinaus greife das Gesetz mit der Einführung des "kleinen Sorgerechts" durch Art. 1 § 9 in das Elternrecht des nicht sorgeberechtigten Elternteils ein. Es verstoße gegen Art. 14 Abs. 1 GG, weil es ohne hinreichend gewichtigen Grund die Testierfreiheit der Lebenspartner durch einen Pflichtteil des überlebenden Lebenspartners einschränke, was allein mit der wirtschaftlichen Sicherung des überlebenden Partners nicht gerechtfertigt werden könne. Außerdem verletze das Gesetz Art. 3 Abs. 1 GG. Obwohl gute Gründe dafür sprächen, auch anderen auf Dauer und gegenseitige Fürsorge angelegten Lebensgemeinschaften einen vergleichbaren rechtlichen Rahmen zur Verfügung zu stellen, fänden diese weiteren schutzwürdigen Partnerschaften im Gesetz keine rechtliche Berücksichtigung. Schließlich enthalte das Gesetz keine steuerrechtlichen Regelungen, obwohl die im Gesetz begründete Unterhaltspflicht in untrennbarem Zusammenhang mit ihrer steuerrechtlichen Berücksichtigung stehe. 22

III.

Zu den Verfahren haben der Deutsche Bundestag, der Bundesrat, die Bundesregierung, die Länderregierungen, die Wissenschaftliche Vereinigung für Familienrecht e.V., der Lesben- und Schwulenverband in Deutschland, der Deutsche Familienverband sowie die Ökumenische Arbeitsgruppe Homosexuelle und Kirche e.V. Gelegenheit zur Stellungnahme erhalten. Hiervon haben der Deutsche Bundestag, die Bundesregierung, der Senat der Freien und Hansestadt Hamburg, die Landesregierung Schleswig-Holstein, der Lesben- und Schwulenverband sowie die Ökumenische Arbeitsgruppe Gebrauch gemacht und ihre Stellungnahme mit Ausnahme des Senats der Freien und Hansestadt Hamburg sowie der Ökumenischen Arbeitsgruppe in der mündlichen Verhandlung vertiefend ergänzt. 23

1. Die Bundesregierung hält das LPartDisBG mit dem Grundgesetz für vereinbar. Um der noch immer bestehenden gesellschaftlichen und politischen Diskriminierung von gleichgeschlechtlichen Paaren entgegenzutreten, schaffe das Gesetz Rechtsstrukturen, die sich aus den geschlechtsunabhängigen Bedürfnissen intensiv gelebter partnerschaftlicher Zweier-Beziehungen und der Notwendigkeit des Schutzes des schwächeren Partners ergäben. Es kopiere damit nicht die Ehe, sondern ziehe eine Konsequenz aus der vorgefundenen Lebenswirklichkeit. Parallelen zum Eherecht endeten dort, wo eheliche Verhältnisse in gleichgeschlechtlichen Beziehungen keine Entsprechung fänden, insbesondere im Hinblick auf gemeinsame Kinder der Eheleute. Mit der eingetragenen Lebenspartnerschaft werde kein Verführungsdruck ausgeübt. Nach dem gesicherten Stand sexualmedizinischer Wissenschaft könne man zur Homosexualität weder erzogen noch verführt werden, sie erwachse vielmehr aus einer starken biologischen Prädisposition. 24

a) Das LPartDisBG determiniere den Verwaltungsvollzug nicht über das verfassungsrechtlich zulässige Maß hinaus, wie dies die Vielgestaltigkeit der zwischenzeitlich ergangenen Ausführungsregelungen der Länder belege. Der Gesetzentwurf habe geteilt werden dürfen. Solange die Rechtsprechung des Bundesverfassungsgerichts Bestand habe, nach der bei Zustimmungsbedürftigkeit nur einer Norm das gesamte Gesetz zustimmungsbedürftig sei, sei der Gesetzgeber dazu angehalten, Gesetzesvorhaben aufzuteilen, um die verfassungsrechtlich vorgegebenen Kompetenzgrenzen zwischen Bundestag und Bundesrat nachzuvollziehen. Andernfalls würde sich das Zustimmungsrecht des Bundesrates faktisch auf alle Gesetzesvorhaben erstrecken. Die Aufteilung sei weder missbräuchlich noch willkürlich erfolgt. Erst als ein breiter Konsens für das gesamte Reformvorhaben nicht gelungen sei, habe man die Aufteilung vorgenommen. Der Gesetzgeber sei geradezu verpflichtet, auf entsprechende politische Entwicklungen während des Gesetzgebungsverfahrens einzugehen. Es bestehe keine Verpflichtung, Unterhaltsansprüche und die steuerliche Entlastung des Unterhaltsverpflichteten in ein und demselben Gesetz zu regeln. 25

Auch einzelne Bestimmungen des Gesetzes begründeten nicht seine Zustimmungsbedürftigkeit. So regele Art. 3 § 16 Nr. 10 LPartDisBG lediglich die Zuständigkeit deutscher Gerichte. Art. 3 § 25 LPartDisBG schaffe keine Zuständigkeit des Standesbeamten, sondern verweise im Sinne einer klassischen Entsprechung auf die zuständige Behörde. Art. 3 § 6 LPartDisBG erstrecke lediglich eine bestehende 26

Zuständigkeit der Standesämter auf die Fälle der Lebenspartnerschaftsnamen und führe deshalb zu einer bloßen quantitativen Veränderung bereits bestehender Zuständigkeiten. Die ausländerrechtlichen Regelungen des Gesetzes bürdeten den Ländern ebenfalls keine neuen, qualitativ vom bisherigen Bestand abweichenden Aufgaben auf. Abwägungen nach Art. 2 Abs. 1 und Art. 1 Abs. 1 GG seien auch bislang schon im Ausländerrecht erforderlich gewesen.

27 Art. 1 § 3 Abs. 3 und 4 LPartDisBG sei dem Berichtigungsverfahren zugänglich gewesen. Durch die fehlerhafte Umsetzung des Beschlusses des Rechtsausschusses des Bundestages sei diese Vorschrift mit der Nennung des Standesbeamten verabschiedet worden, obwohl die Abgeordneten davon ausgegangen seien, die zuständige Behörde werde erst im Ergänzungsgesetz bestimmt. Im Übrigen seien Fehler im Gesetzgebungsverfahren allenfalls bei evidenten Mängeln geeignet, die Nichtigkeit des Gesetzes herbeizuführen. Solche seien jedoch nicht gegeben.

28 Das Gesetz sei auch vollziehbar. Die Länder besäßen die erforderliche Kompetenz zur Regelung im Personenstandswesen und seien faktisch in der Lage, angemessene Verfahrensnormen zu schaffen, was die inzwischen vorliegenden Länderregelungen zeigten. Das LPartDisBG schaffe einen neuen, zuvor unbekannten Bereich des Personenstandswesens, für den der Bund noch keinen Gebrauch von seiner konkurrierenden Gesetzgebungskompetenz aus Art. 74 Abs. 1 Nr. 2 GG gemacht habe. Art. 72 Abs. 2 GG enthalte keine Verpflichtung zum Erlass von Bundesrecht, sondern setze im Gegenteil eine Grenze hierfür.

29 b) Das Gesetz sei auch materiell verfassungsgemäß. Es stehe in Einklang mit Art. 2 Abs. 1 und Art. 1 Abs. 1 GG und sei an der Stärkung gegenseitiger Verantwortung und verlässlicher Lebensführung für gleichgeschlechtliche Paare ausgerichtet. Ähnlichkeiten mit eherechtlichen Regelungen ergäben sich aus der Natur der Sache einer auf Lebenszeit angelegten intensiven Zweierbeziehung.

30 Das Gesetz verstoße nicht gegen Art. 6 Abs. 1 GG, der andere Institute zur Stärkung von Verantwortung zulasse und kein Diskriminierungsgebot gegenüber Personen enthalte, die auf Grund ihrer sexuellen Ausrichtung eine Ehe nicht eingehen könnten. Dem Grundanliegen von Art. 6 Abs. 1 GG, menschliche Grundbedürfnisse nach Nähe und Verlässlichkeit rechtlich abzusichern, entspreche es, auch für homosexuelle Partner angemessene Regelungen zu schaffen, die ihnen ermöglichten, ihren Beziehungen eine rechtliche Basis zu geben. Das LPartDisBG achte den sozialen und rechtlichen Wert von Ehe und Familie. Ihre ungebrochene Wertschätzung komme schon im Wunsch betroffener homosexueller Partner nach einem vergleichbaren Rechtsinstitut zum Ausdruck. Soweit sich eherechtliche Regelungen vom Grundanliegen her auf homosexuelle Lebensgemeinschaften übertragen ließen, bilde die Ehe durchaus ein soziales Vorbild. Das Gesamtbild von Ehe und Familie werde dadurch nicht beeinträchtigt.

31 Es könne dahingestellt bleiben, ob Art. 6 Abs. 1 GG ein Differenzierungs- oder Abstandsgebot enthalte. Einzelne Entsprechungen oder Parallelen zur Ehe führten jedenfalls nicht zur Verletzung eines solchen Gebotes. Die Ausgestaltung der Lebenspartnerschaft im Gesetz unterscheide sich maßgeblich von der Ehe. So hindere eine bestehende Lebenspartnerschaft nicht die Eheschließung, die nach richtiger Ansicht zur Auflösung der Lebenspartnerschaft ipso iure führe. Begründungsmängel führten zur Nichtigkeit der Lebenspartnerschaft. Die eingetragene Lebenspartnerschaft setze Erklärungen über den Vermögensstand voraus. Das Gesetz enthalte keine Vorschriften über die Haushaltsführung von Lebenspartnern und verpflichte diese nicht, bei Wahl und Ausübung einer Erwerbstätigkeit aufeinander Rücksicht zu nehmen. Lebenspartnern werde lediglich gestattet, einen gemeinsamen Namen zu bestimmen. Eine gemeinsame Adoption oder Stiefkindadoption stehe Lebenspartnern nicht offen. Unterhaltsrechtlich werde jeder Lebenspartner grundsätzlich auf die eigene Erwerbstätigkeit verwiesen. Diese und weitere Unterschiede belegten, dass die eingetragene Lebenspartnerschaft kein Abbild der Ehe sei.

32 Dass die eingetragene Lebenspartnerschaft Menschen gleichen Geschlechts vorbehalten sei, begründe keinen Verstoß gegen Art. 3 Abs. 3 GG, da nicht an das Geschlecht, sondern an die Partnerwahl angeknüpft wird. Art. 3 Abs. 1 GG werde nicht

verletzt, weil heterosexuellen Lebensgemeinschaften die Ehe offen stehe. Anders geartete Lebensgemeinschaften unterschieden sich hinsichtlich der Lebensgestaltung in tief greifender Weise von eingetragenen Lebenspartnerschaften.

33 Das Gesetz wahre die Steuergerechtigkeit. Die im Gesetz begründeten Unterhaltsfakten seien als besondere Belastungen einkommensteuerrechtlich abzugsfähig. Schließlich stehe auch das den Lebenspartnern eingeräumte Erbrecht mit Art. 14 Abs. 1 GG in Einklang. Das Pflichtteilsrecht finde heute in der sozialen Verpflichtung, den Unterhalt des Betroffenen über den Tod hinaus zu sichern, seine Berechtigung. Der Gesetzgeber sei befugt, nächsten Familienangehörigen eine angemessene Mindestbeteiligung am Nachlass zu sichern.

34 2. a) Nach Auffassung des Deutschen Bundestages sind die Normenkontrollanträge unbegründet.

35 aa) Seine Argumente zur formellen Verfassungsmäßigkeit decken sich im Wesentlichen mit denen der Bundesregierung. Die Aufspaltung des Gesetzes sei nicht willkürlich erfolgt. Das Gesetz sei vollziehbar. Es enthalte keine nach Art. 84 GG zustimmungsbedürftigen Vorschriften.

36 Auch bezüglich der materiellen Verfassungsmäßigkeit im Hinblick auf Art. 3 Abs. 1 und 3 GG sowie Art. 14 Abs. 1 GG stimmen die Argumente mit denen der Bundesregierung überein.

37 bb) Zur Verfassungsmäßigkeit des Gesetzes im Hinblick auf Art. 6 Abs. 1 GG führt der Bundestag aus, für einen Verstoß gegen ein aus dem besonderen Schutzgebot des Art. 6 Abs. 1 GG hergeleitetes Differenzierungs- oder Abstandsgebot finde sich in der Rechtsprechung des Bundesverfassungsgerichts kein Beleg. Für die verfassungsrechtliche Beurteilung des LPartDisBG spiele die Abwehrfunktion von Art. 6 Abs. 1 GG keine Rolle, da das Gesetz die Ehe nicht berühre, die Eheschließungsfreiheit nicht beeinträchtige, das eheliche Zusammenleben nicht beeinflusse und auch keine neuen Ehehindernisse aufstelle. Ebenfalls sei die Institutsgarantie nicht berührt. Die Lehre von den Einrichtungsgarantien sei eine Grundrechtstheorie, die unter dem Grundgesetz, das politische Herrschaft umfassend verrechtliche, keine oder nur noch eine begrenzte Funktion habe. Bei einer Verfassungsnorm als Einrichtungsgarantie gehe es immer um den von ihr erfassten Normbereich, nicht um andere, außerhalb ihres Normprogramms liegende Tatbestände. Sie verhalte sich demnach gegenüber der Etablierung anderer Institute neutral, soweit diese das grundrechtlich geschützte Institut nicht selbst tangierten. Dies gelte auch für Art. 6 Abs. 1 GG, der lediglich die Verpflichtung des Gesetzgebers enthalte, der Ehe eine normative Grundversorgung sicherzustellen, um den Grundrechtsgebrauch zu ermöglichen. Art. 6 Abs. 1 GG sichere die Ehe, nicht aber ihre Exklusivität. Da das LPartDisBG das für die Ehe geltende Recht unberührt lasse, sei das Institut Ehe hierdurch nicht tangiert.

38 Auch in seiner Funktion als wertentscheidende Grundsatznorm werde Art. 6 Abs. 1 GG durch das LPartDisBG nicht betroffen. Die gesetzlichen Regelungen diskriminierten nicht die Ehe. Das Fördergebot sei nicht verletzt. Aus dem besonderen Schutz nach Art. 6 Abs. 1 GG könne nicht geschlossen werden, dass die Ehe grundsätzlich und stets anders als andere Lebensgemeinschaften zu behandeln sei. Er verbiete nur, den spezifisch eherechtlichen Rahmen auf andere Lebensgemeinschaften zu übertragen, nicht dagegen Regelungen anzugleichen, die an tatsächliche Umstände wie das Zusammenleben oder die emotionale Affinität anknüpften, auf den Schutz Dritter im Wirtschaftsleben abstellten oder bislang auf die Ehe begrenzte Belastungen auf Lebenspartnerschaften ausdehnten, wie dies beim LPartDisBG in verfassungsrechtlich nicht zu beanstandender Weise geschehen sei.

39 b) In der mündlichen Verhandlung haben sich die Bundestagsabgeordneten von Renesse (SPD), Geis (CDU/CSU), Beck (BÜNDNIS 90/DIE GRÜNEN) und Braun (FDP) geäußert. Dabei hat der Abgeordnete Geis eine von der Stellungnahme des Bundestages abweichende Position vertreten.

40 3. Die Freie und Hansestadt Hamburg verweist zur Begründung ihrer Auffassung, die

Normenkontrollanträge seien unbegründet, auf die Stellungnahme der Bundesregierung. Eine gewisse Anlehnung des LPartDisBG an Rechtsfiguren der Ehe bedeute keine Gleichstellung der Lebenspartnerschaft mit der Ehe, sondern sei nur rechtstechnisches Mittel zum Zweck. Mit der Annahme eines Abstandsgebots verkehrten die Antragstellerinnen Art. 6 Abs. 1 GG über seinen Schutz hinaus in ein Abwehrrecht gegen abweichende Lebensentwürfe und ließen die Grundrechte der Homosexuellen völlig außer Betracht. Art. 6 Abs. 1 GG enthalte jedoch kein Gebot der Schlechterstellung nichtehelicher Lebensgemeinschaften gegenüber der Ehe. Selbst wenn die Grundrechtsnorm der Ehe als Typus partnerschaftlichen Zusammenlebens eine möglichst weitgehende Exklusivität zubilligen sollte, um das Ausweichen in andere Lebensformen zu erschweren, ergebe sich daraus nichts für die Regelung gleichgeschlechtlicher Partnerschaften. Menschen mit gleichgeschlechtlicher Orientierung könnten mit ihrem gewünschten Partner keine Ehe eingehen.

41 4. Auch die Schleswig-Holsteinische Landesregierung schließt sich der Stellungnahme der Bundesregierung an. Insbesondere sei ein Verstoß gegen Art. 6 Abs. 1 GG nicht zu erkennen. Das essentielle Charakteristikum von Institutsgarantien sei einerseits, an vorgefundene Strukturen anzuknüpfen, andererseits aber auch entwicklungsoffen zu sein, weil die Wirklichkeit Thema ihres Regelungsprogramms sei. Wie sich die Regelung der güterrechtlichen Beziehungen von Lebenspartnern gestalteten, betreffe kaum den Ordnungskern der Institutsgarantie der Ehe, vielmehr seine Konkretisierung im jeweils historischen Kontext. Es liege in der Gestaltungsfreiheit des Gesetzgebers, Regelungsmodelle zu wechseln oder sie nicht mehr allein nur für die Ehe vorzuhalten. Art. 6 Abs. 1 GG sei ein Abbildungsverbot nicht zu entnehmen, das letztlich dazu führen würde, trotz gleicher oder vergleichbarer Interessenlagen normierungsbedüftige Lebenssachverhalte nur deshalb anders und dadurch möglicherweise sachwidrig zu regeln, weil das an sich passende Regelungskonzept schon im Ehe- und Familienrecht verwirklicht worden sei, was die Gefahr sachwidriger Ergebnisse erzeugen könne.

42 5. Der Lesben- und Schwulenverband ist der Auffassung, das Gesetz sei formell und materiell verfassungsgemäß zustande gekommen. Gleichgeschlechtliche Partnerschaften hätten einen verfassungsrechtlichen Anspruch auf rechtliche Absicherung aus Art. 2 Abs. 1 und Art. 3 Abs. 1 GG. Dass es bislang noch keinen institutionellen Schutz für sie gegeben habe, sei verfassungswidrig gewesen. Erst das neue Rechtsinstitut ermögliche es gleichgeschlechtlichen Lebensgemeinschaften, Rechtssicherheit zu erlangen. Es greife nicht in Art. 6 Abs. 1 GG ein.

43 Allerdings werde der Auffassung, eine Lebenspartnerschaft werde bei Eingehen einer Ehe unwirksam, nicht gefolgt. Es sei unbillig, der Eheschließungsfreiheit des einen Lebenspartners den Vorrang einzuräumen vor dem Vertrauen des anderen in eine dauerhafte Bindung. Vielmehr sei in der Begründung der Lebenspartnerschaft ein Grundrechtsverzicht im Hinblick auf die Eheschließungsfreiheit zu sehen. Art. 6 Abs. 1 GG als wertentscheidende Grundsatznorm gebiete seinem Wortlaut nach keine Ungleichbehandlung gleichgeschlechtlicher Lebensgemeinschaften. Soweit die Ehe als Keimzelle des Staates angesehen werde, könne dies ihre zwingende Bevorzugung nicht begründen. Auch kinderlose Ehen genössen den Schutz des Art. 6 Abs. 1 GG. Soweit diese Grundrechtsnorm die Ehe als Einstands- und Verantwortungsgemeinschaft schütze, welche die Gesellschaft entlaste und sich stabilisierend auf die Partner auswirke, treffe dieser Gesichtspunkt gleichermaßen auf gleichgeschlechtliche Lebensgemeinschaften zu. Staatliche Aktivitäten zur Förderung der Familien würden durch das Institut der eingetragenen Lebenspartnerschaft nicht beschränkt. Ein Bekämpfungsauftrag hinsichtlich anderer sozialer Erscheinungen könne Art. 6 Abs. 1 GG nicht entnommen werden. Schwer wiegende Veränderungen seien durch das LPartDisBG nicht zu erwarten, das die eherechtlichen Vorschriften unberührt lasse. Im Übrigen unterscheide sich die rechtliche Ausgestaltung der Lebenspartnerschaft in vielfältiger Weise vom Eherecht. Auch weitere Grundrechtsverletzungen seien nicht erkennbar.

44 6. Die Ökumenische Arbeitsgruppe Homosexuelle und Kirche bezieht sich auf die Ausführungen des Lesben- und Schwulenverbandes. In der Bewertung der homosexuellen Veranlagung sei in den Kirchen ein Wandel unübersehbar. In einigen evangelischen Landeskirchen sei die Segnung gleichgeschlechtlicher Paare als kirchliche Handlung bereits erlaubt. Die offiziellen Stellungnahmen der römisch-katholischen Kirche

seien zwiespältig. Einerseits werde erklärt, homosexuellen Menschen sei mit Achtung zu begegnen, andererseits werde eine Anerkennung der Partnerschaften im staatlichen wie im kirchlichen Bereich abgelehnt. Allerdings hätten Ergebnisse unvoreingenommener humanwissenschaftlicher Forschung zu einer neuen Sicht der Homosexualität in der katholischen Kirche geführt. Konsequenzen hieraus würden bislang jedoch nur bei den katholischen Laienorganisationen gezogen, in denen die Anerkennung gleichgeschlechtlicher Lebensgemeinschaften nicht mehr als Verstoß gegen die christlich abendländische Wertordnung angesehen werde, sondern die aus dieser die Notwendigkeit der Anerkennung solcher Lebensgemeinschaften herleiteten.

B.

45 Die Anträge sind unbegründet. Das Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften (LPartDisBG) ist mit dem Grundgesetz vereinbar.

I.

46 Das LPartDisBG ist verfassungsgemäß zustande gekommen. Es bedurfte nicht der Zustimmung des Bundesrates.

47 1. Das Gesetz enthält keine gemäß Art. 84 Abs. 1 GG zustimmungsbedürftigen Vorschriften.

48 a) Das Zustimmungserfordernis des Art. 84 Abs. 1 GG soll die Grundentscheidung der Verfassung über die Verwaltungszuständigkeit der Länder zugunsten des föderativen Staatsaufbaues absichern und verhindern, dass Verschiebungen im bundesstaatlichen Gefüge im Wege der einfachen Gesetzgebung über Bedenken des Bundesrates hinweg herbeigeführt werden (vgl. BVerfGE 37, 363 <379 ff.>; 55, 274 <319>; 75, 108 <150>). Ausgehend von diesem Zweck des Art. 84 Abs. 1 GG wird ein Gesetz nicht bereits dadurch zustimmungsbedürftig, dass es die Länder in ihrer Ausführungskompetenz berührt, indem es deren Verwaltungshandeln auf einem bestimmten Gebiet auslöst oder beendet. Vielmehr setzt das Erfordernis einer Zustimmung des Bundesrates eine bundesgesetzliche Regelung über die Einrichtung und das Verfahren von Landesbehörden voraus (vgl. BVerfGE 75, 108 <150>). Eine Einrichtungsregelung liegt nicht nur vor, wenn ein Bundesgesetz neue Landesbehörden vorschreibt, sondern auch, wenn es den näheren Aufgabenkreis einer Landesbehörde festlegt. Das Verfahren der Landesbehörden wird dagegen geregelt, wenn das Gesetz verbindlich die Art und Weise sowie die Form der Ausführung eines Bundesgesetzes bestimmt. Das ist auch dann der Fall, wenn materiell-rechtliche Regelungen des Gesetzes nicht lediglich die Verwaltungsbehörden zum Handeln auffordern, sondern zugleich ein bestimmtes verfahrensmäßiges Verwaltungshandeln festlegen (vgl. BVerfGE 55, 274 <321>; 75, 108 <152>).

49 b) Daran gemessen enthalten die von den Antragstellerinnen angeführten Normen des LPartDisBG keine Regelungen des Verwaltungsverfahrens im Sinne von Art. 84 Abs. 1 GG.

50 aa) Art. 1 § 1 Abs. 1 LPartDisBG bestimmt allein die materiell-rechtlichen Voraussetzungen für das Zustandekommen einer eingetragenen Lebenspartnerschaft. Eine bundesgesetzliche Festlegung des Verwaltungshandelns bei der Eintragung von Lebenspartnerschaften erfolgt durch die Vorschrift nicht. Sie verlangt zwar, dass die zur Begründung einer Lebenspartnerschaft erforderlichen Erklärungen gegenüber einer Behörde abgegeben werden müssen, lässt dabei aber offen, welche Behörde für die Entgegennahme der Erklärungen zuständig ist. Auch das Verfahren zur Abgabe der beiderseitigen Erklärungen ist nicht geregelt. Weder wird ein besonderes Anmeldungsverfahren vorgegeben noch bestimmt, wie die Mitwirkung der zuständigen Behörde bei der Begründung einer Lebenspartnerschaft auszugestalten ist. Formvorschriften über die Abgabe von Willenserklärungen Privater, wie sie etwa Art. 1 § 1 Abs. 1 Satz 1 LPartDisBG enthält, sind keine Regelungen des Verwaltungsverfahrens im Sinne des Art. 84 Abs. 1 GG. Die Länder haben ihren Spielraum genutzt und in den von ihnen erlassenen Ausführungsbestimmungen inzwischen unterschiedliche

Zuständigkeiten von Landesbehörden begründet, die ihr Verwaltungshandeln bei der Eintragung von Lebenspartnerschaften nach den jeweiligen landesrechtlichen Vorgaben auszurichten haben.

51 bb) Mit Art. 3 § 25 LPartDisBG wird keine Zuständigkeit einer Landesbehörde begründet. Allerdings bringt der mit dieser Vorschrift dem EGBGB neu eingefügte Art. 17 a (jetzt Art. 17 b EGBGB), der für eingetragene Lebenspartnerschaften die Anwendung des maßgeblichen Rechts bestimmt, durch seinen Absatz 2 Satz 1 die Norm des Art. 10 Abs. 2 EGBGB zur entsprechenden Anwendung. Nach deren Satz 1 können bei oder nach der Eheschließung Ehegatten gegenüber dem Standesbeamten ihren künftig zu führenden Namen wählen. Diese Verweisung bestimmt jedoch nicht zwingend eine Zuständigkeit des Standesbeamten auch für die Entgegennahme der Erklärungen zur Namenswahl von Lebenspartnern. Vor dem Hintergrund, dass das LPartDisBG selbst offen gelassen hat, welche Behörde für die Begründung von eingetragenen Lebenspartnerschaften zuständig sein soll, ist die Anordnung einer lediglich entsprechenden Anwendung von Art. 10 Abs. 2 EGBGB so zu verstehen, dass auf den materiell-rechtlichen Gehalt von Art. 10 Abs. 2 Satz 1 EGBGB Bezug genommen wird, nicht jedoch über diesen Weg eine Zuständigkeitsregelung erfolgt ist.

52 cc) Ebenso weist Art. 3 § 6 LPartDisBG den Standesämtern keine neue Zuständigkeit zu, sondern bezieht deren schon bestehende auf einen weiteren Personenkreis, wenn er in Ergänzung von § 2 Satz 1 Minderheiten-Namensänderungsgesetz die Änderung des Geburtsnamens einer Person unter den Voraussetzungen von § 1 dieses Gesetzes - also durch Erklärung gegenüber dem Standesbeamten - nunmehr nicht nur bei entsprechender Erklärung des Ehegatten auf den Ehenamen erstreckt, sondern auch auf den Partnerschaftsnamen, sofern der Lebenspartner sich durch Erklärung gegenüber dem Standesbeamten der Namensänderung anschließt. Eine Änderung der inhaltlichen Aufgabe des Standesbeamten ist damit nicht verbunden (vgl. BVerfGE 75, 108 <151>).

53 dd) Dass die Ausländerbehörden nach Art. 3 § 11 LPartDisBG, der die §§ 27 a, 29 Abs. 4 und 31 Abs. 1 AuslG betrifft, jetzt auch ausländischen Lebenspartnern eines Ausländers für die Herstellung und Wahrung der lebenspartnerschaftlichen Gemeinschaft eine Aufenthaltserlaubnis, Aufenthaltsbewilligung oder Aufenthaltsbefugnis erteilen können, erweitert lediglich die tatbestandlichen Voraussetzungen, unter denen ein Aufenthaltsstatus begründet werden kann. Die Aufgabe der Ausländerbehörden erfährt hierdurch eine quantitative Mehrung, nicht aber einen anderen Inhalt. Die Zustimmungsbedürftigkeit lässt sich schon gar nicht darauf stützen, dass die Ausländerbehörden ihre Ermessenserwägungen nun bei Lebenspartnerschaften nicht wie bei Ehen an Art. 6 Abs. 1 GG, sondern an Art. 2 Abs. 1 in Verbindung mit Art. 1 Abs. 1 GG zu orientieren hätten. Bei der Ausübung des ihnen eingeräumten Ermessens haben Behörden stets die Grundrechte der Betroffenen zu achten, gleich auf welches Grundrecht diese sich berufen können.

54 ee) Schließlich bewirkt auch Art. 3 § 16 Nr. 10 LPartDisBG nicht die Zustimmungsbedürftigkeit des Gesetzes nach Art. 84 Abs. 1 GG. Durch die Neuregelung des § 661 Abs. 3 Nr. 1 Buchstabe b ZPO wird die internationale Zuständigkeit deutscher Gerichte gemäß § 606 a ZPO auch für den Fall bestimmt, dass die Lebenspartnerschaft vor einem deutschen Standesbeamten begründet worden ist. Diese Vorschrift weist dem Standesbeamten keine Aufgabe zu, sondern bindet ihrem Wortlaut nach die Zuständigkeit deutscher Gerichte in Lebenspartnerschaftssachen an die Voraussetzung, dass ein deutscher Standesbeamter im Rahmen der Begründung der Lebenspartnerschaft mitgewirkt hat. Sie regelt damit das Gerichtsverfahren, für das Art. 84 Abs. 1 GG nicht einschlägig ist (vgl. BVerfGE 14, 197 <219>). Eine denkbare sachlich nicht gerechtfertigte Ungleichbehandlung von Lebenspartnern, deren Partnerschaft wegen der unterschiedlichen Zuständigkeitsbestimmungen der Länder nicht vor einem Standesbeamten, sondern einer anderen zuständigen Behörde begründet worden ist, ließe sich durch eine verfassungskonforme Auslegung von § 661 Abs. 3 Nr. 1 Buchstabe b ZPO vermeiden.

55 2. Eine Zustimmungspflichtigkeit des LPartDisBG ergibt sich auch nicht daraus, dass in Art. 1 § 3 Abs. 3 und 4 vor der Ausfertigung und Verkündung des Gesetzes Zuständigkeiten des Standesbeamten benannt waren. Diese Fassung des Gesetzes ist in

einer verfassungsrechtlich nicht zu beanstandenden Weise berichtigt worden.

56 a) Auch wenn das Grundgesetz keine Vorschriften über die Berichtigung von Gesetzesbeschlüssen enthält, rechtfertigen es die Erfordernisse einer funktionsfähigen Gesetzgebung, in Anknüpfung an die überkommene Staatspraxis im Gesetzesbeschluss enthaltene Druckfehler und andere offenbare Unrichtigkeiten ohne nochmalige Einschaltung der gesetzgebenden Körperschaften berichtigen zu können, wie dies in § 61 der Gemeinsamen Geschäftsordnung der Bundesministerien (GGO) sowie in § 122 Abs. 3 der Geschäftsordnung des Bundestages im Einzelnen geregelt ist (vgl. BVerfGE 48, 1 <18>).

57 Allerdings ist die Berichtigung von Gesetzesbeschlüssen wegen des den gesetzgebenden Körperschaften zukommenden Anspruchs auf Achtung und Wahrung der allein ihnen zustehenden Kompetenz, den Inhalt von Gesetzen zu bestimmen, außerhalb des Beschlussverfahrens der Art. 76 ff. GG nur in sehr engen Grenzen zulässig. Maßstab für eine solche Grenzziehung im Einzelnen und für die ausnahmsweise Zulässigkeit der Berichtigung eines Gesetzesbeschlusses ist dessen offensichtliche Unrichtigkeit. Dabei kann sich eine offenbare Unrichtigkeit nicht allein aus dem Normtext, sondern insbesondere auch unter Berücksichtigung des Sinnzusammenhangs und der Materialien des Gesetzes ergeben. Maßgebend ist, dass mit der Berichtigung nicht der rechtlich erhebliche materielle Gehalt der Norm und mit ihm seine Identität angetastet wird (vgl. BVerfGE 48, 1 <18 f.>).

58 b) Unter Zugrundelegung dieser Maßstäbe hat die erfolgte Berichtigung von Art. 1 § 3 Abs. 3 und 4 LPartDisBG die Grenzen des verfassungsrechtlich Zulässigen nicht überschritten.

59 aa) Die offensichtliche Unrichtigkeit der von den gesetzgebenden Körperschaften beschlossenen Fassung von Art. 1 § 3 Abs. 3 und 4 LPartDisBG ergibt sich aus dem klaren Widerspruch zwischen einerseits dem Gesetzestext, der auf Grund der Beschlussempfehlung des Rechtsausschusses vom 8. November 2000 (BTDrucks 14/4545) dem Bundestag bei seiner Beschlussfassung in zweiter und dritter Lesung des Gesetzes ebenso wie dem Verfahren im Bundesrat zugrunde lag, und andererseits der Begründung dieser Norm durch den Rechtsausschuss in seinem Bericht vom 9. November 2000 (BTDrucks 14/4550), die gleichermaßen die Grundlage für die Beratung und Beschlussfassung der gesetzgebenden Organe bildeten.

60 Anfang November 2000 brachten die Fraktionen SPD und BÜNDNIS 90/DIE GRÜNEN in den federführenden Rechtsausschuss sowie in die mitberatenden Ausschüsse für Familie, Senioren, Frauen und Jugend (AusschussDrucks 14/508) und für Arbeit und Sozialordnung (AusschussDrucks 14/944) einen Änderungsantrag zum Gesetzentwurf ein, der ebenso wie für andere Bestimmungen, insbesondere Art. 1 § 1 des Entwurfs, auch für alle Absätze von Art. 1 § 3 vorsah, die Nennung des Standesbeamten als zuständige Behörde für die Entgegennahme von Erklärungen zu streichen und die Wirksamkeit von Erklärungen zum Lebenspartnerschaftsnamen an die Abgabe vor der zuständigen Behörde zu binden. Dieser Antrag war Grundlage der Beschlussfassung der Ausschüsse und fand deren mehrheitliche Zustimmung. Die dem Bundestag zugeleitete Beschlussempfehlung des Rechtsausschusses enthielt dann allerdings hinsichtlich Art. 1 § 3 des Entwurfs lediglich entsprechende Änderungen der Absätze 1 und 2, während für die Absätze 3 und 4 die Annahme der unveränderten bisherigen Fassung empfohlen wurde, die die Benennung des Standesbeamten noch enthalten hatte. In dem dem Bundestag ebenfalls zugeleiteten Bericht des Rechtsausschusses, auf den die Beschlussempfehlung verwies, wurde demgegenüber zu Art. 1 § 3 insgesamt ausgeführt, die hier empfohlenen Änderungen seien Folgeregelungen zur Änderung von Art. 1 § 1 Abs. 1 LPartDisBG. Auf dessen Begründung wurde ausdrücklich Bezug genommen. Sie enthielt die Erklärung, der Entwurf verzichte auf die Benennung einer Behörde, die für die Eintragung der Lebenspartnerschaft zuständig sein soll.

61 Diese Begründung von Art. 1 § 3 LPartDisBG widerspricht der Textfassung seiner Absätze 3 und 4 und zeigt unter Berücksichtigung mit seiner Entstehungsgeschichte die offensichtliche Unrichtigkeit des Textes dieser Absätze. Der zwischen Text und Begründung angelegte Widerspruch hat auch Eingang gefunden in die

Beschlussfassungen von Bundestag und Bundesrat. Beide haben zwar auf Grund der Beschlussempfehlung des Rechtsausschusses des Bundestages ihren Beschlüssen die unveränderte Textfassung von Art. 1 § 3 Abs. 3 und 4 LPartDisBG zugrunde gelegt. Die Beschlussfassung erfolgte aber unter der Prämisse, die zur Änderung von Art. 1 § 1 des Entwurfs geführt hatte; im Gesetzentwurf sollte gänzlich auf die Benennung einer zuständigen Behörde verzichtet werden.

62 bb) Die im Verfahren nach § 61 Abs. 2 GGO berichtigte und so verkündete Textfassung von Art. 1 § 3 Abs. 3 und 4 LPartDisBG entspricht dem im Gesetz zum Ausdruck gebrachten Willen des Gesetzgebers.

63 Wenn Art. 1 § 1 LPartDisBG, der das Institut der eingetragenen Lebenspartnerschaft begründet und die wesentlichen Voraussetzungen für das Zustandekommen dieser personalen Gemeinschaft regelt, in Text und Begründung auf die Bestimmung der Behörde verzichtet, die für die Eintragung der eingetragenen Lebenspartnerschaften zuständig sein soll, und wenn dieser Verzicht nicht nur in den weiteren folgenden Gesetzesvorschriften, sondern auch in den beiden ersten Absätzen von Art. 1 § 3 LPartDisBG seine durchgängige Umsetzung dadurch findet, dass lediglich von der zuständigen Behörde gesprochen wird, kommt hiermit zum Ausdruck, dass es der Gesetzgeber den Ländern hat überlassen wollen, welche Behörde sie als zuständige für Lebenspartnerschaftsangelegenheiten bestimmen. Dem entspricht es, wenn in der berichtigten und verkündeten Fassung von Art. 1 § 3 Abs. 3 und 4 LPartDisBG nunmehr in Übernahme des der Beschlussfassung des Rechtsausschusses zugrunde liegenden Textes gänzlich darauf verzichtet wird, darüber eine Aussage zu treffen, wem gegenüber die namensrechtlichen Erklärungen der Lebenspartner abzugeben sind.

64 cc) Dies wird im Übrigen durch die Stellungnahmen zum Berichtigungsverfahren bestätigt. In ihnen wurde übereinstimmend zum Ausdruck gebracht, dass im Gesetz keine Entscheidung über die Zuständigkeit einer bestimmten Behörde für Lebenspartnerschaftsangelegenheiten habe getroffen werden sollen. Die Anregung zu der Berichtigung von Art. 1 § 3 Abs. 3 und 4 LPartDisBG kam vom Sekretariat des Rechtsausschusses unter Hinweis auf einen entsprechenden Übertragungsfehler bei der Erstellung der Beschlussempfehlung. Daraufhin unterrichtete das Bundesministerium der Justiz sowohl den Präsidenten des Bundestages als auch den Präsidenten des Bundesrates über den Fehler bei der Übertragung der im Rechtsausschuss gefassten Beschlüsse in die Beschlussempfehlung, bewertete dies als offensichtliche Unrichtigkeit und leitete gemäß § 61 Abs. 2 GGO das Berichtigungsverfahren ein. Im Zuge dieses Verfahrens wurden auch die Obleute der Fraktionen im Rechtsausschuss damit befasst. In der mündlichen Verhandlung hat der Abgeordnete Beck (BÜNDNIS 90/DIE GRÜNEN) ohne Widerspruch der anwesenden Abgeordneten von Renesse (SPD), Geis (CDU/CSU) und Braun (FDP) vorgetragen, dass die Obleute aller Fraktionen der Berichtigung zugestimmt hätten. Mit Schreiben vom 7. und 12. Dezember 2000 willigten die Präsidenten des Bundestages sowie des Bundesrates in die Berichtigung ein.

65 3. Die Aufteilung des zunächst von den Regierungsfraktionen eingebrachten Gesetzentwurfs zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften (BTDrucks 14/3751) im Laufe des Gesetzgebungsverfahrens auf Empfehlung des Rechtsausschusses des Bundestages in das hier zu prüfende gleichnamige Gesetz mit seinen materiellen Regelungen zur eingetragenen Lebenspartnerschaft und in einen Gesetzentwurf mit insbesondere verfahrensrechtlichen Ausführungsregelungen (BTDrucks 14/4545 und 14/4550 mit Anlagen) verstößt nicht gegen die Verfassung. Vor allem bewirkt die erfolgte Aufteilung nicht die Zustimmungsbedürftigkeit des LPartDisBG.

66 a) Der Bundestag ist verfassungsrechtlich nicht gehindert, in Ausübung seiner gesetzgeberischen Freiheit ein Gesetzgebungsvorhaben in mehreren Gesetzen zu regeln. Dabei kann er, wie hier geschehen, auch noch im laufenden Gesetzgebungsverfahren die von ihm angestrebten materiell-rechtlichen Bestimmungen in einem Gesetz zusammenfassen, gegen das dem Bundesrat nur ein Einspruchsrecht zusteht, und für die Vorschriften, die das Verwaltungsverfahren der Länder regeln sollen, ein anderes, und zwar ein zustimmungsbedürftiges Gesetz vorsehen, wie das in der Praxis nicht selten geschieht (vgl. BVerfGE 34, 9 <28>; 37, 363 <382>).

Die Möglichkeit des Bundestages, mit der Aufteilung einer Gesetzesmaterie auf zwei oder mehrere Gesetze das Zustimmungsrecht des Bundesrates auf einen Teil der beabsichtigten Regelung zu begrenzen, folgt aus seinem Recht zur Gesetzgebung. Mit einer solchen Aufteilung wird weder das Recht der Länder, an der Gesetzgebung des Bundes mitzuwirken, in unzulässiger Weise eingeschränkt noch kommt es zu einer Verschiebung der verfassungsrechtlich zugewiesenen Gewichte von Bundestag und Bundesrat bei der Gesetzgebung (vgl. BVerfGE 37, 363 <379 f.>; 55, 274 <319>; 75, 108 <150>). 67

aa) Im Bereich der konkurrierenden Gesetzgebung, zu der nach Art. 74 Abs. 1 Nr. 2 GG auch das Personenstandswesen und damit die Einführung der eingetragenen Lebenspartnerschaft als neuer Personenstand gehört, haben die Länder nach Art. 72 Abs. 1 GG die Befugnis zur Gesetzgebung, solange und soweit der Bund von seiner Gesetzgebungszuständigkeit nicht durch Gesetz Gebrauch gemacht hat. Dies sichert den Ländern ihre originäre Kompetenz zur Gesetzgebung in quantitativer und qualitativer Hinsicht überall dort, wo der Bundesgesetzgeber noch keine gesetzliche Regelung getroffen hat. Macht dieser allerdings unter den Voraussetzungen des Art. 72 Abs. 2 GG von seiner Gesetzgebungskompetenz Gebrauch, wirkt der Bundesrat bei der Bundesgesetzgebung nach Art. 50 GG lediglich mit. Dabei ist das Erfordernis einer Zustimmung des Bundesrates zu einem Gesetz nach dem Grundgesetz die Ausnahme (vgl. BVerfGE 37, 363 <381>). Unter anderem besteht es nach Art. 84 Abs. 1 GG dann, wenn das Gesetz ausschließlich oder neben anderen Bestimmungen Regelungen über die Einrichtung von Behörden oder das Verwaltungsverfahren enthält und damit in die Kompetenz der Länder gemäß Art. 83 GG eingreift, Bundesgesetze als eigene Angelegenheiten auszuführen und hierfür die entsprechenden landesgesetzlichen Regelungen zu treffen. Die Zustimmung des Bundesrates zu einem solchen Gesetz soll dafür Sorge tragen, dass den Ländern nicht gegen den mehrheitlichen Willen des Bundesrates durch einfaches Bundesgesetz die Gesetzgebungskompetenz für das Verwaltungsverfahren entzogen wird. Diese Sperrwirkung sichert ihnen Einfluss auf den Inhalt des Bundesgesetzes im Ganzen. Denn das Erfordernis einer Zustimmung des Bundesrates erstreckt sich nach der Rechtsprechung des Bundesverfassungsgerichts auf das ganze Gesetz als gesetzgebungstechnische Einheit, also auch auf an sich nicht zustimmungsbedürftige Normen (vgl. BVerfGE 8, 274 <294>; 37, 363 <381>; 55, 274 <319>). Ob an dieser Rechtsprechung angesichts der Kritik im Schrifttum (vgl. etwa Lücke in: Sachs, Grundgesetz, Kommentar, 2. Aufl. 1999, Art. 77 Rn. 15; Maurer, Staatsrecht I, 2. Aufl. 2001, § 17 Rn. 74 ff.) festzuhalten ist, bedarf im vorliegenden Fall keiner Entscheidung, da der Gesetzgeber diesen Weg nicht gewählt hat. 68

Verzichtet der Bundesgesetzgeber demgegenüber in einem Gesetz auf verwaltungsverfahrensrechtliche Regelungen, entspricht dies dem Modell der verfassungsrechtlichen Zuständigkeitsverteilung zwischen Bund und Ländern nach Art. 83 und Art. 84 GG. Gegen ein solches Gesetz hat der Bundesrat nach Art. 77 Abs. 3 GG lediglich ein Einspruchsrecht; ein Einspruch kann gemäß Art. 77 Abs. 4 GG vom Bundestag zurückgewiesen werden. 69

bb) Nichts anderes gilt für den Fall, dass der Bundesgesetzgeber zwar neben einer materiell-rechtlichen Normsetzung auch Regelungen zu deren Umsetzung im Verwaltungsverfahren der Länder treffen will, dabei aber beide Regelungskomplexe nicht in einem Gesetz zusammenführt, sondern sie in jeweils eigenständige Gesetze aufteilt. Wenn hierdurch vom Zustimmungsrecht des Bundesrates allein das Gesetz erfasst wird, in dem der verfahrensrechtliche Teil enthalten ist, bewirkt dies keine Verschiebung der im Grundgesetz festgelegten Zuständigkeiten zu Lasten der Länder. Denn dem Bundesrat steht ein Zustimmungsrecht zu materiell-rechtlichen bundesgesetzlichen Regelungen - abgesehen von den im Grundgesetz vorgesehenen besonderen Fällen - nur dort zu, wo der Bundesgesetzgeber in den Zuständigkeitsbereich der Länder nach Art. 83 ff. GG eingreift. Ein solcher Eingriff erfolgt aber allein durch das vom materiell-rechtlichen Regelungsgehalt getrennte eigenständige Verfahrensgesetz. 70

Die Aufteilung verhindert, dass dem Bundesrat durch gemeinsame Behandlung materiell-rechtlicher und verfahrensrechtlicher Regelungen in einem Gesetz ein Zustimmungsrecht auch hinsichtlich der materiell-rechtlichen Bestimmungen zuwächst. 71

Sie sichert zugleich, dass der Bundestag die ihm zustimmungsfrei zugewiesenen Materien regeln kann, ohne auf die Zustimmung des Bundesrates angewiesen zu sein. Wählt der Bundestag eine solche Vorgehensweise, richtet er die Gestaltung seiner Gesetzgebung gerade an der verfassungsrechtlichen Kompetenzverteilung zwischen Bund und Ländern aus. Die Länder erleiden, wie der vorliegende Fall zeigt, hierdurch keinen Kompetenzverlust. Sie haben inzwischen in eigener Zuständigkeit die für die Ausführung des LPartDisBG erforderlichen Verfahrensregelungen selbst getroffen.

72 b) Ob der Dispositionsbefugnis des Bundestages hinsichtlich der Aufteilung eines Rechtsstoffes auf mehrere Gesetze im Einzelfall verfassungsrechtliche Grenzen gezogen sind und wann solche gegebenenfalls überschritten wären, kann auch hier dahingestellt bleiben (vgl. BVerfGE 24, 184 <199 f.>; 77, 84 <103>). Die Entscheidung des Bundesgesetzgebers, die nicht zustimmungsbedürftigen Regelungen zum neuen Institut der eingetragenen Lebenspartnerschaft in einem Gesetz zu bündeln und die zustimmungsbedürftigen Bestimmungen davon getrennt zum Inhalt eines anderen Gesetzes zu machen, ist frei von Willkür.

73 aa) Ein dem Bundestag unterstelltes Motiv, die Aufteilung der Gesetzesmaterie auf zwei Gesetze nur vorgenommen zu haben, um dem Bundesrat so die Möglichkeit zu verschließen, durch Zustimmungsverweigerung auch die beabsichtigten materiell-rechtlichen Regelungen zu verhindern, lässt diese Vorgehensweise nicht als willkürlich erscheinen. Unter der bisher angenommenen Voraussetzung, dass ein Gesetz schon dann insgesamt zustimmungsbedürftig wird, wenn es nur eine einzige zustimmungsbedürftige Vorschrift enthält (vgl. BVerfGE 8, 274 <294>; 55, 274 <319>), ist eine solche Aufteilung ein legitimer Weg, einer ausgreifenden Erstreckung der Zustimmungsbedürftigkeit von Gesetzen zu begegnen und dem Parlament die Realisierung seines Gesetzesvorhabens zu ermöglichen. Von einem solchen Motiv des Gesetzgebers auf die Missbräuchlichkeit seiner Vorgehensweise zu schließen, würde letztlich dazu führen, den Bundestag zu verpflichten, Verfahrensregelungen stets selbst und zusammen mit dem materiellen Recht zu treffen. Dies ermöglichte zwar einerseits dem Bundesrat, seinen Einfluss stärker auch auf das materielle Recht auszuüben, entzöge andererseits aber den Ländern schleichend Gesetzgebungskompetenzen dort, wo für sie originäre Zuständigkeiten von Verfassungs wegen bestehen. Eine solche Handhabung, nicht dagegen die Aufteilung der Rechtsmaterie auf zwei Gesetze, könnte eine allmähliche Verschiebung grundgesetzlicher Zuständigkeiten bewirken, die Art. 84 Abs. 1 GG gerade verhindern soll.

74 bb) Die im LPartDisBG enthaltenen materiell-rechtlichen Regelungen stellen entgegen der Auffassung der Antragstellerinnen auch keinen "Gesetzestorso" dar. Sie sind aus sich heraus verständlich und hinreichend bestimmt. Sie gestalten die Rechtslage so, dass die Betroffenen ihr Verhalten daran orientieren können. Es bestand für den Gesetzgeber insbesondere keine Notwendigkeit, das Unterhaltsrecht für Lebenspartner und die steuerrechtliche Berücksichtigung darauf beruhender Unterhaltsleistungen in ein und demselben Gesetz zu regeln. Auch das Unterhaltsrecht der Ehegatten ist vom Gesetzgeber stets getrennt von seiner steuerrechtlichen Behandlung in den Steuergesetzen ausgestaltet worden.

75 Das Gesetz ist schließlich auch vollziehbar. Dies wird durch die verschiedenen Ausführungsregelungen der Länder eindeutig bestätigt.

II.

76 Das LPartDisBG ist auch materiell verfassungsgemäß.

77 1. Es ist mit Art. 6 Abs. 1 GG vereinbar. Die Einführung des neuen Instituts der eingetragenen Lebenspartnerschaft für gleichgeschlechtliche Paare und seine rechtliche Ausgestaltung verstoßen weder gegen die in Art. 6 Abs. 1 GG gewährleistete Eheschließungsfreiheit noch gegen die dort normierte Institutsgarantie. Die eingetragene Lebenspartnerschaft ist auch mit Art. 6 Abs. 1 GG in seiner Eigenschaft als wertentscheidende Grundsatznorm vereinbar.

78 a) Als Grundrecht schützt Art. 6 Abs. 1 GG die Freiheit, eine Ehe mit einem selbst

gewählten Partner zu schließen (vgl. BVerfGE 31, 58 <67>; 76, 1 <42>). Dieses Recht auf ungehinderten Zugang zur Ehe wird durch das LPartDisBG nicht berührt.

79 aa) Jeder ehefähigen Person steht auch nach Einführung der eingetragenen Lebenspartnerschaft durch das LPartDisBG der Weg in die Ehe offen. Allerdings kann die Ehe nur mit einem Partner des jeweils anderen Geschlechts geschlossen werden, da ihr als Wesensmerkmal die Verschiedengeschlechtlichkeit der Partner innewohnt (vgl. BVerfGE 10, 59 <66>) und sich nur hierauf das Recht der Eheschließungsfreiheit bezieht. Gleichgeschlechtlichen Paaren bleibt auch nach dem LPartDisBG die Ehe verschlossen. Ihnen wird für eine dauerhafte Bindung als Rechtsinstitut allein die eingetragene Lebenspartnerschaft eröffnet.

80 Ebenso beeinflusst das Gesetz weder unmittelbar noch mittelbar die Freiheit verschiedengeschlechtlicher Paare, eine Ehe zu begründen. Da ihnen die eingetragene Lebenspartnerschaft verschlossen bleibt, können sie durch dieses Institut nicht vom Eheschluss abgehalten werden.

81 bb) Der Zugang zur Ehe wird durch das LPartDisBG nicht eingeschränkt. Eine schon eingegangene Lebenspartnerschaft steht nach dem Gesetz einer Eheschließung nicht entgegen. Das LPartDisBG statuiert für diesen Fall kein ausdrückliches Ehehindernis. Der Standesbeamte hat bei einer solchen Konstellation aber zu prüfen, ob als Voraussetzung für die Eheschließung der ernsthafte Wille der Partner besteht, eine Ehe einzugehen, und seine Mitwirkung an der Eheschließung zu verweigern, wenn ein solcher Wille fehlt (§ 1310 Abs. 1 Satz 2 i.V.m. § 1314 Abs. 2 Nr. 5 BGB).

82 Allerdings hat der Gesetzgeber offen gelassen, ob ein Eheschluss bei bestehender eingetragener Lebenspartnerschaft rechtliche Folgen für den weiteren Bestand der Lebenspartnerschaft nach sich zieht und gegebenenfalls welche dies wären. Die Beantwortung dieser Fragen ist damit letztlich der Rechtsprechung überlassen.

83 Diese im Gesetz enthaltene Lücke kann nur unter Beachtung des der Ehe nach Art. 6 Abs. 1 GG zukommenden Schutzes verfassungskonform geschlossen werden. Dabei gilt es zu berücksichtigen, dass die Ehe als Form einer engen Zweierbeziehung zwischen Mann und Frau eine personelle Exklusivität auszeichnet. Dieses Wesensmerkmal könnte der Ehe verloren gehen, wenn es einem oder beiden Ehepartnern erlaubt bliebe, die ebenfalls auf Dauer angelegte Lebenspartnerschaft mit einem anderen Partner beizubehalten. Der Schutz der Ehe aus Art. 6 Abs. 1 GG gebietet es, neben der Ehe keine andere rechtsverbindliche Partnerschaft des Ehegatten zuzulassen, wovon der Gesetzgeber selbst in Art. 1 § 1 Abs. 2 LPartDisBG ausgegangen ist.

84 Aus diesem Grunde wird in der rechtswissenschaftlichen Literatur vorgeschlagen, die durch das LPartDisBG nicht unterbundene Möglichkeit, bei bestehender Lebenspartnerschaft eine Ehe zu schließen, mit der Rechtsfolge zu verbinden, dass der Eheschluss die Lebenspartnerschaft ipso iure auflöst, die damit keinen rechtlichen Bestand mehr hat (vgl. Schwab, FamRZ 2001, S. 385 <389>). Dies wäre ein Weg, die vorhandene gesetzliche Lücke in einer Art. 6 Abs. 1 GG gerecht werdenden Weise zu schließen. Diese Lösung beeinträchtigt zwar den anderen Lebenspartner stärker als bei einer Aufhebung nach Art. 1 § 15 LPartDisBG, ist aber angesichts der Gewährleistung des Art. 6 Abs. 1 GG noch hinnehmbar.

85 Dem Gebot, die Ehe als Lebensform zwischen einem Mann und einer Frau zu schützen, könnte jedoch auch dadurch Genüge getan werden, das Eingehen einer Ehe davon abhängig zu machen, dass eine Lebenspartnerschaft nicht oder nicht mehr besteht. Ein solches Ehehindernis würde die Freiheitsgarantie des Art. 6 Abs. 1 GG nicht unzulässig einschränken, weil es seinen sachlichen Grund gerade im Wesen und in der Gestalt der Ehe fände (vgl. BVerfGE 36, 146 <163>). Ebenso wie eine bestehende Ehe das Eingehen einer neuen Ehe verhindert (§ 1306 BGB), um die Zweierbeziehung der Ehe nicht zu gefährden, entspricht es dem Schutz der Ehe, sie nur denjenigen zu eröffnen, die sich nicht schon anderweitig in einer Partnerschaft rechtsverbindlich gebunden haben. Diese Möglichkeit, der Ehe den gebotenen Schutz zukommen zu lassen, böte darüber hinaus denjenigen Vertrauensschutz, die mit der eingetragenen Lebenspartnerschaft eine Lebensform gewählt haben, die ihnen der Gesetzgeber als rechtsverbindliche, auf Dauer

angelegte Verantwortungsgemeinschaft nunmehr zur Verfügung gestellt hat. Für sie würde sichergestellt, dass ihre Partnerschaft nicht schon allein durch den einseitigen Entschluss des anderen Partners, eine Ehe schließen zu wollen, beendet werden könnte. Ein Verbot, die Ehe bei Bestehen der Lebenspartnerschaft einzugehen, wäre zwar grundsätzlich sachlich gerechtfertigt. Es begrenzte jedoch die Eheschließungsfreiheit. Ob das vorliegende Gesetz auch insoweit eine richterliche Lückenfüllung ermöglicht, ist hier nicht zu entscheiden. Berücksichtigt man die tief greifenden Folgen, die eine Auflösung oder Beendigung einer eingetragenen Lebenspartnerschaft für das persönliche Leben sowie die wirtschaftliche Situation der einzelnen Betroffenen nach sich zieht und die je nachdem, welche rechtliche Konstruktion gewählt wird, um ein Nebeneinander zwischen Ehe und Lebenspartnerschaft auszuschließen, sehr unterschiedlich ausfallen können, wäre es nahe liegend, dass der Gesetzgeber selbst festlegt, ob eine bestehende Lebenspartnerschaft das Eingehen einer Ehe verhindert oder eine Eheschließung zur Auflösung einer bestehenden Lebenspartnerschaft führt.

86 b) Dem verfassungsrechtlichen Gebot des Art. 6 Abs. 1 GG, die Ehe als Lebensform anzubieten und zu schützen (Institutsgarantie, vgl. BVerfGE 10, 59 <66 f.>; 31, 58 <69 f.>; 80, 81 <92>), hat der Gesetzgeber mit der Einführung der eingetragenen Lebenspartnerschaft durch das LPartDisBG nicht zuwider gehandelt. Regelungsgegenstand des Gesetzes ist nicht die Ehe.

87 aa) Das Grundgesetz selbst enthält keine Definition der Ehe, sondern setzt sie als besondere Form menschlichen Zusammenlebens voraus. Die Verwirklichung des verfassungsrechtlichen Schutzes bedarf insoweit einer rechtlichen Regelung, die ausgestaltet und abgrenzt, welche Lebensgemeinschaft als Ehe den Schutz der Verfassung genießt. Der Gesetzgeber hat dabei einen erheblichen Gestaltungsspielraum, Form und Inhalt der Ehe zu bestimmen (vgl. BVerfGE 31, 58 <70>; 36, 146 <162>; 81, 1 <6 f.>). Das Grundgesetz gewährleistet das Institut der Ehe nicht abstrakt, sondern in der Ausgestaltung, wie sie den jeweils herrschenden, in der gesetzlichen Regelung maßgebend zum Ausdruck gelangten Anschauungen entspricht (vgl. BVerfGE 31, 58 <82 f.>). Allerdings muss der Gesetzgeber bei der Ausformung der Ehe die wesentlichen Strukturprinzipien beachten, die sich aus der Anknüpfung des Art. 6 Abs. 1 GG an die vorgefundene Lebensform in Verbindung mit dem Freiheitscharakter des verbürgten Grundrechts und anderen Verfassungsnormen ergeben (vgl. BVerfGE 31, 58 <69>). Zum Gehalt der Ehe, wie er sich ungeachtet des gesellschaftlichen Wandels und der damit einhergehenden Änderungen ihrer rechtlichen Gestaltung bewahrt und durch das Grundgesetz seine Prägung bekommen hat, gehört, dass sie die Vereinigung eines Mannes mit einer Frau zu einer auf Dauer angelegten Lebensgemeinschaft ist, begründet auf freiem Entschluss unter Mitwirkung des Staates (vgl. BVerfGE 10, 59 <66>; 29, 166 <176>; 62, 323 <330>), in der Mann und Frau in gleichberechtigter Partnerschaft zueinander stehen (vgl. BVerfGE 37, 217 <249 ff.>; 103, 89 <101>) und über die Ausgestaltung ihres Zusammenlebens frei entscheiden können (vgl. BVerfGE 39, 169 <183>; 48, 327 <338>; 66, 84 <94>).

88 bb) Von diesem Schutz wird das Institut der eingetragenen Lebenspartnerschaft nicht erfasst. Die Gleichgeschlechtlichkeit der Partner unterscheidet es von der Ehe und konstituiert es zugleich. Die eingetragene Lebenspartnerschaft ist keine Ehe im Sinne von Art. 6 Abs. 1 GG. Sie erkennt gleichgeschlechtlichen Paaren Rechte zu. Der Gesetzgeber trägt damit den Art. 2 Abs. 1 und Art. 3 Abs. 1 und 3 GG Rechnung, indem er diesen Personen zu einer besseren Entfaltung ihrer Persönlichkeit verhilft und Diskriminierungen abbaut.

89 cc) Die Ehe als Institut ist in ihren verfassungsrechtlichen Strukturprinzipien und ihrer Ausgestaltung durch den Gesetzgeber vom LPartDisBG selbst nicht betroffen. Ihr rechtliches Fundament hat keine Änderung erfahren. Sämtliche Regelungen, die der Ehe einen rechtlichen Rahmen geben und das Institut mit Rechtsfolgen ausstatten, haben nach wie vor Bestand (vgl. BVerfG, Urteil vom 18. Juli 2001 - 1 BvQ 23/01 und 1 BvQ 26/01 -, NJW 2001, S. 2457 f.). Der Institutsgarantie kann, gerade weil sie sich nur auf die Ehe bezieht, kein Verbot entnommen werden, gleichgeschlechtlichen Partnern die Möglichkeit einer rechtlich ähnlich ausgestalteten Partnerschaft zu eröffnen.

90 c) Art. 6 Abs. 1 GG erschöpft sich jedoch nicht darin, die Ehe in ihrer wesentlichen

Struktur zu gewährleisten, sondern gebietet als verbindliche Wertentscheidung für den gesamten Bereich des Ehe und Familie betreffenden privaten und öffentlichen Rechts einen besonderen Schutz durch die staatliche Ordnung (vgl. BVerfGE 6, 55 <72>; 55, 114 <126>). Um dem Schutzauftrag Genüge zu tun, ist es insbesondere Aufgabe des Staates, einerseits alles zu unterlassen, was die Ehe schädigt oder sonst beeinträchtigt, und sie andererseits durch geeignete Maßnahmen zu fördern (vgl. BVerfGE 6, 55 <76>; 28, 104 <113>; 53, 224 <248>; 76, 1 <41>; 80, 81 <92 f.>; 99, 216 <231 f.>). Dagegen hat der Gesetzgeber mit dem LPartDisBG nicht verstoßen.

aa) Die Ehe wird durch das LPartDisBG weder geschädigt noch sonst beeinträchtigt. 91

Der besondere Schutz, der der Ehe nach Art. 6 Abs. 1 GG zukommt, verbietet es, sie insgesamt gegenüber anderen Lebensformen schlechter zu stellen (vgl. BVerfGE 6, 55 <76>; 13, 290 <298 f.>; 28, 324 <356>; 67, 186 <195 f.>; 87, 234 <256 ff.>; 99, 216 <232 f.>). 92

(1) Dies geschieht nicht dadurch, dass das LPartDisBG gleichgeschlechtlichen Paaren die Möglichkeit eröffnet, eine eingetragene Lebenspartnerschaft mit Rechten und Pflichten einzugehen, die denen der Ehe nahe kommen. 93

Zwar hat der Gesetzgeber in weiten Bereichen die Rechtsfolgen des neuen Instituts der eingetragenen Lebenspartnerschaft den eherechtlichen Regelungen nachgebildet. Dadurch werden die Ehe oder Ehegatten jedoch nicht schlechter als bisher gestellt und nicht gegenüber der Lebenspartnerschaft oder Lebenspartnern benachteiligt. Dem Institut der Ehe drohen keine Einbußen durch ein Institut, das sich an Personen wendet, die miteinander keine Ehe eingehen können. 94

(2) Ein Verstoß des LPartDisBG gegen das Benachteiligungsverbot liegt auch nicht darin, dass der Gesetzgeber davon abgesehen hat, mit diesem Gesetz zugleich das Bundessozialhilfegesetz um Regelungen zu ergänzen, die auch bei Lebenspartnern eine gegenseitige Einkommens- und Vermögensberücksichtigung bei der Bedürftigkeitsprüfung als Voraussetzung für die Gewährung von Sozialhilfe vorschreiben. 95

Damit werden derzeit im Sozialhilferecht zwar Ehepaare als wirtschaftliche Einheit behandelt, nicht jedoch ausdrücklich auch Lebenspartner. Bei Ehegatten kann dies wegen der vorzunehmenden Einkommensanrechnung zur Reduzierung oder zum Wegfall des Sozialhilfeanspruchs führen, während Lebenspartner ohne Einkommensanrechnung in den Genuss des ungekürzten Bezuges von Sozialhilfe kommen könnten. Eine darin liegende Benachteiligung von Ehegatten würde jedoch nicht durch das LPartDisBG bewirkt, sondern durch das Fehlen entsprechender Regelungen im Bundessozialhilfegesetz. Das LPartDisBG privilegiert Lebenspartner hinsichtlich der Verpflichtung zu gegenseitiger Unterhaltstragung gerade nicht gegenüber Ehegatten. Werden im Sozialhilferecht daraus nicht die entsprechenden rechtlichen Konsequenzen gezogen, kann dort ein Verstoß gegen das Benachteiligungsverbot aus Art. 6 Abs. 1 GG eintreten, nicht aber durch die Vorschriften des LPartDisBG, die allein Gegenstand des abstrakten Normenkontrollverfahrens sind. 96

bb) Der Gesetzgeber hat mit der Einführung des neuen Instituts der eingetragenen Lebenspartnerschaft auch nicht gegen das Gebot verstoßen, die Ehe als Lebensform zu fördern. Das Gesetz entzieht der Ehe keine Förderung, die sie bisher erfahren hat. Es nimmt lediglich eine andere Lebensgemeinschaft unter rechtlichen Schutz und weist ihr Rechte und Pflichten zu. 97

cc) Dem Gesetzgeber ist es wegen des verfassungsrechtlichen Schutzes der Ehe aus Art. 6 Abs. 1 GG nicht verwehrt, diese gegenüber anderen Lebensformen zu begünstigen (vgl. BVerfGE 6, 55 <76>). Aus der Zulässigkeit, in Erfüllung und Ausgestaltung des Förderauftrags die Ehe gegenüber anderen Lebensformen zu privilegieren, lässt sich jedoch kein in Art. 6 Abs. 1 GG enthaltenes Gebot herleiten, andere Lebensformen gegenüber der Ehe zu benachteiligen. Dies verkennt die Richterin Haas in ihrer abweichenden Meinung, wenn sie das Fördergebot des Art. 6 Abs. 1 GG als ein Benachteiligungsgebot für andere Lebensformen als die Ehe versteht. Art. 6 Abs. 1 GG privilegiert die Ehe durch einen nur ihr zukommenden verfassungsrechtlichen Schutz und 98

verpflichtet den Gesetzgeber, sie mit den ihr angemessenen Mitteln zu fördern. Ein Gebot, andere Lebensformen zu benachteiligen, lässt sich hieraus jedoch nicht ableiten. Das Ausmaß des rechtlichen Schutzes und der Förderung der Ehe wird in keinerlei Hinsicht verringert, wenn die Rechtsordnung auch andere Lebensformen anerkennt, die mit der Ehe als Gemeinschaft verschiedengeschlechtlicher Partner nicht in Konkurrenz treten können. Es ist verfassungsrechtlich auch nicht begründbar, aus dem besonderen Schutz der Ehe abzuleiten, dass solche anderen Lebensgemeinschaften im Abstand zur Ehe auszugestalten und mit geringeren Rechten zu versehen sind. Sein Schutz- und Förderauftrag gebietet es dem Gesetzgeber allerdings, dafür Sorge zu tragen, dass die Ehe die Funktion erfüllen kann, die ihr von der Verfassung zugewiesen ist.

99

(1) Wenn Art. 6 Abs. 1 GG die Ehe unter besonderen Schutz stellt, liegt die Besonderheit darin, dass allein die Ehe als Institut neben der Familie diesen verfassungsrechtlichen Schutz erfährt, nicht dagegen eine andere Lebensform. Die Ehe kann nicht ohne Verfassungsänderung abgeschafft oder in ihren wesentlichen Strukturprinzipien verändert werden (so schon von Mangoldt im Ausschuss für Grundsatzfragen des Parlamentarischen Rates, in: Der Parlamentarische Rat 1948-1949, Akten und Protokolle, Band 5/II, 1993, bearbeitet von Pikart/Werner, S. 826). Nur für sie besteht ein verfassungsrechtlicher Auftrag zur Förderung. Der Besonderheit des Schutzes eine darüber hinausgehende Bedeutung dahingehend beizumessen, dass die Ehe auch im Umfang stets mehr zu schützen sei als andere Lebensgemeinschaften (so im Ergebnis Badura, in: Maunz/Dürig, Grundgesetz, Art. 6 Abs. 1 Rn. 56 <Stand: August 2000>; Burgi, in: Der Staat, Band 39, 2000, S. 487 ff.; Krings, ZRP 2000, S. 409 ff.; Pauly, NJW 1997, S. 1955 f.; Scholz/Uhle, NJW 2001, S. 393 f.; Tettinger, in: Essener Gespräche zum Thema Staat und Kirche, Band 35, 2001, S. 140), kann weder auf den Wortlaut der Grundrechtsnorm noch auf ihre Entstehungsgeschichte gestützt werden.

100

Art. 6 Abs. 1 GG hat im Laufe der Beratungen im Parlamentarischen Rat mannigfache textliche Veränderungen erfahren, wobei des Öfteren die Formulierung zwischen einem Schutz und einem besonderen Schutz der Ehe wechselte (vgl. Parlamentarischer Rat, Hauptausschuss, 21. Sitzung, Protokoll, S. 239; Protokoll der 32. Sitzung des Grundsatzausschusses, in: Der Parlamentarische Rat 1948-1949, a.a.O., Band 5/II, 1993, S. 910 <935>; Protokoll der 43. Sitzung des Hauptausschusses, S. 545 <554 f.>; Stellungnahme des Allgemeinen Redaktionsausschusses zur Fassung der 2. Lesung des Hauptausschusses, S. 121; Parlamentarischer Rat, Hauptausschuss, Protokoll der 57. Sitzung, S. 743 f.). Den Debatten ist dabei nicht zu entnehmen, dass diese Textänderungen erfolgten, weil Ehe und Familie ein mehr oder weniger starker Schutz zukommen sollte. Vielmehr gibt es deutliche Hinweise dafür, dass diese Änderungen allein vom jeweiligen Sprachempfinden veranlasst waren. So meinte von Mangoldt zum Vorschlag des Deutschen Sprachvereins, das Wort "besonderen" zu streichen und die Formulierung zu wählen "Ehe und Familie ... stehen unter dem Schutze der Verfassung", dies sei inhaltlich genau dasselbe, aber in der Formulierung besser (Der Parlamentarische Rat 1948-1949, Band 5/II, a.a.O.).

101

In den Debatten um Art. 6 Abs. 1 GG spielte auch die Frage des Schutzes neuer Lebensformen eine wesentliche Rolle (vgl. hierzu die Beiträge von Helene Weber, in: Protokoll der 21. Sitzung des Hauptausschusses, S. 240, und Elisabeth Selbert, in: Protokoll der 43. Sitzung des Hauptausschusses, S. 552 f.). Dabei hatte insbesondere das Argument, der besondere Schutz der Familie schließe die Gleichstellung unehelicher Kinder in Art. 6 Abs. 5 GG aus (vgl. Weber und Süsterhenn in: Protokoll der 21. Sitzung des Hauptausschusses, S. 242 f.) keinen Erfolg. Wenn von Mangoldt als Berichterstatter in seinem Schriftlichen Bericht zu Art. 6 Abs. 1 GG schließlich anmerkte, diese Grundrechtsnorm sei kaum mehr als eine Deklaration, bei der nicht recht zu übersehen sei, welche Wirkungen sie als unmittelbar geltendes Recht habe (Anlage zum stenographischen Bericht der 9. Sitzung des Parlamentarischen Rates, S. 6), dann spiegelt dies wider, dass zwar Einigkeit darüber bestand, Ehe und Familie unter verfassungsrechtlichen Schutz zu stellen, jedoch keine Klärung erfolgte, was dies im Einzelnen für ihr Verhältnis zu anderen Lebensformen bedeutet. Ein Abstandsgebot kann hierauf jedenfalls nicht gestützt werden.

102

(2) Art. 6 Abs. 1 GG schützt die Ehe, wie sie vom Gesetzgeber unter Wahrung ihrer wesentlichen Grundprinzipien jeweils Gestalt erhalten hat (vgl. BVerfGE 31, 58 <82 f.>).

Als von Menschen gelebte Gemeinschaft ist sie Freiheitsraum und zugleich Teil der Gesellschaft, von deren Veränderungen sie nicht ausgeschlossen ist. Auf solche kann der Gesetzgeber reagieren und die Ausgestaltung der Ehe gewandelten Bedürfnissen anpassen. Damit ändert sich zugleich das Verhältnis der Ehe zu anderen Formen menschlichen Zusammenlebens. Das Gleiche gilt, wenn der Gesetzgeber nicht die Ehe gesetzlich neu gestaltet, sondern andere Lebensgemeinschaften regelt. Insofern stehen Lebensformen nicht in einem festen Abstand, sondern in relativer Beziehung zueinander. Zugleich können sie sich durch die jeweilige Ausgestaltung nicht nur in den ihnen zugewiesenen Rechten und Pflichten unterscheiden oder gleichen, sondern auch in ihrer Funktion und hinsichtlich des Kreises von Personen, die Zugang zu ihnen finden. So kann der Schutz, der der Ehe als Institut zukommt, nicht von den Normadressaten getrennt werden, für die die Ehe als geschützte Lebensform bereitzuhalten ist.

103 (3) Die Förderpflicht des Staates hat sich am Schutzzweck des Art. 6 Abs. 1 GG auszurichten. Trüge der Gesetzgeber selbst durch Normsetzung dazu bei, dass die Ehe ihre Funktion einbüßte, würde er das Fördergebot aus Art. 6 Abs. 1 GG verletzen. Eine solche Gefahr könnte bestehen, wenn der Gesetzgeber in Konkurrenz zur Ehe ein anderes Institut mit derselben Funktion schüfe und es etwa mit gleichen Rechten und geringeren Pflichten versähe, so dass beide Institute austauschbar wären. Eine derartige Austauschbarkeit ist mit der Schaffung der eingetragenen Lebenspartnerschaft jedoch nicht verbunden. Sie kann mit der Ehe schon deshalb nicht in Konkurrenz treten, weil der Adressatenkreis, an den sich das Institut richtet, nicht den der Ehe berührt. Die eingetragene Lebenspartnerschaft ist wegen dieses Unterschieds auch keine Ehe mit falschem Etikett, wie dies in beiden Minderheitenvoten angenommen wird, sondern ein aliud zur Ehe. Nicht ihre Bezeichnung begründet ihre Andersartigkeit, sondern der Umstand, dass sich in der eingetragenen Lebenspartnerschaft nicht Mann und Frau, sondern zwei gleichgeschlechtliche Partner binden können. In ihrer Gesamtheit geben die Strukturprinzipien, die die Ehe kennzeichnen, dieser die Gestalt und Exklusivität, in der sie als Institut verfassungsrechtlichen Schutz erfährt. Art. 6 Abs. 1 GG reserviert jedoch nicht einzelne dieser Strukturelemente allein für die Ehe. Er verbietet dem Gesetzgeber nicht, Rechtsformen für ein auf Dauer angelegtes Zusammenleben auch anderen Personenkonstellationen als der Verbindung von Mann und Frau anzubieten. Durch das Merkmal der Dauerhaftigkeit werden solche Rechtsbeziehungen nicht zur Ehe. Auch sonst ist nicht erkennbar, dass sie das Gefüge dieses Instituts beschädigen könnten.

104 2. Das LPartDisBG verstößt weder gegen das besondere Diskriminierungsverbot des Art. 3 Abs. 3 Satz 1 GG noch gegen den allgemeinen Gleichheitssatz des Art. 3 Abs. 1 GG.

105 a) Darin, dass das Gesetz nur gleichgeschlechtlichen Paaren die eingetragene Lebenspartnerschaft eröffnet (Art. 1 § 1 Abs. 1 LPartDisBG), liegt keine Benachteiligung von verschiedengeschlechtlichen Paaren wegen ihres Geschlechts nach Art. 3 Abs. 3 Satz 1 GG.

106 Das Gesetz verbindet Rechte und Pflichten nicht mit dem Geschlecht einer Person, sondern knüpft an die Geschlechtskombination einer Personenverbindung an, der sie den Zugang zur Lebenspartnerschaft einräumt. Den Personen in dieser Verbindung weist sie dann Rechte und Pflichten zu. Ebenso wie die Ehe mit ihrer Beschränkung auf die Zweierbeziehung zwischen Mann und Frau gleichgeschlechtliche Paare wegen ihres Geschlechts nicht diskriminiert, benachteiligt die Lebenspartnerschaft heterosexuelle Paare nicht wegen ihres Geschlechts. Männer und Frauen werden stets gleichbehandelt. Sie können eine Ehe mit einer Person des anderen Geschlechts eingehen, nicht jedoch mit einer ihres eigenen Geschlechts. Sie können eine Lebenspartnerschaft mit einer Person ihres eigenen Geschlechts gründen, nicht aber mit einer des anderen.

107 b) Es verstößt nicht gegen Art. 3 Abs. 1 GG, dass nichtehelichen Lebensgemeinschaften verschiedengeschlechtlicher Personen und verwandtschaftlichen Einstandsgemeinschaften der Zugang zur Rechtsform der eingetragenen Lebenspartnerschaft verwehrt ist.

108 Art. 3 Abs. 1 GG verbietet, eine Gruppe von Normadressaten im Vergleich zu anderen Normadressaten anders zu behandeln, obwohl zwischen beiden Gruppen keine

Unterschiede von solcher Art und solchem Gewicht bestehen, dass sie die ungleiche Behandlung rechtfertigen könnten (vgl. BVerfGE 55, 72 <88>; 84, 348 <359>; 101, 239 <269>; stRspr). Derartige Unterschiede bestehen jedoch zwischen gleichgeschlechtlichen Paaren und den anderen sozialen Personengemeinschaften.

109 aa) Die eingetragene Lebenspartnerschaft ermöglicht gleichgeschlechtlichen Paaren, ihre Lebensgemeinschaft auf eine rechtlich anerkannte Basis zu stellen und sich in Verantwortung zueinander dauerhaft zu binden, was ihnen bisher verwehrt war, da sie keine Ehe eingehen können. Demgegenüber ist das Anliegen verschiedengeschlechtlicher Paare, sich rechtsverbindlich auf Dauer zu binden, zwar in der Einschätzung der Betroffenen gleichermaßen gewichtig wie das gleichgeschlechtlicher Paare und ihm im Wesentlichen auch ähnlich (vgl. Buba/Vaskovics, a.a.O., S. 16, 245 ff.). Im Gegensatz zu gleichgeschlechtlichen Paaren steht ihnen hierfür aber das Institut der Ehe offen. Der Unterschied, dass aus einer auf Dauer verbundenen Zweierbeziehung von Mann und Frau gemeinsame Kinder erwachsen können, aus einer gleichgeschlechtlichen Partnerschaft dagegen nicht, rechtfertigt es, verschiedengeschlechtliche Paare auf die Ehe zu verweisen, wenn sie ihrer Lebensgemeinschaft eine dauerhafte Rechtsverbindlichkeit geben wollen. Sie werden hierdurch nicht benachteiligt.

110 bb) Auch im Verhältnis der gleichgeschlechtlichen Lebensgemeinschaften zu den Geschwister- oder anderen verwandtschaftlichen Einstandsgemeinschaften bestehen Unterschiede, die ihre unterschiedliche Behandlung rechtfertigen. Dies betrifft schon die Exklusivität der eingetragenen Lebensgemeinschaft, die keine weitere Beziehung gleicher Art neben sich zulässt, während Geschwister- und andere verwandtschaftliche Einstandsgemeinschaften häufig in weitere vergleichbare Beziehungen eingebunden sind und auch neben einer sonstigen Bindung durch Ehe oder Partnerschaft bestehen. Verwandtschaftliche Einstandsgemeinschaften erfahren überdies schon nach geltendem Recht in gewisser Hinsicht eine Absicherung, die gleichgeschlechtlichen Paaren erst mit der Lebenspartnerschaft eröffnet worden ist. So bestehen im Verwandtschaftsverhältnis Zeugnisverweigerungsrechte, Erbrechte und zum Teil auch Pflichtteilsrechte sowie deren steuerliche Begünstigung.

111 cc) Es ist dem Gesetzgeber zwar generell nicht verwehrt, für verschiedengeschlechtliche Paare oder für andere Einstandsgemeinschaften neue Möglichkeiten zu eröffnen, ihre Beziehung in eine Rechtsform zu bringen, wenn er dabei eine Austauschbarkeit der jeweiligen rechtlichen Gestalt mit der Ehe vermeidet. Ein verfassungsrechtliches Gebot, solche Möglichkeiten zu schaffen, besteht jedoch nicht.

112 3. Auch die im Gesetz enthaltenen Bestimmungen zum Sorge- und Erbrecht von Lebenspartnern sowie zum Unterhaltsrecht sind verfassungsrechtlich nicht zu beanstanden.

113 a) aa) Dem Lebenspartner eines allein sorgeberechtigten Elternteils ist nach Art. 1 § 9 LPartDisBG mit dessen Einvernehmen die Befugnis eingeräumt worden, in Angelegenheiten des täglichen Lebens des Kindes mitzuentscheiden, wenn er mit dem Elternteil zusammenlebt. Zugleich hat er ein Notsorgerecht für den Fall erhalten, dass das Wohl des Kindes bei Gefahr im Verzug ein Handeln notwendig macht. Gleiches gilt nun für den Ehegatten eines sorgeberechtigten Elternteils, der selbst nicht Elternteil ist (Art. 2 Nr. 13 LPartDisBG: § 1687 b BGB). Mit der Konstituierung dieses "kleinen Sorgerechts" für den Lebenspartner greift der Gesetzgeber nicht in das Elternrecht des nicht sorgeberechtigten Elternteils aus Art. 6 Abs. 2 GG ein.

114 Art. 6 Abs. 2 Satz 1 GG schützt die Pflege und Erziehung der Kinder als natürliches Recht der Eltern und zuvörderst ihnen obliegende Pflicht. Dabei umfasst der Schutzbereich des Elternrechts grundsätzlich auch die Entscheidung darüber, wer Kontakt mit dem Kind hat und wem durch Übertragung von Entscheidungsbefugnissen Einfluss auf die Erziehung des Kindes zugestanden wird. Allerdings bedarf das Elternrecht der Ausgestaltung durch den Gesetzgeber (vgl. BVerfGE 84, 168 <180>). Es obliegt dem Gesetzgeber, den einzelnen Elternteilen bestimmte Rechte und Pflichten zuzuordnen, wenn die Voraussetzungen für eine gemeinsame Ausübung der Elternverantwortung fehlen (vgl. BVerfGE 92, 158 <178 f.>), oder den Gerichten die Entscheidung zuzuweisen, welchem Elternteil im Einzelfall die elterliche Sorge übertragen wird.

An eine solche Konstellation der alleinigen Sorgeberechtigung eines Elternteils knüpft Art. 1 § 9 LPartDisBG an. Nicht das "kleine Sorgerecht", das sich aus der Alleinsorge des in Lebenspartnerschaft lebenden Elternteils ableitet, entzieht dem nicht sorgeberechtigten Elternteil sein Sorgerecht, sondern die familienrechtlichen Bestimmungen, die ihm kein Sorgerecht zuweisen, oder die familiengerichtlichen Entscheidungen, die nicht ihm, sondern dem anderen Elternteil die alleinige Sorge übertragen. Fehlt ihm das Sorgerecht ohnehin, kann ein Elternteil in seinen Rechten nicht mehr berührt werden, wenn Dritte, die mit dem Kind zusammenleben, im Einverständnis mit dem allein Sorgeberechtigten teilweise gemeinsam Elternverantwortung wahrnehmen. 115

bb) Dass der Gesetzgeber mit dem "kleinen Sorgerecht" eine neue sorgerechtliche Befugnis im Rahmen einer auf Dauer angelegten rechtsverbindlichen Lebensgemeinschaft wie der Ehe oder der eingetragenen Lebenspartnerschaft für Ehegatten und Lebenspartner eines sorgeberechtigten Elternteils, die nicht selber Elternteil des Kindes sind, geschaffen hat, stellt keinen Verstoß gegen den allgemeinen Gleichheitssatz des Art. 3 Abs. 1 GG dar. Durch die Regelung werden nicht sorgeberechtigte Elternteile, die mit dem Sorgeberechtigten nicht in einer rechtlich verfestigten Gemeinschaft leben, nicht ungerechtfertigt benachteiligt. Ihnen sind andere rechtliche Möglichkeiten eingeräumt, das Sorgerecht für ihr Kind allein oder zusammen mit dem anderen Elternteil zu erhalten. Ob nicht sorgeberechtigten Elternteilen aus anderen Gründen ein "kleines Sorgerecht" eröffnet werden sollte, bedarf hier keiner Entscheidung. 116

b) aa) Art. 1 § 10 Abs. 6 LPartDisBG, der dem überlebenden Lebenspartner einen Pflichtteil zuspricht, verletzt nicht die durch Art. 14 Abs. 1 GG geschützte Testierfreiheit. 117

Die Testierfreiheit ist das Recht des Erblassers, zu Lebzeiten einen von der gesetzlichen Erbfolge abweichenden Übergang seines Vermögens anzuordnen (vgl. BVerfGE 58, 377 <398>; 99, 341 <350 f.>). Dabei ist es dem Gesetzgeber überlassen, Inhalt und Schranken des Erbrechts zu bestimmen. Er muss bei dessen näherer Ausgestaltung den grundlegenden Gehalt der verfassungsrechtlichen Gewährleistung des Art. 14 Abs. 1 GG wahren, sich in Einklang mit allen anderen Verfassungsnormen halten und insbesondere den Verhältnismäßigkeitsgrundsatz und das Gleichheitsgebot beachten (vgl. BVerfGE 67, 329 <340>). Dass die gesetzliche Regelung über das Pflichtteilsrecht des überlebenden Lebenspartners diese Grenze überschreitet, ist ungeachtet einer generellen Klärung, welche verfassungsrechtlichen Schranken dem Pflichtteilsrecht gesetzt sind, nicht ersichtlich. 118

Das Erbrecht und das Pflichtteilsrecht des Lebenspartners sind Bestandteil des Rechtsinstituts der eingetragenen Lebenspartnerschaft, die den Partnern gegenseitige Rechte und Pflichten in einer lebenslangen Bindung auferlegt. Mit ihrer Erklärung, die Lebenspartnerschaft eingehen zu wollen, verpflichten sich die Lebenspartner zu gegenseitiger Fürsorge und Unterstützung sowie zur Unterhaltsgewährung. Diese Verpflichtung zur gegenseitigen umfassenden Sorge rechtfertigt es ebenso wie bei Ehegatten, dem Lebenspartner mit dem Pflichtteilsrecht auch über den Tod hinaus eine ökonomische Basis aus dem Vermögen des verstorbenen Lebenspartners zu sichern. 119

bb) Art. 14 Abs. 1 GG ist auch nicht dadurch verletzt, dass durch das gesetzliche Erb- und Pflichtteilsrecht des Lebenspartners das Erbe sonstiger Erbberechtigter geschmälert wird. Selbst wenn Art. 6 Abs. 1 GG das verfassungsrechtliche Gebot enthielte, den nächsten Familienangehörigen eine angemessene wirtschaftliche Mindestbeteiligung am Nachlass einzuräumen, und insoweit der dadurch begünstigte Familienangehörige als Erbe grundrechtlichen Schutz aus Art. 14 Abs. 1 GG genießen würde, was auch hier offen bleiben kann (vgl. BVerfGE 91, 346 <359 f.>), ist damit noch nichts über die Höhe oder den Anteil gesagt, der dem Erben aus der Erbmasse zusteht. Dies bestimmt allein die gesetzliche Zuweisungsregelung, die, um mit der Erbrechtsgarantie in Einklang zu stehen, sachgerecht ausge- staltet sein muss (vgl. BVerfGE 91, 346 <360, 362>). 120

Mit dem Erb- und Pflichtteilsrecht des überlebenden Lebenspartners wird den sonstigen bisher schon erbberechtigten Verwandten des verstorbenen Lebenspartners nicht das Erbrecht entzogen. In den Kreis der Erbberechtigten wird nur ein weiterer Erbberechtigter aufgenommen, der bei der Verteilung der Erbmasse zu berücksichtigen ist. Für die 121

erbberechtigten Verwandten des Erblassers gestaltet sich damit die Situation nicht anders, als sie wäre, wenn der Erblasser eine Ehefrau oder einen Ehemann hinterließe und nicht einen Lebenspartner. In dieser Ausgestaltung liegt keine unsachgerechte Behandlung der übrigen Erbberechtigten.

c) Dass die beabsichtigte einkommensteuerrechtliche Berücksichtigung der mit dem LPartDisBG in seinem Art. 1 §§ 5, 12 und 16 begründeten Unterhaltslasten für Lebenspartner wegen ihrer Aufnahme in den Entwurf des LPartGErgG nicht erfolgen kann, weil dieses Gesetz bisher nicht zustande gekommen ist, führt nicht zur Verfassungswidrigkeit der unterhaltsrechtlichen Bestimmungen des LPartDisBG. *122*

Zwar ist die wirtschaftliche Belastung durch Unterhaltspflichten für den Steuerpflichtigen ein besonderer und unvermeidbarer, die Leistungsfähigkeit mindernder Umstand, dessen Nichtberücksichtigung gegen Art. 3 Abs. 1 GG verstoßen kann (vgl. BVerfGE 68, 143 <152 f.>; 82, 60 <86 f.>). Durch die Einführung der Unterhaltspflichten für Lebenspartner ist jedoch kein Rechtszustand eingetreten, der diese Belastung einkommensteuerrechtlich außer Betracht lässt. Nach § 33 a EStG wird auf Antrag die Einkommensteuer dadurch ermäßigt, dass Aufwendungen, die einem Steuerpflichtigen für den Unterhalt einer ihm gegenüber gesetzlich unterhaltsberechtigten Person erwachsen, in Höhe einer für das jeweilige Kalenderjahr festgesetzten Summe vom Gesamtbetrag der Einkünfte abgezogen werden. Da der Unterhaltsanspruch eines Lebenspartners gesetzlich statuiert ist, ist er nach § 33 a EStG als außergewöhnliche Belastung einkommensteuermindernd zu berücksichtigen. Ob diese Berücksichtigung ausreichend auch im Vergleich zur steuerrechtlichen Behandlung von Ehegatten ist, ist keine Frage, die das LPartDisBG betrifft. Sie wäre durch verfassungsrechtliche Prüfung der einkommensteuerrechtlichen Regelungen zu klären, die nicht von den Normenkontrollanträgen umfasst sind. *123*

C.

Diese Entscheidung ist hinsichtlich der Vereinbarkeit des LPartDisBG mit Art. 6 Abs. 1 GG mit 5:3 Stimmen, hinsichtlich der Vereinbarkeit mit Art. 3 Abs. 1 GG mit 7:1 Stimmen, im Übrigen einstimmig ergangen. *124*

Papier Jaeger Haas

Hömig Steiner Hohmann-Dennhardt

Hoffmann-Riem Bryde

Abweichende Meinung

des Richters Papier

zum Urteil des Ersten Senats vom 17. Juli 2002

- 1 BvF 1/01 -

- 1 BvF 2/01 -

Ich vermag den Ausführungen der Senatsmehrheit insbesondere zu der in Art. 6 Abs. 1 GG verankerten Institutsgarantie der Ehe und den sich hieraus ergebenden Folgerungen nicht zuzustimmen. *125*

Art. 6 Abs. 1 GG stellt die Ehe unter den besonderen Schutz der staatlichen Ordnung. Nach der ständigen Rechtsprechung des Bundesverfassungsgerichts enthält diese Verfassungsbestimmung - wie auch die Senatsmehrheit annimmt - sowohl ein Grundrecht auf Schutz vor Eingriffen des Staates als auch eine Institutsgarantie und eine wertentscheidende Grundsatznorm (vgl. BVerfGE 31, 58 <67>; 62, 323 <329>). Ist die Ehe als Lebensgemeinschaft zwischen Mann und Frau auf eine einfachrechtliche Regelung angewiesen, so eröffnet dies keinesfalls für den einfachen Gesetzgeber die uneingeschränkte Befugnis, die Ehe nach den *jeweils* in der Gesellschaft wirklich oder vermeintlich herrschenden Auffassungen auszugestalten (vgl. BVerfGE 6, 55 <82>; 9, 237 <242 f.>; 15, 328 <332>). Vielmehr sind die einfachgesetzlichen Regelungen - ungeachtet eines anzuerkennenden Gestaltungsspielraums des Gesetzgebers - an Art. 6 Abs. 1 GG *126*

als vorrangiger, selbst die Grundprinzipien enthaltender Leitnorm zu messen (vgl. BVerfGE 10, 59 <66>; 24, 104 <109>; 31, 58 <69 f.>). Danach muss jede einfachgesetzliche Regelung die wesentlichen, das Institut der Ehe bestimmenden Prinzipien beachten (vgl. BVerfGE 31, 58 <69>). Zu diesen durch Art. 6 Abs. 1 GG gewährleisteten Strukturprinzipien, die der Verfügungsgewalt des Gesetzgebers entzogen sind, zählt, dass die Ehe die Verbindung eines Mannes und einer Frau zu einer umfassenden grundsätzlich unauflösbaren Lebensgemeinschaft ist (vgl. BVerfGE 62, 323 <330>). Dies erkennt auch die Senatsmehrheit an, die die Verschiedengeschlechtlichkeit der Ehepartner zu den die Ehe konstituierenden Merkmalen zählt, so dass der Gesetzgeber in der Konsequenz gehindert wäre, einfachrechtlich unter die Ehe auch die Partnerschaft zweier gleichgeschlechtlicher Personen zu fassen. Es ist aber vor diesem Hintergrund nicht einsichtig, dass allein eine andere Bezeichnung für die neu geschaffene Rechtsform der Lebenspartnerschaft es sollte rechtfertigen können, die Institutsgarantie des Art. 6 Abs. 1 GG für nicht einschlägig zu erachten. Denn das in Art. 6 Abs. 1 GG gewährleistete Institut der Ehe ist nicht nur dem Namen nach, sondern in seinen strukturbildenden Merkmalen vor beliebigen Dispositionen des Gesetzgebers geschützt. Schafft der Gesetzgeber, wenn auch unter einem anderen Namen, eine rechtsförmlich ausgestaltete Partnerschaft zwischen zwei gleichgeschlechtlichen Personen, die im Übrigen in Rechten und Pflichten der Ehe entspricht, so missachtet er hierdurch ein wesentliches, ihm durch Art. 6 Abs. 1 GG vorgegebenes Strukturprinzip. Es ist ein Fehlschluss, anzunehmen, dass gerade aufgrund des Abweichens von einem wesentlichen Strukturprinzip die verfassungsrechtliche Institutsgarantie als Maßstab ausscheide. Bei Anwendung dieses verfassungsrechtlichen Maßstabes hätte im Urteil im Einzelnen dargelegt werden müssen, dass die verfassungsrechtlich verankerte Institutsgarantie durch das zur Prüfung gestellte LPartDisBG in ihren wesentlichen Strukturprinzipien nicht berührt werde.

127 Soweit in dem Urteil davon ausgegangen wird, dass die Institutsgarantie allein deshalb nicht betroffen sei, weil die die Ehe regelnden Normen durch das LPartDisBG keine Änderung erfahren, beruht diese Annahme auf der Verkennung des Wesens einer Institutsgarantie. Diese bezweckt nicht in erster Linie die Abwehr ungerechtfertigter Eingriffe zulasten der Ehe - insoweit ist vorrangig die abwehrrechtliche Funktion des Art. 6 Abs. 1 GG einschlägig -; Sinn der Institutsgarantie ist vielmehr, den Gesetzgeber bei Ausgestaltung der Ehe an gewisse Strukturprinzipien, zu denen auch die Verschiedengeschlechtlichkeit der Partner rechnet, zu binden. Er ist demnach gehindert, unter einem anderen Namen für gleichgeschlechtliche Paare ein der Ehe im Übrigen entsprechendes Institut einzuführen. Ob dies mit dem LPartDisBG erfolgt ist oder nicht, versäumt die das Urteil tragende Senatsmehrheit darzulegen, gerade weil sie die spezifischen verfassungsrechtlichen Wirkungen der Institutsgarantie des Art. 6 Abs. 1 GG außer Acht lässt. Sie setzt im Gegenteil keinerlei Grenzen für eine substantielle Gleichstellung mit der Ehe.

Papier

Abweichende Meinung

der Richterin Haas

zum Urteil des Ersten Senats vom 17. Juli 2002

- 1 BvF 1/01 -

- 1 BvF 2/01 -

128 1. Ich stimme mit der Senatsmehrheit darin überein, dass von Verfassungs wegen nichts grundsätzlich gegen die Einführung einer Rechtsform der eingetragenen Lebenspartnerschaft für gleichgeschlechtliche Paare zu erinnern ist. Damit kann jedermann (mit einigen gesetzlich geregelten Ausnahmen) seine Gemeinschaft mit einem Partner gleichen Geschlechts registrieren lassen, ohne dass zwischen diesen eine homosexuelle Beziehung besteht oder beabsichtigt wäre. Allerdings war die Einführung der Rechtsform der eingetragenen Lebenspartnerschaft nicht von Verfassungs wegen geboten.

2. Die Begründung der Senatsmehrheit zur Verfassungsgemäßheit der konkreten Ausgestaltung der Rechtsform der eingetragenen Lebenspartnerschaft ermöglicht es mir jedoch nicht, der Entscheidung in ihren wesentlichen Begründungsteilen zuzustimmen. 129

a) Die Entscheidung wird insbesondere nicht der Bedeutung der Institutsgarantie des Art. 6 Abs. 1 GG gerecht. 130

Sie berücksichtigt nicht in dem gebotenen Maß Bedeutung und Wirkweise der Institutsgarantie der Ehe. Im Blick darauf hätte die Senatsmehrheit prüfen müssen, ob die Rechtsform der eingetragenen Lebenspartnerschaft vom Gesetzgeber der Ehe vergleichbar ausgestaltet worden ist und weshalb dies im Lichte der Verfassungsgewährleistung keinen verfassungsrechtlichen Bedenken begegnet. 131

Art. 6 Abs. 1 GG stellt die Ehe unter den besonderen Schutz der staatlichen Ordnung. Nach der ständigen Rechtsprechung des Bundesverfassungsgerichts enthält diese Verfassungsbestimmung - wie auch die Senatsmehrheit annimmt - eine Institutsgarantie, eine wertentscheidende Grundsatznorm sowie ein Grundrecht auf Schutz vor Eingriffen des Staates (vgl. BVerfGE 31, 58 <67>; 62, 323 <329>). 132

Art. 6 Abs. 1 GG gewährleistet als Institutsgarantie den Bestand der privatrechtlichen Einrichtung der Ehe und Familie; sie hält den rechtlichen Rahmen einer Lebensordnung (BVerfGE 6, 55 <72>) bereit, in der Mann und Frau sich in der Lebensgemeinschaft der Ehe finden und die sie zur Familiengemeinschaft weiterentwickeln können. Wegen dieser in der Ehe potenziell angelegten Elternschaft, die der Gemeinschaft von Eltern und Kind Stabilität verheißt, hat der Verfassungsgeber Ehe und Familie dem Schutz der Verfassung unterstellt. Um der Bedeutung der Ehe für Familie und Gesellschaft willen enthält Art. 6 Abs. 1 GG in seiner Ausprägung als wertentscheidende Grundsatznorm überdies auch noch ein an den Staat gerichtetes Fördergebot (BVerfGE 6, 55 <76>; stRspr), welches die Ausgestaltung und Fortentwicklung der Ehe durch den Gesetzgeber geprägt hat. Die verfassungsrechtlich gebotene Förderung bedeutet entgegen der Auffassung der Senatsmehrheit mehr als nur die Verhinderung der Benachteiligung der Ehe. Förderung bedeutet positive Zuwendung über das normale Maß hinaus, damit also Privilegierung der Ehe. Dem Fördergebot des Art. 6 Abs. 1 GG kann daher auch nicht durch die bloße Benachteiligung anderer Lebensgemeinschaften genügt werden; das Fördergebot zugunsten der Ehe stellt gerade kein Benachteiligungsgebot zu Lasten Dritter dar. 133

Als Institutsgarantie bindet Art. 6 Abs. 1 GG den Gesetzgeber - jenseits der Abwehrrechte der Grundrechtsträger - bei der Ausgestaltung einfachgesetzlicher Regelungen. Der Gesetzgeber ist gehalten, die wesentlichen, das Institut der Ehe bestimmenden Strukturprinzipien zu beachten (vgl. BVerfGE 31, 58 <69>). Zu den wesentlichen Strukturprinzipien des Instituts der Ehe gehört dabei die Verschiedengeschlechtlichkeit der Partner. 134

Ob das Institut Ehe den Schutz oder wie es in der Verfassung heißt, den "besonderen" Schutz der staatlichen Ordnung genießt, ist in diesem Zusammenhang nachgerade unerheblich. Bereits das ausdrückliche Gebot des Schutzes, das sich in der Verfassung nur noch in Art. 1 Abs. 1 Satz 2 GG in Bezug auf die Würde des Menschen in vergleichbarer Weise findet, weist auf den hohen Stellenwert hin, den der Verfassungsgeber Ehe und Familie beigemessen hat. Keine andere Rechtsgemeinschaft, keine Personengemeinschaft, auch wenn sie auf dauerhaften gegenseitigen Beistand angelegt ist, wird daher in vergleichbarer Weise von Verfassungs wegen als Institut geschützt. 135

Die Senatsmehrheit wird dieser Bedeutung der Institutsgarantie nicht gerecht, wenn sie nur darauf abhebt, dass die Ehe durch die Einrichtung einer eingetragenen Lebenspartnerschaft keinen Schaden nimmt. Die Institutsgarantie bezweckt nicht in erster Linie die Abwehr ungerechtfertigter Eingriffe zu Lasten der Ehe - insoweit ist vorrangig die abwehrrechtliche Funktion des Art. 6 Abs. 1 GG -; Sinn der Institutsgarantie ist vielmehr, den Gesetzgeber bei der Ausgestaltung der Ehe an fundamentale Strukturprinzipien, zu denen auch nach Meinung der Senatsmehrheit die Verschiedengeschlechtlichkeit der Partner rechnet, zu binden. Dem verfassungsrechtlichen Gebot, dass nur verschiedengeschlechtliche Partner eine Ehe eingehen können, wird zuwidergehandelt, 136

wenn ihr ein Institut für Paare gleichen Geschlechts zur Seite gestellt wird, dessen Ausgestaltung den für die Ehe in Umsetzung des verfassungsrechtlichen Fördergebots gefundenen Formen entspricht. Auf die Bezeichnung kommt es nicht an. Denn das in Art. 6 Abs. 1 GG gewährleistete Institut der Ehe ist nicht nur dem Namen nach, sondern in seinen strukturbildenden Merkmalen vor beliebigen Dispositionen des Gesetzgebers geschützt. Der Gesetzgeber kann sich den Anforderungen des Art. 6 Abs. 1 GG nicht dadurch entziehen, dass er die Bezeichnung "Ehe" vermeidet. Schafft der Gesetzgeber, ohne dass ihm die das Institut der Ehe rechtfertigenden Gründe zur Seite stehen, die Rechtsform einer Partnerschaft zwischen Personen gleichen Geschlechts, die im Übrigen in Rechten und Pflichten denen der Ehe entspricht, so missachtet er hierdurch ein wesentliches, eben durch Art. 6 Abs. 1 GG vorgegebenes Strukturprinzip. Dies verkennt die Senatsmehrheit, wenn sie meint, dass gerade aufgrund des Abweichens von einem wesentlichen Strukturprinzip die verfassungsrechtliche Institutsgarantie als Maßstab ausscheide.

137 Die Senatsmehrheit hätte deshalb prüfen müssen, ob die Rechtsform der eingetragenen Lebenspartnerschaft einen Regelungsgehalt aufweist, der mit dem des Instituts der Ehe vergleichbar ist. Dies wäre mit Art. 6 Abs. 1 GG nicht zu vereinbaren, da der Lebenspartnerschaft die die Ehe prägenden, ihre Exklusivität auf die Verbindung von Mann und Frau beschränkenden und ihre besondere Förderung rechtfertigenden Elemente fehlen. Denn sie ist nicht auf ein eigenes Kind hin angelegt, führt nicht zu Elternverantwortlichkeit und erbringt dadurch keinen Beitrag für die Zukunftsfähigkeit von Staat und Gesellschaft.

138 b) Die Auffassung der Senatsmehrheit, Art. 3 Abs. 3 GG sei nicht verletzt, weil an die Bindung zweier Personen und nicht an das Geschlecht angeknüpft werde, ist wenig überzeugend. Denn Voraussetzung für das Eingehen einer eingetragenen Lebenspartnerschaft mit einem bestimmten Partner ist die Zugehörigkeit zu dessen Geschlecht. Damit wird für die Eröffnung der Registrierung der Zweierbeziehung naturgemäß an die Geschlechtszugehörigkeit angeknüpft. Insoweit wäre es wünschenswert gewesen, wenn der Senat über die knappe Begründung hinaus noch weitere Ausführungen gemacht hätte.

139 c) Die Ausführungen der Senatsmehrheit zur Verfassungsmäßigkeit des Ausschlusses der Eingehung der eingetragenen Lebenspartnerschaft durch Geschwister und Verwandte gerader Linie (Art. 1 § 1 Abs. 2 Nr. 2 und 3 LPartDisBG) vermögen in ihrer Allgemeinheit die Auffassung der Senatsmehrheit, Art. 3 Abs. 1 GG sei nicht verletzt, nicht zu begründen.

140 (1) Bereits der Maßstab, den die Senatsmehrheit anwendet, ist ungenau. Bei der Prüfung der ungleichen Behandlung von Personengruppen unterliegt nach ständiger Rechtsprechung der Gesetzgeber einer strengen Bindung (vgl. BVerfGE 55, 72 <88>; 88, 87 <96>), die umso enger ist, je mehr sich die personenbezogenen Merkmale den in Art. 3 Abs. 3 GG genannten annähern und je stärker sich die Ungleichbehandlung der Personen auf die Ausübung grundrechtlich geschützter Freiheiten nachteilig auswirken kann (vgl. BVerfGE 60, 123 <134>; 82, 126 <146>; 88, 87 <96>). Ebenso wie an der vollständigen Darstellung des Maßstabs fehlt es auch an einer Darstellung der Vergleichsgruppen; ein Mangel der sich auf die Prüfung auswirkt.

141 (2) Dem verkürzten Maßstab entspricht die verkürzte Argumentation der Senatsmehrheit. Auf ihrer Grundlage ist nicht erkennbar, welche Unterschiede von solchem Gewicht zwischen den Partnern einer eingetragenen Lebenspartnerschaft und einer zwischen Geschwistern oder Verwandten bestehenden Lebensgemeinschaft bestehen, die die unterschiedliche Behandlung der Personenkreise zu rechtfertigen vermöchten.

142 So wird zur Begründung des Ausschlusses der Eingehung einer eingetragenen Lebenspartnerschaft durch Verwandte auf die Exklusivität der eingetragenen Lebenspartnerschaft abgestellt; begründet und näher dargestellt wird diese "Exklusivität" jedoch nicht. Diese lässt sich auch weder aus der Vorschrift über die Eingehung der eingetragenen Lebenspartnerschaft noch aus dem Gesamtkontext des Gesetzes herleiten.

143 Dass Verwandte "häufig" schon anderwärts in einer Ehe oder einer Lebenspartnerschaft gebunden sind, worauf die Senatsmehrheit hinweist, ist in diesem Zusammenhang unerheblich, denn dem wird schon durch die Partnerschaftsbegründungshindernisse nach Art. 1 § 1 Abs. 2 Nr. 1 oder 4 LPartDisBG Rechnung getragen.

144 Warum also ledige und anderweitig nicht durch eine Partnerschaft gebundene Verwandte gerader Linie und Geschwister nicht dem von der Senatsmehrheit postulierten "Exklusivitäts"grundsatz genügen könnten, erschließt sich aus der Begründung des Urteils nicht.

145 Durch ihre abstrakt gehaltene Argumentation weicht die Senatsmehrheit einer Befassung mit der eigentlich relevanten Vergleichsgruppe aus. Diese besteht aus Geschwistern und Verwandten gerader Linie, die in einer Weise zusammenleben, dass ihr rechtliches Regelungsbedürfnis mit dem anderer Partnerschaften vergleichbar ist, denen jetzt die Rechtsform der eingetragenen Lebenspartnerschaft eröffnet ist, weil sie einen gemeinsamen Hausstand führen, einander in Notlagen beistehen, im Rechtsverkehr gemeinsam oder jeweils für den anderen auftreten und emotional - mit derselben Verlässlichkeit wie andere auf Dauer angelegte Beziehungen - primär aufeinander bezogen sind.

146 Soweit es der Senatsmehrheit genügt, darauf hinzuweisen, dass verwandtschaftliche Einstandsgemeinschaften schon nach geltendem Recht "in gewisser Hinsicht eine Absicherung (erhalten), die gleichgeschlechtlichen Paaren erst mit der Lebenspartnerschaft eröffnet worden ist", zeigt bereits diese Formulierung, die ganz im Unverbindlichen und Ungefähren verbleibt, dass es der Senatsmehrheit an einem konkreten Maßstab für die Gleichheitsprüfung fehlt. Es bleibt unklar, welche Umstände für den Vergleich relevant sein sollen und welches Maß an Unterschiedlichkeit erforderlich ist, um die Ungleichbehandlung von Lebensgemeinschaften zwischen Verwandten und zwischen Nicht-Verwandten zu rechtfertigen. Auch der an dieser Stelle eingeführte Begriff der "Absicherung" wird nicht näher definiert. Der dann folgende Hinweis auf im Verwandtschaftsverhältnis bestehende "Zeugnisverweigerungsrechte, Erbrechte und zum Teil auch Pflichtteilsrechte sowie deren steuerliche Begünstigung" ist in dieser Undifferenziertheit unrichtig und überdies unvollständig. Dies zeigt sich etwa in Folgendem: Zwar besitzen Geschwister ein Zeugnisverweigerungsrecht etwa nach § 52 Abs. 1 Nr. 3 StPO. Jedoch haben Geschwister nur ein eingeschränktes gesetzliches Erbrecht (Eltern und Kinder gehen vor, § 1924 Abs. 1, § 1930 Abs. 1 BGB und § 1925 Abs. 1 und 2 BGB) und überhaupt kein Pflichtteilsrecht (§ 2303 Abs. 1 und 2 BGB). Vor allem sind die rechtlichen Auswirkungen der Lebenspartnerschaft nicht auf das Erbrecht sowie die Regelung von Zeugnisverweigerungsrechten beschränkt, sondern betreffen eine Vielzahl von Rechtsgebieten. Ein wesentliches Merkmal der Lebenspartnerschaft ist etwa die Unterhaltsverpflichtung, die zwischen Geschwistern nicht besteht (§ 1601 BGB). Geschwister werden auch nicht in die Familienversicherung aufgenommen (§ 10 Abs. 1 SGB V); ferner können sie nicht ihren Vermögensstand (Art. 1 § 6 LPartDisBG) regeln und sie erhalten kein "kleines Sorgerecht" wie in Art. 1 § 9 LPartDisBG.

147 Wegen der von ihr vorgenommenen eingeschränkten Prüfung hat die Senatsmehrheit den Sachverhalt nicht hinreichend im Lichte des Art. 3 Abs. 1 GG zu würdigen vermocht. Es ist danach nicht erkennbar geworden, dass zwischen Einstandsgemeinschaften von Geschwistern und Verwandten jeweils gleichen Geschlechts und anderen Lebenspartnerschaften, denen die Rechtsform der eingetragenen Lebenspartnerschaft eröffnet ist, Unterschiede von solchem Gewicht bestehen, dass es gerechtfertigt ist, für die beiden erstgenannten Personengruppen ein vergleichbares Regelungsbedürfnis ihrer Beziehungen zu verneinen und ihnen die Eingehung einer eingetragenen Lebenspartnerschaft zu versagen.

Haas

Ninia BAEHR, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon, Joseph Melilio, Plaintiffs-Appellants,

v.

John C. LEWIN, in his official capacity as Director of the Department of Health, State of Hawaii, Defendant-Appellee.

No. 15689.

Supreme Court of Hawaii.

May 5, 1993.

Before MOON, Acting C.J., LEVINSON, J., Intermediate Court of Appeals Chief Judge BURNS, in place of LUM, C.J., Recused, Intermediate Court of Appeals Judge HEEN, in place of KLEIN, J., recused, and Retired Justice HAYASHI, [FN*] Assigned by Reason of Vacancy.

MOON

Syllabus by the Court

*1 PRETRIAL PROCEDURE dismissal--involuntary dismissal--pleading, defects in general clear and certain nature of insufficiency--availability of relief under any state of facts provable.

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle the plaintiff to relief. The duty of the appellate court is therefore to view the plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory. For this reason, in reviewing an order dismissing the plaintiff's complaint for failure to state a claim, the appellate court's consideration is strictly limited to the allegations of the complaint, which must be deemed to be true.

PLEADING--motions judgment on pleadings--in general.

A motion for judgment on the pleadings serves much the same purpose as a motion to dismiss for failure to state a claim, except that it is made after the pleadings are closed. A motion for judgment on the pleadings has utility only when all material allegations of fact are admitted in the pleadings and questions of law alone remain.

PLEADING--motions--judgment on pleadings--in general.

A claim that is evidentiary in nature and requires findings of fact to resolve cannot properly be disposed of under the rubric of a motion for judgment on the pleadings. JUDGMENT--on motion or summary proceeding--hearing and determination.

Consideration of matters outside the pleadings transforms a motion seeking dismissal of a complaint into a motion for summary judgment. But resort to matters outside the record, by way of unverified statements of fact in counsel's memorandum or representations made in oral argument or otherwise, cannot accomplish such a transformation.

CONSTITUTIONAL LAW--personal, civil, and political rights--constitutional guarantees in general--privacy in general.

It is now well established that a right to personal privacy, or a guarantee of certain areas or zones of privacy, is implicit in the United States Constitution.

Article I, section 6 of the Hawaii Constitution expressly states that "[t]he right of the people to privacy is recognized and shall

not be infringed without the showing of a compelling state interest." The privacy concept embodied in this constitutional principle is to be treated as a fundamental right.

At a minimum, article I, section 6 of the Hawaii Constitution encompasses all of the fundamental rights expressly recognized as being subsumed within the privacy protections of the United States Constitution.

MARRIAGE--persons who may marry.

The federal construct of the fundamental right to marry--subsumed within the right to privacy implicitly protected by the United States Constitution-- presently contemplates unions between men and women.

CONSTITUTIONAL LAW--construction, operation, and enforcement of constitutional provisions--general rules of construction--relation to former or other Constitutions.

*2 As the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawaii Constitution, the Hawaii Supreme Court is free to give broader privacy protection under article I, section 6 of the Hawaii Constitution than that given by the United States Constitution.

CONSTITUTIONAL LAW--personal, civil, and political rights--constitutional guarantees in general--privacy in general.

A right to same-sex marriage is not so rooted in the traditions and collective conscience of Hawaii's people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither is a right to same-sex marriage implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed.

CONSTITUTIONAL LAW--personal, civil, and political rights--constitutional guarantees in general--privacy in general. SAME--same--same marriage, sex, and family.

MARRIAGE persons who may marry.

Article I, section 6 of the Hawaii Constitution does not give rise to a fundamental right of persons of the same sex to marry. MARRIAGE--power to regulate and control.

DIVORCE--grounds--causes for divorce in general.

The power to regulate marriage is a sovereign function reserved exclusively to the respective states. By its very nature, the power to regulate the marriage contract includes the power to determine the requisites of a valid marriage contract and to control the qualifications of the contracting parties, the forms and procedures necessary to solemnize the marriage, the duties and obligations it creates, its effect upon property and other rights, and the grounds for marital dissolution. In other words, marriage is a state-conferred legal status, the existence of which gives rise to rights and benefits reserved exclusively to that particular relationship.

MARRIAGE--nature of the obligation.

Marriage is a partnership to which both partners bring their financial resources as well as their individual energies and efforts.

CONSTITUTIONAL LAW--construction, operation, and enforcement of constitutional provisions, validity of statutory provisions.

Notwithstanding the state's acknowledged stewardship over the institution of marriage, the extent of permissible state regulation of the right of access to the marital relationship is subject to constitutional limitations or constraints.

By its plain language, article I, section 5 of the Hawaii Constitution prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex.

STATUTES--construction and operation--general rules of construction.

The fundamental starting point for statutory interpretation is the language of the statute itself. Where statutory language is plain and unambiguous, it must be construed according to its plain and obvious meaning.

CONSTITUTIONAL LAW--equal protection of laws; equal rights; sex discrimination--particular discriminatory practices.

*3 MARRIAGE--persons who may marry.

On its face, Hawaii Revised Statutes (HRS) s 572-1 (1985) restricts the marital relation to a male and a female. Accordingly, on its face and as applied, HRS s 572-1 denies same-sex couples access to the marital status and its concomitant rights and benefits.

CONSTITUTIONAL LAW equal protection of laws; equal rights--sex discrimination particular discriminatory practices.

It is the state's regulation of access to the status of married persons, on the basis of the applicants' sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws in violation of article I, section 5 of the Hawaii Constitution.

Whenever a denial of equal protection of the laws is alleged, as a rule the initial inquiry has been whether the legislation in question should be subjected to "strict scrutiny" or to a "rational basis" test.

"Strict scrutiny" analysis is applied to laws classifying on the basis of suspect categories or impinging upon fundamental rights expressly or impliedly granted by the constitution, in which case the laws are presumed to be unconstitutional unless the state shows compelling state interests which justify such classifications and that the laws are narrowly drawn to avoid unnecessary abridgments of constitutional rights.

Where suspect classifications or fundamental rights are not at issue, the appellate courts of this state have traditionally employed the rational basis test. Under the rational basis test, the inquiry is whether a statute furthers a legitimate state interest.

HRS s 572-1 establishes a sex-based classification.

Sex is a "suspect category" for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution; HRS s 572-1 is therefore subject to the "strict scrutiny" test.

HRS s 572-1 is presumed to be unconstitutional unless it can be shown that the statute's sex-based classification is justified by compelling state interests and that it is narrowly drawn to avoid unnecessary abridgments of constitutional rights.

The plaintiffs-appellants Ninia Baehr (Baehr), Genora Dancel (Dancel), Tammy Rodrigues (Rodrigues), Antoinette Pregil (Pregil), Pat Lagon (Lagon), and Joseph Melilio (Melilio) (collectively "the plaintiffs") appeal the circuit court's order (and judgment entered pursuant thereto) granting the motion of the defendant-appellee John C. Lewin (Lewin), in his official capacity as Director of the Department of Health (DOH), State of Hawaii, for judgment on the pleadings, resulting in the dismissal of the plaintiffs' action with prejudice for failure to state a claim against Lewin upon which relief can be granted. Because, for purposes of Lewin's motion, it is our duty to view the factual allegations of the plaintiffs' complaint in a light most favorable to them (i.e., because we must deem such allegations as true) and because it does not appear beyond doubt that the plaintiffs cannot prove any set of facts in support of their claim that would entitle them to the relief they seek, we hold that the circuit court erroneously dismissed the plaintiffs' complaint.

Accordingly, we vacate the circuit court's order and judgment and

remand this matter to the circuit court for further proceedings consistent with this opinion.

I. BACKGROUND

*4 On May 1, 1991, the plaintiffs filed a complaint for injunctive and declaratory relief in the Circuit Court of the First Circuit, State of Hawaii, seeking, inter alia: (1) a declaration that Hawaii Revised Statutes (HRS) s 572-1 (1985) [FN2]--the section of the Hawaii Marriage Law enumerating the [r]equisites of [a] valid marriage contract"--is unconstitutional insofar as it is construed and applied by the DOH to justify refusing to issue a marriage license on the sole basis that the applicant couple is of the same sex; and (2) preliminary and permanent injunctions prohibiting the future witholding of marriage licenses on that sole basis.

In addition to the necessary jurisdictional and venue-related averments, the plaintiffs' complaint alleges the following facts: (1) on or about December 17, 1990, Baehr/Dancel, Rodrigues/Pregil, and Lagon/Melilio (collectively "the applicant couples") filed applications for marriage licenses with the DOH, pursuant to HRS s 572-6 (Supp.1992); [FN3] (2) the DOH denied the applicant couples' marriage license applications solely on the ground that the applicant couples were of the same sex; [FN4] (3) the applicant couples have complied with all marriage contract requirements and provisions under HRS ch. 572, except that each applicant couple is of the same sex; (4) the applicant couples are otherwise eligible to secure marriage licenses from the DOH, absent the statutory prohibition or construction of HRS s 572-1 excluding couples of the same sex from securing marriage licenses; and (5) in denying the applicant couples' marriage license applications, the DOH was acting in its official capacity and under color of state law.

Based on the foregoing factual allegations, the plaintiffs' complaint avers that: (1) the DOH's interpretation and application of HRS s 572-1 to deny same-sex couples access to marriage licenses violates the plaintiffs' right to privacy, as guaranteed by article I, section 6 of the Hawaii Constitution, [FN5] as well as to the equal protection of the laws and due process of law, as guaranteed by article I, section 5 of the Hawaii Constitution; [FN6] (2) the plaintiffs have no plain, adequate, or complete remedy at law to redress their alleged injuries; and (3) the plaintiffs are presently suffering and will continue to suffer irreparable injury from the DOH's acts, policies, and practices in the absence of declaratory and injunctive relief.

On June 7, 1991, Lewin filed an amended answer to the plaintiffs' complaint.

In his amended answer, Lewin asserted the defenses of failure to state a claim upon which relief can be granted, sovereign immunity, qualified immunity, and abstention in favor of legislative action. [FN7] With regard to the plaintiffs' factual allegations, Lewin admitted: (1) his residency and status as the director of the DOH; (2) that on or about December 17, 1990, the applicant couples personally appeared before an authorized agent of the DOH and applied for marriage licenses; (3) that the applicant couples' marriage license applications were denied on the ground that each couple was of the same sex; and (4) that the DOH did not address the issue of the premarital examination required by HRS s 572-7(a) (Supp.1992) [FN8] "upon being advised" that the applicant couples were of the same sex. Lewin denied all of the remaining allegations of the complaint.

*5 On July 9, 1991, Lewin filed his motion for judgment on the pleadings, pursuant to Hawaii Rules of Civil Procedure (HRCP) 12(h)(2) (1990) [FN9] and 12(c) (1990), [FN10] and to dismiss the plaintiffs' complaint, pursuant to HRCP 12(b)(6) (1990), [FN11] and memorandum in support thereof in the circuit court. The memorandum

was unsupported by and contained no references to any affidavits, depositions, answers to interrogatories, or admissions on file. Indeed, the record in this case suggests that the parties have not conducted any formal discovery.

In his memorandum, Lewin urged that the plaintiffs' complaint failed to state a claim upon which relief could be granted for the following reasons: (1) the state's marriage laws "contemplate marriage as a union between a man and a woman"; (2) because the only legally recognized right to marry "is the right to enter a heterosexual marriage, [the] plaintiffs do not have a cognizable right, fundamental or otherwise, to enter into state-licensed homosexual marriages"; [FN12] (3) the state's marriage laws do not "burden, penalize, infringe, or interfere in any way with the [plaintiffs'] private relationships"; (4) the state is under no obligation "to take affirmative steps to provide homosexual unions with its official approval"; (5) the state's marriage laws "protect and foster and may help to perpetuate the basic family unit, regarded as vital to society, that provides status and a nurturing environment to children born to married persons" and, in addition, "constitute a statement of the moral values of the community in a manner that is not burdensome to (the] plaintiffs"; (6) assuming the plaintiffs are homosexuals (a fact not pleaded in the plaintiffs' complaint), [FN13] they "are neither a suspect nor a quasi-suspect class and do not require heightened judicial solicitude"; and (7) even if heightened judicial solicitude is warranted, the state's marriage laws "are so removed from penalizing, burdening, harming, or otherwise interfering with [the] plaintiffs and their relationships and perform such a critical function in society that they must be sustained."

The plaintiffs filed a memorandum in opposition to Lewin's motion for judgment on the pleadings on August 29, 1991. Citing Au v. Au, 63 Haw. 210, 626 P.2d 173 (1983), and Midkiff v. Castle & Cooke, Inc., 45 Haw. 409, 368 P.2d 887 (1962), they argued that, for purposes of Lewin's motion, the circuit court was bound to accept all of the facts alleged in their complaint as true and that the complaint therefore could not be dismissed for failure to state a claim unless it appeared beyond doubt that they could prove no set of facts that would entitle them to the relief sought. Proclaiming their homosexuality and asserting a fundamental constitutional right to sexual orientation, the plaintiffs reiterated their position that the DOH's refusal to issue marriage licenses to the applicant couples violated their rights to privacy, equal protection of the laws, and due process of law under article I, sections 5 and 6 of the Hawaii Constitution.

*6 The circuit court heard Lewin's motion on September 3, 1991, and, on October 1, 1991, filed its order granting Lewin's motion for judgment on the pleadings on the basis that Lewin was "entitled to judgment in his favor as a matter of law" and dismissing the plaintiffs' complaint with prejudice. [FN14]

The plaintiffs' timely appeal followed.

II. JUDGMENT ON THE PLEADINGS WAS ERRONEOUSLY GRANTED.

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. Ravelo v. County of Hawaii, 66 Haw. 194, 198, 658 P.2d 883, 886 (1983) (quoting Midkiff, 45 Haw. at 414, 368 P.2d at 890); Marsland v. Pang, 5 Haw.App. 463, 474, 701 P.2d 175, 185-86, cert. denied, 67 Haw. 686, 744 P.2d 781 (1985). We must therefore view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein

could warrant relief under any alternative theory. Ravelo, 66 Haw. at 199, 658 P.2d at 886. For this reason, in reviewing the circuit court's order dismissing the plaintiffs' complaint in this case, our consideration is strictly limited to the allegations of the complaint, and we must deem those allegations to be true. Au, 63 Haw. at 214, 626 P.2d at 177 (1981).

An HRCP 12(c) motion serves much the same purpose as an HRCP 12(b)(6) motion, except that it is made after the pleadings are closed. Marsland, 5 Haw.App. at 474, 701 P.2d at 186. " 'A Rule 12(c) motion ... for a judgment on the pleadings only has utility when all material allegations of fact are admitted in the pleadings and only questions of law remain.' " Id. at 475, 701 P.2d at 186 (citing 5 Wright and Miller, Federal Practice and Procedure: Civil s 1357 (1969)).

Based on the foregoing authority, it is apparent that an order granting an HRCP 12(c) motion for judgment on the pleadings must be based solely on the contents of the pleadings. A claim that is evidentiary in nature and requires findings of fact to resolve cannot properly be disposed of under the rubric of HRCP 12(c). Cf. Nawahie v. Goo Wan Hoy, 26 Haw. 111 (1921) ("Only such facts as were properly before the court below at the time of the rendition of the decree appealed from and which appear in the record ... on appeal will be considered. All other matters will be treated as surplusage and of course will be disregarded.") We have recognized that consideration of matters outside the pleadings transforms a motion seeking dismissal of a complaint into an HRCP 56 motion for summary judgment. See Au, 63 Haw. at 213, 626 P.2d at 176; Del Rosario v. Kohanuinui, 52 Haw. 583, 483 P.2d 181 (1971); HRCP 12(b) (1990); cf. HRCP 12(c) (1990). But resort to matters outside the record, by way of "[u]nverified statements of fact in counsel's memorandum or representations made in oral argument" or otherwise, cannot accomplish such a transformation. See Au, 63 Haw. at 213, 626 P.2d at 177; cf. Asada v. Sunn, 66 Haw. 454, 455, 666 P.2d 584, 585 (1983); Mizoguchi v. State Farm Mut. Auto. Ins. Co., 66 Haw. 373, 381-82, 663 P.2d 1071, 1076-77 (1983); HRCP 56(e) (1990).

A. The Circuit Court Made Evidentiary Findings of Fact.

*7 Notwithstanding the absence of any evidentiary record before it, the circuit court's October 1, 1991 order granting Lewin's motion for judgment on the pleadings contained a variety of findings of fact. For example, the circuit court "found" that: (1) HRS s 572-1 "does not infringe upon a person's individuality or lifestyle decisions, and none of the plaintiffs has provided testimony to the contrary"; (2) HRS s 572-1 "does not ... restrict [or] burden ... the exercise of the right to engage in a homosexual lifestyle"; (3) Hawaii has exhibited a "history of tolerance for all peoples and their cultures"; (4) "the plaintiffs have failed to show that they have been ostracized or oppressed in Hawaii and have opted instead to rely on a general statement of historic problems encountered by homosexuals which may not be relevant to Hawaii"; (5) "homosexuals in Hawaii have not been relegated to a position of 'political powerlessness.' ... [T]here is no evidence that homosexuals and the homosexual legislative agenda have failed to gain legislative support in Hawaii"; (6) the "[P]laintiffs have failed to show that homosexuals constitute a suspect class for equal protection analysis under [a]rticle I, [s]ection 5 of the Hawaii State Constitution;" (7) "the issue of whether homosexuality constitutes an immutable trait has generated much dispute in the relevant scientific community"; [FN15] and (8) HRS s 572-1 "is obviously designed to promote the general welfare interests of the community by sanctioning traditional man-woman family units and procreation." (Emphasis added.)

Although not expressly denominated as such, the circuit court's

order also contained a number of conclusions of law. [FN16] These included: (1) "[t]he right to enter into a homosexual marriage is not a fundamental right protected by [a]rticle I, [s]ection 6 of the Hawaii State Constitution"; (2) the right to be free from the denial of a person's civil rights or from discrimination in the exercise thereof because of "sexual orientation [is] ... covered under [a]rticle I, [s]ection 5 of the State Constitution"; (3) HRS s 572-1 "permits heterosexual marriages but not homosexual marriages" and "does not violate the due process clause of [a]rticle I, [s]ection 5 of the Hawaii State Constitution"; (4) HRS s 572-1 "represents a legislative decision to extend the benefits of lawful marriage only to traditional family units which consist of male and female partners"; (5) "[b]ecause [entering into a] homosexual marriage [is not] a fundamental [constitutional] right .... the provisions of section 572-1 do not violate the due process clause of [a]rticle I, [s]ection 5 of the Hawaii State Constitution"; (6) "[h]omosexuals do not constitute a 'suspect class' for purposes of equal protection analysis under [a]rticle I, [s]ection 5 of the Hawaii State Constitution"; (7) "a group must have been subject to purposeful, unequal treatment or have been relegated to a position of political powerlessness in order to be considered a 'suspect class' for the purposes of constitutional analysis"; (8) "[a] law which classifies on the basis of race deserves the utmost judicial scrutiny because race clearly qualifies as a suspect classification. The same cannot be convincingly said with respect to homosexuals as a group"; (9) "the classification created by section 572-1 must meet only the rational relationship test"; (10) "[t]he classification of section 572-1 meets the rational relationship test"; (11) "[s]ection 572-1 is clearly a rational, legislative effort to advance the general welfare of the community by permitting only heterosexual couples to legally marry"; and, finally, (12) Lewin "is entitled to judgment in his favor as a matter of law[.]"

*8 In reviewing the circuit court's order on appeal, as noted above, we must deem all of the factual, allegations of the plaintiffs' complaint as true or admitted, see Au, 63 Haw. at 214, 626 P.2d at 177; Marsland, 5 Haw.App. at 475, 701 P.2d at 186, and, in the absence of an evidentiary record, ignore all of the circuit court's findings of fact. See Au, 63 Haw. at 213, 626 P.2d at 177; Marsland, 5 Haw.App. at 475, 701 P.2d at 186; cf. Asada, 66 Haw. at 455, 666 P.2d at 585; Mizoguchi, 66 Haw. at 381-82, 663 P.2d at 1076-77; Nawahie, 26 Haw. at 111; HRCP 12(c) and 56(e). Ultimately, our task on appeal is to determine whether the circuit court's order, stripped of its improper factual findings, supports its conclusion that Lewin is entitled to judgment as a matter of law and, by implication, that it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief under any alternative theory. See Ravelo, 66 Haw. at 198-99; Au, 63 Haw. at 214, 626 P.2d at 177; Marsland, 5 Haw.App. at 474-75.

We conclude that the circuit court's order runs aground on the shoals of the Hawaii Constitution's equal protection clause and that, on the record before us, unresolved factual questions preclude entry of judgment, as a natter of law, in favor of Lewin and against the plaintiffs. Before we address the plaintiffs' equal protection claim, however, it is necessary as a threshold matter to consider their allegations regarding the right to privacy (and, derivatively, due process of law) within the context of the record in its present embryonic form.

B. The Right to Privacy Does Not Include a Fundamental Right to Same-Sex Marriage.

It is now well established that " 'a right to personal privacy, or a guarantee of certain areas or zones of privacy,' is implicit

in the United States Constitution." State v. Mueller, 66 Haw. 616, 618, 671 P.2d 1351, 1353 (1983) (quoting Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 1973)). And article I, section 6 of the Hawaii Constitution expressly states that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." Haw. Const. art. I, s 6 (1978). The framers of the Hawaii Constitution declared that the "privacy concept" embodied in article I, section 6 is to be "treated as a fundamental right[.]" State v. Kam, 69 Haw. 483, 493, 748 P.2d 372, 378 (1988) (citing Comm. Whole Rep. No. 15, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 1024 (1980)). When article I, section 6 of the Hawaii Constitution was being adopted, the 1978 Hawaii Constitutional Convention, acting as a committee of the whole, clearly articulated the rationale for its adoption:

> By amending the Constitution to include a separate and distinct privacy right, it is the intent of your Committee to insure that privacy is treated as a fundamental right for purposes of constitutional analysis.... This right is similar to the privacy right discussed in cases such as Griswold v. Connecticut, (381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 1965)], Eisenstadt v. Baird, [405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972)], Roe v. Wade, etc. It is a right that, though unstated in the federal Constitution, emanates from the penumbra of several guarantees of the Bill of Rights. Because of this, there has been some confusion as to the source of the right and the importance of it. As such, it is treated as a fundamental right subject to interference only when a compelling state interest is demonstrated. By inserting clear and specific language regarding this right into the Constitution, your Committee intends to alleviate any possible confusion over the source of the right and the existence of it.

*9 Comm. Whole Rep. No. 15, 1 Proceedings, at 1024. This court cited the same passage in Mueller, 66 Haw. at 625-26, 671 P.2d at 1357-58, in an attempt to determine the "intended scope of privacy protected by the Hawaii Constitution." Id. at 626, 671 P.2d at 1358. We ultimately concluded in Mueller that the federal cases cited by the Convention's committee of the whole should guide our construction of the intended scope of article I, section 6. Id.

Accordingly, there is no doubt that, at a minimum, article I, section 6 of the Hawaii Constitution encompasses all of the fundamental rights expressly recognized as being subsumed within the privacy protections of the United States Constitution. In this connection, the United States Supreme Court has declared that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." Zablocki v. Redhail, 434 U.S. 374, 384, 98 S.Ct. 673, 680, 54 L.Ed.2d 618 (1978). The issue in the present case is, therefore, whether the "right to marry" protected by article I, section 6 of the Hawaii Constitution extends to same-sex couples. Because article I, section 6 was expressly derived from the general right to privacy under the United States Constitution and because there are no Hawaii cases that have delineated the fundamental right to marry, this court, as we did in Mueller, looks to federal cases for guidance. The United States Supreme Court first characterized the right of marriage as fundamental in Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). In Skinner, the right to marry was inextricably linked to the right of procreation. The dispute before the Court arose out of an Oklahoma statute that allowed the state to sterilize "habitual criminals" without their consent. In striking down the statute, the Skinner court indicated that it was "dealing ... with legislation which involve(d] one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of

the race." Id. at 541, 62 S.Ct. at 1113 (emphasis added). Whether the Court viewed marriage and procreation as a single indivisible right, the least that can be said is that it was obviously contemplating unions between men and women when it ruled that the right to marry was fundamental. This is hardly surprising inasmuch as none of the United States sanctioned any other marriage configuration at the time. The United States Supreme Court has set forth its most detailed discussion of the fundamental right to marry in Zablocki, supra, which involved a Wisconsin statute that prohibited any resident of the state with minor children "not in his custody and which he is under obligation to support" from obtaining a marriage license until the resident demonstrated to a court that he was in compliance with his child support obligations. 434 U.S. at 376, 98 S.Ct. at 675. The Zablocki court held that the statute burdened the fundamental right to marry; applying the "strict scrutiny" standard to the statute, the Court invalidated it as violative of the fourteenth amendment to the United States Constitution. Id. at 390-91, 98 S.Ct. at 683. In so doing, the Zablocki court delineated its view of the evolution of the federally recognized fundamental right of marriage as follows*

*10 Long ago, in Maynard v. Hill, 125 U.S. 190, 8 S. Ct. 723, 31 L. Ed. 654 (1888), the Court characterized marriage as "the most important relation in life," id., at 205, 8 S. Ct., at 726, and as "the foundation of the family and of society, without which there would be neither civilization nor progress," id., at 211, 8 S. Ct., at 729. In Meyer v. Nebraska, 262 U.S. 390, 434 S. Ct. 625, 67 L. Ed. 1042 (1923), the Court recognized that the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause, id., at 399, 43 S. Ct., at 626, and in Skinner v. Oklahoma ex rel. Williamson, supra, ... marriage was described as "fundamental to the very existence and survival of the race," 316 U.S., at 541, 62 S. Ct., at 1113.

....

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society. The woman whom appellee desired to marry had a fundamental right to seek an abortion of their expected child, see Roe v. Wade, supra, or to bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illigitimacy brings.... Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection. And, if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.

Id. at 384-86, 98 S.Ct. at 680-81 (citations and footnote omitted). Implicit in the Zablocki court's link between the right to marry, on the one hand, and the fundamental rights of procreation, childbirth, abortion, and child rearing, on the other, is the assumption that the one is simply the logical predicate of the others.

The foregoing case law demonstrates that the federal construct of the fundamental right to marry--subsumed within the right to privacy implicitly protected by the United States Constitution--presently contemplates unions between men and women. (once again, this is hardly surprising inasmuch as such unions are the only state-sanctioned marriages currently acknowledged in this country.)

Therefore, the precise question facing this court is whether we

will extend the present boundaries of the fundamental right of marriage to include same-sex couples, or, put another way, whether we will hold that same-sex couples possess a fundamental right to marry. In effect, as the applicant couples frankly admit, we are being asked to recognize a new fundamental right. There is no doubt that "[a]s the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawaii Constitution, we are free to give broader privacy protection (under article I, section 6 of the Hawaii Constitution] than that given by the federal constitution." Kam, 69 Haw. at 491, 748 P.2d at 377 (1988) (citations omitted). However, we have also held that the privacy right found in article I, section 6 is similar to the federal right and that no "purpose to lend talismanic effect" to abstract phrases such as "intimate decision" or "personal autonomy" can "be inferred from [article I, section 61, any more than ... from the federal decisions." Mueller, 66 Haw. at 630, 671 P.2d at 1360.

*11 In Mueller, this court, in attempting to circumscribe the scope of article I, section 6, found itself ultimately "led back to" the landmark United States Supreme Court cases "in [its] search for guidance" on the issue. Id. at 626, 671 P.2d at 1358. In the case that first recognized a fundamental right to privacy, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678 (1965), the Court declared that it was "deal[ing] with a right ... older than the Bill of Rights[.]" Id. at 486, 85 S.Ct. at 1682. And in a concurring opinion, Justice Goldberg observed that judges "determining which rights are fundamental" must look not to "personal and private notions," but to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] ... as to be ranked as fundamental." ... The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' Id. at 493, 85 S.Ct. at 1686-87 (Goldberg, J., concurring) (citations omitted). [FN17]

Applying the foregoing standards to the present case, we do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. Accordingly, we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise.

Our holding, however, does not leave the applicant couples without a potential remedy in this case. As we will discuss below, the applicant couples are free to press their equal protection claim. If they are successful, the State of Hawaii will no longer be permitted to refuse marriage licenses to couples merely on the basis that they are of the same sex. But there is no fundamental right to marriage for same-sex couples under article I, section 6 of the Hawaii Constitution.

C. Inasmuch as the Applicant Couples Claim That the Express Terms of HRS s 572-1, which Discriminates against Same-Sex Marriages, Violate Their Rights under the Equal Protection Clause of the Hawaii Constitution, the Applicant Couples Are Entitled to an Evidentiary Hearing to Determine Whether Lewin Can Demonstrate that HRS s 572-1 Furthers Compelling State Interests and Is Narrowly Drawn to Avoid Unnecessary Abridgments of Constitutional Rights.P

In addition to the alleged violation of their constitutional

rights to privacy and due process of law, the applicant couples contend that they have been denied the equal protection of the laws as guaranteed by article I, section 5 of the Hawaii Constitution. On appeal, the plaintiffs urge and, on the state of the bare record before us, we agree that the circuit court erred when it concluded, as a matter of law, that: (1) homosexuals do not constitute a "suspect class" for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution; [FN18] (2) the classification created by HRS s 572-1 is not subject to "strict scrutiny," but must satisfy only the "rational relationship" test; and (3) HRS s 572-1 satisfies the rational relationship test because the legislature "obviously designed [it] to promote the general welfare interests of the community by sanctioning traditional man-woman family units and procreation."

*12 1. Marriage is a state-conferred legal partnership status, the existence of which gives rise to a multiplicity of rights and benefits reserved exclusively to that particular relation. The power to regulate marriage is a sovereign function reserved exclusively to the respective states. Salisbury v. List, 501 F.Supp. 105, 107 (D.Nev.1980); see O'Neill v. Dent, 364 F.Supp. 565 (E.D.N.Y.1973). By its very nature, the power to regulate the marriage relation includes the power to determine the requisites of a valid marriage contract and to control the qualifications of the contracting parties, the forms and procedures necessary to solemnize the marriage, the duties and obligations it creates, its effect upon property and other rights, and the grounds for marital dissolution. Id.; see also Maynard v. Hill, supra.

In other words, marriage is a state-conferred legal status, the existence of which gives rise to rights and benefits reserved exclusively to that particular relationship. This court construes marriage as " 'a partnership to which both partners bring their financial resources as well as their individual energies and efforts.' " Gussin v. Gussin, 73 Haw. 470, 483, 836 P.2d 484, 491 (1992) (citation omitted); Myers v. Myers, 70 Haw. 143, 154, 764 P.2d 1237, 1244, reconsideration denied, 70 Haw. 661, 796 P.2d 1004 (1988); Cassiday v. Cassiday, 68 Haw. 383, 387, 716 P.2d 1133, 1136 (1986). So zealously has this court guarded the state's role as the exclusive progenitor of the marital partnership that it declared, over seventy years ago, that "common law" marriages--i.e., "marital" unions existing in the absence of a state-issued license and not performed by a person or society possessing governmental authority to solemnize marriages--would no longer be recognized in the Territory of Hawaii. Parke v. Parke, 25 Haw. 397,, 404-05 (1920). [FN19]

Indeed, the state's monopoly on the business of marriage creation has been codified by statute for more than a century. HRS s 572-1(7), descended from an 1872 statute of the Hawaiian Kingdom, conditions a valid marriage contract on "[t]he marriage ceremony be[ing] performed in the State by a person or society with a valid license to solemnize marriages[.]" HRS s 572-11 (1985) accords the DOH sole authority to grant licenses to solemnize marriages, and HRS s 572-12 (1985) restricts the issuance of such licenses to clergy, representatives of religious societies (such as the Society of Friends) not having clergy but providing solemnization by custom, and judicial officers. Finally, HRS ss 572-5 and 572-6 vest the DOH with exclusive authority to issue licenses to marriage applicants and to ensure that the general requisites and procedures prescribed by HRS chapter 572 are satisfied.

The applicant couples correctly contend that the DOH's refusal to allow them to marry on the basis that they are members of the same sex deprives them of access to a multiplicity of rights and benefits that are contingent upon that status. Although it is unnecessary in this opinion to engage in an encyclopedic recitation

of all of them, a number of the most salient marital rights and benefits are worthy of note. They include: (1) a variety of state income tax advantages, including deductions, credits, rates, exemptions, and estimates, under HRS chapter 235 (1985 and Supp.1992); (2) public assistance from and exemptions relating to the Department of Human Services under HRS chapter 346 (1985 and Supp.1992); (3) control, division, acquisition, and disposition of community property under HRS chapter 510 (1985); (4) rights relating to dower, curtesy, and inheritance under HRS chapter 533 (1985 and Supp.1992); (5) rights to notice, protection, benefits, and inheritance under the Uniform Probate Code, HRS chapter 560 (1985 and Supp.1992); (6) award of child custody and support payments in divorce proceedings under HRS chapter 571 (1985 and Supp.1992); (7) the right to spousal support pursuant to HRS s 572-24 (1985); (8) the right to enter into premarital agreements under HRS chapter 572D (Supp.1992); (9) the right to change of name pursuant to HRS s 574-5(a)(3) (Supp.1992); (10) the right to file a nonsupport action under HRS chapter 575 (1985 and Supp.1992); (11) post-divorce rights relating to support and property division under HRS chapter 580 (1985 and Supp.1992); (12) the benefit of the spousal privilege and confidential marital communications pursuant to Rule 505 of the Hawaii Rules of Evidence (1985); (13) the benefit of the exemption of real property from attachment or execution under HRS chapter 651 (1985); and (14) the right to bring a wrongful death action under HRS chapter 663 (1985 and Supp.1992). For present purposes, it is not disputed that the applicant couples would be entitled to all of these marital rights and benefits, but for the fact that they are denied access to the state-conferred legal status of marriage.

*13 2. HRS s 572-1, on its face, discriminates based on sex against the applicant couples in the exercise of the civil right of marriage, thereby implicating the equal protection clause of article I, section 5 of the Hawaii Constitution.

Notwithstanding the state's acknowledged stewardship over the institution of marriage, the extent of permissible state regulation of the right of access to the marital relationship is subject to constitutional limitations or constraints. See, e.g., Zablocki, 435 U.S. at 388-91, 98 S.Ct. at 682-83; Loving v. Virginia, 388 U.S. 1, 7-12, 87 S.Ct. 1817, 1821-24, 18 L.Ed.2d 1010 (1967); Salisbury, 501 F.Supp. at 107 (citing Johnson v. Rockefeller, 58 F.R.D. 42 (S.D.N.Y.1972)). It has been held that a state may deny the right to marry only for compelling reasons. Salisbury, 501 F.Supp. at 107; Johnson, supra. [FN20]

The equal protection clauses of the United States and Hawaii Constitutions are not mirror images of one another. The fourteenth amendment to the United States Constitution somewhat concisely provides, in relevant part, that a state may not "deny to any person within its jurisdiction the equal protection of the laws." Hawaii's counterpart is more elaborate. Article I, section 5 of the Hawaii Constitution provides in relevant part that "[n]o person shall ... be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry." (Emphasis added.) Thus, by its plain language, the Hawaii Constitution prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex.

"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [people]." Loving, 388 U.S. at 1 87 S.Ct. at 1824. So "fundamental" does the United States Supreme Court consider the institution of marriage that it has deemed marriage to be "one of the 'basic civil rights of [men and women.]" ' Id. (quoting

Skinner, 316 U.S. at 541, 62 S.Ct. at 1113).

Black's Law Dictionary (6th ed.1990) defines "civil rights" as synonymous with "civil liberties." Id. at 246. "Civil liberties" are defined, inter alia, as "[p]ersonal, natural rights guaranteed and protected by Constitution; e.g., ... freedom from discrimination.... Body of law dealing with natural liberties ... which invade equal rights of others. Constitutionally, they are restraints on government." Id. This court has held, in another context, that such "privilege(s] of citizenship ... cannot be taken away [on] any of the prohibited bases of race, religion, sex or ancestry" enumerated in article I, section 5 of the Hawaii Constitution and that to do so violates the right to equal protection of the laws as guaranteed by that constitutional provision. State v. Levinson, 71 Haw. 492, 499, 795 P.2d 845, 849-50 (1990) (exclusion of female jurors solely because of their sex denies them equal protection under Hawaii Constitution) (emphasis added).

*14 Rudimentary principles of statutory construction render manifest the fact that, by its plain language, HRS s 572-1 restricts the marital relation to a male and a female. " '[T]he fundamental starting point for statutory interpretation is the language of the statute itself.... [W]here the statutory language is plain and unambiguous, " we construe it according " 'to its plain and obvious meaning.' " Schmidt v. Board. of Directors of Ass'n of Apartment Owners of The Marco Polo Apartments, 73 Haw. 526, 531-32, 836 P.2d 479, 482 (1992); In re Tax Appeal of Lower Mapunapuna Tenants Ass'n, 73 Haw. 63, 68, 828 P.2d 263, 266 (1992). The non-consanguinity requisite contained in HRS s 572-1(1) precludes marriages, inter alia, between "brother and sister," "uncle and niece," and "aunt and nephew[.]" The anti-bigamy requisite contained in HRS s 572-1(3) forbids a marriage between a "man" or a "woman" as the case may be, who, at the time, has a living and "lawful wife ... [or] husband[.]" And the requisite, set forth in HRS s 572-1(7), requiring marriage ceremonies to be performed by state-licensed persons or entities expressly speaks in terms of "the man and woman to be married [.]" [FN21] Accordingly, on its face and (as Lewin admits) as applied, HRS s 572-1 denies same-sex couples access to the marital status and its concomitant rights and benefits. It is the state's regulation of access to the status of married persons, on the basis of the applicants' sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws in violation of article I, section 5 of the Hawaii Constitution.

Relying primarily on four decisions construing the law of other jurisdictions, [FN22] Lewin contends that "the fact that homosexual (sic--actually, same-sex] [FN23] partners cannot form a state-licensed marriage is not the product of impermissible discrimination" implicating equal protection considerations, but rather "a function of their biologic inability as a couple to satisfy the definition of the status to which they aspire." Lewin's answering brief at 21. Put differently, Lewin proposes that "the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman." Id. at 7. We believe Lewin's argument to be circular and unpersuasive.

Two of the decisions upon which Lewin relies are demonstrably inapposite to the appellant couples' claim. In Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), appeal dismissed, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed. 65 (1972), the questions for decision were whether a marriage of two persons of the same sex was authorized by state statutes and, if not, whether state authorization was compelled by various provisions of the United States Constitution, including the fourteenth amendment. Regarding

the first question, the Baker court arrived at the same conclusion as have we with respect to HRS s 572-1: by their plain language, the Minnesota marriage statutes precluded same-sex marriages. Regarding the second question, however, the court merely held that the United States Constitution was not offended; apparently, no state constitutional questions were raised and none were addressed.

*15 De Santo v. Barnsley, 328 Pa.Super. 181, 476 A.2d 952 (1984), is also distinguishable. In De Santo, the court held only that common law same-sex marriage did not exist in Pennsylvania, a result irrelevant to the present case. The appellants sought to assert that denial of same-sex common law marriages violated the state's equal rights amendment, but the appellate court expressly declined to reach the issue because it had not been raised in the trial court. Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct.App.1973), and Singer v. Hara, 11 Wash.App. 247, 522 P.2d 1187, review denied, 84 Wash.2d 1008 (1974), warrant more in-depth analysis. In Jones, the appellants, both females, sought review of a judgment that held that they were not entitled to have a marriage license issued to them, contending that refusal to issue the license deprived them of the basic constitutional rights to marry, associate, and exercise religion freely. In an opinion acknowledged to be "a case of first impression in Kentucky," the Court of Appeals summarily affirmed, ruling as follows: Marriage was a custom long before the state commenced to issue licenses for that purpose.... [M]arriage has always been considered as a union of a man and a woman....

It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Clerk ... to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined.

....

In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage. 501 S.W.2d at 589-90. Significantly, the appellants' equal protection rights federal or state--were not asserted in Jones, and, accordingly, the appeals court was relieved of the necessity of addressing and attempting to distinguish the decision of the United States Supreme Court in Loving. Loving involved the appeal of a black woman and a caucasian man (the Lovings) who were married in the District of Columbia and thereafter returned to their home state of Virginia to establish their marital abode. 388 U.S. at 2, 87 S.Ct. at 1819. The Lovings were duly indicted for and convicted of violating Virginia's miscegenation laws, [FN24] which banned interracial marriages. Id. [FN25] In his sentencing decision, the trial judge stated, in substance, that Divine Providence had not intended that the marriage state extend to interracial unions: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." Id. at 3, 87 S.Ct. at 1819 (quoting the trial judge) (emphasis added).

The Lovings appealed the constitutionality of the state's miscegenation laws to the Virginia Supreme Court of Appeals, which, inter alia, upheld their constitutionality and affirmed the Lovings' convictions. Id. at 3-4, 388 S.Ct. at 1819. [FN26] The Lovings then pressed their appeal to the United States Supreme Court. Id.

*16 In a landmark decision, the United States Supreme Court, through Chief Justice Warren, struck down the Virginia miscegenation laws on both equal protection and due process grounds. The Court's holding as to the former is pertinent for present purposes:

[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination....

There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races.... At the very least, the Equal Protection Clause demands that racial classifications ... be subjected to the "most rigid scrutiny," ... and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. ...

There is patently no legitimate overriding purpose independent of invidious discrimination which justifies this classification.... We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. Id. at 10-12, 87 S.Ct. at 1823 (emphasis added and citation omitted).

[FN27]

The facts in Loving and the respective reasoning of the Virginia courts, on the one hand, and the United States Supreme Court, on the other, both discredit the reasoning of Jones and unmask the tautological and circular nature of Lewin's argument that HRS s 572-1 does not implicate article I, section 5 of the Hawaii Constitution because same sex marriage is an innate impossibility. Analogously to Lewin's argument and the rationale of the Jones court, the Virginia courts declared that interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural, 388 U.S. at 3, 87 S.Ct. at 1819, and, in effect, because it had theretofore never been the "custom" of the state to recognize mixed marriages, marriage "always" having been construed to presuppose a different configuration. With all due respect to the Virginia courts of a bygone era, we do not believe that trial judges are the ultimate authorities on the subject of Divine Will, and, as Loving amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order. Singer v. Hara, 11 Wash.App. 247, 522 P.2d 1187, review denied, 84 Wash.2d 1008 (1974), suffers the same fate as does Jones. In Singer, two males appealed from a trial court's order denying their motion to show cause by which they sought to compel the county auditor to issue them a marriage license. on appeal, the unsuccessful applicants argued that: (1) the trial court erred in concluding that the Washington state marriage laws prohibited same-sex marriages; (2) the trial court's order violated the equal rights amendment to the state constitution; and (3) the trial court's order violated various provisions of the United States Constitution, including the fourteenth amendment.

*17 The Washington Court of Appeals affirmed the trial court's order, rejecting all three of the appellants' contentions. Predictably, and for the same reasons that we have reached the identical conclusion regarding HRS s 572-1, the Singer court determined that it was "apparent from a plain reading of our marriage statutes that the legislature has not authorized same-sex marriages." Id. at 249, 522 P.2d at 1189. Regarding the appellants' federal and state claims, the court specifically "(did] not take exception to the proposition that the Equal Protection Clause of the Fourteenth Amendment requires strict judicial scrutiny of legislative attempts at sexual discrimination." Id. at 261, 522 P.2d at 1196 (emphasis added). [FN28]

Nevertheless, the Singer court found no defect in the state's

marriage laws, under either the United States Constitution or the state constitution's equal rights amendment, based upon the rationale of Jones: "[a]ppellants were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself." Id. As in Jones, we reject this exercise in tortured and conclusory sophistry.

3. Equal Protection Analysis under Article I, Section 5 of the Hawaii Constitution "Whenever a denial of equal protection of the laws is alleged, as a rule our initial inquiry has been whether the legislation in question should be subjected to 'strict scrutiny' or to a 'rational basis' test." Nakano v. Matayoshi, 68 Haw. 140, 151, 706 P.2d 814, 821 (1985) (citing Nagle v. Board of Educ., 63 Haw. 389, 392, 629 P.2d 109, 111 (1981)). This court has applied "strict scrutiny" analysis to " 'laws classifying on the basis of suspect categories or impinging upon fundamental rights expressly or impliedly granted by the [c]onstitution," ' in which case the laws are " 'presumed to be unconstitutional [FN29] unless the state shows compelling state interests which justify such classifications,' " Holdman v. Olim, 59 Haw. 346, 349, 581 P.2d 1164, 1167 (1978) (citing Nelson v. Miwa, 56 Haw. 601, 605 n.4, 546 P.2d 1005, 1008 n.4 (1976)), and that the laws are "narrowly drawn to avoid unnecessary abridgments of constitutional rights." Nagle, 63 Haw. at 392, 629 P.2d at 111 (citations omitted).

By contrast, "[w]here 'suspect' classifications or fundamental rights are not at issue, this court has traditionally employed the rational basis test." Id. at 393, 629 P.2d at 112. "Under the rational basis test, we inquire as to whether a statute rationally furthers a legitimate state interest." Estate of Coates v. Pacific Engineering, 71 Haw. 358, 364, 791 P.2d 1257, 1260 (1990). "Our inquiry seeks only to determine whether any reasonable justification can be found for the legislative enactment." Id.

As we have indicated, HRS s 572-1, on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex. See infra at 30-31. As such, HRS s 572-1 establishes a sex-based classification.

*18 HRS s 572-1 is not the first sex-based classification with which this court has been confronted. In Holdman v. Olim, supra, a woman prison visitor (Holdman) brought an action against prison officials seeking injunctive, monetary, and declaratory relief arising from a prison matron's refusal to admit Holdman entry when she was not wearing a brassiere. The matron's refusal derived from a directive, promulgated by the Acting Prison Administrator, that "visitors will be properly dressed. Women visitors are asked to be fully clothed, including undergarments. Provocative attire is discouraged." 59 Haw. at 347-48, 581 P.2d at 1166 (emphasis added). Holdman proceeded to trial, and the circuit court dismissed her action at the close of her case in chief. Id. at 347, 581 P.2d at 1165-66. On appeal, this court affirmed the dismissal of Holdman's complaint. The significance of Holdman for present purposes, however, is the rationale by which this court reached its result:

> This court has not [heretofore] dealt with a sex-based classification. In Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973), a plurality of the United States Supreme Court favored the inclusion of classifications based upon sex among those considered to be suspect for the purposes of the compelling state interest test. However, subsequent cases have made it clear that the current governing test under the Fourteenth Amendment (to the United States Constitution) is a standard intermediate between rational basis and strict scrutiny. "[C]lassifications by gender must serve important

governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197[, 97 S. Ct. 451, 457, 50 L. Ed. 2d 397] (1976). Also see Califano v. Goldfarb, 430 U.S. 199, 2(10 n.8, 97 S. Ct. 1021, 1028, n.8, 51 L. Ed. 2d 2701 (1977) and Califano v. Webster, 430 U.S. 313, 316-17[, 97 S. Ct. 1192, 1194, 51 L. Ed. 2d 3601 (1977).

....

Dress standards are intimately related to sexual attitudes.... The dress restrictions imposed upon women visitors by the directive derived their relation to prison security out of the assumption that these attitudes were present among the residents. Whether or not this assumption was correct, it is manifest that the directive was substantially related to the achievement of the important governmental objective of prison security and met the test under the Fourteenth Amendment.

....

[Holdman's] challenge to the directive under the state constitution requires separate consideration. Article I, Section 4 [FN30] of the Hawaii Constitution declares that no person shall be "denied the equal protection of the laws, nor be denied the enjoyment of [the person's] civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." Article I, Section 21 [FN31] provides: "Equality of rights under the law shall not be denied or abridged by the State on account of sex." We are presented with two questions, either of which might be dispositive of the present case. We must first inquire whether the treatment [Holdman] received denied to her the equal protection of the laws guaranteed by the Hawaii Constitution under a more stringent test than that applicable under the Fourteenth Amendment. If the more general guarantee of equal protection does not sustain [Holdman's] claims, we must then inquire whether the specific guarantee of equality of rights under the law contained in Article I, Section 21, has been infringed.

*19 It is open to this court, of course, to apply the more stringent test of compelling state interest to sex-based classifications in assessing their validity under the equal protection clause of the state constitution. State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974). [Holdman] urges that we do so, arguing both from Frontiero v. Richardson, supra, and from the presence of sex with race, religion and ancestry as a category specifically named in Article I, Section 4.

We need not deal finally with that issue, and reserve it for future consideration, since we conclude that the compelling state interest test would be satisfied in this case if it were to be held applicable ....

....

Survival under the strict scrutiny test places the directive beyond [Holdman's] challenge under her asserted ... right to equal protection .... It does not necessarily place the directive beyond challenge under the equal rights provision of Article I, Section 21.

Article I, Section 21, is substantially identical with the proposed Equal Rights Amendment of the United States Constitution.... The standard of review to be applied under an ERA has not been clearly formulated by judicial decision....

... Unless we are to attempt in this case to define the standard of review required under Hawaii's ERA, no purpose will be served by analysis of the considerable body of decisions which fall short of dealing with that question.... We have concluded that the treatment of which [Holdman] complains withstands the test of strict scrutiny by reason of a compelling State interest. we are not prepared to hold in this case that .... a more stringent test should be applied under Article I, Section 21.... Id. at 349-54,

581 P.2d at 1167-69 (emphasis added and citations and footnote omitted).

Our decision in Holdman is key to the present case in several respects. First, we clearly and unequivocally established, for purposes of equal protection analysis under the Hawaii Constitution, that sex-based classifications are subject, as a per se matter, to some form of "heightened" scrutiny, be it "strict" or "intermediate," rather than mere "rational basis" analysis. [FN32] Second, we assumed, arguendo, that such sex-based classifications were subject to "strict scrutiny." Third, we reaffirmed the longstanding principle that this court is free to accord greater protections to Hawaii's citizens under the state constitution than are recognized under the United States Constitution. [FN33] And fourth, we looked to the then current case law of the United States Supreme Court for guidance.

Of the decisions of the United States Supreme Court cited in Holdman, Frontiero v. Richardson, supra, was by far the most significant. In Frontiero, a married woman air force officer and her husband (the Frontieros) filed suit against the Secretary of Defense seeking declaratory and injunctive relief against enforcement of federal statutes governing quarters allowances and medical benefits for members of the uniformed services. The statutes provided, solely for administrative convenience, that spouses of male members were unconditionally considered dependents for purposes of obtaining such allowances and benefits, but that spouses of female members were not considered dependents unless they were in fact dependent for more than one-half of their support. The Frontieros' lawsuit was precipitated by the husband's inability to satisfy the statutory dependency standard. A three-judge district court panel denied the Frontieros' claim for relief, and they appealed.

*20 Noting that "[u]nder these statutes, a serviceman may claim his wife as a 'dependent' without regard to whether she is in fact dependent upon him for any part of her support," but that "[a] servicewoman ... may not claim her husband as a 'dependent' ... unless he is in fact dependent upon her for over one-half of his support," a plurality of four, through Justice Brennan (the Brennan plurality), framed the issue on appeal as "whether this difference in treatment constitutes an unconstitutional discrimination against servicewomen...." 411 U.S. at 679-80, 93 S.Ct. at 1766. By an eight-to-one majority, the Court concluded that the statutes established impermissibly differential treatment between men and women and, accordingly, reversed the judgment of the district court.

The disagreement among the eight-justice majority lay in the level of judicial scrutiny applicable to instances of statutory sex-based discrimination. The Brennan plurality agreed with the Frontieros' contention that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." Id. at 683, 93 S.Ct. at 1768 (footnotes omitted). Thus, the Brennan plurality applied the "strict scrutiny" standard to its review of the illegal statutes. Justice Stewart concurred in the judgment, "agreeing that the statutes ... work[ed] an invidious discrimination in violation of the Constitution." Id. at 692, 93 S.Ct. at 1772-73. Particularly noteworthy in Frontiero, however, was the concurring opinion of Justice Powell, joined by the Chief Justice and Justice Blackmun (the Powell group). The Powell group agreed that "the challenged statutes constitute[d] an unconstitutional discrimination against servicewomen," but deemed it "unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding." Id. at 726-77,

93 S.Ct. at 1773 (emphasis added and citation omitted). Central to the Powell group's thinking was the following explanation:

> There is another ... reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, ... the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems ... that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

*21 Id. at 727, 93 S.Ct. at 1773 (emphasis added).

The Powell group's concurring opinion therefore permits but one inference: had the Equal Rights Amendment been incorporated into the United States Constitution, at least seven members (and probably eight) of the Frontiero Court would have subjected statutory sex-based classifications to "strict" judicial scrutiny.

In light of the interrelationship between the reasoning of the Brennan plurality and the Powell group in Frontiero, on the one hand, and the presence of article I, section 3--the Equal Rights Amendment--in the Hawaii Constitution, on the other, it is time to resolve once and for all the question left dangling in Holdman. Accordingly, we hold that sex is a "suspect category" for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution [FN34] and that HRS s 572-1 is subject to the "strict scrutiny" test. It therefore follows, and we so hold, that (1) HRS s 572-1 is presumed to be unconstitutional (2) unless Lewin, as an agent of the State of Hawaii, can show that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights.

4. The dissenting opinion misconstrues the holdings and reasoning of the plurality. We would be remiss if we did not address certain basic misconstructions of this opinion appearing in Judge Heen's dissent. First, we have not held, as Judge Heen seems to imply, that (1) the appellants "have a 'civil right' to a same sex marriage[,]" (2) "the civil right to marriage must be accorded to same sex couples[,]" and (3) the applicant couples "have a right to a same sex marriage[.]" Dissenting opinion at 1-3. These conclusions would be premature. We have, however, noted that the United States Supreme Court has recognized for over fifty years that marriage is a basic civil right. See supra at 29-30. That proposition is relevant to the prohibition set forth in article I, section 5 of the Hawaii Constitution against discrimination in the exercise of a person's civil rights, inter alia, on the basis of sex. See id. at 29.

Second, we have not held, as Judge Heen also seems to imply, that HRS s 572-1 "unconstitutionally discriminates against [the applicant couples] who seek a license to enter into a same sex marriage[.]" Dissenting opinion at 1. Such a holding would likewise be premature at this time. What we have held is that, on its face and as applied, HRS s 572-1 denies same-sex couples access to the marital status and its concomitant rights and benefits, thus implicating the equal protection clause of article I, section 5. See supra at 31.

We understand that Judge Heen disagrees with our view in this

regard based on his belief that "HRS s 572-1 treats everyone alike and applies equally to both sexes[,]" with the result that "neither sex is being granted a right or benefit the other does not have, and neither sex is being denied a right or benefit that the other has." Dissenting opinion at 4-5 (emphasis in original). The rationale underlying Judge Heen's belief, however, was expressly considered and rejected in Loving:

*22 Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race.... [W]e reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscriptions of all invidious discriminations.... In the case at bar, ... we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race. 388 U.S. at 8, 87 S.Ct. at 1821-22. Substitution of "sex" for"race" and article I, section 5 for the fourteenth amendment yields the precise case before us together with the conclusion that we have reached.

As a final matter, we are compelled to respond to Judge Heen's suggestion that denying the appellants access to the multitude of statutory benefits "conferred upon spouses in a legal marriage ... is a matter for the legislature, which can express the will of the populace in deciding whether such benefits should be extended to persons in (the applicant couples'] circumstances." Dissenting opinion at 10. In effect, we are being accused of engaging in judicial legislation. We are not. The result we reach today is in complete harmony with the Loving Court's observation that any state's powers to regulate marriage are subject to the constraints imposed by the constitutional right to the equal protection of the laws. 388 U.S. at 7, 87 S.Ct. at 1821. If it should ultimately be determined that the marriage laws of Hawaii impermissibly discriminate against the appellants, based on the suspect category of sex, then that would be the result of the interrelation of existing legislation.

[W]hether the legislation under review is wise or unwise is a matter with which we have nothing to do. Whether it ... work[s] well or work[s] ill presents a question entirely irrelevant to the issue. The only legitimate inquiry we can make is whether it is constitutional. If it is not, its virtues, if it have any, cannot save it; if it is, its faults cannot be invoked to accomplish its destruction. If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 483, 54 S.Ct. 231, 256, 78 L.Ed. 413 (1934) (Sutherland, J., dissenting).

III. CONCLUSION

Because, for the reasons stated in this opinion, the circuit court erroneously granted Lewin's motion for judgment on the pleadings and dismissed the plaintiffs' complaint, we vacate the circuit court's order and judgment and remand this matter for further proceedings consistent with this opinion. on remand, in accordance with the "strict scrutiny" standard, the burden will rest on Lewin to overcome the presumption that HRS s 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights. See Nagle, 63 Haw. at 392, 629 P.2d at 111; Holdman, 59 Haw. at 349, 581 P.2d at 1167.

*23 Vacated and remanded.

BURNS, J., concurring.

I concur that the circuit court's October 1, 1991 order erroneously granted the State's motion for judgment on the pleadings and erroneously dismissed the plaintiffs' complaint with prejudice. My concurrence is based on my conclusion that this case involves genuine issues of material fact. "Constitutional and other questions of a large public import should not be decided on an inadequate factual basis." 6 J. Moore and J. Lucas, Moore's Federal Practice, s 56[10] (2d ed.1982) (citation omitted).

The marriage at issue in this case is the marriage specifically authorized by Hawaii's statutes. My label for this marriage is the "Hawaii Civil Law Marriage." The issue is whether the Hawaii constitution permits the State to discriminate against same-sex couples by extending the right to enter into a Hawaii Civil Law Marriage to opposite-sex couples and not to same-sex couples.

The Hawaii Constitution mandates, in article I, section 3, that "[e]quality of rights under the law shall not be denied or abridged by the State on account of sex." It also mandates, in article I, section 5, that "[n]o person shall be ... denied the equal protection of the laws, ... or be discriminated against in the exercise thereof because of ... sex[.]" Thus, any State action that discriminates against a person because of his or her "sex" is subject to strict scrutiny.

As used in the Hawaii constitution, to what does the word "sex" refer? In my view, the Hawaii constitution's reference to "sex" includes all aspects of each person's "sex" that are "biologically fated." The decision whether a person when born will be a male or a female is "biologically fated." Thus, the word "sex" includes the male-female difference. Is there any other aspect of a person's "sex" that is "biologically fated"? In March 1993, the Cox News Service reported in relevant part as follows:

> The issue of whether people become homosexuals because of "nature or nurture" is one of the most controversial subjects scientists have confronted in recent years.
>
> * * *
>
> Until the middle 1980s, the prevailing view among most scientists was that homosexual "tendencies" were mostly the result of upbringing.
>
> * * *
>
> Later, researchers at the Salk Institute in San Diego found anatomical differences between homosexual and heterosexual men in parts of the brain noted for differences between men and women.
>
> Theories gravitate to the role of male sex hormones. The Honolulu Advertiser, March 9, 1993, at AB, col. 1.

In March 1993, the Associated Press reported in relevant part as follows:

> CHICAGO--Genes appear to play an important role in determining whether women are lesbians, said a researcher who found similar results among gay men.
>
> * * *
>
> "I think we're dealing with something very complex, perhaps the interaction between hormones, the environment and genetic components," [Roger] Gorski [an expert in biological theories of homosexuality] said yesterday.
>
> * * *

*24 The Honolulu Advertiser, March 12, 1993, at A-24, col. 1.

On the other hand, columnist Charles Krauthammer reports as follows:

> It is natural, therefore, that just as parents have the inclination and right to wish to influence the development of a child's character, they have the inclination and right to try to

influence a child's sexual orientation. Gay advocates argue, however, that such influence is an illusion. Sexual orientation, they claim, is biologically fated and thus entirely impervious to environmental influence. Unfortunately, as E. L. Pattullo, former director of Harvard's Center for the Behaviorial Sciences, recently pointed out in Commentary magazine, the scientific evidence does not support such a claim....

* * *

The Honolulu Advertiser, May 2, 1993, at B2, cols. 3, 4 and 5. If heterosexuality, homosexuality, bisexuality, and asexuality are "biologically fated[,]" then the word "sex" also includes those differences. Therefore, the questions whether heterosexuality, homosexuality, bisexuality, and asexuality are "biologically fated" are relevant questions of fact which must be determined before the issue presented in this case can be answered. If the answers are yes, then each person's "sex" includes both the "biologically fated" male-female difference and the "biologically fated" sexual orientation difference, and the Hawaii constitution probably bars the State from discriminating against the sexual orientation difference by permitting opposite-sex Hawaii Civil Law Marriages and not permitting same-sex Hawaii Civil Law marriages. If the answers are no, then each person's "sex" does not include the sexual orientation difference, and the Hawaii constitution may permit the State to encourage heterosexuality and discourage homosexuality, bisexuality, and asexuality by permitting opposite-sex Hawaii Civil Law Marriages and not permitting same-sex Hawaii Civil Law Marriages.

HEEN, J., dissenting.

I dissent. [FN35] Although the lower court judge may have engaged in "verbal overkill" in arriving at his decision, the result he reached was correct and should be affirmed. See State v. Taniguchi, 72 Haw. 235, 815 P.2d 24 (1991).

I agree with the plurality's holding that Appellants do not have a fundamental right to a same sex marriage protected by article I, s 6 of the Hawaii State Constitution.

However, I cannot agree with the plurality that (1) Appellants have a "civil right" to a same sex marriage; (2) Hawaii Revised Statutes (HRS) s 572-1 unconstitutionally discriminates against Appellants who seek a license to enter into a same sex marriage; (3) Appellants are entitled to an evidentiary hearing that applies a "strict scrutiny" standard of review to the statute; and (4) HRS s 572-1 is presumptively unconstitutional. Moreover, in my view, Appellants' claim that they are being discriminatorily denied statutory benefits accorded to spouses in a legalized marriage should be addressed to the legislature.

1.

*25 Citing Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), the plurality holds that Appellants have a civil right to marriage. I disagree. " 'It is axiomatic ... that a decision does not stand for a proposition not considered by the court." ' People v. Superior Court, 8 Cal.App. 4th 688, 703, 10 Cal.Rptr.2d 873, 881 (1992) (quoting People v. Harris, 47 Cal.3d 1047, 1071, 255 Cal. Rtpr. 352, 767 P.2d 619 (1989)).

Loving is simply not authority for the plurality's proposition that the civil right to marriage must be accorded to same sex couples. Loving points out that the right to marriage occupies an extremely venerated position in our society. So does every other case discussing marriage. However, the plaintiff in Loving was not claiming a right to a same sex marriage. Loving involved a marriage between a white male and a black female whose marriage, which took place in Washington, D.C., was refused recognition in Virginia under that state's miscegenation laws. [FN36]

The plurality also cites Zablocki v. Redhail, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), as establishing constitutional limits on the states' right to regulate marriage. That is an undeniable principle. In Zablocki an application for a marriage license by a male and a female was denied because the male was not able to show, pursuant to a Wisconsin statute's requirement, that he was in compliance with all existing obligations for child support.

Loving and Zablocki neither establish the right to a same sex marriage nor limit a state's power to prohibit any person from entering into such a marriage. The plurality's conclusion here that Appellants have a right to a same sex marriage and, therefore, an evidentiary hearing is completely contrary to the clear import of Zablocki and Loving.

Although appellants suggest an analogy between the racial classification involved in Loving and Perez and the alleged sexual classification involved in the case at bar, we do not find such an analogy. The operative distinction lies in the relationship which is described by the term "marriage" itself, and that relationship is the legal union of one man and one woman. Washington statutes, specifically those relating to marriage ... and marital (community) property ..., are clearly founded upon the presumption that marriage, as a legal relationship, may exist only between one man and one woman who are otherwise qualified to enter that relationship.

* * *

[A]ppellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex. Singer v. Hara, 11 Wash.App. 247, 253-55, 522 P.2d 1187, 1191-92, review denied, 84 Wash.2d 1008 (1974) (footnotes omitted).

*26 The issue of a right to a same sex marriage has been considered by the courts in four other states. Those courts arrive at the opposite conclusion from the plurality here. See Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct.App.1973); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), appeal dismissed, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972); De Santo v. Barnsley, 328 Pa.Super. 181, 476 A.2d 952 (1984); Singer v. Hara, supra. I do not agree with the plurality's contention that those cases are not precedent for this case. The basic issue in each of those four cases, as in this one, was whether any person has the right to legally marry another person of the same sex. Neither do I agree with the plurality that Loving refutes the reasoning of the courts in those four cases.

2.

HRS s 572-1 treats everyone alike and applies equally to both sexes. The effect of the statute is to prohibit same sex marriages on the part of professed or non-professed heterosexuals, homosexuals, bisexuals, or asexuals, and does not effect an invidious discrimination. [FN37]

The constitutional guarantee of equal protection of the laws means that no person or class of persons shall be denied the same privileges and benefits under the laws that are enjoyed by other persons or other classes of persons in like circumstances. Mahiai v. Suwa, 69 Haw. 349, 742 P.2d 359 (1987). HRS s 572-1 does not establish a "suspect" classification based on gender [FN38] because all males and females are treated alike. A male cannot obtain a license to marry another male, and a female cannot obtain a license to marry another female. Neither sex is being granted a right or benefit the other does not have, and neither sex is being denied a right or benefit that the other has.

My thesis is well illustrated by the case of Phillips v. Wisconsin Personnel Comm'n, 167 Wis.2d 205, 482 N.W.2d 121 (Ct.App.1992). In that case, the plaintiff, an unmarried female, was denied medical benefits for her unmarried female "dependent" lesbian companion because Phillips' state health plan defined "dependent" as spouse or children. Phillips appealed the commission's dismissal of her gender discrimination complaint and the Wisconsin Court of Appeals, in striking down her claim, stated that dependent insurance coverage is unavailable to unmarried companions of both male and female employees. A statute is only subject to a challenge for gender discrimination under the equal protection clause when it discriminates on its face, or in effect, between males and females. Id. 167 Wis. at 227, 482 N.W.2d at 129 (emphasis in original and citations omitted).

Similarly, HRS s 572-1 does not discriminate on the basis of gender. The statute applies equally to all unmarried persons, both male and female, who desire to enter into a legally recognized marriage. [FN39] Thus, no evidentiary hearing is required.

The cases cited by the plurality to support its holding that Appellants are a "suspect class" are inapposite. [FN40] Unlike the instant case, the facts in both cases show government regulations preferring one gender (class) over another. In Holdman v. Olim, 59 Haw. 346, 581 P.2d 1164 (1978), the prison regulation requiring female visitors to wear proper undergarments clearly affected only female visitors to the state prison system. Male visitors to the prison were not subject to such a regulation. The supreme court explicitly referred to the regulation as being a sex-based classification. While the reasoning in Holdman is very interesting, it does not support the plurality's conclusion in this case that HRS s 572-1 creates a suspect class.

*27 Likewise, in Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), the federal statutes required that female members of the military service, but not male members, prove that they provided over one-half of their spouse's support in order to have the spouses classified as "dependents." The statutes were clearly discriminatory, since male members of the military were favored over female members.

3.

Since HRS s 572-1 is not invidiously discriminatory and Appellants are not members of a suspect class, this court should not require an evidentiary hearing. [FN41] Neither should this court mandate that HRS s 572-1 be subjected to the "strict scrutiny" test. If anything, Appellants' challenge subjects the statute only to the "rational basis" test. Estate of Coates v. Pacific Engineering, 71 Haw. 358, 791 P.2d 1257 (1990). Thus, the issue is whether the statute rationally furthers a legitimate state interest. Id. There is no question that such a rational relationship exists; therefore, the statute is a constitutional exercise of the legislature's authority. In my view, the purpose of HRS s 572-1 is analogous to the purpose of Washington's marriage license statute as stated in Singer, supra.

In the instant case, it is apparent that the state's refusal to grant a license allowing the appellants to marry one another is not based upon appellants' status as males, but rather it is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children.

... [M]arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union. Thus the refusal of the state to authorize same sex marriage results from such impossibility of reproduction rather than from an invidious

discrimination "on account of sex." Therefore, the definition of marriage as the legal union of one man and one woman is permissible as applied to appellants, notwithstanding the prohibition contained in the ERA, because it is founded upon the unique physical characteristics of the sexes and appellants are not being discriminated against because of their status as males per se. [FN42]

Id. 11 Wash.App. at 259-60, 522 P.2d at 1195 (emphasis and footnote added). The court in Singer was considering the case in the light of that state's Equal Rights Amendment (identical to article I, s 3 of the Hawaii State Constitution). The Washington court's reasoning is pertinent, in my view, to Appellants' claim in the case at hand and supports the constitutionality of the statute.

4.

Furthermore, I cannot agree with the plurality that HRS s 572-1 is presumptively unconstitutional. The general rule is that every statute is presumed to be constitutional, and the party challenging the law on constitutional grounds has the heavy burden of overcoming this presumption. Washington v. Fireman's Fund Ins. Cos., 68 Haw. 192, 199, 708 P.2d 129, 134 (1985), cert. denied, 476 U.S. 1169, 106 S.Ct. 2890, 90 L.Ed.2d 977 (1986).

*28 In Washington this court, in considering a constitutional challenge to a statutory classification, stated:

> To prevail, a party challenging the constitutionality of a statutory classification on equal protection ground has the burden of showing, "with convincing clarity tat the classification is not rationally related to the" statutory purpose, State v. Bloss, 62 Haw. 147, 154, 613 P.2d 354, 359 (1980), or that "the challenged classification does not 'rest upon some ground of difference having a fair and substantial relation to the object of the legislation,' " Hasegawa v. Maui Pineapple Co., 52 Haw. 327, 330, 475 P.2d 679, 681 (1970), and is therefore "arbitrary and capricious." State v. Freitas, 61 Haw. 262, 272, 602 P.2d 914, 922 (1979). See also, Schwab v. Ariyoshi, 58 Haw. 25, 31, 564 P.2d 135, 139 1977

This court has ruled that:

> [E]qual protection does not mandate that all laws apply with universality to all persons; the State "cannot function without classifying its citizens for various purposes and treating some differently from others." The legislature may not, however, in exercising this right to classify, do so arbitrarily. The classification must be reasonably related to the purpose of the legislation.
>
> We set out in Hasegawa a two-step procedure for determining whether the statute passed constitutional muster:
>
> First, we must ascertain the purpose or objective that the State sought to achieve in enacting (the challenged statute]. Second, we must examine the means chosen to accomplish that purpose, to determine whether the means bears a reasonable relationship to the purpose. Joshua, 65 Haw. at 629, 656 P.2d at 740 (quoting Hasegawa, 52 Haw. at 330, 475 P.2d at 681). Id. 68 Haw. at 199, 708 P.2d at 134.

In my view, the statute's classification is clearly designed to promote the legislative purpose of fostering and protecting the propagation of the human race through heterosexual marriages and bears a reasonable relationship to that purpose. [FN43] I find nothing unconstitutional in that.

5.

Appellants complain that because they are not allowed to legalize their relationships, they are denied a multitude of statutory benefits conferred upon spouses in a legal marriage. However, redress for those deprivations is a matter for the legislature, which can express the will of the populace in deciding whether such

benefits should be extended to persons in Appellants' circumstances. Those benefits can be conferred without rooting out the very essence of a legal marriage. [FN44] This court should not manufacture a civil right which is unsupported by any precedent, and whose legal incidents--the entitlement to those statutory benefits--will reach beyond the right to enter into a legal marriage and overturn long standing public policy encompassing other areas of public concern. This decision will have far-reaching and grave repercussions on the finances and policies of the governments and industry of this state and all the other states in the country.

FN* Retired Associate Justice Hayashi, who was assigned by reason of vacancy to sit with the justices of the supreme court pursuant to article VI, s 2 of the Constitution of the State of Hawaii and HRS s 602-10 (1985), and whose temporary assignment expired prior to the filing of this opinion, would have joined in the dissent with Associate Judge Heen.

FN2. HRS s 572-1 provides:

Requisites of valid marriage contract. In order to make valid the marriage contract, it shall be necessary that:

(1) The respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, brother and sister of the half as well as to the whole blood, uncle and niece, aunt and nephew, whether the relationship is legitimate or illegitimate;

(2) Each of the parties at the time of contracting the marriage is at least sixteen years of age; provided that with the written approval of the family court of the circuit court within which the minor resides, it shall be lawful for a person under the age of sixteen years, but in no event under the age of fifteen years, to marry, subject to section 572-2 [relating to consent of parent or guardian];

(3) The man does not at the time have any lawful wife living and that the woman does not at the time have any lawful husband living;

(4) Consent of neither party to the marriage has been obtained by force, duress, or fraud;

(5) Neither of the parties is a person afflicted with any loathsome disease concealed from, and unknown to, the other party;

(6) It shall in no case be lawful for any person to marry in the State without a license for that purpose duly obtained from the agent appointed to grant marriage licenses; and

(7) The marriage ceremony be performed in the State by a person or society with a valid license to solemnize marriages and the man and woman to be married and the person performing the marriage ceremony be all physically present at the same place and time for the marriage ceremony.

HRS s 572-1 (1985) (emphasis added). In 1984, the legislature amended the statute to delete the then existing prerequisite that "[n]either of the parties is impotent or physically incapable of entering into the marriage state [.]" Act 119, s 11, 1984 Haw. Sess. Laws 238-39 (emphasis added).

Correlatively, section 2 of Act 119 amended HRS s 580-21 (1985) to delete as a ground for annulment the fact "that one of the parties was impotent or physically incapable of entering into the marriage state " at the time of the marriage. Id. at 239 (emphasis added). The legislature's own actions thus belie the dissent's wholly unsupported declaration, at 8 n.8, that "the purpose of HRS s 572-1 is to promote and protect propagation...."

FN3. HRS s 572-6 provides:

Application; license; limitations. To secure a license to marry, the persons applying for the license shall appear personally before an agent authorized to grant marriage licenses and shall file with the agent an application in writing. The application shall be accompanied by a statement signed and sworn to by each of the persons, setting forth: the person's full name, date of birth, residence; their relationship, if any; the full names of parents; and that all prior marriages, if any, have been dissolved by death or dissolution. If all prior marriages have been dissolved by death or dissolution, the statement shall also set forth the date of death of the last prior spouse or the date and jurisdiction in which the last decree of dissolution was entered. Any other information consistent with the standard marriage certificate as recommended by the Public Health Service, National Center for Health Statistics, may be requested for statistical or other purposes, subject to approval of and modification by the department of health; provided that the information shall be provided at the option of the applicant and no applicant shall be denied a license for failure to provide the information. The agent shall indorse on the application, over the agent's signature, the date of the filing thereof and shall issue a license which shall bear on its face the date of issuance. Every license shall be of full force and effect for thirty days commencing from and including the date of issuance. After the thirty-day period, the license shall become void and no marriage ceremony shall be performed thereon.

It shall be the duty of every person, legally authorized to issue licenses to marry, to immediately report the issuance of every marriage license to the agent of the department of health in the district in which the license is issued, setting forth all the facts required to be stated in such manner and on such form as the department may prescribe. HRS s 572-6 (Supp.1992).

HRS s 572-5(a) (Supp.1992) provides in relevant part that "[t]he department of health shall appoint ... one or more suitable persons as agents authorized to grant marriage licenses ... in each judicial circuit."

FN4. Exhibits "A," "C," and "D," attached to the plaintiffs' complaint, purport to be identical letters dated April 12, 1991, addressed to the respective applicant couples, from the DOH's Assistant Chief and State Registrar, Office of Health Status Monitoring, which stated:

This will confirm our previous conversation in which we indicated that the law of Hawaii does not treat a union between members of the same sex as a valid marriage. We have been advised by our attorneys that a valid marriage within the meaning of ch. 572, Hawaii Revised Statutes,P must be one in which the parties to the marriage contract are of different sexes.

In view of the foregoing, we decline to issue a license for your marriage to one another since you are both of the same sex and for this reason are not capable of forming a valid marriage contract within the meaning of ch. 572. Even if we did issue a marriage license to you, it would not be a valid marriage under Hawaii law. (Emphasis added.)

FN5. Article I, section 6 of the Hawaii Constitution provides:

The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right. Haw. Const. art. I, s 6 (1978).

FN6. Article I, section 5 of the Hawaii Constitution provides:

No person shall be deprived of life, liberty or property

without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry. Haw. Const. art. I, s 5 (1978).

FN7. Lewin's motion for judgment on the pleadings relied exclusively on the ground that the plaintiffs' complaint tailed to state a claim upon which relief could be granted, and the circuit court granted the motion and entered judgment in Lewin's favor on that basis alone. Accordingly, the merits of Lewin's other defenses are not at issue in this appeal, and we do not reach them.

FN8. In substance, HRS s 572-7(a) (Supp.1992) requires "the female" to accompany a marriage license application with a signed physician's statement verifying that she has been given a serological test for immunity against rubella and has been informed of the adverse effects of rubella on fetuses. The statute exempts from the examination requirement those females who provide proof of live rubella virus immunization or laboratory evidence of rubella immunity, "or who, by reason of age or other medically determined condition [are] not and never will be physically able to conceive a child." Id.

FN9. HRCP 12(h)(2) (1990) provides in relevant part that "[a] defense of failure to state a claim upon which relief can be granted ... may be made ... by motion for judgment on the pleadings...."

FN10. HRCP 12(c) provides:

Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56. HRCP 12(c) (1990).

HRCP 56 provides in relevant part:

(b) For Defending Party. A party against whom a claim ... is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

....

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in any affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits....

HRCP 56 (1990).

FN11. HRCP 12(b) provides in relevant part:

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading ... shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ... (6) failure to state a claim upon which relief can be granted.... A motion making any of these defenses shall be made before pleading if a further leading is permitted.... If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. HRCP 12(b) (1990).

FN12. "Homosexual" and "same-sex" marriages are not synonymous; by the same token, a "heterosexual" same-sex marriage is, in theory, not oxymoronic. A "homosexual" person is defined as "[o]ne sexually attracted to another of the same sex." Taber's Cyclopedic Medical Dictionary 839 (16th ed.1989). "Homosexuality" is "sexual desire or behavior directed toward a person or persons of one's own sex." Webster's Encyclopedic Unabridged Dictionary of the English Language 680 (1989). Conversely, "heterosexuality" is "[s]exual attraction for one of the opposite sex," Taber's Cyclopedic Medical Dictionary at 827, or "sexual feeling or behavior directed toward a person or persons of the opposite sex." Webster's Encyclopedic Unabridged Dictionary of the English Language at 667. Parties to "a union between a man and a woman" may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals.

FN13. Lewin is correct that the plaintiffs' complaint does not allege that the plaintiffs, or any of them, are homosexuals. Thus it is Lewin, who, by virtue of his motion for judgment on the pleadings, has sought to place the question of homosexuality in issue.

FN14. A final and appealable judgment in Lewin's favor and against the plaintiffs was filed contemporaneously with the order granting the motion for judgment on the pleadings.

FN15. For the reasons stated infra in this opinion, it is irrelevant, for purposes of the constitutional analysis germane to this case, whether homosexuality constitutes "an immutable trait" because it is immaterial whether the plaintiffs, or any of them, are homosexuals. Specifically, the issue is not material to the equal protection analysis set forth in section II.C of this opinion infra at 23-46. Its resolution is unnecessary to our ruling that HRS s 572-1, both on its face as applied, denies same-sex couples access to the marital status and its concomitant rights and benefits. Its resolution is also unnecessary to our conclusion that it is the state's regulation of access to the marital status, on the basis of the applicants' sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws in violation of article I, section 5 of the Hawaii Constitution. See infra at 24-37. And, in particular, it is immaterial to the exercise of "strict scrutiny" review, see infra at 38-46, inasmuch as we are unable to perceive any conceivable relevance of the issue to the ultimate conclusion of law-- which, in the absence of further evidentiary proceedings, we cannot reach at this time--regarding whether HRS s 572-1 furthers compelling state interests and is narrowly drawn to avoid

unnecessary abridgments of constitutional rights. See infra at 46-47.

In light of the above, we disagree with Chief Judge Burns's position that "questions whether heterosexuality, homosexuality, bisexuality, and asexuality are 'biologically fated' are relevant questions of fact." Concurring opinion at 3. This preoccupation seems simply to restate the immaterial question whether sexual orientation is an "immutable trait."

FN16. A "conclusion of law," for present purposes, is either: (1) a "[f]inding by [the] court as determined through application of rules of law"; (2) "[p]ropositions of law which [the] judge arrives at after, and as a result of, finding certain facts in [the] case[;]" or (3) "[t]he final judgment or decree required on [the] basis of facts found[.]" Black's Law Dictionary 290 (6th ed.1990). The second category may constitute such "mixed questions of fact and law" as "are dependent upon the facts and circumstances of each individual case[.]" See Coll v. McCarthy, 72 Haw. 20, 28, 804 P.2d 881, 886 (1991).

FN17. In Mueller, this court cited Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937), for the proposition that only rights that are implicit in the concept of ordered liberty can be deemed fundamental. Pursuant to that standard, this court held that a prostitute did not have a fundamental right under article I, section 6 of the Hawaii Constitution to conduct business in her own home. 66 Haw. at 628, 630, 671 P.2d at 1359-60.

FN18. For the reasons stated infra in this opinion, it is irrelevant, for purposes of the constitutional analysis germane to this case, whether homosexuals constitute a "suspect class" because it is immaterial whether the plaintiffs, or any of them, are homosexuals. See supra note 14.

FN19. In Parke, a "common law" petitioner sought unsuccessfully to derive the benefits of inheritance rights unique to a married spouse, apparently having affirmatively chosen not to seek the state-conferred status of a lawful marriage "partner." Id. at 398, 405. A "same sex spouse" suffered the identical fate in De Santo v. Barnsley, 328 Pa.Super. 181, 476 A.2d 952 (1984) (two persons of same sex cannot contract common law marriage, notwithstanding state's recognition of common law marriage between persons of different sex), a decision on which Lewin relies in his answering brief. It is ironic that, in arguing before the circuit court that Hawaii's marriage laws do not "burden, penalize, infringe, or interfere in any way with the [plaintiffs'] private relationships" and in urging before this court that their "relationships are not disturbed in any manner by" HRS s 572-1, Lewin implicitly suggests that the applicant couples should be content with a de facto status that the state declines to acknowledge de jure and that lacks the statutory rights and benefits of marriage. See infra, at 26-28.

FN20. For example, states, including Hawaii, may and do prohibit marriage for such "compelling" reasons as consanguinity (to prevent incest), see, e.g., HRS s 572-1(1), immature age (to protect the welfare of children), see, e.g., HRS ss 572-1(2) and 572-2 (1985), presence of venereal disease (to foster public health), see, e.g., HRS s 572-1(5), and to prevent bigamy, see, e.g., HRS s 572-1(3). See also Zablocki, 434 U.S. at 392, 98 S.Ct. at 684 (concurring opinion of Stewart, J.); Salisbury, 501 F.Supp. at 107.

FN21. That the legislature, in enacting HRS ch. 572, obviously contemplated marriages between persons of the opposite sex is not, however, outcome dispositive of the plaintiffs' claim. Legislative action, whatever its motivation, cannot sanitize constitutional violations. Cf. City of Cleburne v. Cleburne Living Center, Inc., 473 U. & . 432, 448, 105 S.Ct. 3249, 3259, 87 L.Ed.2d 313 (1985) ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order ... action violative of the Equal Protection Clause.")

FN22. The four decisions are Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct.App.1973); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), appeal dismissed, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972); De Santo v. Barnsley, supra; and Singer v. Hara, 11 Wash.App. 247, 522 P.2d 1187, review denied, 84 Wash.2d 1008 (1974).

FN23. See supra note 11.

FN24. Virginia's miscegenation laws "arose as an incident to slavery and [were] common ... since the colonial period." 388 U.S. at 6, 87 S.Ct. at 1820-21. It is noteworthy that one of the "central provisions" of the statutory miscegenation scheme automatically voided all marriages between "a white person and a colored person" without the need for any judicial proceeding. Id. at 4, 87 S.Ct. at 1820.

FN25. As of 1949, the following thirty of the forty-eight states banned interracial marriages by statute: Alabama; Arizona; Arkansas; California; Colorado; Delaware; Florida; Georgia; Idaho; Indiana; Kentucky; Louisiana; Maryland; Mississippi; Missouri; Montana; Nebraska; Nevada; North Carolina; North Dakota; Oklahoma; Oregon; South Carolina; South Dakota; Tennessee; Texas; Utah; Virginia; West Virginia; and Wyoming. 388 U.S. at 6 n.5, 87 S.Ct. at 1820 n.5. When the Lovings commenced their lawsuit on October 28, 1964, sixteen states still had miscegenation laws on the books. Id. at 3, 6 n.5, 87 S.Ct. at 1819, 1820 n. 5. The first state court to recognize that miscegenation statutes violated the right to the equal protection of the laws was the Supreme Court of California in Perez v. Sharp, 32 Cal.2d 711, 198 P.2d 17 (1948). 388 U.S. at 6 n.5, 87 S.Ct. at 1820-21 n.5.

FN26. See Loving v. Commonwealth, 206 Va. 924, 147 S.E.2d 78 (1966). The Virginia Supreme Court of Appeals, however, modified as "so unreasonable as to render the sentences void" the trial court's twenty-five year suspension of the Lovings' jail sentences "upon the condition that they leave the ... state 'at once and ... not return together or at the same time to [the] ... state for a period of twenty-five years.' " Id. at 930, 147 S.E.2d at 82-83. The Virginia high court deemed it sufficient that the Lovings be prohibited from "again cohabit[ing] as man and wife in [the] state" in order to achieve the objectives of "securing the rehabilitation of the offender[s and] enabling [them] to repent and reform so that [they] may be restored to a useful place in society." Id. at 930, 147 S.E.2d at 83.

FN27. As we have noted in this opinion, unlike the equal protection clause of the fourteenth amendment to the United States Constitution, article I, section 5 of the Hawaii Constitution, inter alia, expressly prohibits discrimination against persons in the exercise of their civil rights on the basis of sex.

FN28. Accordingly, but for the fact that the Singer court was unable to discern sexual discrimination in the state's marriage laws, it would have engaged in a "strict scrutiny" analysis. See infra at 38-39.

FN29. The presumption of statutory constitutionality, to which Judge Heen refers at 8 of his dissenting opinion, does not apply to laws, which, on their face, classify on the basis of suspect categories. Washington v. Fireman's Fund Ins. Cos., 68 Haw. 192, 1991 708 P.2d 129, 134 (1985), cert. denied, 476 U.S. 1169, 106 S.Ct. 2890, 90 L.Ed.2d 977 (1986) on which the dissent relies, is not authority to the contrary inasmuch as the statute in question did not involve any suspect categories and was reviewed under the "rational basis" standard.

FN30. In 1978, article I, section 4 was renumbered article I, section 5.

FN31. In 1978, article I, section 21 was renumbered article I, section 3.

FN32. In subsequent decisions, we have reaffirmed that sex-based classifications are subject, at the very least, to "intermediate scrutiny" under the equal protection clause of the Hawaii Constitution. State v. Tookes, 67 Haw. 608, 614, 699 P.2d 983, 988 (1985); State v. Rivera, 62 Haw. 120, 123, 612 P.2d 526, 529 (1980).

FN33. See, e.g., State v. Texeira, 50 Haw. 138, 142 n.2, 433 P.2d 39-3, 597 n.2 (1967); State v. Grahovac, 52 Haw. 527, 531, 533, 480 P.2d 148, 151-52 (1971); State v. Santiago, 53 Haw. 254, 265-66, 492 P.2d 657, 664 (1971); State v. Kaluna, 55 Haw. 361, 367-69, 372-75, 520 P.2d 51, 57-58, 60-62 (1974); State v. Manzo, 58 Haw. 440, 452, 573 P.2d 945, 953 (1977); State v. Miyasaki, 62 Haw. 269, 280-82, 614 P.2d 915, 921-23 1980); Huihui v. Shimoda, 64 Haw. 527, 531, 644 P.2d 968, 971 (1982); State v. Fields, 67 Haw. 268, 282, 686 P.2d 1379, 1390 (1984); State v. Wyatt, 67 Haw. 293, 304 n.9, 687 P.2d 544, 552 n.9 1984; State v. Tanaka, 67 Haw. 658, 661-62, 701 P.2d 1274, 1276 1985 State v. Kim, 68 Haw. 286, 289-90, 711 P.2d 1291, 1293-94 (1985); State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988); State v. Quino, 74 Haw. ----, ---- n.2, 840 P.2d 358, 364 n.2 (1992) (Levinson, J., concurring).

FN34. Our holding in this regard is not, as the dissent suggests, "[t]hat Appellants are a 'suspect class.' " Dissenting opinion at 6.

FN35. Retired Associate Justice Yoshimi Hayashi, whose appointment as a substitute justice in this case expired before this dissent was filed, concurs with this dissent.

FN36. Since race has historically been considered a "suspect class," the Supreme Court applied the strict scrutiny standard of review to Virginia's statute. See note 6, infra, for the definition of suspect class.

FN37. Appellants' sexual preferences or lifestyles are completely irrelevant. Although the plurality appears to recognize the irrelevance, the real thrust of the plurality opinion disregards the true import of the statute. The statute treats everyone alike and applies equally to both sexes.

FN38. The plurality recognizes that the U.S. Supreme Court

does not recognize sex or gender as a "suspect" classification, and thus gender has not historically been afforded the elevated "strict scrutiny" standard of review.

FN39. Indeed, it may be said that the statute establishes one classification: unmarried persons.

FN40. The plurality does not define "suspect class." A suspect classification exists where the class of individuals formed by a statute, on its face or as administered, has been " ... saddled with such disabilities, or subjected to such a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16, 40, reh'g denied, 411 U.S. 959, 93 S.Ct.1919, 36 L.Ed.2d 418 (1973).

FN41. The apparent result of the plurality opinion is that Appellants do not have any burden of proof on remand. According to the plurality opinion, all Appellants need to do is appear in court and say, "Here we are. The statute discriminates against us on the basis of our sex (whether male or female) and sex is a suspect class." Even in cases alleging racial discrimination (a suspect class), "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose[,]" and the burden is on the plaintiff to prove that discriminatory purpose. Washington v. Davis, 426 U.S. 229, 240, 96 S.Ct.2040, 2048, 48 L.Ed.2d 597, 607-08 (1976); see State v. Tookes, 67 Haw. 608, 699 P.2d 983 (1985). The plurality opinion has eliminated the need for Appellants to prove purposeful discrimination.

FN42. Since, in my view, the purpose of HRS s 572-1 is to promote and protect propagation, the concern expressed in Chief Judge Burns' concurring opinion as to whether the statute discriminates against persons who may be genetically impelled to homosexuality does not cause the statute to be invidiously discriminatory.

FN43. In 1984, the state legislature amended HRS s 572 by deleting the requirement that marriage applicants show they are not impotent or that they are not physically incapable of entering into a marriage. Act 119, s 1, 1984 Haw. Sess. Laws 238. The plurality contends that the amendment refutes my assertion that the purpose of HRS s 572-1 is to foster and protect the propagation of the human race. I disagree.

A careful reading of the senate committee report on the amendment indicates that the amendment does not attenuate the fundamental purpose of HRS s 572-1. The intent of the amendment was to remove any impediment that may prevent persons who are "physically handicapped, elderly, or have temporary physical limitations from entering into a valid marriage relationship." Sen. Stand. Comm. Rep. No. 570-84, in 1984 Senate Journal, at 1284. The amendment accommodates only persons with physical limitations on their productive capacities. with respect to those persons, the legislature stated that the view that the primary purpose of marriage is to bear children is "narrow and outdated." That characterization should not be expanded to include the applicants in this case.

FN44. I note that a number of municipalities across the country have adopted domestic partnership ordinances that confer

such benefits on the domestic partners as the municipalities have authority to grant. Note: A More Perfect Union: A Legal And Social Analysis Of Domestic Partnership Ordinances 92 Colum. L.Rev. 1164 1992).

Filed in the First Circuit Court, State of Hawaii
11:06 a.m., Dec. 3, 1996
R.S. Yamada, clerk

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT CIVIL NO. 91-1394
STATE OF HAWAII

FINDINGS OF FACT AND CONCLUSIONS OF LAW NINIA BAEHR, GENORA DANCEL, TAMMY RODRIGUES, ANTOINETTE PREGIL, PAT LAGON, AND JOSEPH MELILLO,
Plaintiffs,
vs .
LAWRENCE H. MIIKE, in his
official capacity as Director
of the Department of Health,
State of Hawaii,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial before the Honorable Kevin S.C. Chang on September 10, 1996. Plaintiffs Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon, and Joseph Melillo were represented by attorneys Daniel R. Foley, Evan Wolfson and Kirk H. Cashmere. Defendant Lawrence H. Miike was represented by Deputy Attorney Generals Rick J. Eichor and Lawrence Goya. The Court having reviewed all the evidence admitted at the trial and having considered the arguments and other written -l- submissions of counsel for the parties and the briefs filed by the amicus curiae, hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACTS

I. THE PARTIES

1. At all times relevant herein, Plaintiffs Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon and Joseph Melillo (hereinafter collectively referred to as "Plaintiffs") were or are residents of the City and County of Honolulu, State of Hawaii.

2. Defendant Lawrence H. Miike ("Defendant") is a resident of the City and County of Honolulu. State of Hawaii. Defendant Miike is sued in his official capacity as Director of Department of Health, State of Hawaii. [When this lawsuit was commenced, John Lewin was the Director of Department of Health, State of Hawaii. Thereafter, pursuant to Rule 43(c) of the Hawaii Rules of Appellate Procedure, Defendant Miike was automatically substituted for Defendant Lewin when he assumed the position of the Director of Department of Health, State of Hawaii. A Notice of Substitution of Parties was also filed by defense counsel on April 23, 1996.]

II. RELEVANT PROCEDURAL HISTORY

3. Plaintiffs filed their Complaint for Injunctive and Declaratory Relief ("Complaint") on May 1, 1991.

4. In pertinent part, Plaintiffs' Complaint alleges that on or about December 17, 1990, Defendant and his agent denied the applications for marriage licenses presented by Plaintiffs Baehr and Dancel, Plaintiffs Rodrigues and Pregil and Plaintiffs Lagon and Melillo, respectively, solely on the ground that the couples are of the same sex. Plaintiffs sought a judicial declaration that the construction and application of Hawaii Revised Statutes ("HRS") 572-1 to deny an application for a license to marry because an applicant couple is of the same sex is unconstitutional.

5. Defendant filed an Amended Answer to Complaint on June 7,

1991. In pertinent part, Defendant admitted that Plaintiffs Baehr and Dancel, Plaintiffs Rodrigues and Pregil and Plaintiffs Lagon and Melillo applied for marriage licenses on December 17, 1990, and that the couples applications for marriage licenses were denied by Defendant through his agent on the ground that the couples are of the same sex.

6. On July 9, 1991, Defendant filed a Motion For Judgement on the Pleading which sought a dismissal of the lawsuit. Defendant asserted, in pertinent part, that Plaintiffs in their Complaint had failed to state a claim against Defendant upon which relief could be granted.

7. A hearing was held on Defendant's Motion for Judgment on the Pleadings on September 3, 1991.

8. An Order Granting Defendant's Motion for Judgment on the Pleading was filed on October 1, 1991. A Judgment in favor of Defendant and against Plaintiffs was also filed on October 1, 1991. 9. Plaintiffs filed their Notice of Appeal to the Supreme Court of the State of Hawaii on October 17, 1991.

10. In Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993), the Hawaii Supreme Court vacated the circuit courts order and judgment in favor of Defendant and remanded the case to the circuit court for further proceedings. In pertinent part, the Hawaii Supreme Court directed the following.

> On remand, in accordance with the "strict scrutiny" standard, the burden will rest on [Defendant] to overcome the presumption that HRS 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights.

Id., 74 Haw. at 583 (citations omitted).

11. On May 17, 1993, Defendant filed a motion for reconsideration or clarification to the Hawaii Supreme Court.

12. On May 27, 1993, the Hawaii Supreme Court granted Defendant's motion for reconsideration, or, in the alternative, for clarification in part, and clarified the mandate on remand as follows.

> Because, for the reasons stated in the plurality opinion filed in the above-captioned matter on May 5, 1993, the circuit court erroneously granted Lewin's motion for judgment on the pleadings and dismissed the plaintiffs' complaint, the circuit court's order and judgment are vacated and the matter is remanded for further proceedings consistent with the pluralitv opinion. On remand, in accordance with the "strict scrutiny" standard, the burden will rest on [Defendant] to overcome the presumption that HRS 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights.

Baehr v. Lewin 74 Haw. 530, 852 P.2d 44 (1993), reconsideration and clarification granted in part, 74 Haw. 645, 852 P.2d 74 (1993) (citations omitted).

13. An Order of Early Assignment to Trial Judge was filed on May 5, 1995.

14. On July 13, 1995, Defendant Director of Health's Motion for Reservation of Questions to the Supreme Court of Hawaii and for Stay Pending Appeal, or, in the alternative for Stay Pendinq the Action of The Commission on Sexual Orientation and the Law and of The Eighteenth Legislature filed on July 5, 1995, was granted in part, and the trial in the above-captioned case was

rescheduled from September 25, 1995 to July 15, 1996. See Order Denying Defendant Director of Health's Motion for Reservation of Questions to the Supreme Court of Hawaii and for Stay Pending Appeal, and Granting Alternative Motion for Stay of Trial Pending the Action of The Commission on Sexual Orientation and the Law and of The Eighteenth Legislature filed on September 7, 1995.

15. A Notice of Change of Responsible Deputy was filed on April 18, 1996, which stated that responsibility for handling of the case on behalf of the Defendant had been changed to Deputy Attorney General Rick J. Eichor.

16. Following a status conference with counsel on April 19, 1996, a Stipulation to Continue Trial Date and Order was filed on May 9, 1996. As a result, the trial in the above-captioned case was continued from the week of August 1, 1996 to September 10, 1996.

III. DEFENDANT'S POSITION

17. The directive of the Hawaii Supreme Court is clear. Pursuant to the mandate of the Supreme Court, Defendant has the burden of proof in this case. Id.

18. Defendant's First Amended Pretrial Statement was filed on May 13, 1996. In pertinent part, Defendant stated the following.

> [A]ll that remains is for the State to show that there is a compelling State interest to deny Plaintiff marriage licenses because they are of the same sex and that this compelling interest is narrowly drawn to avoid unnecessary abridgments of constitutional rights.
>
> The following substantial and compelling state interests will he shown:
>
> a. That the State has a compelling interest in protecting the health and welfare of children and other persons. . . .
>
> b. That the State has a compelling interest in fostering procreation within a marital setting. . . .
>
> c. That the State has a compelling interest in securing or assuring recognition of Hawaii marriages in other jurisdictions. . . .
>
> d. That the State has a compelling interest in protecting the State's public fisc from the reasonably foreseeable effects of State approval of same-sex marriage in the laws of Hawaii. . . .
>
> e. That the State has a compelling state interest in protecting civil liberties, including the reasonably foreseeable effects of State approval of same-sex marriages, on its citizens.

Defendant's First Amended Pretrial Statement at pages 2-4.

19. Defendant's Pre-Trial Memorandum was filed on September 6, 1996. In pertinent part, Defendant asserted the following.

> The State of Hawaii has a compelling interest to promote the optimal development of children. . . . It is the State of Hawaii's position that, all things being equal, it is best for a child that it be raised in a single

> home by its parents, or at least by a married male and female. . . .
> The marriage law furthers the compelling state interest of securing or assuring recognition of Hawaii marriages in other jurisdictions. . . .
> The marriage law furthers the compelling state interest in protecting the public fisc from the reasonably foreseeable effects of approval of same-sex marriage.

Defendant's Pre-Trial Memorandum at pages 1, 2 and 4.

20. Defense counsel acknowledged Defendant's burden of proof and, in pertinent part, stated the following in his Opening Statement. "The State has a compelling interest in promoting the optimal development of children. . . . It is the State's policy to pursue the optimal development of children, to unite children with their mothers and fathers, and to have mothers and fathers take responsibility for their children." Trial Transcript ("Tr.") 9/10/96. pages 4-5.

IV. DEFENDANT'S WITNESSES

21. Defendant presented testimony from the following expert witnesses: (1) Kyle D. Pruett, M.D.; (2) David Eggebeen, Ph.D.; (3) Richard Williams, Ph.D.: and (4) Thomas S. Merrill, Ph D.

22. Dr. Kyle Pruett is an expert in the field of psychiatry, specializing in child development. Beginning in 1981 and continuing for a ten-year period, Dr. Pruett conducted a longitudinal study of fifteen families with young children with regard to the developmental competence of children raised primarily by their fathers in intact families. At the end of his study, Dr. Pruett found that children raised by families with primarily paternal care in the early months and years of life are competent and robust in their development, and are not sources of clinical concern.

23. In pertinent part, Dr. Pruett found that there were unique paternal contributions made by a father which had a positive effect on the following: (1) a child's self-esteem and feelings of being loved and important to the family; (2) a child's ability to cope with frustration and discouragement; (3) a child's interest in generative or creative matters; and (4) a child's gender flexibility.

24. However, Dr. Pruett also stated that the unique or non-replicable contributions offered by a father (and the unique contributions offered by a mother) are "small", in comparison to the contributions that parents make together to their children.

Tr. 9/10/96, page 84. Dr. Pruett conceded that the beneficial results described above are not essential to being a happy, healthy and well-adjusted child. Tr. 9/10/96, pages 86-87.

25. Dr. Pruett testified that biological parents have a predisposition which helps them in parenting children. The predisposition is based upon the following factors: (1) chromosomal or genetic contributions; (2) the parents' choice and timing of conception or procreation; (3) the physical changes to the mother's body and the father's observations and interaction with those changes; (4) immediate bonding upon the child's birth; and (5) a predisposition to sacrifice and make one's self secondary to the needs of the child.

26. Dr. Pruett also expressed his belief that children which are adopted or are the result of assisted reproduction live in a "burden[ed] system." Tr. 9/10/96, pages 58, 62.

27. Dr. Pruett stated that same-sex relationships do not provide the same type of learning model or experience for children as does male-female parenting, because there is an overabundance of information about one gender and little information about the other gender. Tr. 9/10/96, page 63.

28. Nevertheless, Dr. Pruett also stated that same-sex parents can, and do, produce children-with a clear sense of gender identity. Tr. 9/10/96, pages 106.

29. Dr. Pruett stated the following with respect to raising children in a same-sex marriage environment.

> Q. And in comparing same sex parenting with opposite sex parenting, which is more likely to pose greater developmental difficulties for children?
>
> A. In terms of probability, same-sex marriages are more likely to provide a more burdened nurturing domain.

Tr. 9/10/96, page 63.

30. It is Dr. Pruett's opinion that most children are more likely to reach their optimal development being raised in an intact family by their mother and father. According to Dr. Pruett, this family configuration presents the fewest burdens on child development. Tr. 9/10/96, page 63.

31. However, Dr. Pruett also stated that single parents, gay fathers, lesbian mothers and same-sex couples have the potential to, and often do, raise children that are happy, healthy and well-adjusted. Tr. 9/10/96, page 69.

32. Dr. Pruett testified that single parents, gay fathers, lesbian mothers, adoptive parents, foster parents and same-sex couples can be, and do become, good parents. Tr. 9/10/96, page 71. Significantly, Dr. Pruett knows the foregoing to be true based on his clinical experience. Tr. 9/10/96, page 72.

33. More specifically, Dr. Pruett stated that parents' sexual orientation does not disqualify them from being good, fit, loving or successful parents. Tr. 9/10/96, page 72.

34. Dr. Pruett agreed that, in general, gay and lesbian parents are as fit and loving parents as non-gay persons and couples. Tr. 9/10/96, page 73.

35. Same-sex couples have the same capability as different-sex couples to manifest the qualities conducive to good parenting. Tr. 9/10/96, page 75.

Dr. Pruett testified as follows.

> Q. And you've seen same-sex couples that have those qualities [to being good parents]?
>
> A. Yes.
>
> Q. And have made good parents?
>
> A. And have made good parents, yes.
>
> Q. And good parents as a couple?
>
> A. Yes.

Tr. 9/10/96, page 75.

36. Dr. Pruett also agreed that same-sex couples should be allowed to adopt children, provide foster care and to take children in and raise and care for them. Tr. 9/10/96, page 73.

37. Importantly, Dr. Pruett testified that the quality of the nurturing relationship between parent and child could, and would, outweigh any limitation or burden imposed on the child as a result of having same-sex parents. Tr. 9/10/96, page 79.

38. Finally, when questioned regarding research performed by Charlotte Patterson regarding children raised by same-sex couples, Dr. Pruett expressed his agreement with the general conclusions reached by Dr. Patterson. Tr. 9/10/96, pages 132-133.

More specifically, Dr. Pruett agreed with the following

conclusions, that gay and lesbian parents "are doing a good job" and that "the kids are turning out just fine." Tr. 9/10/96, pages 133-134.

Dr. Pruett was not surprised by Dr. Patterson's conclusions. In fact, they are what he expected to see, and although Dr. Pruett questions Dr. Patterson's research methodology, he is not aware of any data, research or literature which disputes Dr. Patterson's findings and conclusions. Tr. 9/10/96, pages 132-134.

39. Dr. David Eggebeen is an expert in the field of sociology with a special emphasis in demographics related to family and children.

40. In pertinent part, Dr. Eggebeen testified regarding changes or trends which have occurred in partnering, child bearing and labor force behavior in the United States. For example, Dr. Eggebeen testified regarding the following facts: (1) the marriage rate in the U.S. population has declined over the past twenty years; (2) the median age of marriage for women in the U.S. population has risen over the past twenty years; (3) the annual divorce rate in the U.S. population has increased over the past approximate thirty years; (4) the number of young adults currently cohabiting has increased over the past eight years; (5) the birth rate for women in the U.S. population has decreased over the past twenty years; (6) the number of proportionate births to non-married women in certain racial groups has increased over the past thirty years; and (7) the number of women in the labor force in the U.S. population and the number of working mothers with children under the age of six has increased dramatically over the past thirty years.

41. Based on his studies of the changes referred above, Dr. Eggebeen testified as follows.

> [C]hildren are going through fundamental changes in the structure of childhood and what we're seeing today is children today are living in very different circumstances than was evident or the case in the past. It's common today to find children in single parent families. It's common today to find children in single parent families. It's common today to find children living with a mother who never married. It's common today to find children in remarried families. It's common today to find children in dual earner families where both parents participate in the type of work. It is common or getting common to find children whose parents never married and thev're cohabiting.

Tr. 9/11/96, pages 32-33.

42. However, Dr. Eggebeen also testified that, as of 1990, almost six out of ten children in the United States are living in families where their parents are married and both of the parents are biological parents of the child.

43. Dr. Eggebeen explained further that ". . . children have gone through substantial changes in their lives. . . [T]here is greater diversity in living arrangements and family --- in families that children live today in the '9Os. However, a substantial percentage of children remain or will spend their childhood in . . . traditional kinds of family structures." Tr. 9/11/96, page 38.

44. Based on his research, Dr. Eggebeen concluded that marriage is a "gateway to becoming a parent," and marriage is synonymous with having children. Tr. 9/11/96, page 42.

45. However, Dr. Eggebeen also testified that individuals get

married without intending to have children, or marry and are biologically unable to have children. Further, the absence of the intent or the ability to have children does not weaken the institution of marriage.

In fact, Dr. Eggebeen recognized that people marry and want to get married for reasons other than having children; that those reasons are valuable and important; and that regardless of children, it is beneficial to society for adults to marry. Dr. Eggebeen testified that individuals should not be prohibited from marriage simply because they cannot have children. Tr. 9/11/96, pages 55-57.

46. Dr. Eggebeen testified that children raised in a single parent home are at a "heightened risk", as compared to children raised in a married couple family. Tr. 9/11/96, page 43. According to Dr. Eggebeen, children in a single parent family are at greater risk for the following: (1) poverty or economic hardship; (2) poor academic performance; (3) behavior problems and conduct disorders; and (4) premarital or teenage birth for girls.

47. Dr. Eggebeen stated that remarriage or cohabiting with a step-parent does not lessen or eliminate the risks to children from single parent families. "[C]hildren in a remarriage family. . . do not seem to perform any differently than children who remain in single parent families and therefore their performance or the risk of poor outcomes is about the same as is for children in single parent families." Tr. 9/11/96, page 46.

48. Dr. Eggebeen suggested that the lack of improvement in risk factors in remarriage or step-parent families may be attributable to "the role ambiguity of step parent relationships," characteristics which a step-parent brings to the family and which adversely affect the children or the absence of a biological relationship with the children. Tr. 9/11/96, pages 46-48. With respect to the latter, Dr. Eggebeen related the story of Cinderella and her evil stepmother. Tr. 9/11/96, page 48.

49. Dr. Eggebeen equates a same-sex couple with children to a step-parent situation with all of the above-described risk factors. Specifically, Dr. Eggebeen testified that "same-sex marriages where children [are] involved is by definition a step parent relationship," because there is one parent who is not the biological parent of the child. Tr. 9/11/96, pages 49.

50. However, Dr. Eggebeen conceded that there are some situations involving a same-sex couple which would not fit the classic step-parent scenario. For example, a situation involving a same-sex couple that sought and received reproductive assistance and in which the non-biological parent was fully involved from the beginning of the planning process, was present throughout the nine month period and at birth, and thereafter, raised the child as though they were the biological parents of the child. Tr. 9/11/96, pages 114-115.

51. Dr. Eggebeen also testified that single parents, adoptive parents, lesbian mothers, gay fathers and same-sex couples can create stable family environments and raise healthy and well-adjusted children. Tr. 9/11/96, page 82.

52. It is Dr. Eggebeen's opinion that gay and lesbian couples can, and do, make excellent parents and that they are capable of raising a healthy child. Tr. 9/11/96, page 83.

53. Dr. Eggebeen agrees that gay and lesbian parents should be allowed to adopt children and serve as foster parents. Tr. 9/11/96, page 85.

54. Dr. Eggebeen testified that cohabiting same-sex couples are less stable than married couples. However, the sole basis for Dr. Eggebeen's conclusion is a chart taken from the book entitled American Couples, co-authored by Pepper Schwartz, Ph.D.

The chart which summarizes approximately twenty year old information is Defendant's Exhibit Q, and depicts a comparison of the percentages of married, gay and lesbian couples, respectively, which had stayed together or broken up over periods of time.

Dr. Eggebeen testified that Exhibit Q is the best data that he could find which proves that gay and lesbian couples have substantially higher break up rates over time than married different sex couples. Tr. 9/11/96,-pages 73-74. Dr. Eggebeen admitted that he has done limited research on the subject of same sex couples and gay and lesbian parenting, and agrees that Charlotte Patterson and Pepper Schwartz are experts in the fields. Tr. 9/11/96, pages 131-132.

55. Finally, and importantly, Dr. Eggebeen stated that children of same-sex couples would be helped if their families had access to or were able to receive the following benefits of marriage: (1) state income tax advantages; (2) public assistance; (3) enforcement of child support, alimony or other support orders; (4) inheritance rights; and (5) the ability to prosecute wrongful death actions. Dr. Eggebeen also agreed that children of same-sex couples would be helped if their families received the social status derived from marriage. Tr. 9/11/96, pages 89-92.

56. Dr. Richard Williams is an expert in the field of psychology with special expertise in qualitative and quantitative research and research methods, statistical analysis and construction of research studies.

57. Dr. Williams was asked by defense counsel to review and analyze studies of children raised by gay and lesbian parents. He reviewed approximately twenty to thirty studies, and eventually selected nine studies to critique.

58. At trial, Dr. Williams presented commentary regarding nine research studies which defense counsel anticipated that Plaintiffs' expert witnesses would rely upon for their testimony and opinions in this case.

Dr. Williams' general criticism of the nine studies included the following: (1) there was non-representative sampling of heterosexual, gay and lesbian parents; (2) inadequate sample size was employed; and (3) comparison groups used in the studies were not comparable in terms of household make up. Dr Williams also presented specific criticism as to each of the nine referenced studies .

59. The testimony of Dr. Williams is not persuasive or believable because of his expressed bias against the social sciences, which include the fields of psychology and sociology.

For example, Dr. Williams believes that a majority of the studies in the social sciences have theoretical or methodological flaws. Tr. 9/12/96, pages 71-72. According to Dr. Williams, modern psychology is so flawed that no fix, reconciliation or overhaul can correct it. Tr. 9/12/96, page 70.

60. Further, even assuming that research studies are conducted properly, Dr. Williams still doubts the ultimate value of psychology and other social sciences. Tr. 9/12/96, page 73.

61. At times, Dr. Williams expressed severe views. For example, Dr. Williams believes that there is no scientific proof that evolution occurred. Tr. 9/12/96, page 80.

62. Finally, Dr. Williams admitted that his critique of studies regarding gay and lesbian parenting is a minority position. Tr. 9/12/96, pages 74-75.

63. Defendant's last witness was Thomas Merrill, Ph.D. Dr. Merrill is an expert in the field of psychology, including the areas of human development, gender development and relationships relative to children and their development.

64. Dr. Merrill is a psychologist in private practice in Honolulu, Hawaii. His clinical experience with families involving

one or two gay or lesbian parents is limited. Dr. Merrill has not testified as an expert in Family Court cases which involved the sexual orientation of a parent or a same-sex couple and the custody of a child. He has not participated in or conducted any study which focused on the children of gay and lesbian parents. Tr. 9/13/96, page 36.

65. Dr. Merrill examined the issue of same-sex versus opposite sex parent and child development for the first time as a result of his retention in this case. Tr. 9/13/96, page 35.

66. In pertinent part, Dr. Merrill testified that the parental relationship is an important learning model for children and that it is significant to have opposite sex parents for a child's learning. Tr. 9/13/96, pages 12-13.

67. Dr. Merrill stated that different-sex parents are important because both parents serve as models and as objects for a child's learning and development. Dr. Merrill explained as follows:

> We interact with -- and when I say identify, we measure and develop ourself in relationship to our same gender parent. We also identify our relationship with our opposite sex parents and there are different developmental stages where that relationship with the opposite sex parent is equal to or more important than our development -- our relationship at the moment with the same gender parent.

Tr. 9/13/96, page 13.

68. According to Dr. Merrill, although replacement of a biological parent is certainly possible, as in the case of remarriage and adoption, it would result in the presence of a different influence on the child and the child's developmental outcome may be different. Tr. 9/13/96, pages 20-21.

69. Dr. Merrill testified that same-sex parents do provide a learning experience for a child. However, Dr. Merrill stated that there is insufficient information regarding the effects of being raised by gay or lesbian parents on the development of a child. Tr. 9/13/96, page 22.

As a result, Dr. Merrill has no opinion regarding the development of children in a family with same-sex parents. Specifically, he cannot say whether or not children raised in a same-sex family environment will develop to be healthy, well-adjusted adults. Tr. 9/13/96, page 38.

70. At the close of his direct examination, Dr. Merrill presented the following opinions.

> Q. In your opinion, to a reasonable degree of psychological probability, in what family structure are children most likely to reach their optimal development?
>
> A. Children are most apt to reach their optimal level of development as exhibited in terms of their adjustment as adults in a family in which there is a limited amount of strife, a maximum amount of nurturing, a maximum amount of support, a maximum amount of guidance, a maximum amount of leadership, and a very strong and intimate bond between parents and child.
>
> Q. And does the presence of the mother and father improve the likelihood that there will be a strong bond?
>
> A. That would be a significant part of the maximum optimum environment in which to raise a child, yes.

Tr. 9/13/96, pages 32-33.

71. Dr. Merrill testified that the sexual orientation of a parent is not an indication of parental fitness. Tr. 9/13/96, page 46.

72. Dr. Merrill also agreed that gay and lesbian couples with children do have successful relationships. Tr. 9/13/96, page 46.

73. On one occasion, Dr. Merrill was retained by two attorneys to do a custody evaluation in a case involving a same-sex relationship on the mother's side. In part, he was asked to address children's development issues. Dr. Merrill testified that the fact that there was a same-sex relationship on the mother's side was not an issue and did not affect his evaluation in the case. Tr. 9/13/96, page 34.

74. Finally, and in pertinent part, Dr. Merrill testified as follows.

> Q. Now, doctor, do you think the children, regardless of whether they have a mother and a father, male-female parents, single parents, adoptive parents, gay and lesbian parents, same gender parents, should have the same opportunity in society to reach their optimum development, each child?

A. Yes, I do.

Tr. 9/13/96, page 45.

Dr. Merrill further stated that children should not be denied benefits, such as health care, education and housing based on the status of their parents. Opposite-sex, same-sex, single and adoptive parent status should not be a basis to deny benefits to children. Tr. 9/13/96, page 46.

V. PLAINTIFFS' WITNESSES

75. Although Plaintiffs do not have the burden of proof in this case, they nevertheless presented testimony from the following expert witnesses: (1) Pepper Schwartz, Ph.D; (2) Charlotte Patterson, Ph.D.; (3) David Brodzinsky, Ph.D; and (4) Robert Bidwell, M.D.

76. The court found the testimony of Dr. Schwartz and Dr. Brodzinsky to be especially credible.

Dr. Schwartz and Dr. Brodzinsky are well-qualified individuals. See Plaintiffs' Exhibits 1 and 2, respectively.

At trial, each of them testified in a knowledgeable, informative and straightforward manner worthy of belief. In general, the expert opinions of Dr. Schwartz and Dr. Brodzinsky appear to be well-founded based on their significant research and analysis, and their clinical and professional experience, respectively.

77. Dr. Schwartz is an expert in sociology and interdisciplinary studies of sexuality with a special expertise in gender and human sexuality, marriage and the family, and same-sex relations in parenting and research. She testified, in pertinent part, to the following.

78. Initially, Dr. Schwartz discussed her book, American Couples. Dr. Schwartz specifically addressed a chart taken from the book and relied upon by Defendant. According to Dr Schwartz, the data contained in Defendant's Exhibit Q represents the following: (1) that there is a substantially higher break up rate for all three kinds of couples (gay men, lesbian and cohabitors) than there is for married couples; and (2) married couples have an advantage that keeps them together longer than other kinds of couples. Tr. 9/16/96, pages 47-48.

79. Dr. Schwartz noted that the data presented in

American Couples was collected in the late '70s and up until 1980 or 1981. Since that time, there have been significant changes in society. For example, the entry of AIDS into gay male life and society, has made people more cautious and less likely to have multiple partners and more desirous of settling down. Gay men, in particular, have been hardest hit by the disease and it has made monogomy and couplehood more attractive.

Additionally, there is now a trend in which people contemplate and want to be more serious, to make families and to engage in long-term committed relationships. This is a large change from the attitudes of the late '70s and early '80s. Tr. 9/16/96, page 54-56.

80. Dr. Schwartz testified that heterosexual and homosexual people want to get married. Tr. 9/16/96, pages 58-59, 65. The doctor stated specifically:

> [T]hey want companionship, they want love, they want trust, they want someone who will be with them through thick and thin. They're looking for a live and a love partner. . . . [I]n our own [culture] it's an aspiration for --- for intimacy and security. And that is the definition of marriage as people first and primarily think of it."

Tr. 9/16/96, page 59.

81. Dr. Schwartz stated that same-sex couples can, and do, have successful, loving and committed relationships. Tr. 9/16/96, page 129.

82. Dr. Schwartz also identified practical, economic, legal, social and psychological benefits of marriage and reasons for people to marry. Tr. 9/16/96, pages 59-65.

83. Dr. Schwartz testified that the sexual orientation of parents is not an indicator of parental fitness. Tr. 9/16/96, page 128.

84. Dr. Schwartz also testified that gay and lesbian parents and same-sex couples are as fit and loving parents, as non-gay persons and different-sex couples. Tr. 9/16/96, page 127.

85. Dr. Schwartz believes that the primary quality of parenting is not the parenting structure, or biology, but is the nurturing relationship between parent and child. Tr. 9/16/96, page 129.

86. Dr. Schwartz also believes that children should not be denied benefits and protections because of the status of their parents. Tr. 9/16/96, pages 129-130.

87. Dr. Schwartz has the following opinions.

First, there is no reason related to the promotion of the optimal development of children why same-sex couples should not be permitted to marry. Tr. 9/16/96, page 130.

Second, allowing same-sex couples to marry would not have a negative impact on society or the institution of marriage. Dr. Schwartz testified, "[T]here would be no dishonor and no ultimate fragility to the institution [of marriage] by including gays and lesbians." Tr. 9/16/96, pages 130-131. Third, allowing same-sex couples to marry would have a positive impact on society and the institution of marriage. Dr. Schwartz stated the following.

> I think that marriage is really a high state of hope and effort for people. I think when we deny it to people we say that --- that there's some other location for love and raising children and that we're not as concerned about these kids' welfare or in some ways we don't think it would be good for them to be in a married home. It's not that those children don't exist, it's not that those

families don't exist, they do.

To me, I think that most Americans believe in marriage strongly. I believe by taking other people into the fold and asking that they behave as responsible to their children to give them support to have both rituals to enter into their relationships and legal complications by exiting them, that we shore up how important we think marriage is. I think it --- I think it in no way undermines it and I think it strengthens it by our insistence about how important it is and why we hope this will be available for all families.

Tr. 9/16/96, pages 131-132.

88. Dr. Charlotte Patterson is an expert in the field of psychology of child development with a special expertise in lesbian and gay parenting and the development of children of lesbian and gay parents. She testified, in pertinent part, to the following.

89. Dr. Patterson is a professor at the University of Virginia. She has completed two studies regarding the children of lesbian and gay parents.

90. The first study is known as the Bay Area Family Study. The study involved thirty-seven families, all of which had at least one child between the ages of four and nine. In every case, the children had either been born to women who identified themselves as lesbian at the time of the study, or who adopted children early in life. Data in the Bay Area Family Study was collected in 1990 and 1991.

91. According to Dr. Patterson, the main result of the Bay Area Family Study was a conclusion that the particular group of children, when compared to available norms, appeared to be developing in a normal fashion. Tr. 9/17/96, pages 23-24.

However, Dr. Patterson also noted a finding that the children of the lesbian mothers sample were more likely to express that they felt (within a normal range) symptoms of stress in their lives, as compared to children in the normal sample. The children who described symptoms of stress also said that they felt an overall sense of well-being about themselves in their lives. Although she has two plausible explanations, Dr. Patterson does not have a definitive interpretation or explanation for the above finding. Tr. 9/17/96, page 25.

Dr. Patterson agreed that the sample group of lesbian mothers in the Bay Area Family Study, when considering ethnic background, education, income, and other socioeconomic factors is not representative of women and all mothers in America. Tr. 9/17/96, pages 81-84.

92. Dr. Patterson's second study is known as the Contemporary Family Study. The study involved eighty families who conceived a child using the resources of the Sperm Bank of California. and all of which had at least one child that was at least five years old at the time of the study. Fifty-five of the families were headed by lesbian mothers. The remaining twenty-five families were headed by heterosexual parents. Most of the data for this study was collected in 1994 and 1995.

93. The three main conclusions of the Contemporary Family Study are as follows: (1) as a group, the children born as a result of donor insemination were developing normally; (2) sexual orientation of the parents was not a good predictor of how well children do in terms of a child's well-being and adjustment; and (3) irrespective of their parents' sexual orientation, children who live in a harmonious family environment had better reports from parents and teachers. Tr. 9/17/96, pages 36-37.

94. Based on her studies and review of other research, Dr. Patterson testified as follows. A biological relationship between parent and child is not essential to raising a healthy child. The quality of parenting which a child receives is more important than a biological connection or the gender of a parent. Tr. 9/17/96, pages 42-43.

95. According to Dr. Patterson, there is no data or research which establishes that gay fathers and lesbian mothers are less capable of being good parents than non-gay people and which supports denying gay people the ability to adopt and raise children. Tr. 9/17/96, page 52.

96. Dr. Patterson believes that gay and lesbian people and same-sex couples are as fit and loving parents as non-gay people and different-sex couples. Further, sexual orientation is not an indicator of parental fitness. Tr. 9/17/96, pages 53-54.

97. Dr. Patterson testified that same-sex couples can, and do, have successful, loving and committed relationships. Tr. 9/17/96, pages 54.

98. Dr. Patterson presented the following opinion. There is no reason related to the promotion of the development of children why same-sex couples should not be permitted to marry. Tr. 9/17/96, page 55.

99. Dr. David Brodzinsky is an expert in the fields of psychology and child development with a special expertise in adoption and other forms of nonbiological parenting and the development of children raised by nonbiological parents.

100. Dr. Brodzinsky counsels children and families in a clinical setting and also has an academic appointment at Rutgers University. In the academic setting, Dr. Brodzinsky does research, teaches, directs a program on counseling foster children and does clinical supervision. He has been at Rutgers University since 1974.

Dr. Brodzinsky serves as a consultant to several adoption agencies in New Jersey and New York and is a founding director of the Adoption Institute, a newly formed nonprofit organization, whose mission is to provide information and education and promote research regarding adoption and adoption practices. In the past ten to fifteen years, he has conducted research and written extensively on the psychology of adoption, foster care, stress and coping in children.

101. In his clinical practice, Dr. Brodzinsky has worked with gay and lesbian parents. He has provided counseling over the years to approximately forty families headed by same-sex parents and same-sex couples. In pertinent part, Dr. Brodzinsky testified as follows.

102. Dr. Brodzinsky stated the following with respect to the following question: "Are there advantages to being raised by one's biological parents?"

> The issue is not the structural variable, biological versus nonbiological, one parent versus two parent. Those are kind of --- they hide, I think, really what is going on. The issue is really the process variables, how children are cared for, is the child provided warmth, is the child provided consistency of care, is the child provided a stimulated environment, is the child given support. Those are the factors we can call, for lack of a better way of saying it, sensitive care-giving which transcend whether you're a single parent, two parent, biological, nonbiological. The research shows that --- that those are the factors that carry the biggest weight. And when you take a look at structural variables,

there's not all that much support that structural variable in and of themselves are all that important.

Tr. 9/18/96, page 42.

103. Dr. Brodzinsky noted that same-sex parent adoptions occur and it is his opinion that same-sex parent adoptions should be allowed. Tr. 9/18/96, page 49. Dr. Brodzinsky explained as follows.

Q. As an expert in adoption and as a psychologist, do you believe that gay men and lesbians, same-sex couples, should be continue to be allowed to adopt children?

A. Absolutely.

Q. Why?

A. Because they are able to provide, like heterosexual couples or single parents, warm and loving environments. They're --- they're adopting children now. They're doing a good job of it. Obviously, you know, when we --- when a person seeks to adopt, there is an evaluation. It would be the same kind of an evaluation. We would exclude a gay or lesbian individual for the same reason that we would exclude a heterosexual individual. That is, if they had a significant emotional problems or some other kind of factor that we felt, as -- as, you know, agency consultants, you know, would not -- would not predict well to a child's well-being.

Tr. 9/18/96, pages 56-57.

104. Dr. Brodzinsky testified that the research shows that same-sex couples and different-sex couples can be highly competent care-givers. The sexual orientation of parents is not an indicator of parental fitness. Tr. 9/18/96, page 50.

105. According to Dr. Brodzinsky, the primary quality of good parenting is not the particular structure of the family or biology, but is the nurturing relationship between parent and child. Tr. 9/18/96, page 63.

106. Dr. Brodzinsky believes that children adopted by same-sex couples are not at any increased risk for behavioral or psychological problems. Tr. 9/18/96, page 50.

107. Dr. Brodzinsky expressed his strong view regarding the issue of whether there is a best family environment to raise children.

Q. Now, the State's arguments seem to suggest that we somehow need to identify a best family for children, or as between mothers and fathers, we have to pick a best parent. What's your position on that?

A. I find that offensive truthfully. I find it offensive because it tends to suggest that there's only one way of being a parent. It excludes all nonbiological parenting which would be adoptive parenting, stepparenting, foster parenting, parenting by gay and lesbians. It suggests that if there are some additional issues that come with some of these nontraditional families that should be reason for excluding rather than taking that information and using it not in a punitive way but in a proactive, kind of supportive way to help families deal with the inevitable issues

that come up in life. And there are going to be some unique issues in varying forms of family. But to talk about one form of family that is best, I find that, you know, truthfully offensive and a distortion of the research literature. And that's really why I'm here, you know, to make sure that message comes across.

Tr. 9/18/96, pages 58-59.

108. Finally, it is Dr. Brodzinsky's opinion that there is no reason related to the promotion of the development of children why same-sex couples should not be permitted to marry. Tr. 9/18/96, page 63.

109. Dr. Robert Bidwell is an expert in pediatrics with a subspecialty in adolescent medicine. Dr. Bidwell is the Director of Adolescent Medicine at Kapiolani Medical Center and is also employed at the University of Hawaii Department of Pediatrics with the John A. Burns School of Medicine. Dr. Bidwell teaches medical students and pediatric residents in training, provides patient care, and practices adolescent medicine and general pediatrics at Kapiolani Medical Center.

110. In his clinical practice, Dr. Bidwell has treated children of same-sex parents. He has provided medical services to hundreds of children with families which included a single gay or lesbian parent or same-sex parents. In pertinent part, Dr. Bidwell testified as follows.

111. Dr. Bidwell described the best environment to raise a healthy, well-adjusted child or adolescent as being one in which "there's all those things that we associate with family, which is love and nurturance and guidance, protection, safety." Tr. 9/19/96, pages 27-28.

112. According to Dr. Bidwell, gay and lesbian parents and same-sex couples can, and do, provide an environment for their children. Tr. 9/19/96, page 29.

113. Dr. Bidwell testified that gay and lesbian parents and same-sex couples raise children that are just as healthy and well-adjusted as those raised by different-sex couples. Tr. 9/19/96, page 38.

114. Dr. Bidwell conceded- that he has worked with adolescents and teen-aged children living in a same-sex family environment that have experienced embarrassment, distress or a "difficult time" because their family "is not the same as the majority of families that surround them." However, the doctor also described the situation as a phase in the child's development. He said the following.

What's been reassuring to me is that -- that this has been a phase in their development, that I do not know of any teenager who has not gotten through this phase intact as a healthy adolescent. And, yes, I think there was pain. I think that there may have been tears from time to time, wishing that things were different. But I think it's -- I mean it's what we call growing up. I mean there are many different kinds of families. And all of our parents are different in some way from what we would like to see. . . .

So I think my experience has been for the same -- has been the same for the children of gay and lesbian parents, is that they may go through a rough time. And not all of them do. Remarkably, most of them, they make their

> accommodations. They find ways to deal with it. But they get through these periods. And if anything, I think they grow stronger through that experience. They learn about life. They learn about diversity. And the research -- and although I'm not a heavy-duty research person, I do look at the research. The research confirms that --that teenagers get through this period.
>
> But I guess to get back to your question, yes, there is a special experience for these young people, and sometimes it's painful. But it doesn't do developmental damage to these kids. If anything, it creates strength and promotes growth.

Tr. 9/19/96, pages 30-32.

115. Finally, Dr. Bidwell believes that children of same-sex parents would benefit, with respect to their health, development and adjustment, if their parents were married. Tr. 9/19/96, page 38.

VI. SPECIFIC FINDINGS

116. The following are specific findings of fact for this case based on the credible evidence presented at trial.

117. Defendant presented insufficient evidence and failed to establish or prove any adverse consequences to the public fisc resulting from same-sex marriage.

118. Defendant presented insufficient evidence and failed to establish or prove any adverse impacts to the State of Hawaii or its citizens resulting from the refusal of other jurisdictions to recognize Hawaii same-sex marriages or from application of the federal constitutional provision which requires other jurisdictions to give full faith and credit recognition to Hawaii same-sex marriages. See Article IV, Section 1 of the U.S. Constitution (The Full Faith and Credit Clause).

119. Defendant presented insufficient evidence and failed to establish or prove the legal significance of the institution of traditional marriage and the need to protect traditional marriage as a fundamental structure in society.

120. There is a public interest in the rights and well-being of children and families. See H.R.S. Chapters 571 and 577.

121. A father and a mother can, and do, provide his or her child with unique paternal and maternal contributions which are important, though not essential, to the development of a happy, healthy and well-adjusted child.

122. Further, an intact family environment consisting of a child and his or her mother and father presents a less burdened environment for the development of a happy, healthy and well-adjusted child.

There certainly is a benefit to children which comes from being raised by their mother and father in an intact and relatively stress free home.

123. However, there is diversity in the structure and configuration of families. In Hawaii, and elsewhere, children are being raised by their natural parents, single parents, step-parents, grandparents, adopted parents, hanai parents, foster parents, gay and lesbian parents, and same-sex couples.

124. There are also families in Hawaii, and elsewhere, which do not have children as family members.

125. The evidence presented by Plaintiffs and Defendant establishes that the single most important factor in the development of a happy, healthy and well-adjusted child is the

nurturing relationship between parent and child.

More specifically, it is the quality of parenting or the "sensitive care-giving" described by David Brodzinsky, which is the most significant factor that affects the development of a child.

126. The sexual orientation of parents is not in and of itself an indicator of parental fitness.

127. The sexual orientation of parents does not automatically disqualify them from being good, fit, loving or successful parents.

128. The sexual orientation of parents is not in and of itself an indicator of the overall adjustment and development of children.

129. Gay and lesbian parents and same-sex couples have the potential to raise children that are happy, healthy and well-adjusted.

130. Gay and lesbian parents and same-sex couples are allowed to adopt children, provide foster care and to raise and care for children.

131. Gay and lesbian parents and same-sex couples can provide children with a nurturing relationship and a nurturing environment which is conducive to the development of happy, healthy and well-adjusted children.

132. Gay and lesbian parents and same-sex couples can be as fit and loving parents, as non-gay men and women and different-sex couples.

133. While children of gay and lesbian parents and same-sex couples may experience symptoms of stress and other issues related to their non-traditional family structure, the available scientific data, studies and clinical experience presented at trial suggests that children of gay and lesbian parents and same-sex couples tend to adjust and do develop-in a normal fashion.

134. Significantly, Defendant has failed to establish a causal link between allowing same-sex marriage and adverse effects upon the optimal development of children.

135. As noted herein, there is a benefit to children which comes from being raised by their mother and father in an intact and relatively stress-free home.

However, in this case, Defendant has not proved that allowing same-sex marriage will probably result in significant differences in the development or outcomes of children raised by gay or lesbian parents and same-sex couples, as compared to children raised by different-sex couples or their biological parents.

In fact, Defendant's expert, Kenneth Pruett, agreed, in pertinent part, that gay and lesbian parents "are doing a good job" raising children and, most importantly, "the kids are turning out just fine."

136. Contrary to Defendant's assertions, if same-sex marriage is allowed, the children being raised by gay or lesbian parents and same-sex couples may be assisted, because they may obtain certain protections and benefits that come with or become available as a result of marriage. See Baehr v. Lewin, 74 Haw. 530, 560-561, 852 P.2d 44, 59 (1993), for a list of noteworthy marital rights and benefits.

137. In Hawaii, and elsewhere, same-sex couples can, and do, have successful, loving and committed relationships.

138. In Hawaii, and elsewhere, people marry for a variety of reasons including, but not limited to the following: (1) having or raising children; (2) stability and commitment; (3) Pmne1onal closeness (4) intimacy and monogamy; (5) the establishment of a framework for a long-term relationship; (6) personal significance; (7) recognition by society; and (8) certain legal and economic protections, benefits and obligations. See

Baehr v. Lewin, 74 Haw. 530, 560-561, 852 P.2d 44, 59 (1993) for a list of noteworthy marital rights and benefits.

In Hawaii, and elsewhere. gay men and lesbian women share this same mix of reasons for wanting to be able to marry.

139. Simply put, Defendant has failed to establish or prove that the public interest in the well-being of children and families, or the optimal development of children will be adversely affected by same-sex marriage.

140. If any of the above findings of fact shall be deemed conclusions of law, the Court intends that every such finding shall he construed as a conclusion of law.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter and the parties to this action. Venue is proper in the First Circuit Court. HRS 603-21.5 and 603-36.

2. The trier of fact determines the credibility of a witness and the weight to be given to his or her testimony. In pertinent part, the trier of fact may consider the witness' demeanor and manner while on the stand, the character of his or her testimony as being probable or improbable, inconsistencies, patent omissions and discrepancies in his or her testimony or between the testimony of other witnesses, contradictory testimony or evidence, his or her interest in the outcome to the case and other factors bearing upon the truthfulness or untruthfulness of the witness' testimony. Younq Ah Chor v. Dulles, 270 F.2d 338! 341 (9th Cir., 1959); and Nani Koolau Co. v. Komo Construction, Inc., 5 Haw. App. 137, 139-140, 681 P.2d 580, 584 (1984). In a non-jury trial, the credibility of a witness is a matter for the trial court to determine and the court can accept or reject the testimony of a witness in whole or in part. Lee v. Kimura, 2 Haw. App. 538, 544, 634 P.2d 1043, 1047-1048 (1981).

3. Defendant's burden in this case is to "overcome the presumption that HRS 572-1 is unconstitutional by demonstrating that it furthers a compelling state interest and is narrowly drawn to avoid unnecessary abridgements of constitutional rights." Baehr, 74 Haw. 530, 583, 852 P.2d 44, 74 (1993) citing Naqle v. Board of Education, 63 Haw. 389, 392, 629 P.2d 109, 111 (1987) and Holdman v. Olim, 59 Haw. 346, 349, 581 P.2d 1164, 1167 (1978).

4. There is no fundamental right to marriage for same sex couples under article I, section 6 of the Hawaii Constitution. Marriage is a state-conferred legal status which gives rise to certain rights and benefits. Baehr v. Lewin, 74 Haw. 530, 557 and 560-561, 852 P.2d 44, 57 (1993).

5. The Department of Health, State of Hawaii, has the exclusive authority to issue licenses to marriage applicants. Baehr v. Lewin, 74 Haw. 530, 560, 852 P.2d 44, 59 (1993).

6. There are certain rights and benefits which accompany the state-conferred legal status of marriage See Baehr v. Lewin, 74 Haw. 530, 560-561, 852 P.2d 44, 59 (1993) for a list of noteworthy marital rights and benefits.

7. If Plaintiffs, and other same-sex couples, were allowed the state-conferred legal status of marriage, they would be conferred with these and other marital rights and benefits.

8. HRS 572-1, on its face and as applied, regulates access to the status of marriage and its concomitant rights and benefits on the basis of the applicants' sex. As such, HRS _572-1 establishes a sex-based classification. Baehr v. Lewin, 74 Haw. 530, 572, 852 P.2d 44, 64 (1993).

9. Sex is a "suspect category" for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution. Consequently, HRS 572-1 is subject to the "strict scrutiny" test. Baehr v. Lewin, 74 Haw. 530, 580, 852 P.2d 44, 67 (1993).

10. Defendant, rather than Plaintiffs, carries a heavy burden of justification. Nachtwey v. Doi, 59 Haw. 430, 435, 583 P.2d 955, 959 (1978) citing San Antonio School District v. Rodriquez, 411 U.S. 1, 16-17, 93 S.Ct. 1278, 1288, 36 L.Ed.2d 16, 33 (1973).

11. Specifically, HRS 572-1 is presumed to be unconstitutional and the burden is on Defendant to show that the statute's sex-based classification is justified by compelling state interests and the statute is narrowly drawn to avoid unnecessary abridgments of constitutional rights. Baehr v. Lewin, 74 Haw. 530, 583, 852 P.2d 44, 67 (1993), reconsideration and clarification granted in part, 74 Haw. 645, 646, 852 P.2d 74 (1993).

12. Article IV section 1 of the U.S. Constitution provides, in pertinent part, that all states must recognize the "public acts, records and judicial proceedings of every other state."

Whether other states will recognize or avoid recognizing same-sex marriages which take place in Hawaii and the consequences to Hawaii residents of other states' recognition or non-recognition of same-sex marriage (and all of the rights and benefits associated with marriage) is an important issue.

However, except for asking the court to take judicial notice of the Defense of Marriage Act, P.L. 1-4-199 ("DOMA"), Defendant introduced little or no other evidence with regard to this significant issue of comity and same-sex marriage, conflict-of-laws, and/or the effects, if any, of the Full Faith and Credit Clause of the U.S. Constitution.

13. Except for the affidavit testimony of Kenneth K. M. Ling and Michael L. Meaney, which provided statistical, budgetary and operational information regarding the Family Court of the First Circuit Court and the Child Support Enforcement Agency, State of Hawaii, respectively Defendant presented little or no other evidence which addressed how same-sex marriage would adversely affect the public fisc. Defendant did not offer any testimony which explained the significance of the above and Defendant did not specifically explain or establish how same-sex marriage would adversely impact the Family Court or the Child Support Enforcement Agency.

14. Defendant presented meager evidence with regard to the importance of the institution of traditional marriage, the benefits which that relationship provides to the community and, most importantly, the adverse effects, if any, which same-sex marriage would have on the institution of traditional marriage and how those adverse effects would impact on the community and society. The evidentiary record in this case is inadequate to thoughtfully examine and decide these significant issues.

15. Finally, Defendant's argument that legalized prostitution, incest and polygamy will occur if same-sex marriage is allowed disregards existing statutes and established precedent [for example, State v. Mueller, 66 Haw. 616, 671 P.2d 1351 (1983) (upholding ban on prostitution)] and the Supreme Court's acknowledgment of compelling reasons to prevent and prohibit marriage under circumstances such as incest. Baehr v. Lewin, 74 Haw. 530, 562 n.19, 852 P.2d 44, 59 n.19 (1993).

16. In Dean v. District of Columbia, 653 A.2d 307 (D.C.App. 1995), two homosexual males filed a complaint against the District of Columbia which sought an injunction to require the Clerk of the Superior Court to issue them a marriage license. The trial court granted summary judgment in favor of the District of Columbia. On appeal, the District of Columbia Court of Appeals affirmed the trial court's order granting summary judgment.

In the Dean case, Judge Ferren wrote a lengthy opinion concurring in part and dissenting in part, and in which the

majority joined in part.

Judge Ferren would have reversed summary judgment and remanded the case for trial to decide (1) the level of scrutiny constitutionally required, and (2) whether the District of Columbia has demonstrated a compelling or substantial enough governmental interest to justify refusing plaintiffs a marriage license. The portion of Judge Ferren's opinion which deals with the question of whether the District of Columbia could demonstrate at trial a substantial or compelling state interest is useful and informative. In pertinent part, Judge Ferren wrote the following.

> [I]f the government cannot cite actual prejudice to the public majority from a change in the law to allow same-sex marriages . . . then the public majority will not have a sound basis for claiming a compelling, or even a substantial, state interest in withholding the marriage statute from same-sex couples; a mere feeling of distaste or even revulsion at what someone else is or does, simply because it offends majority values without causing concrete harm, cannot justify inherently discriminatory legislation against members of a constitutionally protected class - as the history of constitutional rulings against racially discriminatory legislation makes clear.
>
> Suppose, on the other hand, that scientifically credible "deterrence" evidence were forthcoming at trial, so that either the heterosexual majority or the homosexual minority would be prejudiced in some concrete way, depending on whether the marriage statute was, or was not, available to homosexual couples. In that case, the ultimate question of whose values should be enforced, framed in terms of what a substantial or compelling state interest really is, would pose the hardest possible question for the court as majority and minority interests resoundingly clash.

Dean at 653 A.2d at 355-356 (1995) (footnotes omitted).

17. In this case, the evidence presented by Defendant does not establish or prove that same-sex marriage will result in prejudice or harm to an important public or governmental interest.

18. Defendant has not demonstrated a basis for his claim of the existence of compelling state interests sufficient to justify withholding the legal status of marriage from Plaintiffs.

As discussed hereinabove, Defendant has failed to present sufficient credible evidence which demonstrates that the public interest in the well-being of children and families, or the optimal development of children would be adversely affected by same-sex marriage. Nor has Defendant demonstrated how same-sex marriage would adversely affect the public fisc, the state interest in assuring recognition of Hawaii marriages in other states, the institution of traditional marriage, or any other important public or governmental interest.

The evidentiary record presented in this case does not justify the sex-based classification of HRS 572-1.

Therefore, the court specifically finds and concludes, as a matter of law, that Defendant has failed to sustain his burden to overcome the presumption that HRS 572-1 is unconstitutional by demonstrating or proving that the statute furthers a compelling state interest.

19. Further, even assuming arguendo that Defendant was able to demonstrate that the sex-based classification of HRS 572-1 is justified because it furthers a compelling state interest, Defendant has failed to establish that HRS 572-1 is narrowly tailored to avoid unnecessary abridgments of constitutional rights. Nachtwey v. Doi, 59 Haw. 430, 435, 583 P.2d 955, 958 (1978) (citations omitted) (quoting San Antonio School District v. Rodriquez, 411 U.S. 1, 16-17, 93 S.Ct. 1278, 1288, 36 L.Ed.2d 16, 33 (1973).

20. If any of the above conclusions of law shall be deemed findings of fact, the court intends that each such conclusion be construed as a finding of fact.

21. Based on the foregoing, in accordance with the mandate of the Hawaii Supreme Court, and applying the law to the evidence presented at trial, judgment shall be entered in favor of Plaintiffs Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon and Joseph Melillo as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. The sex-based classification in HRS 572-1, on its face and as applied, is unconstitutional and in violation of the equal protection clause of article I, section 5 of the Hawaii Constitution.

2. Defendant Lawrence H. Miike, as Director of Department of Health, State of Hawaii, and his agents, and any person in acting in concert with Defendant or claiming by or through him, is enjoined from denying an application for a marriage license solely because the applicants are of the same sex.

3. To the extent permitted by law, costs shall be imposed against Defendant and awarded in favor of Plaintiffs.

DATED: Honolulu. Hawaii. December 3, 1996.

KEVIN S. C. CHANG
Judge of the Above-Entitled

NO. 20371

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

NINIA BAEHR, GENORA DANCEL, TAMMY RODRIGUES, ANTOINETTE PREGIL, PAT LAGON, JOSEPH MELILLO,	CIV. NO. 91-1394-05 APPEAL FROM THE FINAL JUDGMENT filed on December 11, 1996
Plaintiffs-Appellees,	FIRST CIRCUIT COURT
vs.	
LAWRENCE MIIKE, in his official capacity as Director of the Department of Health, State of Hawaii,	
Defendant-Appellant.	

SUMMARY DISPOSITION ORDER

Pursuant to Hawai'i Rules of Evidence (HRE) Rules 201 and 202 (1993), this court takes judicial notice of the following: On April 29, 1997, both houses of the Hawai'i legislature passed, upon final reading, House Bill No. 117 proposing an amendment to the Hawai'i Constitution (the marriage amendment). See 1997 House Journal at 922; 1997 Senate Journal at 766. The bill proposed the addition of the following language to article I of the Constitution: "**Section 23**. The legislature shall have the power to reserve marriage to opposite-sex couples." See 1997 Haw. Sess. L. H.B. 117 § 2, at 1247. The marriage amendment was ratified by the electorate in November 1998.

In light of the foregoing, and upon carefully reviewing the record and the briefs and supplemental briefs submitted by the parties and amicus curiae and having given due consideration to the arguments made and the issues raised by the parties, we resolve the defendant-appellant Lawrence Miike's appeal as follows:

On December 11, 1996, the first circuit court entered judgment in favor of plaintiffs-appellees Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon, and Joseph Melillo (collectively, "the plaintiffs") and against Miike, ruling (1) that the sex-based classification in Hawai`i Revised Statutes (HRS) § 572-1 (1985) was "unconstitutional" by virtue of being "in violation of the equal

protection clause of article I, section 5 of the Hawai[`]i Constitution," (2) that Miike, his agents, and any person acting in concert with or by or through Miike were enjoined from denying an application for a marriage license because applicants were of the same sex, and (3) that costs should be awarded against Miike and in favor of the plaintiffs. The circuit court subsequently stayed enforcement of the injunction against Miike.

The passage of the marriage amendment placed HRS § 572-1 on new footing. The marriage amendment validated HRS § 572-1 by taking the statute out of the ambit of the equal protection clause of the Hawai'i Constitution, at least insofar as the statute, both on its face and as applied, purported to limit access to the marital status to opposite-sex couples. Accordingly, whether or not in the past it was violative of the equal protection clause in the foregoing respect, HRS § 572-1 no longer is.[1] In light of the marriage amendment, HRS § 572-1 must be given full force and effect.

The plaintiffs seek a limited scope of relief in the present lawsuit, i.e., access to applications for marriage licenses and the consequent legally recognized marital status. Inasmuch as HRS § 572-1 is now a valid statute, the relief sought by the plaintiffs is unavailable. The marriage amendment has rendered the plaintiffs' complaint moot. Therefore,

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[1] In this connection, we feel compelled to address two fundamental misapprehensions advanced by Justice Ramil in his concurrence in the result that we reach today. First, Justice Ramil appears to misread the plurality opinion in Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44, reconsideration and clarification granted in part, 74 Haw. 650, 875 P.2d 225 (1993) [hereinafter, "Baehr I"], to stand for the proposition that HRS § 572-1 (1985) defines the legal status of marriage "to include unions between persons of the same sex." Concurrence at 1. Actually, that opinion expressly acknowledged that "[r]udimentary principles of statutory construction renders manifest the fact that, by its plain language, HRS § 572-1 restricts the marital relation to a male and a female." Baehr I, 74 Haw. at 563, 852 P.2d at 60. Second, because, in his view, HRS § 572-1 limits access to a marriage license on the basis of "sexual orientation," rather than "sex," see concurrence at 1 n.1, Justice Ramil asserts that the plurality opinion in Baehr I mistakenly subjected the statute to strict scrutiny, see id. at 2-3. Notwithstanding the fact that HRS § 572-1 obviously does not forbid a homosexual person from marrying a person of the opposite sex, but assuming arguendo that Justice Ramil is correct that the touchstone of the statute is sexual orientation, rather than sex, it would still have been necessary, prior to the ratification of the marriage amendment, to subject HRS § 572-1 to strict scrutiny in order to assess its constitutionality for purposes of the equal protection clause of article I, section 5 of the Hawai'i Constitution. This is so because the framers of the 1978 Hawai'i Constitution, sitting as a committee of the whole, expressly declared their intention that a proscription against discrimination based on sexual orientation be subsumed within the clause's prohibition against discrimination based on sex. See Stand. Comm. Rep. No. 69, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 675 (1980). Indeed, citing the foregoing constitutional history, Lewin conceded that very point in his answering brief in Baehr I when he argued that article I, section 6 of the Hawai'i Constitution (containing an express right "to privacy") did not protect sexual orientation because it was already protected under article I, section 5. Lewin could hardly have done otherwise, inasmuch as his proposed order granting his motion for judgment on the pleadings in Baehr I contained the statement that "[u]ndoubtedly, the delegates [to the convention] meant what they said: Sexual orientation [i]s already covered under Article I, Section 5 of the State Constitution."

IT IS HEREBY ORDERED that the judgment of the circuit court be reversed and that the case be remanded for entry of judgment in favor of Miike and against the plaintiffs.

IT IS FURTHER ORDERED that the circuit court shall not enter costs or attorneys' fees against the plaintiffs.

DATED: Honolulu, Hawai'i, December 9, 1999.

On the briefs:

Charles J. Cooper (of Cooper, Carvin & Rosenthal, PLLC) and Margery S. Bronster (Attorney General of Hawai'i), for the defendant-appellant Lawrence Miike

Daniel R. Foley (of Partington & Foley), Evan Wolfson (of Lambda Legal Defense Fund, Inc.), and Kirk H. Cashmere, for the plaintiffs-appellees Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon, and Joseph Melillo

James E.T. Koshiba (of Koshiba Agena & Kubota), for amicus curiae Hawaii's Future Today

Craig Furusho, for amicus curiae The National Legal Foundation

Robert K. Matsumoto, Jay Alan Sekulow (of The American Center for Law & Justice), and Marie A. Sheldon, for amici curiae Representative Michael Kahikina, Representative Ezra Kanoho, Representative David Stegmaier, Representative Romy M. Cachola, Representative Felipe Abinsay, Jr., and Representative Gene Ward

Karen A. Essene, for amicus curiae The Madison Society of Hawai'i

Berton T. Kato, for amicus curiae National Association for Research and Therapy of Homosexuality, Inc.

Paul Alston and Lea O. Hong (of Alston Hunt Floyd & Ing), for amicus curiae Na Mamo O Hawai'i

Sandra Dunn, Steffen N. Johnson (of Mayer, Brown & Platt), and Kimberlee W. Colby, Steven T. McFarland, and Samuel B. Casey (of Christian Legal Society), for amici curiae The Christian Legal Society, Lutheran Church - Missouri Synod, National Association of Evangelicals, The Institute on Religion and Democracy, The Association for Church Renewal, Liberty Counsel, Biblical Witness Fellowship, Episcopalians United, Inc., The Presbyterian Lay Committee, Focus Renewal Ministries in the United Church of Christ, and Good News: A Forum for Scriptural Christianity Within the United Methodist Church

Michael Livingston (of Davis, Levin, Livingston & Grande) and Mary L. Bonauto and Amelia A. Craig (of Gay & Lesbian Advocates & Defenders), for amici curiae Gay and Lesbian Advocates & Defenders, National Organization for Women, Inc., National Organization for Women Foundation, Inc., NOW Legal Defense and Education Fund, National Center for Lesbian Rights, Northwest Women's Law Center, People For The American Way, Asian American Legal Defense and Education Fund, and Mexican American Legal Defense and Educational Fund

Steven H. Aden (of Dold LaBerge & Aden), for amicus curiae The Rutherford Institute

Richard Kiefer (of Carlsmith Ball Wichman Case & Ichiki), for amici curiae Urie Brofenbrenner, Ph.D., Susan D. Cochran, Ph.D., Anthony R. D'Augelli, Ph.D., Susan E. Golombok, Ph.D., Richard Green, M.D., J.D., Martha Kirkpatrick, M.D., Lawrence A. Kurdek, Ph.D., Letitia Anne Peplau, Ph.D., Ritch C. Savin-Williams, Ph.D., Royce W. Scrivner, Ph.D., and Fiona Tasker, Ph.D.

Frederick W. Rohlfling III and J. Stevens Keali'iwahamana Hoag (of Frederick W. Rohlfling III & Associates), for amicus curiae The Church of Jesus Christ of Latter-Day Saints

Mary Blaine Johnston, for amicus curiae American Friends Service Committee

Robert Bruce Graham, Jr. (of Ashford & Wriston), for amicus curiae Hawaii Catholic Conference

David S. Brustein, for amici curiae Andrew J. Cherlin, Ph.D., Frank F. Furstenberg, Jr., Ph.D., Sara S. McLanahan, Ph.D., Gary D. Sandefur, Ph.D., Lawrence L. Wu, Ph.D.

Ronald V. Grant (of Dwyer Imanaka Schraff Kudo Meyer & Fujimoto), for amicus curiae Independent Women's Forum

Paul Alston and William M. Kaneko (of Alston Hunt Floyd & Ing), for amicus curiae Japanese Americans Citizens League of Honolulu

Robert Bruce Graham, Jr. (of Ashford & Wriston) and L. Steven Grasz (Deputy Attorney General, State of Nebraska), for amici curiae states of Nebraska, Alabama, Colorado, Georgia, Idaho, Michigan, Mississippi, Missouri, South Carolina, and South Dakota

Chris R. Davis (of Phelps-Chartered) and Robert Bruce Graham (of Ashford & Wriston), for amicus curiae Westboro Baptist Church

Edward C. Kemper, Sandy S. Ma (of American Civil Liberties Union of Hawai'i Foundation), Matthew A. Coles and Jennifer Middleton (of American Civil Liberties Union Foundation), and Leslie G. Fagan and Tobias Barrington Wolff (of Paul, Weiss, Rifkind, Wharton, & Garrison), for amicus curiae American Civil Liberties Union of Hawai'i Foundation

Thomas J. Kuna-Jacob (pro se), amicus curiae

Robert Bruce Graham, Jr. (of Ashford & Wriston) and David Zweibel (of Agudath Israel of America), for amicus curiae Agudath Israel of America

Baker v. State (98-032)

[Filed 20-Dec-1999]

ENTRY ORDER

SUPREME COURT DOCKET NO. 98-032

NOVEMBER TERM, 1998

Stan Baker, et al.	}	APPEALED FROM:
	}	
	}	
v.	}	Chittenden Superior Court
	}	
State of Vermont, et al.	}	
	}	DOCKET NO. 1009-97CnC

In the above-entitled cause, the Clerk will enter:

The judgment of the superior court upholding the constitutionality of the Vermont marriage statutes under Chapter I, Article 7 of the Vermont Constitution is reversed. The effect of the Court's decision is suspended, and jurisdiction is retained in this Court, to permit the Legislature to consider and enact legislation consistent with the constitutional mandate described herein.

Jeffrey L. Amestoy, Chief Justice

Concurring:

Concurring and Dissenting:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

James L. Morse, Associate Justice

Marilyn S. Skoglund, Associate Justice

No. 98-032

Stan Baker, et al. Supreme Court

On Appeal from
v. Chittenden Superior Court

State of Vermont, et al. November Term, 1998

Linda Levitt, J.

Beth Robinson and Susan M. Murray of Langrock Sperry & Wool, Middlebury, and Mary Bonauto, Gay & Lesbian Advocates & Defenders, Boston, Massachusetts, for Plaintiffs-Appellants.

William H. Sorrell, Attorney General, and Eve Jacobs-Carnahan and Timothy Tomasi, Assistant Attorneys General, Montpelier, for Defendant-Appellee State.

Timothy M. Eustace of Stitzel, Page & Fletcher, P.C., Burlington, for Defendants-Appellees Town of Shelburne and City of South Burlington.

Gregg H. Wilson of Kolvoord, Overton & Wilson, Essex Junction, for Defendant-Appellee Town of Milton.

Harvey Golubock, Montpelier, for Amicus Curiae Vermont Human Rights Commission.

Richard T. Cassidy of Hoff, Curtis, Pacht, Cassidy & Frame, P.C., Burlington, and Evan Wolfson, Lambda Legal Defense and Education Fund, Inc., and Lawson M. Vicario and S. Elizabeth Foster of Gibson, Dunn & Crutcher LLP, New York, New York, for Amici Curiae Vermont Coalition for Lesbian and Gay Rights, et al.

David Rath of Kohn & Rath, Hinesburg, for Amicus Curiae Professors of Legislation and Statutory Interpretation.

Eileen M. Blackwood of Blackwood and Kraynak, P.C., Burlington, David Chambers, White River Junction, and Matthew Coles, American Civil Liberties Union Foundation, New York, New York, for Amici Curiae Parents and Friends of Lesbian and Gay Men, et al.

Peter M. Lawrence of Barr, Sternberg & Moss, P.C., Bennington, for Amici Curiae Vermont Organization for Weddings of the Same-Gender, et al.

<Page 2>

William M Dorsch of Mickenberg, Dunn, Sirotkin & Dorsch, Burlington, for Amici Curiae Vermont NOW, et al.

Philip C. Woodward and Karen McAndrew of Dinse, Knapp & McAndrew, P.C., Burlington, for Amici Curiae Vermont Psychiatric Association, et al.

Hal Goldman, Burlington, for Amicus Curiae Take It To the People.

J. Paul Giuliani of McKee, Giuliani & Cleveland, Montpelier, and Dwight G. Duncan, North Dartmouth, Massachusetts, for Amici Curiae New Journey, et al.

Robert H. Erdmann, South Burlington, Jay Alan Sekulow and John P. Tuskey, Virginia Beach, Virginia, and Vincent P. McCarthy, New Milford, Connecticut, for Amicus Curiae The American Center for Law and Justice.

Clarke A. Gravel of Gravel & Shea, Burlington, and Don Stenberg, Nebraska Attorney General, and L. Steven Grasz, Deputy Attorney General,

Lincoln, Nebraska, for Amici Curiae State of Nebraska, et al.

Jon R. Eggleston, Burlington, for Amicus Curiae Professors of Law and Jurisprudence.

Duncan F. Kilmartin, Newport, and David R. Huggins, The National Legal Foundation, Memphis, Tennessee, for Amici Curiae Specialty Research Associates, et al.

William M. O'Brien, O'Brien Law Offices, Winooski, Thomas E. McCormick of McCormick Fitzpatrick Kasper & Burchard, Burlington, and Von G. Keetch and Alexander Dushku of Kirton & McConkie, Salt Lake City, Utah, for Amici Curiae Roman Catholic Diocese of Burlington, Vermont, et al.

John Fitzpatrick, Burlington, and David Zwiebel, New York, New York, for Amicus Curiae Agudath Israel of America.

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PRESENT: Amestoy, C.J., Dooley, Morse, Johnson and Skoglund, JJ.

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AMESTOY, C.J. May the State of Vermont exclude same-sex couples from the benefits and protections that its laws provide to opposite-sex married couples? That is the fundamental question we address in this appeal, a question that the Court well knows arouses deeply-felt religious, moral, and political beliefs. Our constitutional responsibility to consider the legal merits of issues properly before us provides no exception for the controversial case. The issue before the Court, moreover, does not turn on the religious or moral debate over intimate same-sex relationships, but rather on the statutory and constitutional basis for the exclusion of same-sex couples from the secular benefits and protections offered married couples.

We conclude that under the Common Benefits Clause of the Vermont Constitution, which, in pertinent part, reads,

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community,

Vt. Const., ch. I, art 7., plaintiffs may not be deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry. We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel "domestic partnership" system or some equivalent statutory alternative, rests with the Legislature. Whatever system is chosen, however, must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law.

Plaintiffs are three same-sex couples who have lived together in committed relationships

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for periods ranging from four to twenty-five years. Two of the couples have raised children together. Each couple applied for a marriage license from their respective town clerk, and each was refused a license as ineligible under the applicable state marriage laws. Plaintiffs thereupon filed this lawsuit against defendants -- the State of Vermont, the Towns of Milton and Shelburne, and the City of South Burlington -- seeking a declaratory judgment that the refusal to issue them a license violated the marriage statutes and the Vermont Constitution.

The State, joined by Shelburne and South Burlington, moved to dismiss the action on the ground that plaintiffs had failed to state a claim for which relief could be granted. The Town of Milton answered the complaint and subsequently moved for judgment on the pleadings. Plaintiffs opposed the motions and cross-moved for judgment on the pleadings. The trial court granted the State's and the Town of Milton's motions, denied plaintiffs' motion, and dismissed the complaint. The court ruled that the marriage statutes could not be construed to permit the issuance of a license to same-sex couples. The court further ruled that the marriage statutes were constitutional because they rationally furthered the State's interest in promoting "the link between procreation and child rearing." This appeal followed. (FN1)

I. The Statutory Claim

Plaintiffs initially contend the trial court erred in concluding that the marriage statutes

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render them ineligible for a marriage license. It is axiomatic that the principal objective of statutory construction is to discern the legislative intent. See Merkel v. Nationwide Ins. Co., 166 Vt. 311, 314, 693 A.2d 706, 707 (1997). While we may explore a variety of sources to discern that intent, it is also a truism of statutory interpretation that where a statute is unambiguous we rely on the plain and ordinary meaning of the words chosen. See In re P.S., 167 Vt. 63, 70, 702 A.2d 98, 102 (1997). "[W]e rely on the plain meaning of the words because we presume they reflect the Legislature's intent." Braun v. Board of Dental Examiners, 167 Vt. 110, 116, 702 A.2d 124, 127 (1997).

Vermont's marriage statutes are set forth in Chapter 1 of Title 15, entitled "Marriage," which defines the requirements and eligibility for entering into a marriage, and Chapter 105 of Title 18, entitled "Marriage Records and Licenses," which prescribes the forms and procedures for obtaining a license and solemnizing a marriage. Although it is not necessarily the only possible definition, there is no doubt that the plain and ordinary meaning of "marriage" is the union of one man and one woman as husband and wife. See Webster's New International Dictionary 1506 (2d ed. 1955) (marriage consists of state of "being united to a person . . . of the opposite sex as husband or wife"); Black's Law Dictionary 986 (7th ed. 1999) (marriage is "[t]he legal union of a man and woman as husband and wife"). This understanding of the term is well rooted in Vermont common law. See Le Barron v. Le Barron, 35 Vt. 365, 366-71 (1862) (petition by wife to annul marriage for alleged physical impotence of husband); Clark v. Field, 13 Vt. 460, 465 (1841) (suit to declare marriage null and void on ground that husband and wife had not consummated marriage); Overseers of the Poor of the Town of Newbury v. Overseers of the Poor of the Town of Brunswick, 2 Vt. 151, 152 (1829) (dispute between towns

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over liability for support of family turned, in part, on validity of marriage where justice of peace had not declared parties husband and wife). The legislative understanding is also reflected in the enabling statute governing the issuance of marriage licenses, which provides, in part, that the license "shall be issued by the clerk of the town where either the bride or groom resides." 18 V.S.A. § 5131(a). "Bride" and "groom" are gender-specific terms. See Webster's, supra, at 334 (bride defined as "a woman newly married, or about to be married;" bridegroom defined as "a man newly married, or about to be married").

Further evidence of the legislative assumption that marriage consists of a union of opposite genders may be found in the consanguinity statutes, which expressly prohibit a man from marrying certain female relatives, see 15 V.S.A. § 1, and a woman from marrying certain male relatives, see id. § 2. In addition, the annulment statutes explicitly refer to "husband and wife," see id. § 513, as do other statutes relating to married couples. See, e.g., 12 V.S.A. § 1605 ("husband and wife" may not testify about communications to each other under rule commonly known as "marital privilege," see State v. Wright, 154 Vt. 512, 525, 581 A.2d 720, 728 (1990)); 14 V.S.A. §§ 461, 465, 470 (referring to interest of "widow" in estate of her "husband"); id. § 10 (requiring three witnesses where "husband or wife" are given beneficial interest in other's will); 15 V.S.A. § 102 (legal protections where "married man . . . deserts, neglects, or abandons his wife").

These statutes, read as a whole, reflect the common understanding that marriage under Vermont law consists of a union between a man and a woman. Plaintiffs essentially concede this fact. They argue, nevertheless, that the underlying purpose of marriage is to protect and encourage the union of committed couples and that, absent an explicit legislative prohibition, the

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statutes should be interpreted broadly to include committed same-sex couples. Plaintiffs rely principally on our decision in In re B.L.V.B., 160 Vt. 368, 369, 628 A.2d 1271, 1272 (1993). There, we held that a woman who was co-parenting the two children of her same-sex partner could adopt the children without terminating the natural mother's parental rights. Although the statute provided generally that an adoption deprived the natural parents of their legal rights, it contained an exception where the adoption was by the "spouse" of the natural parent. See id. at 370, 628 A.2d at 1273 (citing 12 V.S.A. § 448). Technically, therefore, the exception was inapplicable. We concluded, however, that the purpose of the law was not to restrict the exception to legally married couples, but to safeguard the child, and that to apply the literal language of the statute in these circumstances would defeat the statutory purpose and "reach an absurd result." Id. at 371, 628 A.2d at 1273. Although the Legislature had undoubtedly not even considered same-sex unions when the law was enacted in 1945, our interpretation was consistent with its "general intent and spirit." Id. at 373, 628 A.2d at 1274.

Contrary to plaintiffs' claim, B.L.V.B. does not control our conclusion here. We are not dealing in this case with a narrow statutory exception requiring a broader reading than its literal words would permit in order to avoid a result plainly at odds with the legislative purpose. Unlike B.L.V.B., it is far from clear that limiting marriage to opposite-sex couples violates the Legislature's "intent and spirit." Rather, the evidence demonstrates a clear legislative assumption that marriage under our statutory scheme consists of a union between a man and a woman. Accordingly, we reject plaintiffs' claim that they were entitled

to a license under the statutory scheme governing marriage.

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II. The Constitutional Claim

Assuming that the marriage statutes preclude their eligibility for a marriage license, plaintiffs contend that the exclusion violates their right to the common benefit and protection of the law guaranteed by Chapter I, Article 7 of the Vermont Constitution.(FN2) They note that in denying them access to a civil marriage license, the law effectively excludes them from a broad array of legal benefits and protections incident to the marital relation, including access to a spouse's medical, life, and disability insurance, hospital visitation and other medical decisionmaking privileges, spousal support, intestate succession, homestead protections, and many other statutory protections. They claim the trial court erred in upholding the law on the basis that it reasonably served the State's interest in promoting the "link between procreation and child rearing." They argue that the large number of married couples without children, and the increasing incidence of same-sex couples with children, undermines the State's rationale. They note that Vermont law affirmatively guarantees the right to adopt and raise children regardless of the sex of the parents, see 15A V.S.A. § 1-102, and challenge the logic of a legislative scheme that recognizes the rights of same-sex partners as parents, yet denies them -- and their children -- the same security as spouses.

In considering this issue, it is important to emphasize at the outset that it is the Common Benefits Clause of the Vermont Constitution we are construing, rather than its counterpart, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. It is

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altogether fitting and proper that we do so. Vermont's constitutional commitment to equal rights was the product of the successful effort to create an independent republic and a fundamental charter of government, the Constitution of 1777, both of which preceded the adoption of the Fourteenth Amendment by nearly a century. As we explained in State v. Badger, 141 Vt. 430, 448-49, 450 A.2d 336, 347 (1982), "our constitution is not a mere reflection of the federal charter. Historically and textually, it differs from the United States Constitution. It predates the federal counterpart, as it extends back to Vermont's days as an independent republic. It is an independent authority, and Vermont's fundamental law."

As we explain in the discussion that follows, the Common Benefits Clause of the Vermont Constitution differs markedly from the federal Equal Protection Clause in its language, historical origins, purpose, and development. While the federal amendment may thus supplement the protections afforded by the Common Benefits Clause, it does not supplant it as the first and primary safeguard of the rights and liberties of all Vermonters. See id. (Court is free to "provide more generous protection to rights under the Vermont Constitution than afforded by the federal charter"); State v. Jewett, 146 Vt. 221, 224, 500 A.2d 233, 235 (1985) (state constitution may protect Vermonters "however the philosophy of the United States Supreme Court may ebb and flow"); see generally H. Linde, First Things First, Rediscovering the States' Bill of Rights, 9 U. Balt. L. Rev. 379, 381-82 (1980); S. Pollock, State Constitutions as Separate Sources of Fundamental Rights, 35 Rutgers L. Rev. 707, 717-19 (1983).

A. Historical Development

In understanding the import of the Common Benefits Clause, this Court

has often referred

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to principles developed by the federal courts in applying the Equal Protection Clause.(FN3) See, e.g., Choquette v. Perrault, 153 Vt. 45, 51-52,569 A.2d 455, ___ (1989). At the same time, however, we have recognized that "[a]lthough the provisions have some similarity of purpose, they are not identical." Benning v. State, 161 Vt. 472, 485 n.7, 641 A.2d 757, 764 n.7 (1994). Indeed, recent Vermont decisions reflect a very different approach from current federal jurisprudence. That approach may be described as broadly deferential to the legislative prerogative to define and advance governmental ends, while vigorously ensuring that the means chosen bear a just and reasonable relation to the governmental objective.

Although our decisions over the last few decades have routinely invoked the rhetoric of

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suspect class favored by the federal courts, see, e.g., Choquette, 153 Vt. at 51, 569 A.2d at 458, there are notable exceptions. The principal decision in this regard is the landmark case of State v. Ludlow Supermarkets, Inc., 141 Vt. 261, 448 A.2d 791 (1982). There, Chief Justice Albert Barney, writing for the Court, invalidated a Sunday closing law that discriminated among classes of commercial establishments on the basis of their size. After noting that this Court, unlike its federal counterpart, was not constrained by considerations of federalism and the impact of its decision on fifty varying jurisdictions, the Court declared that Article 7 "only allows the statutory classifications . . . if a case of necessity can be established overriding the prohibition of Article 7 by reference to the "`common benefit, protection, and security of the people.'" Id. at 268, 448 A.2d at 795. Applying this test, the Court concluded that the State's justifications for the disparate treatment of large and small businesses failed to withstand constitutional scrutiny. Id. at 269-70, 448 A.2d at 796.

Ludlow, as we later explained, did not alter the traditional requirement under Article 7 that legislative classifications must "reasonably relate to a legitimate public purpose." Choquette, 153 Vt. at 52, 569 A.2d at 459. Nor did it overturn the principle that the justifications demanded of the State may depend upon the nature and importance of the benefits and protections affected by the legislation; indeed, this is implicit in the weighing process. It did establish that Article 7 would require a "more stringent" reasonableness inquiry than was generally associated with rational basis review under the federal constitution. State v. Brunelle, 148 Vt. 347, 351, 534 A.2d 198, 201-202 (1987); see also Hodgeman v. Jard Co., 157 Vt. 461, 464, 599 A.2d 1371, 1373 (1991) (citing Ludlow for principle that Article 7 "may require this Court to examine more closely distinctions drawn by state government than would the Fourteenth

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Amendment"). Ludlow did not override the traditional deference accorded legislation having any reasonable relation to a legitimate public purpose. It simply signaled that Vermont courts -- having "access to specific legislative history and all other proper resources" to evaluate the object and effect of State laws -- would engage in a meaningful, case-specific analysis to ensure that any exclusion from the general benefit and protection of the law would bear a just and reasonable relation to the legislative goals. Ludlow, 141 Vt. at 268, 448 A.2d at 795.(FN4)

Although it is accurate to point out that since Ludlow our decisions have consistently recited the federal rational-basis/strict-scrutiny tests, it is equally fair to observe that we have been less than consistent in their application. Just as commentators have noted the United States Supreme Court's obvious yet unstated deviations from the rational-basis standard, so have this Court's holdings often departed from the federal test.(FN5) In Colchester Fire Dist. No. 2 v.

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Sharrow, 145 Vt. 195, 198-99, 485 A.2d 134, 136-37 (1984), for example, the Court ostensibly applied a rational-basis test to invalidate a payment scheme for revenue-bond assessments. While acknowledging the broad discretion traditionally accorded the Legislature in taxation and other areas of public welfare, the Court nevertheless examined each of the district's rationales in detail and found them to be unpersuasive in light of the record and administrative experience. See id. at 200-201, 485 A.2d at 137 (record established no "plausible relationship between the method of bond assessment and its alleged purposes").

In Choquette, 153 Vt. at 51, 569 A.2d at 458, the Court again purported to apply rational-basis review under Article 7 in holding a fence-repair statute to be unconstitutional. Not content to accept arguments derived from a bygone agricultural era, the Court held that the policies underlying the law were outdated and failed to establish a reasonable relation to the public purpose in the light of contemporary circumstances. See id. at 53-54, 569 A.2d at 459-60; see also Oxx v. Department of Taxes, 159 Vt. 371, 376, 618 A.2d 1321, 1324 (1992) (income tax assessment violated Equal Protection and Common Benefits Clauses as applied);

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Lorrain v. Ryan, 160 Vt. 202, 215 628 A.2d 543, 551 (1993) (statutory scheme denying right of spouse of injured worker to sue third-party tortfeasor for loss of consortium violated Equal Protection and Common Benefits Clauses).

The "more stringent" test was also implicit in our recent decision in MacCallum v. Seymour's Administrator, 165 Vt. 452, 686 A.2d 935 (1996), which involved an Article 7 challenge to an intestacy statute that denied an adopted person's right of inheritance from collateral kin. While employing the rhetoric of minimal scrutiny, our analysis was more rigorous than traditional federal rational-basis review. Indeed, although the State proffered at least a conceivable purpose for the legislative distinction between natural and adopted children, we held that the classification was unreasonable, explaining that "[a]dopted persons have historically been a target of discrimination," id. at 459, 686 A.2d at 939, and that however reasonable the classification when originally enacted, it represented an "outdated" distinction today. Id. at 460, 686 A.2d at 939. Thus, while deferential to the historical purpose underlying the classification, we demanded that it bear a reasonable and just relation to the governmental objective in light of contemporary conditions.

This approach may also be discerned in the Court's recent opinion in Brigham v. State, 166 Vt. 246, 692 A.2d 384 (1997), addressing an Article 7 challenge to the State's educational funding system. Consistent with prior decisions, the Court acknowledged the federal standard, see id. at 265, 692 A.2d at 395, even as it eschewed the federal categories of analysis. Indeed, after weighing the State's justifications for the

disparate funding of education against its impact upon public-school students, the Court concluded; "Labels aside, we are simply unable to fathom a legitimate governmental purpose to justify the gross inequities in educational opportunities

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evident from the record." Id. at 265, 692 A.2d at 396.

Thus, "labels aside," Vermont case law has consistently demanded in practice that statutory exclusions from publicly-conferred benefits and protections must be "premised on an appropriate and overriding public interest." Ludlow, 141 Vt. at 268, 448 A.2d at 795. The rigid categories utilized by the federal courts under the Fourteenth Amendment find no support in our early case law and, while routinely cited, are often effectively ignored in our more recent decisions. As discussed more fully below, these decisions are consistent with the text and history of the Common Benefits Clause which, similarly, yield no rigid categories or formulas of analysis. The balancing approach utilized in Ludlow and implicit in our recent decisions reflects the language, history, and values at the core of the Common Benefits Clause. We turn, accordingly, to a brief examination of constitutional language and history.

B. Text

We typically look to a variety of sources in construing our Constitution, including the language of the provision in question, historical context, case-law development, the construction of similar provisions in other state constitutions, and sociological materials. See Benning, 161 Vt. at 476, 641 A.2d 759. The Vermont Constitution was adopted with little recorded debate and has undergone remarkably little revision in its 200-year history. Recapturing the meaning of a particular word or phrase as understood by a generation more than two centuries removed from our own requires, in some respects, an immersion in the culture and materials of the past more suited to the work of professional historians than courts and lawyers. See generally, H. Powell, Rules for Originalists, 73 Va. L. Rev. 659, 659-61 (1987); P. Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204, 204-209 (1980). The responsibility

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of the Court, however, is distinct from that of the historian, whose interpretation of past thought and actions necessarily informs our analysis of current issues but cannot alone resolve them. See Powell, supra, at 662-68; Brest, supra, at 237. As we observed in State v. Kirchoff, 156 Vt. 1, 6, 587 A.2d 988, 992 (1991), "our duty is to discover the core value that gave life to Article [7]." (Emphasis added). Out of the shifting and complicated kaleidoscope of events, social forces, and ideas that culminated in the Vermont Constitution of 1777, our task is to distill the essence, the motivating ideal of the framers. The challenge is to remain faithful to that historical ideal, while addressing contemporary issues that the framers undoubtedly could never have imagined.

We first focus on the words of the Constitution themselves, for, as Chief Justice Marshall observed, "although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words." Sturges v. Crowningshield, 17 U.S. (4 Wheat.) 122, 202 (1819). One of the fundamental rights included in Chapter I of the Vermont Constitution of 1777, entitled "A Declaration of Rights of the Inhabitants of the State of Vermont," the Common Benefits Clause as originally written provided:

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family or set of men, who are a part only of that community; and that the community hath an indubitable, unalienable and indefeasible right, to reform, alter or abolish government, in such manner as shall be, by that community, judged most conducive to the public weal.

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Vt. Const. of 1777, ch. I, art. VI.(FN6)

The first point to be observed about the text is the affirmative and unequivocal mandate of the first section, providing that government is established for the common benefit of the people and community as a whole. Unlike the Fourteenth Amendment, whose origin and language reflect the solicitude of a dominant white society for an historically-oppressed African-American minority (no state shall "deny" the equal protection of the laws), the Common Benefits Clause mirrors the confidence of a homogeneous, eighteenth-century group of men aggressively laying claim to the same rights as their peers in Great Britain or, for that matter, New York, New Hampshire, or the Upper Connecticut River Valley. See F. Mahady, Toward a Theory of State Constitutional Jurisprudence: A Judge's Thoughts, 13 Vt. L. Rev. 145, 151-52 (1988) (noting distinct eighteenth-century origins of Article 7). The same assumption that all the people should be afforded all the benefits and protections bestowed by government is also reflected in the second section, which prohibits not the denial of rights to the oppressed, but rather the conferral of advantages or emoluments upon the privileged.(FN7)

The words of the Common Benefits Clause are revealing. While they do not, to be sure, set forth a fully-formed standard of analysis for determining the constitutionality of a given

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statute, they do express broad principles which usefully inform that analysis. Chief among these is the principle of inclusion. As explained more fully in the discussion that follows, the specific proscription against governmental favoritism toward not only groups or "set[s] of men," but also toward any particular "family" or "single man," underscores the framers' resentment of political preference of any kind. The affirmative right to the "common benefits and protections" of government and the corollary proscription of favoritism in the distribution of public "emoluments and advantages" reflect the framers' overarching objective "not only that everyone enjoy equality before the law or have an equal voice in government but also that everyone have an equal share in the fruits of the common enterprise." W. Adams, The First American Constitutions 188 (1980) (emphasis added). Thus, at its core the Common Benefits Clause expressed a vision of government that afforded every Vermonter its benefit and protection and provided no Vermonter particular advantage.

C. Historical Context

Although historical research yields little direct evidence of the framers' intentions, an examination of the ideological origins of the Common Benefits Clause casts a useful light upon the inclusionary principle at its textual core. Like other provisions of the Vermont Constitution of 1777, the Common Benefits Clause was borrowed verbatim from the Pennsylvania Constitution of 1776, which was based, in turn, upon

a similar provision in the Virginia Declaration of Rights of 1776. See J. Shaeffer, A Comparison of the First Constitutions of Vermont and Pennsylvania, 43 Vt. Hist. 33, 33-35 (1975); J. Selsam, The Pennsylvania Constitution of 1776: A Study in Revolutionary Democracy 178 (1936). The original Virginia clause differed from the Pennsylvania and Vermont provisions only in the second section, which

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was contained in a separate article and provided "[t]hat no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services." See Virginia Declaration of Rights, art. IV (reprinted in 11 West's Encyclopedia of American Law 82 (1998)).(FN8)

Although aimed at Great Britain, the American Revolution -- as numerous historians have noted -- also tapped deep-seated domestic antagonisms. The planter elite in Virginia, the proprietors of Eastern Pennsylvania, and New Yorkers claiming Vermont lands were each the object of long-standing grievances. Selsam, supra, at 255-56; R. Shalhope, Bennington and the Green Mountain Boys: The Emergence of Liberal Democracy in Vermont, 1760-1850 at 70-97 (1996); G. Wood, The Creation of the American Republic, 1776-1787 at 75-82 (1969). Indeed, the revolt against Great Britain unleashed what one historian, speaking of Pennsylvania, has called "a revolution within a revolution." Selsam, supra, at 1. By attempting to claim equal rights for Americans against the English, regardless of birthright or social status, "even the most aristocratic of southern Whig planters . . . were pushed into creating an egalitarian ideology that could be and even as early as 1776 was being turned against themselves." Wood, supra, at 83. While not opposed to the concept of a social elite, the framers of the first state constitutions believed that it should consist of a "natural aristocracy" of talent, rather than an entrenched clique favored by birth or social connections. See id. at 479-80. As the preeminent

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historian of the ideological origins of the Revolution explained, "while `equality before the law' was a commonplace of the time, `equality without respect to the dignity of the persons concerned' was not; [the Revolution's] emphasis on social equivalence was significant." B. Bailyn, The Ideological Origins of the American Revolution 307 (1967). Thus, while the framers' "egalitarian ideology" conspicuously excluded many oppressed people of the eighteenth century -- including African-Americans, Native Americans, and women -- it did nevertheless represent a genuine social revolt pitting republican ideals of "virtue," or talent and merit, against a perceived aristocracy of privilege both abroad and at home.

Vermont was not immune to the disruptive forces unleased by the Revolution. One historian has described Vermont on the eve of the Revolution as rife with "factional rivalry [and] regional jealousy." G. Aichele, Making the Vermont Constitution: 1777-1824, 56 Vt. Hist. 166, 177 (1988). Competing factions in the Champlain and Upper Connecticut River Valleys had long vied for political and economic dominance. See id. at 180. Echoing Selsam on Pennsylvania, another historian has spoken of "Vermont's double revolution -- a rebellion within a rebellion" to describe the successful revolt against both Great Britain and New York by the yeoman farmers, small-scale proprietors, and moderate land speculators who comprised the bulk of the Green Mountain Boys. D. Smith, Green Mountain Insurgency: Transformation of New York's Forty-Year Land War, 64 Vt. Hist. 197, 197-98, 224 (1996); see also Shalhope, supra, at 169 (egalitarian ideology of American Revolution "resonated powerfully with the visceral feelings" of Green Mountain Boys and others in Vermont).

The powerful movement for "social equivalence" unleashed by the Revolution ultimately found its most complete expression in the first state constitutions adopted in the early years of

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the rebellion. In Pennsylvania, where social antagonisms were most acute, the result was a fundamental charter that has been described as "the most radical constitution of the Revolution." Wood, supra, at 84-85; see also Shaeffer, supra, at 35-36. Yet the Pennsylvania Constitution's egalitarianism was arguably eclipsed the following year by the Vermont Constitution of 1777. In addition to the commitment to government for the "common benefit, protection, and security," it contained novel provisions abolishing slavery, eliminating property qualifications for voting, and calling for the governor, lieutenant governor, and twelve councilors to be elected by the people rather than appointed by the Legislature. See Shalhope, supra, at 171-72. These and other provisions have led one historian to observe that Vermont's first charter was the "most democratic constitution produced by any of the American states." See id. at 172.

The historical origins of the Vermont Constitution thus reveal that the framers, although enlightened for their day, were not principally concerned with civil rights for African-Americans and other minorities, but with equal access to public benefits and protections for the community as a whole. The concept of equality at the core of the Common Benefits Clause was not the eradication of racial or class distinctions, but rather the elimination of artificial governmental preferments and advantages. The Vermont Constitution would ensure that the law uniformly afforded every Vermonter its benefit, protection, and security so that social and political preeminence would reflect differences of capacity, disposition, and virtue, rather than governmental favor and privilege.(FN9)

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[continues text of FN9 (see below)]

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D. Analysis under Article 7

The language and history of the Common Benefits Clause thus reinforce the conclusion that a relatively uniform standard, reflective of the inclusionary principle at its core, must govern our analysis of laws challenged under the Clause. Accordingly, we conclude that this approach, rather than the rigid, multi-tiered analysis evolved by the federal courts under the Fourteenth Amendment, shall direct our inquiry under Article 7. As noted, Article 7 is intended to ensure that the benefits and protections conferred by the State are for the common benefit of the community and are not for the advantage of persons "who are a part only of that community." When a statute is challenged under Article 7, we first define that "part of the community" disadvantaged by the law. We examine the statutory basis that distinguishes those protected by the law from those excluded from the State's protection. Our concern here is with delineating, not with labelling the excluded class as "suspect," "quasi-suspect," or "non-suspect" for purposes of determining different levels of judicial scrutiny.(FN10)

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We look next to the government's purpose in drawing a classification that includes some members of the community within the scope of the

challenged law but excludes others. Consistent with Article 7's guiding principle of affording the protection and benefit of the law to all members of the Vermont community, we examine the nature of the classification to determine whether it is reasonably necessary to accomplish the State's claimed objectives.

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We must ultimately ascertain whether the omission of a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose. Consistent with the core presumption of inclusion, factors to be considered in this determination may include: (1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals; and (3) whether the classification is significantly underinclusive or overinclusive. As Justice Souter has observed in a different context, this approach necessarily "calls for a court to assess the relative `weights' or dignities of the contending interests." Washington v. Glucksberg, 521 U.S. 702, 767 (1997) (Souter, J., concurring). What keeps that assessment grounded and objective, and not based upon the private sensitivities or values of individual judges, is that in assessing the relative weights of competing interests courts must look to the history and "`traditions from which [the State] developed'" as well as those "`from which it broke,'" id. at 767 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)), and not to merely personal notions. Moreover, the process of review is necessarily "one of close criticism going to the details of the opposing interests and their relationships with the historically recognized principles that lend them weight or value." Id. at 769 (emphasis added).(FN11)

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Ultimately, the answers to these questions, however useful, cannot substitute for "`[t]he inescapable fact . . . that adjudication of . . . claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.'" Id. (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 849 (1992)). The balance between individual liberty and organized society which courts are continually called upon to weigh does not lend itself to the precision of a scale. It is, indeed, a recognition of the imprecision of "reasoned judgment" that compels both judicial restraint and respect for tradition in constitutional interpretation.(FN12)

E. The Standard Applied

With these general precepts in mind, we turn to the question of whether the exclusion of same-sex couples from the benefits and protections incident to marriage under Vermont law

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contravenes Article 7. The first step in our analysis is to identify the nature of the statutory classification. As noted, the marriage statutes apply expressly to opposite-sex couples. Thus, the statutes exclude anyone who wishes to marry someone of the same sex.(FN13)

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Next, we must identify the governmental purpose or purposes to be served by the statutory classification. The principal purpose the State

advances in support of the excluding same-sex couples from the legal benefits of marriage is the government's interest in "furthering the link between procreation and child rearing." The State has a strong interest, it argues, in promoting a permanent commitment between couples who have children to ensure that their offspring are considered legitimate and receive ongoing parental support. The State contends, further, that the Legislature could reasonably believe that sanctioning same-sex unions "would diminish society's perception of the link between procreation and child rearing . . . [and] advance the notion that fathers or mothers . . . are mere surplusage to the functions of procreation and child rearing." The State argues that since same-sex couples cannot conceive

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a child on their own, state-sanctioned same-sex unions "could be seen by the Legislature to separate further the connection between procreation and parental responsibilities for raising children." Hence, the Legislature is justified, the State concludes, "in using the marriage statutes to send a public message that procreation and child rearing are intertwined."

Do these concerns represent valid public interests that are reasonably furthered by the exclusion of same-sex couples from the benefits and protections that flow from the marital relation? It is beyond dispute that the State has a legitimate and long-standing interest in promoting a permanent commitment between couples for the security of their children. It is equally undeniable that the State's interest has been advanced by extending formal public sanction and protection to the union, or marriage, of those couples considered capable of having children, i.e., men and women. And there is no doubt that the overwhelming majority of births today continue to result from natural conception between one man and one woman. See J. Robertson, Assisted Reproductive Technology and the Family, 47 Hast. L. J. 911, 911-12 (1996) (noting the number of births resulting from assisted-reproductive technology, which remain small compared to overall number of births).

It is equally undisputed that many opposite-sex couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children. Therefore, if the purpose of the statutory exclusion of same-sex couples is to "further[] the link between procreation and child rearing," it is significantly under-inclusive. The law extends the benefits and protections of marriage to many persons with no logical connection to the stated governmental goal.

Furthermore, while accurate statistics are difficult to obtain, there is no dispute that a

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significant number of children today are actually being raised by same-sex parents, and that increasing numbers of children are being conceived by such parents through a variety of assisted-reproductive techniques. See D. Flaks, et al., Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children, 31 Dev. Psychol. 105, 105 (1995) (citing estimates that between 1.5 and 5 million lesbian mothers resided with their children in United States between 1989 and 1990, and that thousands of lesbian mothers have chosen motherhood through donor insemination or adoption); G. Green and F. Bozett, Lesbian Mothers and Gay Fathers, in Homosexuality: Research Implications for Public Policy 197, 198 (J. Gonsiorek et al. eds., 1991) (estimating that numbers of children of either gay fathers or lesbian mothers range between six and fourteen million); C. Patterson, Children of the Lesbian Baby Boom: Behavioral Adjustment, Self-Concepts, and Sex Role Identity, in Lesbian and

Gay Psychology (B. Greene et al. eds., 1994) (observing that although precise estimates are difficult, number of families with lesbian mothers is growing); E. Shapiro & L. Schultz, Single-Sex Families: The Impact of Birth Innovations Upon Traditional Family Notions, 24 J. Fam. L. 271, 281 (1985) ("[I]t is a fact that children are being born to single-sex families on a biological basis, and that they are being so born in considerable numbers").

Thus, with or without the marriage sanction, the reality today is that increasing numbers of same-sex couples are employing increasingly efficient assisted-reproductive techniques to conceive and raise children. See L. Ikemoto, The In/Fertile, the Too Fertile, and the Dysfertile, 47 Hast. L. J. 1007, 1056 & n.170 (1996). The Vermont Legislature has not only recognized this reality, but has acted affirmatively to remove legal barriers so that same-sex couples may legally adopt and rear the children conceived through such efforts. See 15A V.S.A. § 1-102(b)

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(allowing partner of biological parent to adopt if in child's best interest without reference to sex). The State has also acted to expand the domestic relations laws to safeguard the interests of same-sex parents and their children when such couples terminate their domestic relationship. See 15A V.S.A. § 1-112 (vesting family court with jurisdiction over parental rights and responsibilities, parent-child contact, and child support when unmarried persons who have adopted minor child "terminate their domestic relationship").

Therefore, to the extent that the State's purpose in licensing civil marriage was, and is, to legitimize children and provide for their security, the statutes plainly exclude many same-sex couples who are no different from opposite-sex couples with respect to these objectives. If anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues the marriage laws are designed to secure against. In short, the marital exclusion treats persons who are similarly situated for purposes of the law, differently.

The State also argues that because same-sex couples cannot conceive a child on their own, their exclusion promotes a "perception of the link between procreation and child rearing," and that to discard it would "advance the notion that mothers and fathers . . . are mere surplusage to the functions of procreation and child rearing" Apart from the bare assertion, the State offers no persuasive reasoning to support these claims. Indeed, it is undisputed that most of those who utilize non-traditional means of conception are infertile married couples, see Shapior and Schultz, supra, at 275, and that many assisted-reproductive techniques involve only one of the married partner's genetic material, the other being supplied by a third party through sperm, egg, or embryo donation. See E. May, Barren in the Promised Land: Childless

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Americans and the Pursuit of Happiness, 217, 242 (1995); Robertson, supra, at 911-12, 922-27. The State does not suggest that the use of these technologies undermines a married couple's sense of parental responsibility, or fosters the perception that they are "mere surplusage" to the conception and parenting of the child so conceived. Nor does it even remotely suggest that access to such techniques ought to be restricted as a matter of public policy to "send a public message that procreation and child rearing are intertwined." Accordingly, there is no reasonable basis to conclude that a same-sex couple's use of the same technologies would undermine the bonds of parenthood, or society's perception of parenthood.

The question thus becomes whether the exclusion of a relatively small but significant number of otherwise qualified same-sex couples from the same legal benefits and protections afforded their opposite-sex counterparts contravenes the mandates of Article 7. It is, of course, well settled that statutes are not necessarily unconstitutional because they fail to extend legal protection to all who are similarly situated. See Benning, 161 Vt. at 486, 641 A.2d at 764 ("A statute need not regulate the whole of a field to pass constitutional muster."). Courts have upheld underinclusive statutes out of a recognition that, for reasons of pragmatism or administrative convenience, the legislature may choose to address problems incrementally. See, e.g., City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (legislature may adopt regulations "that only partially ameliorate a perceived evil"); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) ("The legislature may select one phase of one field and apply a remedy there, neglecting the others."). The State does not contend, however, that the same-sex exclusion is necessary as a matter of pragmatism or administrative convenience. We turn, accordingly, from the principal justifications advanced by the State to the interests asserted

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by plaintiffs.

As noted, in determining whether a statutory exclusion reasonably relates to the governmental purpose it is appropriate to consider the history and significance of the benefits denied. See Glucksberg, 521 U.S. at 710 (to assess importance of rights and interests affected by statutory classifications, courts must look to "history, legal traditions and practices"). What do these considerations reveal about the benefits and protections at issue here? In Loving v. Virginia, 388 U.S. 1, 12 (1967), the United States Supreme Court, striking down Virginia's anti-miscegenation law, observed that "[t]he freedom to marry has long been recognized as one of the vital personal rights." The Court's point was clear; access to a civil marriage license and the multitude of legal benefits, protections, and obligations that flow from it significantly enhance the quality of life in our society.

The Supreme Court's observations in Loving merely acknowledged what many states, including Vermont, had long recognized. One hundred thirty-seven years before Loving, this Court characterized the reciprocal rights and responsibilities flowing from the marriage laws as "the natural rights of human nature." See Overseers of the Poor, 2 Vt. at 159. Decisions in other New England states noted the unique legal and economic ramifications flowing from the marriage relation. See, e.g., Adams v. Palmer, 51 Maine 481, 485 (Me. 1863) ("it establishes fundamental and most important domestic relations"). Early decisions recognized that a marriage contract, although similar to other civil agreements, represents much more because once formed, the law imposes a variety of obligations, protections, and benefits. As the Maine Supreme Judicial Court observed, the rights and obligations of marriage rest not upon contract, "but upon the general law of the State, statutory or common, which defines and prescribes those

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rights duties and obligations. They are of law, not contract." See id. at 483; see also Ditson v. Ditson, 4 R.I. 87, 105 (1856) (marriage transcends contract because "it gives rights, and imposes duties and restrictions upon the parties to it"). In short, the marriage laws transform a private agreement into a source of significant public benefits and protections.

While the laws relating to marriage have undergone many changes during the last century, largely toward the goal of equalizing the status of husbands and wives, the benefits of marriage have not diminished in value. On the contrary, the benefits and protections incident to a marriage license under Vermont law have never been greater. They include, for example, the right to receive a portion of the estate of a spouse who dies intestate and protection against disinheritance through elective share provisions, under 14 V.S.A. §§ 401-404, 551; preference in being appointed as the personal representative of a spouse who dies intestate, under 14 V.S.A. § 903; the right to bring a lawsuit for the wrongful death of a spouse, under 14 V.S.A. § 1492; the right to bring an action for loss of consortium, under 12 V.S.A. § 5431; the right to workers' compensation survivor benefits under 21 V.S.A. § 632; the right to spousal benefits statutorily guaranteed to public employees, including health, life, disability, and accident insurance, under 3 V.S.A. § 631; the opportunity to be covered as a spouse under group life insurance policies issued to an employee, under 8 V.S.A. § 3811; the opportunity to be covered as the insured's spouse under an individual health insurance policy, under 8 V.S.A. § 4063; the right to claim an evidentiary privilege for marital communications, under V.R.E. 504; homestead rights and protections, under 27 V.S.A. §§ 105-108, 141-142; the presumption of joint ownership of property and the concomitant right of survivorship, under 27 V.S.A. § 2; hospital visitation and other rights incident to the medical treatment of a family member, under

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18 V.S.A. § 1852; and the right to receive, and the obligation to provide, spousal support, maintenance, and property division in the event of separation or divorce, under 15 V.S.A. §§ 751-752. Other courts and commentators have noted the collection of rights, powers, privileges, and responsibilities triggered by marriage. See generally Baehr v. Lewin, 852 P.2d 44, 59 (Haw. 1993); D. Chambers, What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples, 95 Mich. L. Rev. 447, passim; J. Robbenolt & M. Johnson, Legal Planning for Unmarried Committed Parties: Empirical Lessons for a Preventive and Therapeutic Approach, 41 Ariz. L. Rev. 417, passim (1999); J. Trosino, American Wedding: Same-Sex Marriage and the Miscegenation Analogy, 73 B.U.L. Rev. 93, 96 (1993).

While other statutes could be added to this list, the point is clear. The legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned. Considered in light of the extreme logical disjunction between the classification and the stated purposes of the law -- protecting children and "furthering the link between procreation and child rearing" -- the exclusion falls substantially short of this standard. The laudable governmental goal of promoting a commitment between married couples to promote the security of their children and the community as a whole provides no reasonable basis for denying the legal benefits and protections of marriage to same-sex couples, who are no differently situated with respect to this goal than their opposite-sex counterparts. Promoting a link between procreation and childrearing similarly fails to support the exclusion. We turn, accordingly, to the remaining interests identified by the State in support of the statutory exclusion.

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The State asserts that a number of additional rationales could support a legislative decision to exclude same-sex partners from the statutory benefits and protections of marriage. Among these are the State's

purported interests in "promoting child rearing in a setting that provides both male and female role models," minimizing the legal complications of surrogacy contracts and sperm donors, "bridging differences" between the sexes, discouraging marriages of convenience for tax, housing or other benefits, maintaining uniformity with marriage laws in other states, and generally protecting marriage from "destabilizing changes." The most substantive of the State's remaining claims relates to the issue of childrearing. It is conceivable that the Legislature could conclude that opposite-sex partners offer advantages in this area, although we note that child-development experts disagree and the answer is decidedly uncertain. The argument, however, contains a more fundamental flaw, and that is the Legislature's endorsement of a policy diametrically at odds with the State's claim. In 1996, the Vermont General Assembly enacted, and the Governor signed, a law removing all prior legal barriers to the adoption of children by same-sex couples. See 15A V.S.A. § 1-102. At the same time, the Legislature provided additional legal protections in the form of court-ordered child support and parent-child contact in the event that same-sex parents dissolved their "domestic relationship." Id. § 1-112. In light of these express policy choices, the State's arguments that Vermont public policy favors opposite-sex over same-sex parents or disfavors the use of artificial reproductive technologies, are patently without substance.

Similarly, the State's argument that Vermont's marriage laws serve a substantial governmental interest in maintaining uniformity with other jurisdictions cannot be reconciled with Vermont's recognition of unions, such as first-cousin marriages, not uniformly sanctioned

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in other states. See 15 V.S.A. §§ 1-2 (consanguinity statutes do not exclude first cousins); 1 H. Clark, The Law of Domestic Relations in the United States § 2.9, at 153-54 (2d ed. 1987) (noting states that prohibit first-cousin marriage). In an analogous context, Vermont has sanctioned adoptions by same-sex partners, see 15A V.S.A. § 1-102, notwithstanding the fact that many states have not. See generally, Annotation, Adoption of Child By Same-Sex Partners, 27 A.L.R.5th 54, 68-72 (1995). Thus, the State's claim that Vermont's marriage laws were adopted because the Legislature sought to conform to those of the other forty-nine states is not only speculative, but refuted by two relevant legislative choices which demonstrate that uniformity with other jurisdictions has not been a governmental purpose.

The State's remaining claims (e.g., recognition of same-sex unions might foster marriages of convenience or otherwise affect the institution in "unpredictable" ways) may be plausible forecasts as to what the future may hold, but cannot reasonably be construed to provide a reasonable and just basis for the statutory exclusion. The State's conjectures are not, in any event, susceptible to empirical proof before they occur.(FN14)

Finally, it is suggested that the long history of official intolerance of intimate same-sex relationships cannot be reconciled with an interpretation of Article 7 that would give state-sanctioned benefits and protection to individuals of the same sex who commit to a permanent domestic relationship. We find the argument to be unpersuasive for several reasons. First, to

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the extent that state action historically has been motivated by an animus against a class, that history cannot provide a legitimate basis for continued unequal application of the law. See MacCallum, 165 Vt. at 459-60, 686 A.2d at 939 (holding that although adopted persons had

"historically been a target of discrimination," social prejudices failed to support their continued exclusion from intestacy law). As we observed recently in Brigham, 166 Vt. at 267, 692 A.2d at 396, "equal protection of the laws cannot be limited by eighteenth-century standards." Second, whatever claim may be made in light of the undeniable fact that federal and state statutes -- including those in Vermont -- have historically disfavored same-sex relationships, more recent legislation plainly undermines the contention. See, e.g., Laws of Vermont, 1977, No. 51, § 2, 3 (repealing former § 2603 of Title 13, which criminalized fellatio). In 1991, Vermont was one of the first states to enact statewide legislation prohibiting discrimination in employment, housing, and other services based on sexual orientation. See 21 V.S.A. § 495 (employment); 9 V.S.A. § 4503 (housing); 8 V.S.A. § 4724 (insurance); 9 V.S.A. § 4502 (public accommodations). Sexual orientation is among the categories specifically protected against hate-motivated crimes in Vermont. See 13 V.S.A. § 1455. Furthermore, as noted earlier, recent enactments of the General Assembly have removed barriers to adoption by same-sex couples, and have extended legal rights and protections to such couples who dissolve their "domestic relationship." See 15A V.S.A. §§ 1-102, 1-112.

Thus, viewed in the light of history, logic, and experience, we conclude that none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law. Accordingly, in the faith that a case beyond the imagining of the framers of our Constitution

may, nevertheless, be safely anchored in the values that infused it, we find a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that Vermont law provides opposite-sex married couples. It remains only to determine the appropriate means and scope of relief compelled by this constitutional mandate.

F. Remedy

It is important to state clearly the parameters of today's ruling. Although plaintiffs sought injunctive and declaratory relief designed to secure a marriage license, their claims and arguments here have focused primarily upon the consequences of official exclusion from the statutory benefits, protections, and security incident to marriage under Vermont law. While some future case may attempt to establish that -- notwithstanding equal benefits and protections under Vermont law -- the denial of a marriage license operates per se to deny constitutionally-protected rights, that is not the claim we address today.

We hold only that plaintiffs are entitled under Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions. These include what are typically referred to as "domestic partnership" or "registered partnership" acts, which generally establish an alternative legal status to marriage for same-sex couples, impose similar formal requirements and limitations, create a parallel licensing or registration scheme, and extend all or most of the same rights and obligations provided by the law to married partners. See Report, Hawaii Commission on Sexual Orientation

and the Law (Appendix D-1B) (1995) (recommending enactment of "Universal Comprehensive Domestic Partnership Act" to establish equivalent licensing and eligibility scheme and confer upon domestic partners "the same rights and obligations under the law that are conferred on spouses in a marriage relationship") (emphasis added); C. Christensen, If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage", 66 Fordham L. Rev. 1699, 1734-45 (1998) (discussing various domestic and foreign domestic partnership acts); A. Friedman, Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage, 35 How. L. J. 173, 217-220 n. 237 (reprinting Denmark's "Registered Partnership Act"); see generally, Note, A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances, 92 Colum. L. Rev. 1164 (1992) (discussing local domestic partnership laws); M. Pedersen, Denmark: Homosexual Marriage and New Rules Regarding Separation and Divorce, 30 J. Fam. L. 289 (1992) (discussing amendments to Denmark's Registered Partnership Act); M. Roth, The Norwegian Act on Registered Partnership for Homosexual Couples, 35 J. Fam. L. 467 (1997) (discussing Norway's Act on Registered Partnership for Homosexual Couples). We do not intend specifically to endorse any one or all of the referenced acts, particularly in view of the significant benefits omitted from several of the laws.

Further, while the State's prediction of "destabilization" cannot be a ground for denying relief, it is not altogether irrelevant. A sudden change in the marriage laws or the statutory benefits traditionally incidental to marriage may have disruptive and unforeseen consequences. Absent legislative guidelines defining the status and rights of same-sex couples, consistent with constitutional requirements, uncertainty and confusion could result. Therefore, we hold that the

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current statutory scheme shall remain in effect for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion.(FN15) See Linkletter v. Walker, 381 U.S. 618, 628 (1965) (no constitutional rule impedes court's discretion to postpone operative date of ruling where exigencies require); Smith v. State, 473 P.2d 937, 950 (Idaho 1970) (staying operative effect of decision abrogating rule of sovereign immunity until adjournment of next legislative session); Spanel v. Mounds View School Dist. No. 621, 118 N.W.2d 795, 803-04 (Minn. 1962) (same). In the event that the benefits and protections in question are not statutorily granted, plaintiffs may petition this Court to order the remedy they originally sought.

Our colleague asserts that granting the relief requested by plaintiffs -- an injunction prohibiting defendants from withholding a marriage license -- is our "constitutional duty." Post, at 3. (Johnson, J., concurring in part and dissenting in part). We believe the argument is predicated upon a fundamental misinterpretation of our opinion. It appears to assume that we hold plaintiffs are entitled to a marriage license. We do not. We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. That the State could do so through a marriage license is obvious. But it is not required to do so, and the mandate proposed by our colleague is inconsistent with the Court's holding.

The dissenting and concurring opinion also invokes the United States Supreme Court's

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desegregation decision in Watson v. City of Memphis, 373 U.S. 526 (1963), suggesting that the circumstances here are comparable, and demand a

comparable judicial response. The analogy is flawed. We do not confront in this case the evil that was institutionalized racism, an evil that was widely recognized well before the Court's decision in Watson and its more famous predecessor, Brown v. Board of Education, 347 U.S. 483 (1954). Plaintiffs have not demonstrated that the exclusion of same-sex couples from the definition of marriage was intended to discriminate against women or lesbians and gay men, as racial segregation was designed to maintain the pernicious doctrine of white supremacy. See Loving, 388 U.S. at 11 (holding anti-miscegenation statutes violated Equal Protection Clause as invidious effort to maintain white supremacy). The concurring and dissenting opinion also overlooks the fact that the Supreme Court's urgency in Watson was impelled by the City's eight year delay in implementing its decision extending Brown to public recreational facilities, and "the significant fact that the governing constitutional principles no longer bear the imprint of newly enunciated doctrine." See Watson, 373 U.S. at 529; Dawson v. Mayor and City Council of Baltimore, 220 F.2d 386, aff'd, 350 U.S. 877 (1955). Unlike Watson, our decision declares decidedly new doctrine.

The concurring and dissenting opinion further claims that our mandate represents an "abdicat[ion]" of the constitutional duty to decide, and an inexplicable failure to implement "the most straightforward and effective remedy." Post, at 3, 10. Our colleague greatly underestimates what we decide today and greatly overestimates the simplicity and effectiveness of her proposed mandate. First, our opinion provides greater recognition of -- and protection for -- same sex relationships than has been recognized by any court of final jurisdiction in this

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country with the instructive exception of the Hawaii Supreme Court in Baehr, 825 P.2d 44. See Hawaii Const., art. I, § 23 (state constitutional amendment overturned same-sex marriage decision in Baehr by returning power to Legislature "to reserve marriage to opposite-sex couples"). Second, the dissent's suggestion that her mandate would avoid the "political caldron" (post, at 4) of public debate is -- even allowing for the welcome lack of political sophistication of the judiciary -- significantly insulated from reality. See Hawaii Const., art. I, § 23; see also Alaska Const., art. I, § 25 (state constitutional amendment reversed trial court decision in favor of same-sex marriage, Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998), by providing that "a marriage may exist only between one man and one woman").

The concurring and dissenting opinion confuses decisiveness with wisdom and judicial authority with finality. Our mandate is predicated upon a fundamental respect for the ultimate source of constitutional authority, not a fear of decisiveness. No court was ever more decisive than the United States Supreme Court in Dred Scott, 60 U.S. (19 How.) 393 (1857). Nor more wrong. Ironically it was a Vermonter, Stephen Douglas, who in defending the decision said -- as the dissent in essence does here -- "I never heard before of an appeal being taken from the Supreme Court." See A. Bickel, The Morality of Consent 101 (1975). But it was a profound understanding of the law and the "unruliness of the human condition," id. at 11, that prompted Abraham Lincoln to respond that the Court does not issue Holy Writ. See id. at 101. Our colleague may be correct that a mandate intended to provide the Legislature with the opportunity to implement the holding of this Court in an orderly and expeditious fashion will have precisely the opposite effect. Yet it cannot be doubted that judicial authority is not ultimate authority.

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It is certainly not the only repository of wisdom.

> When a democracy is in moral flux, courts may not have the best or the final answers. Judicial answers may be wrong. They may be counterproductive even if they are right. Courts do best by proceeding in a way that is catalytic rather than preclusive and that is closely attuned to the fact that courts are participants in the system of democratic deliberation.

C. Sunstein, Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 6, 101 (1996).

The implementation by the Vermont Legislature of a constitutional right expounded by this Court pursuant to the Vermont Constitution for the common benefit and protection of the Vermont community is not an abdication of judicial duty, it is the fulfillment of constitutional responsibility.

III. Conclusion

While many have noted the symbolic or spiritual significance of the marital relation, it is plaintiffs' claim to the secular benefits and protections of a singularly human relationship that, in our view, characterizes this case. The State's interest in extending official recognition and legal protection to the professed commitment of two individuals to a lasting relationship of mutual affection is predicated on the belief that legal support of a couple's commitment provides stability for the individuals, their family, and the broader community. Although plaintiffs' interest in seeking state recognition and protection of their mutual commitment may -- in view of divorce statistics -- represent "the triumph of hope over experience,"(FN16) the essential aspect of their claim is simply and fundamentally for inclusion in the family of State-sanctioned human relations.

The past provides many instances where the law refused to see a human being when it should have. See, e.g., Dred Scott, 60 U.S. at 407 (concluding that African slaves and their descendants had "no rights which the white man was bound to respect"). The future may provide instances where the law will be asked to see a human when it should not. See, e.g., G. Smith, Judicial Decisionmaking in the Age of Biotechnology, 13 Notre Dame J. Ethics & Pub. Policy 93, 114 (1999) (noting concerns that genetically engineering humans may threaten very nature of human individuality and identity). The challenge for future generations will be to define what is most essentially human. The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.

The judgment of the superior court upholding the constitutionality of the Vermont marriage statutes under Chapter I, Article 7 of the Vermont Constitution is reversed. The effect of the Court's decision is suspended, and jurisdiction is retained in this Court, to permit the Legislature to consider and enact legislation consistent with the constitutional mandate described herein.

FOR THE COURT:

Chief Justice

Footnotes

FN1. In their motions, each of the parties presented the trial court with extensive extra-pleading facts and materials, including legislative history, scientific data, and sociological and psychological studies. See V.R.C.P. 12(b) & (c) (motion treated as one for summary judgment where "matters outside the pleadings are presented to and not excluded by the court"); Fitzgerald v. Congleton, 155 Vt. 283, 293-94, 583 A.2 595, 601 (1990) (court effectively converted motion to dismiss into motion for summary judgment where it considered matters outside pleadings and parties had reasonable opportunity to submit extra-pleading materials). The parties have continued to rely on these materials on appeal. In addition, the Court has received numerous amicus curiae briefs, representing a broad array of interests, supportive of each of the parties.

FN2. Although plaintiffs raise a number of additional arguments based on both the United States and the Vermont Constitutions, our resolution of the Common Benefits claim obviates the necessity to address them.

FN3. Conventional equal protection analysis under the Fourteenth Amendment employs three "tiers" of judicial review based upon the nature of the right or the class affected. See generally, Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440-41 (1985); 3 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 18.3, at 216-10 (3d ed. 1999). The first step in that analysis is to categorize the class affected as more or less similar to race based upon certain judicially-developed criteria. See Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 272 (1979); see generally, J. Baer, Equality Under the Constitution: Reclaiming the Fourteenth Amendment 253-64 (1983); C. Sunstein, The Anticaste Principle, 92 Mich. L. Rev. 2410, 2441-44 (1994). If a legislative classification implicates a "suspect" class, generally defined in terms of historical discrimination, political powerlessness, or immutable characteristics, the law is subject to strict scrutiny, and the state must demonstrate that it furthers a compelling governmental interest that could not be accomplished by less restrictive means. In addition to race (the original suspect class), alienage and national origin have also been recognized as suspect. See Cleburne, 473 U.S. at 440. The United States Supreme Court has created a "middle-tier" level of review for legislative classifications based on gender or illegitimacy; laws affecting these groups must be substantially related to a sufficiently important governmental interest to withstand constitutional scrutiny. See id. The balance of legislative enactments, including nearly all economic and commercial legislation, are presumptively constitutional and will be upheld if rationally related to any conceivable, legitimate governmental interest. See Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981); see also Cleburne, 473 U.S. at 440. Thus, as one commentator has explained, rationality review may be "used to uphold laws justified even by hypothesized or ad hoc state interests." J. Wexler, Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism, 66 Geo. Wash. L. Rev. 298, 300 (1998).

FN4. In this respect, Ludlow was consistent with an older line of Vermont decisions which, albeit in the Fourteenth Amendment context, routinely subjected laws involving economic classifications to a relatively straightforward reasonableness evaluation, explicitly balancing the rights of the affected class against the State's proffered rationale. See, e.g., State v. Hoyt, 71 Vt. 59, 64, 42 A. 973, 975 (1899) (peddler-licensing classifications must be "based on some reasonable

ground, some difference that bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection"); State v. Cadigan, 73 Vt. 245, 252, 50 A. 1079, 1081 (1901) (State must establish "reasonable basis" to support law distinguishing between business partnerships organized in Vermont and those formed in other states); State v. Haskell, 84 Vt. 429, 437, 75 A. 852, 856 (1911) (mill regulation must be "based upon some difference having a reasonable and just relation to the object sought"). These opinions are notable for their detailed examination of the context and purposes of the challenged legislation, the impact on the affected class, and the logical fit between the statutory classification and the public ends to be achieved.

FN5. Cass Sunstein, among others, has documented the United States Supreme Court's unacknowledged departures from the deferential rational-basis standard without defining a new kind of scrutiny. See C. Sunstein, Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 6, 59-61 (1996). These cases include Romer v. Evans, 517 U.S. 620, 635 (1996) (holding Colorado statute that banned state or local laws forbidding sexual-orientation discrimination was not rationally related to legitimate governmental objective), City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (applying rational basis review, Court invalidated zoning discrimination against mentally retarded as based on "irrational prejudice"), and United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) (invalidating regulation that excluded non-family members of household from food stamp program). In each of these decisions, the Court employed a highly contextual, fact-based analysis balancing private rights and public interests even while ostensibly applying minimal rational basis review. Conversely, in Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995), the high court itself questioned the notion that strict scrutiny was inevitably "fatal in fact." See G. Gunther, The Supreme Court, 1971 Term -- Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection, 86 Harv. L. Rev. 1, 8 (1972) (observing that strict scrutiny is generally "`strict' in theory and fatal in fact"). Viewed together, these cases have prompted one commentator to suggest that "[t]he hard edges of the tripartite division have thus softened," and that the Court has moved "toward general balancing of relevant interests." Sunstein, supra, at 77.

FN6. The current version differs from the original only in that the gender-neutral terms "person" and "persons" have been substituted for "man" and "men." See Vt. Const., Ch. II § 76. This revision was not intended to "alter the sense, meaning or effect of the" provision. Id.

FN7. There is little doubt as to the obligatory nature of the Common Benefits Clause, which provides that "government is, or ought to be, instituted for the common benefit, protection, and security . . . ." (Emphasis added). Indeed the State does not argue that it is merely hortatory or aspirational in effect, an argument that would not be persuasive in any event. See Brigham, 166 Vt. at 261-62, 692 A.2d at 393-94 (1997) (framers "drew no distinction between `ought' and `shall' in defining rights and duties").

FN8. The use of the word "family" in the Pennsylvania Common Benefits Clause reflects Pennsylvania's history, where elite "proprietors" including the Penns and other established families, had long dominated colonial politics, religion, and economic interests. The revolt against Great Britain presented an opportunity for western Pennsylvania farmers, urban gentry, and dissenting Presbyterians nursing "deep seated and long-felt grievances" to end Eastern domination of the colony, and establish a more democratic form of government. See Selsam, supra, at 1, 255-56.

FN9. This Court has noted that interpretations of similar constitutional provisions from other states may be instructive in understanding our own. See Benning, 161 Vt. at 476, 641 A.2d at 759. "Common Benefits" decisions from other states, however, are scarce. Pennsylvania eliminated the Common Benefits Clause when it replaced its constitution in 1790, and Virginia courts have not explored in any depth the meaning of its clause. The New Hampshire Constitution of 1783 also included a common benefits section substantially similar to Vermont's. See N.H. Const., Pt. 1, art. 10. Although New Hampshire courts have not developed an independent Common Benefits jurisprudence, several early New Hampshire decisions noted the provision's significance. See State v. Pennoyer, 18 A.2d 878, 881 (1889) (relying on Common Benefits Clause to strike down physician-licensing statute that exempted physicians who had resided in one place for four years); Rosenblum v. Griffin, 197 A. 701, 706 (1938) (noting that under Common Benefits Clause, "[e]quality of benefit is no less required than equality of burden. Otherwise equal protection is denied"). Massachusetts included a variation on Vermont's Common Benefits Clause in its Constitution of 1780, as well as a separate "emoluments" provision. See Mass. Const., Pt. 1, arts. VI & VII (adopted 1780). Massachusetts has not relied on the Common Benefits provision as a separate source of equal protections rights. See Town of Brookline v. Secretary of Com., 631 N.E.2d 968, 978 n.19 (Mass. 1994).

In the nineteenth century, a number of additional states adopted variations on the Common Benefits Clause. See, e.g., Conn. Const. of 1818, art. 1, § 2 ("[A]ll political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit."); Ohio Const. of 1851, art. 1, § 2 ("All political power is inherent in the people. Government is instituted for their equal protection and benefit."); W. Va. Const. Const., art. III, § 3 (adopted 1872) ("Government is instituted for the common benefit, protection and security of the people, nation or community."). Even assuming that provisions enacted in the nineteenth century have some bearing on the meaning of a Revolutionary-era document, these sister-state constitutions provide little guidance. Ohio has held that the state clause is the "functional equivalent" of the Equal Protection Clause with similar standards. See American Ass'n of Univ. Professors v. Central State Univ., 699 N.E.2d 463, 467 (Ohio 1998). The West Virginia Supreme Court, in contrast, has relied on the Common Benefits Clause to hold that the State constitution provides greater individual protection than the United States Constitution. See United Mine Workers of Am. Inter. Union v. Parsons, 305 S.E.2d 343, 353-54 (W. Va. 1983). Apart from noting the absence of an equivalent provision in the federal constitution, however, the West Virginia court has not engaged in any extensive textual or historical analysis.

A number of states during the Revolutionary and early National periods also adopted separate provisions, apparently modeled on the Pennsylvania and Virginia clauses, declaring that no men, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services. See, e.g., N.C. Const. of 1776, Decl. of Rights, § 3; Mass. Const., Pt. 1, art. VI; Conn. Const. of 1818, art. I, § 1; Miss. Const. of 1832, art. I, § 1; Ky. Const. of 1792, art. XII, § 1. These "emoluments and privileges" clauses have been extensively cited and applied, often in the context of taxpayer suits challenging public expenditures as unconstitutional "gifts" of public funds without consideration of public service, or suits challenging legislative acts granting special credits, payments, or exemptions to a specific class. see, e.g., Commissioner of Pub. Works v. City of Middletown. 731 A.2d 749. 757 (Conn. 1999) (challenge to tax exemption); Driscoll v. City of New Haven, 52 A. 618, 622 (Conn. 1902) (taxpayer suit to enjoin municipal grant of land to private company); Kentucky Union R.R. Co. v. Bourbon County, 2. S.W. 687, 690 (Ky. 1887) (taxpayer suit to enjoin subscription

of bonds for railroad purposes); Brumley v. Baxter, 36 S.E.2d 281, 286 (N.C. 1945) (taxpayer suit to enjoin municipal grant of real property for use by military veterans); see also Gross v. Auditor of Accounts, 109 Vt. 156, 159, 194 A. 465, 467 (1937) (Article 7 challenge to payment to sheriff's widow as "emolument" without consideration of public service). These cases generally turned on whether the challenged action promoted a public purpose or was made without some consideration of public service. They represent, in effect, the reverse of the Common Benefits Clause, prohibiting the grant of special privileges to a select class of persons over and above those granted to the general community, as the Common Benefits Clause requires the equal enjoyment of general benefits and protections by the whole community.

FN10. The concurring opinion would tie its analysis to the presumably "objective" test of suspect class. But suspect class analysis has never provided a stable mooring for constitutional application of Vermont's Common Benefits Clause. Although the concurrence identifies precedents of this Court holding that a more searching scrutiny is required when a statutory scheme involves suspect classes, we have never established the criteria for determining what constitutes a suspect class under the Vermont Constitution nor have we ever identified a suspect class under Article 7. Moreover, the concurrence applies strict scrutiny predicated on a finding that lesbians and gay men are a suspect class, although the overwhelming majority of decisions have rejected such claims. See Ben-Shalom v. Marsh, 881 F.2d 454, 464-66 (7th Cir. 1989), cert denied, 494 U.S. 1004 (1990); Equality Found'n of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 292-93 (6th Cir. 1997); Thomasson v. Perry, 80 F.3d 915, 927 (4th Cir.), cert. denied, 519 U.S. 948 (1996); Richenberg v. Perry, 97 F.3d 256, 260-61 (8th Cir. 1996), cert. denied, 522 U.S. 807) (1997); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571-72 (9th Cir. 1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1002 (1990); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987); Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) (en banc), cert. denied, 478 U.S. 1035 (1986); National Gay Task Force v. Board of Educ., 729 F.2d 1270, 1273 (10th Cir. 1984), aff'd 470 U.S. 903 (1985); Opinion of the Justices, 530 A.2d 21, 24 (N.H. 1987).

The Court -- no less than the concurrence -- seeks a rationale faithful to our Constitution and careful in the exercise of this Court's limited powers. The concurrence suggests that the Oregon Supreme Court's decision in Hewitt v. State Accident Ins. Fund Corp., 653 P.2d 970, 977-78 (Or. 1982) should be relied upon to supply the missing Vermont jurisprudence of suspect class criteria. Yet, the Oregon Court of Appeals found it necessary to abandon the immutable personal-characteristic criterion of Hewitt in order to find that homosexuals were a suspect class entitled to heightened scrutiny. See Tanner v. Oregon Health Sciences Univ., 971 P.2d 435, 446 (Or. Ct. App. 1998). The "adverse stereotyping" analysis used in its place, see id., may provide one intermediate appellate court's answer to the question of whether homosexuals are a suspect class, but it is far from an "exacting standard" by which to measure the prudence of a court's exercise of its powers. It is difficult to imagine a legal framework that could provide less predictability in the outcome of future cases than one which gives a court free reign to decide which groups have been the subject of "adverse social or political stereotyping." Id. The artificiality of suspect-class labeling should be avoided where, as here, the plaintiffs are afforded the common benefits and protections of Article 7, not because they are part of a "suspect class," but because they are part of the Vermont community.

FN11. The concurring and concurring and dissenting opinions are mistaken in suggesting that this standard places identical burdens upon the State regardless of the nature of the rights affected. As explained

above, the significance of the benefits and protections at issue may well affect the justifications required of the State to support a statutory classification. This is plainly demonstrated in the discussion of marriage benefits and protections which follows. Nor is there any merit to the assertion that this standard invites a more "activist" review of economic and social welfare legislation. See post, at 15 (Dooley, J., concurring). Characterizing a case as affecting "economic" interests, "civil rights," "fundamental" rights, or "suspect classes" -- as our colleagues apparently prefer -- is no less an exercise in judgment. Indeed, it may disguise the court's value judgments with a label, rather than explain its reasoning in terms that the public and the litigants are entitled to understand. "It is a comparison of the relative strengths of opposing claims that informs the judicial task, not a deduction from some first premise." Glucksberg, 521 U.S. at 764 (Souter, J., concurring). That is a task we trust will continue to be undertaken in a legal climate that recognizes that "constitutional review, not judicial lawmaking, is a court's business here." Id. at 768.

FN12. Justice Harlan has described the process of constitutional interpretation as follows:

If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

Poe, 367 U.S. at 542 (Harlan, J. dissenting).

FN13. Relying largely on federal precedents, our colleague in her concurring and dissenting opinion suggests that the statutory exclusion of same-sex couples from the benefits and protections of marriage should be subject to heightened scrutiny as a "suspect" or "quasi-suspect" classification based on sex. All of the seminal sex-discrimination decisions, however, have invalidated statutes that single-out men or women as a discrete class for unequal treatment. See, e.g., United States v. Virginia, 518 U.S. 515, 555-56 (1996) (repudiating statute that precluded women from attending Virginia Military Institute); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982) (invalidating admission policy that excluded males from attending state-supported nursing school); Craig v. Boren, 429 U.S. 190, 204 (1976) (invalidating statute that allowed women to purchase non-intoxicating beer at younger age than men); Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (striking statute that imposed more onerous requirements upon female members of armed services to claim spouses as dependents).

Although this Court has not addressed the issue, see State v. George, 157 Vt. 580, 588, 602 A.2d 953, 957 (1991), we do not doubt that a statute that discriminated on the basis of sex would bear a heavy burden under the Article 7 analysis set forth above. The difficulty here is that the marriage laws are facially neutral; they do not single-out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex. As we observed in George, 157 Vt. at 585, 602 A.2d at 956, "[i]n order to trigger equal protection analysis at all . . . a defendant must show that he was treated differently as a member of one class from treatment of members of another class similarly situated." (Emphasis added). Here, there is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct.

Indeed, most appellate courts that have addressed the issue have rejected the claim that defining marriage as the union of one man and one woman discriminates on the basis of sex. See, e.g. Baker v. Nelson, 191 N.W.2d 185, 186-87 (Minn. 1971); Singer v. Hara, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974); see also Phillips v. Wisconsin Personnel Comm'n, 482 N.W.2d 121, 129 (Wis. Ct. App. 1992) (holding that health insurance regulation limiting state employee's dependent coverage to spouse did not constitute sex discrimination because coverage was "unavailable to unmarried companions of both male and female employees"); State v. Walsh, 713 S.W.2d 508, 510 (Mo. 1986) (rejecting claim that sodomy statute imposed sex-based classification because it "applie[d] equally to men and women [in] prohibit[ing] both classes from engaging in sexual activity with members of their own sex"). But see Baehr v. Lewin, 852 P.2d 44, 64 (Haw. 1993) (plurality opinion holding that state's marriage laws discriminated on basis of sex).

Although the concurring and dissenting opinion invokes the United States Supreme Court decision in Loving v. Virginia, 388 U.S. 1 (1967), the reliance is misplaced. There the high court had little difficulty in looking behind the superficial neutrality of Virginia's anti-miscegenation statute to hold that its real purpose was to maintain the pernicious doctrine of white supremacy. Id. at 11. Our colleague argues, by analogy, that the effect, if not the purpose, of the exclusion of same-sex partners from the marriage laws is to maintain certain male and female stereotypes to the detriment of both. To support the claim, she cites a number of antiquated statutes that denied married women a variety of freedoms, including the right to enter into contracts and hold property.

The test to evaluate whether a facially gender-neutral statute discriminates on the basis of sex is whether the law "can be traced to a discriminatory purpose." Personnel Administrator v. Feeney, 442 U.S. 256, 272 (1979). The evidence does not demonstrate such a purpose. It is one thing to show that long-repealed marriage statutes subordinated women to men within the marital relation. It is quite another to demonstrate that the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles or anxiety about gender-role confusion. That evidence is not before us. Accordingly, we are not persuaded that sex discrimination offers a useful analytic framework for determining plaintiffs' rights under the Common Benefits Clause.

FN14. It would, for example, serve no useful purpose to remand this matter for hearings on whether marriages of convenience (i.e., unions for the purpose of obtaining certain statutory benefits) would result from providing same-sex couples with the statutory benefits and protections accorded opposite-sex couples under marriage laws. For the reasons we have stated in this opinion, it is not a failure of proof that is fatal to the State's arguments, it is a failure of logic.

FN15. Contrary to the characterization in the concurring and dissenting opinion, we do not "decline[] to provide plaintiffs with a marriage license" because of uncertainty and confusion that change may bring. Post, at 11. Rather, it is to avoid the uncertainty that might result during the period when the Legislature is considering potential constitutional remedies that we consider it prudent to suspend the Court's judgment for a reasonable period.

FN16. J. Boswell, Life of Johnson (1791) (reprinted in Bartlett's Familiar Quotations 54 (15th ed. 1980).

Concurring

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DOOLEY, J., concurring. I concur in Part I of the majority opinion, the holding of Part II, and the mandate. I do not, however, concur in the reasoning of Part II. I recognize that to most observers the significance of this decision lies in its result and remedy. In the cases that come before us in the future, however, the significance of this case will lie in its rationale - that is, how we interpret and apply Chapter I, Article 7 of the Vermont Constitution. Moreover, in this, the most closely-watched opinion in this Court's history, its acceptability will be based on whether its reasoning and result are clearly commanded by the Constitution and our precedents, and whether it is a careful and necessary exercise of the Court's limited powers. I do not believe that the majority's rationale meets this exacting standard, and I fear how it may be applied - or ignored - in the future.

This is a concurrence and not a dissent. I agree with the majority that the consequence of limiting marriage to a man and woman is the exclusion of these plaintiffs, and many persons similarly situated, from numerous rights, benefits, and duties that government and society provide to - and impose on - married persons. However we might have described marriage in relation to the very limited government that was created by our Constitution, the complexity of the current system of government-created benefits and burdens has made civil marriage a modern-day emolument, a government recognized and supported special status for which these plaintiffs are not eligible.

This is a civil rights case, very different from a claim of discrimination with respect to, for example, a peddler's fee, see State v. Hoyt, 71 Vt. 59, 42 A. 973 (1899), operation of partnerships, see State v. Cadigan, 73 Vt. 245, 50 A. 1079 (1901), or regulation of river pollution, see State v. Haskell, 84 Vt. 429, 75 A. 852 (1911). It is also very different from a claim that exemptions to a Sunday closing law unconstitutionally discriminated against large

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stores, the issue in State v. Ludlow Supermarkets, Inc., 141 Vt. 261, 448 A.2d 791 (1982). The United States Supreme Court has recognized that discrimination based on race, alienage, national origin, or sex requires greater justification than economic discrimination, such as discrimination in the fees charged certain peddlers based on the type of goods they are selling. See Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985) (discussing the standards for scrutinizing various classifications). Compare United States v. Virginia, 515 U.S. 518, 532 (1996) (sex), and Loving v. Virginia, 388 U.S. 1, 11 (1967) (race), with Williamson v. Lee Optical, Inc., 348 U.S. 483, 486-88 (1955) (economic regulation). Until this decision, we also recognized this distinction. As we stated in Brigham v. State, 166 Vt. 246, 265, 692 A.2d 384, 396 (1997): "Where a statutory scheme affects fundamental constitutional rights or involves suspect classifications, both federal and state decisions have recognized that proper equal protection analysis necessitates a more searching scrutiny."

The marriage statutes do not facially discriminate on the basis of sexual orientation. There is, however, no doubt that the requirement that civil marriage be a union of one man and one woman has the effect of discriminating against lesbian and gay couples, like the plaintiffs in this case, who are unable to marry the life partners of their choice. The majority proclaims that most decisions have concluded that lesbians and gay men are not a suspect classification, inferring that any conclusion to

the contrary is wrong. See ante, at 24 n.10. On this point, however, I believe the central analysis of Ludlow is critical:

> [A] state court reviewing state legislation is in a very different posture from the United States Supreme Court when it undertakes the parallel task. Rather than disposing of a case on the premise that its impact will presumably affect more than fifty varying jurisdictions, a state court reaches its result in the legal climate of the single jurisdiction with which it is associated, if federal proscriptions are not transgressed.

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141 Vt. at 268, 448 A.2d at 795. Although our precedents mandate use of at least a close cousin of the federal equal protection test, we must, as we said in Ludlow, apply that test in our own "legal climate."

Vermont's legal climate differs considerably from that in other jurisdictions where courts have held that lesbians and gay men are not a suspect classification. Indeed, the federal analysis of the rights of lesbians and gay men almost always starts with Bowers v. Hardwick, 478 U.S. 186 (1986), a decision that reflects a legal climate quite hostile to those rights. Bowers upheld a Georgia conviction for sodomy based on a sex act committed by two males in the bedroom of defendant's home. See id. at 196. It held that, for due process purposes, individuals do not have "a fundamental right to engage in homosexual sodomy." Id. at 191.

Federal courts considering equal-protection challenges have relied on Bowers to conclude that lesbians and gay men are not a suspect classification. They rationalize that if homosexual conduct can constitutionally be criminalized, homosexuals cannot constitute a suspect class. See, e.g., Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 292-93 (6th Cir. 1997) (holding that under Bowers and its progeny, homosexuals do not constitute suspect class because conduct which defined them as homosexuals could constitutionally be proscribed); Ben-Shalom v. Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989) (citing Bowers and holding that because homosexual conduct may constitutionally be criminalized, homosexuals do not constitute a suspect class); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) (same);Woodward v. United States, 871 F.2d 1068, 1074-76 (Fed. Cir. 1989) (same); Padula v. Webster, 822 F.2d 97, 102-03 (D.C. Cir. 1987) (same); see also Opinion of the Justices, 530 A.2d 21, 24 (N.H. 1987) (stating that for federal equal-protection analysis homosexuals do not constitute a suspect class, nor is there a fundamental

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right to engage in sodomy according to Bowers).

The majority errs in relying on these cases because the Bowers rationale applied in all of them is not applicable in Vermont today. Although Vermont, like all states, once criminalized sodomy, and had a "fellation" law, see State v. LaForrest, 71 Vt. 311, 312, 45 A.2d 225, 226 (1899) (holding sodomy a crime by virtue of 1 V.S.A. § 271 -- formerly V.S. 898 -- and adopting common law so far as applicable in Vermont); 13 V.S.A. §2603 (repealed 1977, No. 51, §2), it repealed this law in 1977 and does not now prohibit, or otherwise restrict, homosexual conduct between adults, except on the same terms that it restricts heterosexual conduct. See, e.g., 13 V.S.A. § 3252 (sexual assault); 13 V.S.A. § 3253 (aggravated assault); 13 V.S.A. § 2601 (lewd and lascivious conduct).

Since 1992, it has generally been the policy of Vermont to prohibit discrimination based on sexual orientation. See 1991, No. 135 (Adj.

Sess.). This includes discrimination based on "male or female homosexuality." 1 V.S.A. § 143. Thus, I believe our "legal climate" is vastly different from that in Bowers, where, after considering that twenty-four states had criminalized sodomy between consenting adults, the United States Supreme Court concluded that there was no fundamental right, deeply rooted in the Nation's history, to engage in such conduct. My point here is simply that the rationale in federal decisions for withholding a more searching scrutiny does not apply in Vermont. The majority errs in relying on these decisions and the state court decisions applying the same federal analysis.

Chapter I, Article 7 of the Vermont Constitution actually contains three clauses, the most important of which is the second, which contains the prohibition on governmental actions "for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." This anti-privilege language, and variations on it, is contained

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in the vast majority of pre-civil war state constitutions. See, e.g., Conn. Const. of 1818, art. I, §1; Ky. Const. of 1792, art. XII, § 1; Mass. Const., art. VI (adopted in 1780); N.H. Const., art. X (adopted in 1784); N.C. Const. of 1776, art. III; Ohio Const. of 1851, art. I, § 2; Va. Const. of 1776, Bill of Rights, § 4; Tx. Const. of 1845, art. I, § 2. At least in this century, the jurisprudence in Vermont is similar to that in most states. See, e.g., Town of Emerald Isle v. State, 360 S.E.2d 756, 764 (N.C. 1987) (classification is not exclusive emolument if intended to promote general welfare and reasonable basis exists to conclude it serves public interest); Primes v. Tyler, 331 N.E.2d 723, 728-29 (Ohio 1975) (statute violates constitution because no governmental interest justifies grant of special privilege and immunity); Rosenblum v. Griffin, 197 A. 701, 706 (N.H. 1938) (classification is constitutional under New Hampshire or federal law if based on some reasonable ground); City of Corbin v. Louisville & Nashville R.R. Co., 26 S.W.2d 539, 540 (Ky. 1930) (purpose of emoluments and privileges clause is to place all similarly situated citizens on plane of equality under law).

Oregon, like Vermont, has developed an independent state constitutional jurisprudence. Article I, Section 20 of the Oregon Constitution, adopted in 1859, provides that no law shall "grant[] to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." This provision is similar in purpose and effect to our Common Benefits Clause. See D. Schuman, The Right to "Equal Privileges and Immunities": A State Version of "Equal Protection," 13 Vt. L. Rev. 221, 222-25 (1988). The Oregon Supreme Court has described that provision precisely how we today have described Chapter I, Article 7: "Antedating the Civil War and the equal protection clause of the fourteenth amendment, its language reflects early egalitarian objections to favoritism and special privileges for a few rather than the concern of the Reconstruction Congress about discrimination against disfavored individuals or groups." State v. Clark, 630 P.2d 810, 814 (Or. 1981). Just as this Court has acknowledged in developing its Article 7 jurisprudence, the Oregon court has recognized that a privilege for a person or group of persons means discrimination against

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others. See id. at 814 (Article I, Section 20 of Oregon Constitution protects against adverse discrimination as well as against favoritism).

Thus, while developing an independent state constitutional jurisprudence, the Oregon Supreme Court has looked to the decisions of United States Supreme Court, but has adopted the federal analysis only where the court finds it persuasive. See State v. Kennedy, 666 P.2d 1316, 1321 (Or. 1983). See, e.g., Hewitt v. State Accident Ins. Fund Corp., 653 P.2d 970, 976 (Or. 1982) (declining to adopt federal standard of intermediate scrutiny for sex-based classifications).

The Oregon Supreme Court, like this Court, has adopted the federal, tiered framework for analyzing equal-protection type constitutional challenges. See Hewitt, 653 P.2d at 976 (following United States Supreme Court analysis that asks whether classification is made on basis of suspect classification, and if so, whether such classification is subject to strict scrutiny). Moreover, it has held, as we have held, that its state constitution "prohibits disparate treatment of groups or individuals by virtue of 'invidious' social categories" and that discrimination against a suspect class is subject to strict scrutiny. Id.; see MacCallum v. Seymour's Adm'r, 165 Vt. 452, 460, 686 A.2d 935, 939 (1996) (Article 7 protects against invidious discrimination). I point out the similarities between our Article 7 jurisprudence and Oregon's Section 20 jurisprudence because this Court has not established the criteria for identifying suspect classifications, while the Oregon courts have. Because of the historical similarity, I find it useful to look to Oregon case law, and the United States Supreme Court decisions upon which it relies, in considering whether lesbians and gay men are a suspect classification under Article

7.

In Hewitt, the Oregon Supreme Court determined that sex-based classifications are suspect because (1) they focus on an immutable personal characteristic and thus "can be suspected of reflecting `invidious' social or political premises, that is to say, prejudice or stereotyped prejudgments," and (2) "[t]he purposeful historical, legal, economic and political unequal treatment of women is well known." 653 P.2d at 977. Accordingly, the court held that sex-based classifications are inherently suspect, like the United States Supreme Court found classifications based on race, alienage, and nationality. See id. at 977-78 (citing Loving v. Virginia, 388 U.S. 1, 11 (1967) (race); Graham v. Richardson, 403 U.S. 365, 372 (1971) (alienage); Oyama v. California, 332 U.S. 633, 646 (1948) (nationality)).

Although the Oregon Supreme Court has not addressed whether lesbians and gay men are a suspect classification, the Oregon Court of Appeals has recently done so. See Tanner v. Oregon Health Sciences Univ., 971 P.2d 435 (Or. Ct. App. 1998). In Tanner, the court held that Article I, Section 20 of the Oregon Constitution requires the Oregon Health Sciences University to extend health and life insurance benefits to the unmarried domestic partners of its homosexual employees. See id. at 448. The Tanner court examined the Hewitt two-part test for defining suspect classes and determined that "immutability -- in the sense of inability to alter or change -- is not necessary" because alienage and religious affiliation -- which may be changed -- have been held to be suspect classifications. Thus, it held that defining a suspect class depends not on the immutability of a class-defining characteristic, but upon (1) whether the characteristic has historically been regarded as defining a distinct socially-recognized group, and if so (2) whether that group has been the subject of adverse social or political stereotyping. See id. at 446. Applying this test, the court concluded that the class of homosexual couples is

clearly defined in terms of stereotyped personal and social characteristics; is widely regarded as a distinct, socially recognized group; and indisputably has "been and continues to be the subject of adverse social and political stereotyping and prejudice." Id. at 447. Thus, the court found that the plaintiffs, three lesbian couples, were members of a suspect class.

In this concurrence, I do not detail a suspect-classification analysis, but I can summarize my opinion by saying that I agree with the general framework adopted by the Oregon courts in Hewitt and Tanner. These decisions concerning Article I, Section 20 of that state's constitution are entirely consistent with the law we have developed under Chapter I, Article 7 of the Vermont Constitution, at least prior to this decision. I find Hewitt and Tanner far more persuasive than the majority's decision, which backtracks from the established legal framework under Article 7 and fails to provide any guidelines whatsoever for the Legislature, the trial courts, or Vermonters in general to predict the outcome of future cases.

I agree with the majority that the State cannot justify the denial of legal benefits and responsibilities of civil marriage to gay and lesbian couples. And I agree that the appropriate remedy is either to require the State to extend the option of receiving these benefits and associated responsibilities to these couples, or to require that it offer the opportunity for civil marriage on equal terms. I will briefly explain my disagreement with the majority's rationale for reaching the same result.

The majority's analysis under Chapter I, Article 7 proceeds in three steps: (1) there is one equality standard imposed by Article 7, and it applies to claims of civil rights discrimination and economic discrimination alike; (2) the equality standard is higher, that is, more active, than the standard imposed by the Equal Protection Clause of the Fourteenth Amendment for analyzing claims of economic discrimination; and (3) under the new standard, the denial of the benefits

of marriage to lesbians and gay men violates Chapter I, Article 7. In the first two steps, the majority makes statements entirely contrary to our existing Article 7 jurisprudence. As to the third step, I find no standard in the Court's decision - it is entirely a matter of "judgment."

The first step in the Court's analysis requires overruling a long series of precedents holding that where a statutory scheme affects fundamental constitutional rights or involves suspect classifications, Article 7 requires "a more searching scrutiny." Brigham, 166 Vt. at 265, 692 A.2d at 396.(FN1) Among the decisions that have stated this standard are L'Esperance v. Town of Charlotte, 167 Vt. 162, 165, 704 A.2d 760, 762 (1997); McCallum, 165 Vt. at 457, 686 A.2d at 936-37; Benning v. State, 161 Vt. 472, 486, 641 A.2d 757, 764 (1994); In re Sherman Hollow, Inc., 160 Vt. 627, 628, 641 A.2d 753, 755 (1993) (mem.); Oxx v. Department of Taxes, 159 Vt. 371, 376, 618 A.2d 1321, 1324 (1992); Hodgeman v. Jard Co., 157 Vt. 461, 464, 599 A.2d 1371, 1373 (1991); State v. George, 157 Vt. 580, 588, 602 A.2d 953, 957 (1991); Town of Sandgate v. Colehamer, 156 Vt. 77, 88, 589 A.2d 1205, 1211 (1990); and Choquette v. Perrault, 153 Vt. 45, 51-52, 569 A.2d 455, 459 (1989).(FN2) The majority barely acknowledges the multi-tiered standard stated in those cases, and dismisses it as a "rigid" analysis. See ante, at 23. It is ironic that in a civil rights case we overrule our precedent

requiring the State to meet a higher burden in civil rights cases, but still conclude, under the lower standard, that the State has not met its burden.

The effect of the majority decision is that the State now bears no higher burden to justify discrimination against African-Americans or women than it does to justify discrimination against large retail stores as in Ludlow. I doubt that the framers of our Constitution, concerned with preventing the equivalent of British royalty, would believe that the inevitable line-drawing that must occur in economic regulation should be equated with the denial of civil and human rights. I do not believe that the new standard is required by, or even consistent with, the history on which the majority bases it.

The second step is also at variance with our Article 7 law, even as it seeks to rely upon it. The majority holds that Article 7 requires a more active standard of constitutional review than the Fourteenth Amendment, as interpreted by the United States Supreme Court, in the absence of a fundamental right or suspect classification. See ante, at 11-12. This means that in the future this Court is less likely to defer to the Legislature and more likely to find its acts unconstitutional than would the United States Supreme Court. Again, I find great irony in the fact that we are doing this unnecessarily in a case where the main theme of the State and many amici is that we must defer to the Legislature on the issue before us.

I agree that Ludlow, Choquette, and MacCallum contain important holdings about how equality challenges are addressed by a state court. Ludlow holds that we must look at justifications for distinctions that are realistic in view of Vermont's unique legal culture. See Ludlow, 141 Vt. at 268, 448 A.2d at 795. Choquette and MacCallum hold that such justifications must be relevant to contemporary circumstances and not be wholly archaic. See Choquette, 153 Vt. at 53-54, 569 A.2d at 460; MacCallum, 165 Vt. at 461, 686 A.2d at 940.

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None of these decisions demonstrate that "Vermont decisions reflect a very different approach from current federal jurisprudence," which is how the majority characterizes them. Ante, at 10. Indeed, we have said over and over that the test, where no fundamental right or suspect class is involved, "is the same under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution" as under Article 7. Lorrain v. Ryan, 160 Vt. 202, 212, 628 A.2d 543, 550 (1993); see Brigham, 166 Vt. at 265, 692 A.2d at 395; L'Esperance, 167 Vt. at 165, 704 A.2d at 762. Although the majority seeks to rely on isolated statements from Ludlow, in fact, we are by this decision creating a new, more active standard of review in Article 7 challenges.(FN3)

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We have wisely, in the past, avoided the path the majority now chooses, a path worn and abandoned in many other states. When Justice Hayes decried the failure of litigants to raise state constitutional issues, see State v. Jewett, 146 Vt. 221, 229, 500 A.2d 233, 238 (1985), he could not have been referring to challenges under state anti-emolument and equality provisions. In state after state, throughout the nineteenth and early twentieth centuries, state supreme courts routinely struck down economic and social welfare statutes under these provisions using an analysis similar to that employed by the majority in this case. See H. Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence 9 (1993). For example, in Auditor of Lucas

County v. State, 78 N.E. 955, 957 (Ohio 1906), the Ohio Supreme Court struck down an Ohio law that provided a stipend of $25 each quarter to adult blind persons because it was over-inclusive -- including rich and poor -- and under-inclusive -- including only some disabled persons. See also Cincinnati v. Cook, 140 N.E. 655, 656 (Ohio 1923) (striking down ordinance that allowed parking in front of train station only with consent of supervisor of station, in part because it created "privilege or immunity" in those who were allowed to park); Low v. Rees Printing Co., 59 N.W. 362, 368 (Neb. 1894) (striking down eight-hour-day law because it exempted farm or domestic labor); State v. Pennoyer, 18 A. 878, 881 (N.H. 1889) (striking down statute requiring licensing of all physicians, except those who resided in only one town between 1875 and 1879, because it imposed unequal burden on

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members of same class); Millett v. People, 7 N.E. 631, 636 (Ill. 1886) (striking down statute requiring mine operators who tied wages to amount of coal extracted to keep scale at mine so coal could be weighed before managers had chance to separate unusable material); In re Jacobs, 98 N.Y.98, 112-14 (N.Y. 1885) (striking down act addressing deplorable working conditions under which cigar makers labored in tenements by banning the manufacturing of cigars in those dwellings); Ex parte Westerfield, 55 Cal. 550, 551 (Cal. Sup. Ct. 1880) (striking down law making it misdemeanor for bakers to force employees to work between six o'clock Saturday evening and six o'clock Sunday evening).

Most of these decisions reflect judicial attitudes prevalent in the era of Lochner v. New York, 198 U.S. 45 (1905), when the United States Supreme Court was routinely striking down economic and social welfare legislation. As the United States Supreme Court modified its jurisprudence to give primacy to the federal and state legislative role in economic and social welfare legislation, state courts did likewise, often on the basis that Fourteenth Amendment jurisprudence was equally applicable under state due process and equality provisions. See Gillman, supra, at 62. See, e.g.,Department of Mental Hygiene v. Kirchner, 400 P.2d 321, 322 (Cal. 1965) (Fourteenth Amendment to federal constitution and Sections 11 and 21 of Article I of California Constitution provide generally equivalent but independent protections in their respective jurisdictions); People v. Willi, 179 N.Y.S. 542, 547 (Del. Cty. Ct. 1919) (methods of analysis under Fourteenth Amendment and state constitution are identical); City of Chicago v. Rhine, 2 N.E.2d 905, 908 (Ill. 1936) (simultaneously analyzing federal and state equal protection claims); Ex Parte Caldwell, 118 N.W. 133, 134 (Neb. 1908) (upholding under state and federal constitutions statute prohibiting common labor on Sunday).

The Vermont Supreme Court never adopted an activist stance in reviewing economic and

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social welfare legislation, and history shows we chose the right course. We could have relied upon the looser and more activist language that prevailed in the federal cases in the early twentieth century -- the same language that the majority relies upon today, ante, at 12 n.4 -- to substitute our judgment for the Legislature, but wisely we did not. Unfortunately, we have now resurrected that approach. I can find no justification for the holding that Article 7 requires a more activist approach than the Fourteenth Amendment for reviewing social welfare and economic legislation. We were right in Lorrain, Brigham, and L'Esperance on this point and should adhere to those precedents.

Finally, concerning the third step of the majority's analysis, I question whether the majority's new standard is ascertainable, is consistent with our limited role in constitutional review, and contains appropriate judicial discretion. As Justice Johnson explains in her dissent, see post, at 21 n.13, the strength of the federal approach is that it disciplines judicial discretion and promotes predictability. See C. Sunstein, Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 78 (1996). Indeed, the Oregon courts have followed the federal approach in this area to avoid a balancing process "of pragmatic considerations about which reasonable people may differ over time," Kennedy, 666 P.2d at 1321, and "policy choices disguised as ad hoc evaluations based on comparison of incommensurable," Schuman, supra, at 227. The majority calls the federal approach "rigid" at one point, ante, at 23, but then describes it, as applied in Tanner, as an invitation to subjective judicial decision-making. Ante, at 24 n.10. The two criticisms are as inconsistent as any criticisms could be. I accept the former -- rigid -- as accurate, at least in comparison with the wide judicial discretion the majority claims here as an alternative. The latter -- subjective judicial decision-making -- is, however, the least accurate criticism the majority could level.

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Two points about the new standard are particularly troublesome for me. The majority now requires that legislative classifications be "reasonably necessary to accomplish the State's claimed objectives." Ante, at 24. In our imperfect world, few legislative classifications are "necessary," and most legislation could be more narrowly tailored to the state's objective. I cannot square this standard with our limited role in constitutional adjudication. As I noted earlier, while language to this effect appears in Ludlow, it has never been used as the basis of one of our decisions until today.

More importantly, I cannot endorse, in this vitally important area of constitutional review, a standard that relies wholly on factors and balancing, with no mooring in any criteria or guidelines, however imperfect they may be. On this point, I agree with Justice Johnson. See post, at 21 n.13. I accept the majority's assertion that it has attempted to avoid a standard based on "personal notions," and that all constitutional adjudication requires reasoned judgment, but I do not believe that it has succeeded in properly applying the critical considerations it has identified. Ante, at 25. Instead of mooring its analysis within the framework of fundamental rights and suspect classifications, the majority professes to make its new Article 7 standard "objective and grounded" by requiring courts, in balancing the competing interests, to "look to the history and `traditions from which [the State] developed' as well as those `from which it broke.'" Ante, at 25. It is difficult to conceive that any persons sitting on this Court, whatever their philosophical persuasions, would be insensitive to the history and traditions from which Vermont developed, and those from which it broke, but how this standard will be applied to Article 7 challenges is not at all predictable. In the end, the approach the majority has developed relies too much on the identities and personal philosophies of the men and women who fill the chairs at the Supreme Court, too little on ascertainable standards that judges of

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different backgrounds and philosophies can apply equally, and very little, if any, on deference to the legislative branch.

The final irony in this decision for me is that the balancing and weighing process set forth in the Court's opinion describes exactly the

process we would expect legislators to go through if they were facing the question before us. We are judges, not legislators.

For the above reasons, I concur in the mandate, but respectfully disagree with Part II of the Court's decision, the majority's rationale for reaching this mandate.

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Associate Justice

Footnotes

FN1. The majority's characterization of Brigham is neither fair nor accurate. The majority states that Brigham "acknowledged the federal standard," but "eschewed the federal categories of analysis." Ante, at 14. Far beyond "acknowledging" the federal standards, Brigham held explicitly that they applied under Article 7 -- a holding now implicitly overruled by the majority decision. Rather than eschewing the federal standards, we held that the educational financing system advanced no "legitimate governmental purpose" under any standard. See Brigham, 166 Vt. at 265, 692 A.2d at 396.

FN2. The majority's statement that suspect class analysis is "often effectively ignored in our more recent decisions" is inaccurate, unless our statements that we need not reach the issue in a case somehow "ignores" suspect-class analysis. Ante, at 15. See, e.g., MacCallum, 165 Vt. at 457 n.1, 686 A.2d at 938 n.1 (in view of our disposition, we need not reach plaintiff's claim that adopted persons are suspect class).

FN3. My concern about the effect of this decision as a precedent is heightened by the majority's treatment of the Ludlow decision. It is fair to say that for some purposes, there have been two versions of the Ludlow decision. First, there is the one we have described in dicta, usually as a historical event. See State v. Brunelle, 148 Vt. 347, 351, 534 A.2d 198, 201-02 (1987); Hodgeman, 157 Vt. at 464, 599 A.2d at 1373. This one holds that Article 7 is "more stringent than the federal constitutional standard which requires only a rational justification." Brunelle, 148 Vt. at 351, 534 A.2d at 201-02. Second, there is the Ludlow decision that we have actually used in deciding cases. See, e.g., Choquette, 153 Vt. at 52, 569 A.2d at 459; In re Property of One Church Street, 152 Vt. 260, 263-65, 565 A.2d 1349, 1350-51 (1989). This version of Ludlow holds that the Article 7 standard is the reasonable-relationship test applicable under the Fourteenth Amendment to the United States Constitution. See Choquette, 153 Vt. at 52, 569 A.2d at 459; see also Lorrain, 160 Vt. at 212, 628 A.2d at 550 (test under Article 7 is same as that under federal Equal Protection Clause).

Obviously, these versions of Ludlow are irreconcilable, and only one can be accurate. In case after case, advocates pursuing Article 7 challenges have tried, and failed, to get us to adopt the first version of Ludlow as the basis for a favorable decision. The first version has appeared only in dicta in two isolated cases. Today, seventeen years after the Ludlow decision, the advocates have finally succeeded, with a begrudging acknowledgment from the majority that our decisions "have consistently recited" the federal test and are now wholesale overruled.

In view of this history of treatment of Ludlow, I find incredible the majority's statement that "Vermont case law has consistently demanded in practice that statutory exclusions from publicly-conferred benefits and protections must be `premised on an appropriate and overriding public

interest,'" ante, at 15, quoting Ludlow as if all of our decisions after Ludlow disingenuously mouthed one deferential constitutional standard but silently employed a more activist standard. If one general statement could be made, it would be that we have never actually employed the standard quoted by the majority in any case, until this one.

My fear is that once we get beyond this controversial decision, we will end up with two versions of it. Will we go back to minimalist review when we get a claim of discrimination, for example, between large stores and small ones, or will the more activist review promised by this decision prevail? Our history in applying Ludlow says that we will do the former, which I find to be the more desirable, but a serious blow will have been dealt to our ability to develop neutral constitutional doctrine.

Concurring and Dissenting

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JOHNSON, J., concurring in part and dissenting in part. Forty years ago, in reversing a decision that had denied injunctive relief for the immediate desegregation of publicly owned parks and recreational facilities in Memphis, Tennessee, a unanimous United States Supreme Court stated:

> The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelming compelling reason, they are to be promptly fulfilled.

Watson v. City of Memphis, 373 U.S. 526, 533 (1963).

Plaintiffs come before this Court claiming that the State has unconstitutionally deprived them of the benefits of marriage based solely upon a discriminatory classification that violates their civil rights. They ask the Court to remedy the unlawful discrimination by enjoining the State and its municipalities from denying them the license that serves to identify the persons entitled to those benefits. The majority agrees that the Common Benefits Clause of the Vermont Constitution entitles plaintiffs to obtain the same benefits and protections as those bestowed upon married opposite-sex couples, yet it declines to give them any relief other than an exhortation to the Legislature to deal with the problem. I concur with the majority's holding, but I respectfully dissent from its novel and truncated remedy, which in my view abdicates this Court's constitutional duty to redress violations of constitutional rights. I would grant the requested relief and enjoin defendants from denying plaintiffs a marriage license based solely on the sex of the applicants.

The majority declares that the issue before this Court does not turn on the heated moral debate over intimate same-sex relationships, and further, that this Court has a constitutional responsibility to consider the legal merits of even controversial cases. See ante, at 3. Yet, notwithstanding these pronouncements, the majority elects to send plaintiffs to an uncertain fate

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in the political caldron of that very same moral debate.(FN1) And to what end? Passing this case on to the Legislature will not alleviate the instability and uncertainty that the majority seeks to avoid, and will unnecessarily entangle this Court in the Legislature's efforts to accommodate the majority's mandate within a "reasonable period of time."

Ante, at 41.

In 1948, when the California Supreme Court struck down a state law prohibiting the issuance of a license authorizing interracial marriages, the Court did not suspend its judgment to allow the Legislature an opportunity to enact a separate licensing scheme for interracial marriages. See Perez v. Lippold, 198 P.2d 17, 29 (Cal. 1948) (granting writ of mandamus compelling county clerk to issue certificate of registry). Indeed, such a mandate in that context would be unfathomable to us today. Here, as in Perez, we have held that the State has unconstitutionally discriminated against plaintiffs, thereby depriving them of civil rights to which they are entitled. Like the Hawaii Circuit Court in Baehr v. Miike, No. Civ.91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct., Dec. 3, 1996), which rejected the State's reasons for excluding same-sex couples from marriage, we should simply enjoin the State from denying marriage licenses to plaintiffs based on sex or sexual orientation. That remedy would provide prompt and complete relief to plaintiffs and create reliable expectations that would stabilize the legal rights and duties of all couples.

I.

My dissent from the majority's mandate is grounded on the government's limited interest in dictating public morals outside the scope of its police power, and the differing roles of the judicial and legislative branches in our tripartite system of government. I first examine the

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State's narrow interest in licensing marriages, then contrast that interest with the judiciary's fundamental duty to remedy civil rights violations, and lastly emphasize the majority's failure to adequately explain why it is taking the unusual step of suspending its judgment to allow the Legislature an opportunity to redress the unconstitutional discrimination that we have found.

This case concerns the secular licensing of marriage. The State's interest in licensing marriages is regulatory in nature. See Southview Coop. Housing v. Rent Control Bd., 486 N.E.2d 700, 704 (Mass. 1985) ("Licensing is simply a means of regulating."). The regulatory purpose of the licensing scheme is to create public records for the orderly allocation of benefits, imposition of obligations, and distribution of property through inheritance. Thus, a marriage license merely acts as a trigger for state-conferred benefits. See Priddy v. City of Tulsa, 882 P.2d 81, 83 (Okla. Crim. App. 1993) (license gives to licensee special privilege not accorded to others, which licensee otherwise would not enjoy). In granting a marriage license, the State is not espousing certain morals, lifestyles, or relationships, but only identifying those persons entitled to the benefits of the marital status.(FN2) See People v. County of Mendocino, 683 P.2d

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1150, 1155 (Cal. 1984) (licensing regulates activity based on determination of qualification of licensee).

Apart from establishing restrictions on age and consanguinity related to public health and safety, see 18 V.S.A. § 5142 (minors and incompetent persons); 15 V.S.A. §§ 1, 2 (consanguinity), the statutory scheme at issue here makes no qualitative judgment about which persons may obtain a marriage license. See Leduc v. Commonwealth, 657 N.E.2d 755, 756-57 (Mass. 1995) (historical aim of licensure is generally to preserve public

health, safety and welfare). Hence, the State's interest concerning the challenged licensing statute is a narrow one, and plaintiffs have prevailed on their constitutional claim because the State has failed to raise any legitimate reasons related to public health or safety for denying marital benefits to same-sex couples. See Commonwealth v. Bonadio, 415 A.2d 47, 50 (Pa. 1980) ("With respect to regulation of morals, the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct does not harm others."). In my view, the State's interest in licensing marriages would be undisturbed by this Court enjoining defendants from denying plaintiffs a license.

While the State's interest in licensing marriages is narrow, the judiciary's obligation to remedy constitutional violations is central to our form of government. Indeed, one of the

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fundamental principles of our tripartite system of government is that the judiciary interprets and gives effect to the constitution in cases and controversies concerning individual rights. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163, 177-78 (1803); see also Shields v. Gerhart, 163 Vt. 219, 223, 658 A.2d 924, 927-28 (1995) (emphasizing "the preeminence of the Vermont Constitution in our governmental scheme," which includes right of citizens under Chapter I, Article 4 to find a certain remedy promptly and without delay).(FN3)

This power is "not merely to rule on cases, but to decide them." Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995) (emphasis in original); see Records of the Council of Censors of the State of Vermont 431 (P. Gillies and D. Sanford eds., 1991) (supreme judicial tribunals are to regard constitution as fundamental law superior to legislative enactment; consequently, if enactment is repugnant to constitution, judges are bound to pronounce it inoperative and void). As this Court has stated on numerous occasions, when measures enacted pursuant to the State's police powers have no real or substantial relation to any legitimate purpose of those powers and invade individual "`rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.'" State v. Morse, 84 Vt. 387, 394, 80 A. 189, 191-92 (1911) (quoting Mugler v. Kansas, 123 U.S. 623 (1887));

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see Beecham v. Leahy, 130 Vt. 164, 172, 287 A.2d 836, 841 (1972) ("It is the function of the judicial branch to pass upon the appropriateness and reasonableness of the legislative exercise of police power."). This Court emphasized in Morse that "in its last analysis, the question of the validity of such measures [enacted under the police powers] is one for the court." 84 Vt. at 394, 80 A. at 191.

The power of courts to fashion remedies for constitutional violations is well established in both this Court's and the United States Supreme Court's jurisprudence concerning individual rights and equal protection. See MacCallum v. Seymour's Adm'r, 165 Vt. 452, 462, 686 A.2d 935, 941 (1996) (holding that statute denying adopted children right to inherit from collateral heirs violated Common Benefits Clause, and declaring plaintiff to be lawful heir of estate of collateral relative); Medical Ctr. Hosp. v. Lorrain, 165 Vt. 12, 14-15, 675 A.2d 1326, 1329 (1996) (determining that doctrine making husbands liable to creditors for necessary items provided to wives violated principle of equal protection when applied only to men, and choosing to abolish doctrine rather than to extend it to both men and women); see also Heckler v. Mathews, 465 U.S. 728, 740 (1984) (when right

invoked is that to equal treatment, "the appropriate remedy is a mandate of equal treatment"); Davis v. Passman, 442 U.S. 228, 241-42 (1979) (within "great outlines" of Constitution, "judiciary is clearly discernible as the primary means through which rights may be enforced"; unless Constitution commits issue to coordinate branch, "we presume that justiciable constitutional rights are to be enforced through the courts"). Particularly in civil rights cases involving discrimination against a disfavored group, "courts do not need specific [legislative] authorization to employ a remedy, at law or in equity, that is tailored to correct a constitutional wrong." Aguayo v. Christopher, 865 F. Supp. 479, 487-88 (N.D.Ill. 1994) (finding unconstitutional on its face statute making citizenship available to

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foreign-born children of citizen fathers, but not citizen mothers, and issuing judgment declaring plaintiff to be citizen).

Accordingly, absent "compelling" reasons that dictate otherwise, it is not only the prerogative but the duty of courts to provide prompt relief for violations of individual civil rights. See Watson, 373 U.S. at 532-33 (defendants have heavy burden of showing that delay in desegregating public parks and recreational facilities is "manifestly compelled by constitutionally cognizable circumstances"). This basic principle is designed to assure that laws enacted through the will of the majority do not unconstitutionally infringe upon the rights of a disfavored minority.

There may be situations, of course, when legislative action is required before a court-ordered remedy can be fulfilled. For example, in Brigham v. State, 166 Vt. 246, 249, 269, 692 A.2d 384, 386, 398 (1997), this Court declared that Vermont's system for funding public education unconstitutionally deprived Vermont schoolchildren of a right to an equal educational opportunity, and then retained jurisdiction until the Legislature enacted legislation that satisfied the Court's holding. Plainly, it was not within the province of this Court to create a new funding system to replace the one that we had declared unconstitutional. The Legislature needed to enact legislation that addressed issues such as the level of state funding for public schools, the sources of additional revenue, and the framework for distributing state funds. See Act 60, 16 V.S.A. §§ 4000-4029. In finding a funding source, the Legislature had to consider whether to apply a flat or progressive tax on persons, property, entities, activities or income. These considerations, in turn, required the Legislature to consider what state programs would have to be curtailed to make up for the projected additional school funding. All of these complex political decisions entailed core legislative functions that were a necessary predicate to fulfillment

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of our holding. See Brigham, 166 Vt. at 249, 692 A.2d at 386 (devising system for funding public education lies within prerogative of Legislature).

A completely different situation exists here. We have held that the Vermont Constitution entitles plaintiffs "to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples." Ante, at 39. Given this holding, the most straightforward and effective remedy is simply to enjoin the State from denying plaintiffs a marriage license, which would designate them as persons entitled to those benefits and protections.(FN4) No legislation is required to redress the constitutional violation that the Court has found. Cf. Watson, 373 U.S. at 532 (desegregation of recreational facilities does not present same kind of cognizable difficulties inherent in desegregating schools). Nor does

our paramount interest in vindicating plaintiffs' constitutional rights interfere in any way with the State's interest in licensing marriages. Far from intruding upon the State's narrow interest in its licensing statute, allowing plaintiffs to obtain a license would further the overall goals of marriage, as defined by the majority -- to provide stability to individuals, their families, and the broader community by clarifying and protecting the rights of married persons, see ante, at 35. Cf. In re B.L.V.B., 160 Vt. 368, 372, 375, 628 A.2d 1271, 1274-75 (1993) (purpose of adoption statute read in its entirety is to clarify and protect legal rights of adopted persons, not to proscribe adoptions by certain combinations of individuals; denying children of same-sex partners security of legally recognized relationship with second parent serves no legitimate state interest).

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The majority declines to provide plaintiffs with a marriage license, however, because a sudden change in the marriage laws "may have disruptive and unforeseen consequences," and "uncertainty and confusion could result." Ante, at 40. Thus, within a few pages of rejecting the State's doomsday speculations as a basis for upholding the unconstitutionally discriminatory classification, the majority relies upon those same speculations to deny plaintiffs the relief to which they are entitled as the result of the discrimination. See ante, at 37, 39.

During the civil rights movement of the 1960's, state and local governments defended segregation or gradual desegregation on the grounds that mixing the races would lead to interracial disturbances. The Supreme Court's "compelling answer" to that contention was "that constitutional rights may not be denied simply because of hostility to their assertion or exercise." See Watson, 373 U.S. at 535. Here, too, we should not relinquish our duty to redress the unconstitutional discrimination that we have found merely because of "personal speculations" or "vague disquietudes." Id. at 536. While the laudatory goals of preserving institutional credibility and public confidence in our government may require elected bodies to wait for changing attitudes concerning public morals, those same goals require courts to act independently and decisively to protect civil rights guaranteed by our Constitution.(FN5)

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None of the cases cited by the majority support its mandate suspending the Court's judgment to allow the Legislature to provide a remedy. In Linkletter v. Walker, 381 U.S. 618, 622 (1965), the issue was whether the decision in Mapp v. Ohio, 367 U.S. 643 (1961) extending the exclusionary rule (FN6) to the states through the federal due process clause applied to all state court convictions that had become final before Mapp. The Court declined to apply Mapp retroactively, stating that both defendants and the states had relied upon the decision that Mapp had overruled, that the fairness of the underlying trials had not been placed at issue, and that applying Mapp retroactively would severely tax the administration of justice in state courts. See Linkletter, 381 U.S. at 637-39. After noting that it was not concerned with "pure" prospectivity because the exclusionary rule had been applied in Mapp itself, the Court held that new rules may be applied prospectively "where the exigencies of the situation require such an application." See id. at 622, 628.

Unlike Linkletter, the issue here is not whether the majority's holding should be applied retroactively or prospectively, but rather whether the relief it has promised should be provided

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promptly by this Court or at some uncertain future time by the Legislature. Neither these plaintiffs, nor any same-sex couples seeking the benefits and protections of marriage, obtain any relief until the Legislature acts, or failing that, this Court acts again. Thus, the majority is not applying its holding on even a purely prospective basis. In any event, assuming that Linkletter continues to have vitality in cases involving civil rights violations, see Fairfax Covenant Church v. Fairfax County Sch. Bd., 17 F.3d 703, 709, 710 (4th Cir. 1994) (stating that Supreme Court has recently cast serious doubt upon practice of departing from traditional rule of retroactive application, which is "the rule inherent in the judicial function" of applying and interpreting law in real controversies), the "unforeseen consequences" alluded to by the majority cannot be considered "exigencies" warranting relief only at some unspecified future time.

The other two cases cited by the majority also concern whether court rulings should be applied prospectively or retroactively. In those cases, the courts weighed the potential consequences of a decision to abrogate common-law sovereign immunity -- the doctrine declaring that the government is immune from lawsuits. See Smith v. State, 473 P.2d 937, 950 (Idaho 1970) (applying decision to abrogate doctrine of sovereign immunity to cases before court but otherwise staying decision until adjournment of following legislative session to prevent undue hardship to government agencies that relied on doctrine); Spanel v. Mounds View Sch. Dist. No. 621, 118 N.W.2d 795, 803-04 (Minn. 1962) (staying decision to abrogate sovereign immunity until following legislative session to prevent hardship to government agencies that relied on doctrine); cf. Presley v. Miss. State Highway Comm'n, 608 So. 2d 1288, 1298 (Miss. 1992) (giving retroactive application to decision finding sovereign immunity act unconstitutional would pose fiscally disastrous consequences to state agencies). These courts simply acknowledged that retroactively applying their holding abrogating sovereign immunity, without affording the

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Legislature an opportunity either to alter insurance coverage or enact an immunity statute, would have potentially disastrous fiscal consequences for the state. See Hillerby v. Town of Colchester, 167 Vt. 270, 293, 706 A.2d 446, 459 (1997) (Johnson, J., dissenting) (favoring quasi-prospective approach that would afford Legislature time to react to holding abrogating general municipal immunity). That is not the situation here, where no disastrous consequences, fiscal or otherwise, have been identified.

I recognize that the Legislature is, and has been, free to pass legislation that would provide same-sex couples with marital benefits. But the majority does not explain why it is necessary for the Legislature to act before we remedy the constitutional violation that we have found. In our system of government, civil rights violations are remedied by courts, not because we issue "Holy Writ" or because we are "the only repository of wisdom." Ante, at 43-44. It is because the courts "must ultimately define and defend individual rights against government in terms independent of consensus or majority will." L. Tribe, American Constitutional Law § 15.3, at 896 (1978).(FN7)

"`[G]roups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time.'" Rosenberg v. Canada, Docket No. C22807 (Ontario Court of Appeals, April 23, 1998, at 17-18 (quoting Vriend v. Alberta, [1988] S.C.J. No. 29 (Q.L.), at para. 122). Once a court has determined that a discriminatory classification has deprived

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plaintiffs of a constitutionally ripe entitlement, the court must decide if the classification "is demonstrably justifiable in a free and democratic society, not whether there might be a more propitious time to remedy it." Id. at 18.

Today's decision, which is little more than a declaration of rights, abdicates that responsibility. The majority declares that plaintiffs have been unconstitutionally deprived of the benefits of marriage, but does not hold that the marriage laws are unconstitutional, does not hold that plaintiffs are entitled to the license that triggers those benefits, and does not provide plaintiffs with any other specific or direct remedy for the constitutional violation that the Court has found to exist. By suspending its judgment and allowing the Legislature to choose a remedy, the majority, in effect, issues an advisory opinion that leaves plaintiffs without redress and sends the matter to an uncertain fate in the Legislature. Cf. In re Williams, 154 Vt. 318, 318-19, 321, 577 A.2d 686, 686-87 (1990) (statute requiring district court to hold hearings, issue findings, and advise local legislative bodies concerning alleged police misconduct violated separation of powers between judicial and legislative branches by requiring courts to give advisory opinions, upon which municipalities might or might not act). Ironically, today's mandate will only increase "the uncertainty and confusion" that the majority states it is designed to avoid. Ante, at 40.

No decision of this Court will abate the moral and political debate over same-sex marriage. My view as to the appropriateness of granting plaintiffs the license they seek is not based on any overestimate (or any estimate) of its effectiveness, nor on a miscalculation (or any calculation) as to its likely permanence, were it to have received the support of a majority of this Court. Rather, it is based on what I believe are the commands of our Constitution.

II.

Although I concur with the majority's conclusion that Vermont law unconstitutionally excludes same-sex couples from the benefits of marriage, I write separately to state my belief that this is a straightforward case of sex discrimination.

As I argue below, the marriage statutes establish a classification based on sex. Whether such classification is legally justifiable should be analyzed under our common-benefits jurisprudence, which until today, has been closely akin to the federal equal-protection analysis under the Fourteenth Amendment. Therefore, the State must show that the classification is narrowly tailored to further important, if not compelling, interests. Not only do the rationalizations advanced by the State fail to pass constitutional muster under this or any other form of heightened scrutiny,(FN8) they fail to satisfy the rational-basis test as articulated under the Common Benefits Clause.(FN9)

"We have held that the Common Benefits Clause in the Vermont Constitution, see ch. I, art. 7, is generally coextensive with the equivalent guarantee in the United States Constitution,

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and imports similar methods of analysis." Brigham, 166 Vt. at 265, 692 A.2d at 395; see also Lorrain, 160 Vt. at 212, 628 A.2d at 550 (test under Common Benefits Clause is same as test under federal Equal Protection Clause). Where the statutory scheme affects a fundamental constitutional right or involves a suspect classification, "the State must demonstrate that any discrimination occasioned by the law serves a compelling governmental interest, and is narrowly tailored to serve that objective."

Brigham, 166 Vt. at 265, 692 A.2d at 396. Otherwise, classifications are constitutional if they are "reasonably related to the promotion of a valid public purpose." MacCallum, 165 Vt. at 457, 686 A.2d at 937-38.

As the majority states, the marriage "statutes, read as a whole, reflect the common understanding that marriage under Vermont law consists of a union between a man and a woman." Ante, at 6. Thus, the statutes impose a sex-based classification. See, e.g., Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, *6, 1998 WL 88743 (Alaska Super. Feb. 27, 1998) (prohibition on same-sex marriage is sex-based classification); Baehr v. Lewin, 852 P.2d 44, 64 (Haw. 1993) (Levinson, J., plurality opinion) (same). A woman is denied the right to marry another woman because her would-be partner is a woman, not because one or both are lesbians. Similarly, a man is denied the right to marry another man because his would-be partner is a man, not because one or both are gay. Thus, an individual's right to marry a person of the same sex is prohibited solely on the basis of sex, not on the basis of sexual orientation. Indeed, sexual orientation does not appear as a qualification for marriage under the marriage statutes. The State makes no inquiry into the sexual practices or identities of a couple seeking a license.

The State advances two arguments in support of its position that Vermont's marriage laws do not establish a sex-based classification. The State first contends that the marriage statutes

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merely acknowledge that marriage, by its very nature, cannot be comprised of two persons of the same sex. Thus, in the State's view, it is the definition of marriage, not the statutes, that restricts marriage to two people of the opposite sex. This argument is circular. It is the State that defines civil marriage under its statute. The issue before us today is whether the State may continue to deprive same-sex couples of the benefits of marriage. This question is not resolved by resorting to a historical definition of marriage; it is that very definition that is being challenged in this case.

The State's second argument, also propounded by the majority, see ante, at 27 n.13, is that the marriage statutes do not discriminate on the basis of sex because they treat similarly situated males the same as similarly situated females. Under this argument, there can be no sex discrimination here because "[i]f a man wants to marry a man, he is barred; a woman seeking to marry a woman is barred in precisely the same way. For this reason, women and men are not treated differently." C. Sunstein, Homosexuality and the Constitution, 70 Ind. L.J. 1, 19 (1994). But consider the following example. Dr. A and Dr. B both want to marry Ms. C, an X-ray technician. Dr. A may do so because Dr. A is a man. Dr. B may not because Dr. B is a woman. Dr. A and Dr. B are people of opposite sexes who are similarly situated in the sense that they both want to marry a person of their choice. The statute disqualifies Dr. B from marriage solely on the basis of her sex and treats her differently from Dr. A, a man. This is sex discrimination.(FN10)

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I recognize, of course, that although the classification here is sex-based on its face, its most direct impact is on lesbians and gay men, the class of individuals most likely to seek same-sex marriage. Viewing the discrimination as sex-based, however, is important. Although the original purpose of the marriage statutes was not to exclude same-sex couples, for the simple reason that same-sex marriage was very likely not

on the minds of the Legislature when it passed the licensing statute, the preservation of the sex-based classification deprives lesbians and gay men of the right to marry the life partner of their choice. If, as I argue below, the sex-based classification contained in the marriage laws is unrelated to any valid purpose, but rather is a vestige of sex-role stereotyping that applies to both men and women, the classification is still unlawful sex discrimination even if it applies equally to men and women. See McCallum, 165 Vt. at 459, 686 A.2d at 939 (Constitution does not permit law to give effect, either directly or indirectly, to private biases; when government itself makes the classification, it is obliged to afford all persons equal protection of the law); Loving v. Virginia, 388 U.S. 1, 8-9, 11 (1967) (statute prohibiting racial intermarriage violates Equal Protection Clause although it applies equally to Whites and Blacks because classification was designed to maintain White Supremacy.)(FN11)

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Although Vermont has not had occasion to consider the question, most, if not all, courts have held that the denial of rights or benefits on the basis of sex subject the state's action to some level of heightened scrutiny.(FN12) This is so because the sex of an individual "frequently bears no relation to ability to perform or contribute to society." Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion). Moreover, in some cases, such as here, sex-based classifications "very likely reflect outmoded notions of the relative capabilities of men and women." Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985).

I do not believe that it is necessary to reach the question in this case, however, because in my view, the justifications asserted by the State do not satisfy even our rational-basis standard under the Common Benefits Clause, which requires that the classification be "reasonably related to the promotion of a valid public purpose." MacCallum, 165 Vt. at 457 n.1, 686 A.2d at 938 n.1 (because statute failed to pass constitutional muster under rational-basis test, no need to determine whether adopted persons are suspect class).(FN13) In MacCallum, we invalidated, under

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[continues text of FN13 (see "Footnotes" below)]

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the Common Benefits Clause, a statute denying an adopted person's right of inheritance from collateral kin, stating that the statute was grounded on outdated prejudices instead of a valid public purpose. See id. at 460-62, 686 A.2d at 939-41. Rather than blindly accept any conceivable justification proffered by the State in that case, we carefully considered the State's rationales to determine whether the discriminatory classification rested upon a reasonable consideration of legislative policy. See id. at 457, 459-61, 696 A.2d at 938, 939-40; see also Romer v. Evans, 517 U.S. 620, 635-36 (state constitutional amendment prohibiting all legislative, executive, or judicial action designed to protect homosexuals from discrimination violated Equal Protection Clause under rational-basis test because it was discriminatory and had no proper legislative end); Cleburne, 473 U.S. at 450 (ordinance requiring special use permit for operation of home for mentally retarded violated Equal Protection Clause under rational basis test because it rested on irrational prejudice rather than legitimate government purpose).

Before applying the rational-basis standard to the State's justifications, it is helpful to examine the history of the marriage laws in Vermont. There is no doubt that, historically, the marriage laws

imposed sex-based roles for the partners to a marriage -- male provider and female dependent -- that bore no relation to their inherent abilities to contribute to society. Under the common law, husband and wife were one person. See R. & E. Builders, Inc. v. Chandler, 144 Vt. 302, 303-04, 476 A.2d 540, 541 (1984). The legal existence of a woman

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was suspended by marriage; she merged with her husband and held no separate rights to enter into a contract or execute a deed. See id. She could not sue without her husband's consent or be sued without joining her husband as a defendant. See id. Moreover, if a woman did not hold property for her `sole and separate use' prior to marriage, the husband received a freehold interest in all her property, entitling him to all the rents and profits from the property. See id.

Starting in the late nineteenth century, Vermont, like other states, began to enact statutes, such as the Rights of Married Women Act, see 15 V.S.A. §§ 61-69, to grant married women property and contractual rights independent of their husbands. See Medical Ctr. Hosp. v. Lorrain, 165 Vt. 12, 14, 675 A.2d 1326, 1328 (1996). The Legislature's intent in enacting the Rights of Married Women Act was to "reject[] the archaic principle that husband and wife are `one person,'" and "to set a married woman free `from the thraldom of the common law.'" Richard v. Richard, 131 Vt. 98, 102, 106, 300 A.2d 637, 639, 641 (1973). Thus, we recognized that the legal existence of married women was no longer merged into that of their husbands, see Lorrain, 165 Vt. at 15, 676 A.2d at 1329, and that "a married woman is a `person' under the Constitution of Vermont." Richard, 131 Vt. at 106, 300 A.2d at 641.

Today, the partners to a marriage are equal before the law. See R & E Builders, 144 Vt. at 304, 476 A.2d at 541 (modern statutes attempt to accord wives legal rights equal to husbands). A married woman may now enter contracts, sue and be sued without joining her husband, purchase and convey property separate from her husband, own property, and collect rents and profits from it. See Lorrain, 165 Vt. at 15, 675 A.2d at 1329 (women have property and contractual rights equal to men regardless of their marital status). As the Legislature enacted statutes to confer rights upon married women, this Court abolished common-law doctrines arising from the common law theory that husband and wife were one person and that

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the wife had no independent legal existence. See, e.g., Richard, 131 Vt. at 106, 300 A.2d at 641 (abolishing interspousal immunity, which was based on "archaic principle" that husband and wife are one person, to allow passenger wife to sue husband for personal injuries arising from husband's negligence in operating automobile).

The question now is whether the sex-based classification in the marriage law is simply a vestige of the common-law unequal marriage relationship or whether there is some valid governmental purpose for the classification today. See MacCallum, 165 Vt. at 460-62, 686 A.2d at 939-41 (State's rationales proffered to validate statutory classification cannot rest on outdated presumptions not reasonable today when vast cultural and social changes have occurred). In support of the marriage statutes, the State advances public purposes that fall into three general categories.

In the first category, the State asserts public purposes -- uniting men and women to celebrate the "complementarity" (sic) of the sexes and providing male and female role models for children -- based on broad and vague generalizations about the roles of men and women that reflect

outdated sex-role stereotyping. The State contends that (1) marriage unites the rich physical and psychological differences between the sexes; (2) sex differences strengthen and stabilize a marriage; (3) each sex contributes differently to a family unit and to society; and (4) uniting the different male and female qualities and contributions in the same institution instructs the young of the value of such a union. The State relies on social science literature, such as Carol Gilligan's In a Different Voice: Psychological Theory and Women's Development (1982), to support its contention that there are sex differences that justify the State requiring two people to be of opposite sex to marry.

The State attempts to analogize this case to the changes in law brought about by women's

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participation in the legal profession starting in the 1970s, arguing that women have brought a different voice to legal theory and practice. The State also points to United States v. Virginia, 518 U.S. 515, 533 (1996) (hereinafter VMI), arguing that an institution or community made up exclusively of one sex is different from a community composed of both. The goal of diversity has been recognized to justify affirmative action programs in public broadcasting and education. See, e.g., Metro v. Broadcasting, Inc. FCC, 497 U.S. 547, 567-68 (1990) (holding that state interest in racial diversity in broadcasting justified affirmative-action racial classification); Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 311-319 (1978) (opinion of Powell, J.) (endorsing race classification in university admission as legitimate means of achieving diversity). Similarly, the recognition that women may contribute differently from men is a valid argument for women's full participation in all aspects of public life. The goal of community diversity has no place, however, as a requirement of marriage.

To begin with, carried to its logical conclusion, the State's rationale could require all marriages to be between people, not just of the opposite sex, but of different races, religions, national origins, and so forth, to promote diversity. Moreover, while it may be true that the female voice or point of view is sometimes different from the male, such differences are not necessarily found in comparing any given man and any given woman. The State's implicit assertion otherwise is sex stereotyping of the most retrograde sort. Nor could the State show that the undoubted differences between any given man and woman who wish to marry are more related to their sex than to other characteristics and life experiences. In short, the "diversity" argument is based on illogical conclusions from stereotypical imaginings that would be condemned by the very case cited for its support. See VMI, 518 U.S. at 533 (justifications for sex-based classifications "must not rely on overbroad generalizations about different talents,

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capabilities, or preferences of males and females.").

In the second category, the State asserts, under several different guises, the public purpose of maintaining the sex-based classification. First, the State claims an interest in "preserving the existing marital structure." Second, the State claims an interest in "instructing the young of the value of uniting male and female qualities." This is mere tautology. The State's objective is to preserve the status quo, but that does not address the question of whether the classification can be justified. Perpetuating the classification, in and of itself, is not a valid purpose for the classification. See id. at 545 (rejecting as circular governmental justification that sex-based classification is

essential to governmental objective of single-sex education).

Many of the State's remaining justifications, which I place into a third category, assume highly questionable public purposes. But because none of these justifications are even remotely, much less reasonably, related to the challenged classification, I accept, for the sake of argument, the premise that each of them concerns a legitimate state interest.

The State contends, for example, that prohibiting individuals from marrying a person of the same sex promotes the public purpose of minimizing custody and visitation disputes arising from surrogacy contracts because the prohibition may deter use of technologically assisted reproduction by same-sex couples. Further, the State argues that increased use of technologically assisted reproduction "may lead men who conceive children by sexual union to perceive themselves as sperm donors, without any responsibility for their offspring." Both of these reasons suffer from the same constitutional deficiency. If the state purpose is to discourage technologically assisted reproduction, I agree with the majority that the classification is significantly underinclusive. The State does nothing to discourage technologically assisted reproduction by individuals or opposite-sex couples. Moreover, opposite-sex couples may obtain

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marriage licenses without regard to whether or not they will use technologically assisted reproduction.(FN14) The public purpose provides no rationale for the different treatment.

The State also asserts that it has an interest in furthering the link between procreation and child rearing "to ensure that couples who engage in sexual intercourse accept[] responsibility for the potential children they might create." But the State cannot explain how the failure of opposite-sex couples to accept responsibility for the children they create relates at all to the exclusion of same-sex couples from the benefits of marriage. To the extent that couples, same-sex or opposite-sex, will fail to take responsibility for the children they create, the risk is greater where the couples are not married. Therefore, denying same-sex couples the benefits of marriage on this ground is not only arbitrary but completely at odds with the stated government purpose.

The State further contends that prohibiting individuals from marrying same-sex partners will deter marriages of convenience entered into solely to obtain tax benefits or government assistance. Two persons of the opposite sex are completely free to enter into a marriage of convenience, however, without the State examining their motives. Indeed, the pool of opposite-sex couples who may choose to enter into such marriages is much greater than the pool of same-sex couples. Once again, the public purpose provides no rationale for treating individuals who choose same-sex partners differently from those who choose opposite-sex partners.

Although "[a] statute need not regulate the whole of a field to pass constitutional muster,"

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Benning v. State, 161 Vt. 472, 486, 641 A.2d 757, 764 (1994), there still must be some rational basis for an underinclusive classification. Here, none of the alleged governmental purposes within the third category of State justifications provides a rational basis for treating similarly situated people differently, or for applying the classification in an underinclusive manner. See Cleburne, 473 U.S. at 446 (State may not

impose classification where relationship to asserted goal is so attenuated as to render distinction arbitrary or irrational). The State's justifications are nothing more than post-hoc rationalizations completely unrelated to any rational reason for excluding same-sex couples from obtaining the benefits of marriage.

Finally, the State claims a valid public purpose in adopting a classification to align itself with the other states. The Vermont Constitution is freestanding authority, however, and may protect rights not protected under the federal constitution or other state constitutions. Brigham, 166 Vt. at 257, 268, 692 A.2d at 391, 397 (recognizing right to equal education under Vermont Constitution, while acknowledging that this right is not recognized under federal constitution and is recognized under only some state constitutions). This Court does not limit the protections the Vermont Constitution confers on Vermonters solely to make Vermont law consistent with that of other states. See id. at 257, 692 A.2d at 391 (decisions in other states are of limited precedential value because each state's constitutional evolution is unique). Indeed, as the majority notes, Vermont's marriage laws are already distinct in several ways from the laws of other states.

In sum, the State treats similarly situated people -- those who wish to marry -- differently, on the basis of the sex of the person they wish to marry. The State provides no legally valid rationale for the different treatment. The justifications asserted by the State for the classification are tautological, wholly arbitrary, or based on impermissible assumptions about

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the roles of men and women. None of the State's justifications meets the rational-basis test under the Common Benefits Clause. Finding no legally valid justification for the sex-based classification, I conclude that the classification is a vestige of the historical unequal marriage relationship that more recent legislative enactments and our own jurisprudence have unequivocally rejected. The protections conferred on Vermonters by the Common Benefits Clause cannot be restricted by the outmoded conception that marriage requires one man and one woman, creating one person -- the husband. As this Court recently stated, "equal protection of the laws cannot be limited by eighteenth-century standards." See Brigham, 166 Vt. at 267, 692 A.2d at 396.

III.

This case is undoubtedly one of the most controversial ever to come before this Court. Newspaper, radio and television media have disclosed widespread public interest in its outcome, as well as the full spectrum of opinion as to what that outcome should be and what its ramifications may be for our society as a whole. One line of opinion contends that this is an issue that ought to be decided only by the most broadly democratic of our governmental institutions, the Legislature, and that the small group of men and women comprising this Court has no business deciding an issue of such enormous moment. For better or for worse, however, this is simply not so. This case came before us because citizens of the state invoked their constitutional right to seek redress through the judicial process of a perceived deprivation under state law. The Vermont Constitution does not permit the courts to decline to adjudicate a matter because its subject is controversial, or because the outcome may be deeply offensive to the strongly held beliefs of many of our citizens. We do not have, as does the Supreme Court of the United States, certiorari jurisdiction, which allows that Court, in its sole discretion, to

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decline to hear almost any case. To the contrary, if a case has been brought before us, and if the established procedures have been followed, as they were here, we must hear and decide it.

Moreover, we must decide the case on legal grounds. However much history, sociology, religious belief, personal experience or other considerations may inform our individual or collective deliberations, we must decide this case, and all cases, on the basis of our understanding of the law, and the law alone. This must be the true and constant effort of every member of the judiciary. That effort, needless to say, is not a guarantee of infallibility, nor even an assurance of wisdom. It is, however, the fulfillment of our pledge of office.

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Associate Justice

Footnotes

FN1. In the 1999 legislative session, while the instant case was pending before this Court, fifty-seven representatives signed H. 479, which sought to amend the marriage statutes by providing that a man shall not marry another man, and a woman shall not marry another woman.

FN2. Although the State's licensing procedures do not signal official approval or recognition of any particular lifestyles or relationships, commentators have noted that denying same-sex couples a marriage license is viewed by many as indicating that same-sex relationships are not entitled to the same status as opposite-sex relationships. See, e.g., C. Christensen, If Not Marriage? On Securing Gay and Lesbian Family Values by a "Similacrum of Marriage", 66 Fordham L. Rev. 1699, 1783-84 (1998) (most far reaching consequence of legalizing same-sex marriage would be symbolic shedding of sexual outlaw image and civil recognition of shared humanity); D. Chambers, What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples, 95 Mich. L. Rev. 447, 450 (1996) (allowing same-sex couples to marry would signify acknowledgement of same-sex couples as equal citizens). This Court has recognized that singling out a particular group for special treatment may have a stigmatizing effect more significant than any economic consequences. See MacCallum v. Seymour's Administrator, 165 Vt. 452, 460, 686 A.2d 935, 939 (1996) (noting that symbolic and psychological damage resulting from unconstitutional classification depriving adopted children of right to inherit from collateral kin may be more significant than any concern over material values). The United States Supreme Court has also recognized this phenomenon. See Romer v. Evans, 517 U.S. 620, 634 (1996) (laws singling out gays and lesbians for special treatment "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected"); Heckler v. Matthews, 465 U.S. 728, 739-40 (1984) (stigmatizing members of disfavored group as less worthy participants in community "can cause serious noneconomic injuries . . . solely because of their membership in a disfavored group"). Because enjoining defendants from denying plaintiffs a marriage license is the most effective and complete way to remedy the constitutional violation we have found, it is not necessary to reach the issue of whether depriving plaintiffs of the "status" of being able to obtain the same state-conferred marriage license provided to opposite-sex couples violates their civil rights.

FN3. Unlike the Vermont Constitution, see Vt. Const. ch. II, § 5

("The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercises the powers properly belonging to the others."), the United States Constitution does not contain an explicit separation-of-powers provision; however, the United States Supreme Court has derived a separation-of-powers requirement from the federal constitution's statement of the powers of each of the branches of government. See, e.g., Bowsher v. Synar, 478 U.S. 714, 721-22 (1986). Because we have relied upon federal separation-of-powers jurisprudence in interpreting Chapter II, Section 5, see Trybulski v. Bellows Falls Hydro-Elec. Corp., 112 Vt. 1, 7, 20 A.2d 117, 120 (1941), I draw upon federal case law for analysis and support in discussing separation-of-powers principles. See In re D.L., 164 Vt. 223, 228 n.3, 669 A.2d 1172, 1176 n.3 (1995); see also In re Constitutionality of House Bill 88, 115 Vt. 524, 529, 64 A.2d 169, 172 (1949) (noting that judicial power of Vermont Supreme Court and United States Supreme Court is same).

FN4. I do not misinterpret the majority's holding. See ante, at 41. I am aware that the Legislature is not obligated to give plaintiffs a marriage license, or any other remedy for that matter. It is this Court, not the Legislature, that has the duty to remedy the constitutional violation we have found. We are left to speculate why the majority is not enjoining defendants from denying plaintiffs the regulatory license that they seek and that would entitle them to the same benefits and protections to which they are entitled under the majority's holding.

FN5. The majority states that my analogy to the circumstances in Watson is "flawed" because (1) we are not confronting the evil of institutionalized racism; and (2) our ruling today is "decidedly new doctrine." Ante, at 42. The majority's first point implies that our duty to remedy unconstitutional discrimination is somehow limited when that discrimination is based on sex or sexual orientation rather than race. I would not prioritize among types of civil rights violations; our duty to remedy them is the same, once a constitutional violation is found.

Regarding the second point, the Court in Watson enunciated "the usual principle that any deprivation of constitutional rights calls for prompt rectification," stating further that the unavoidable delay in implementing the desegregation of schools ordered in Brown v. Board of Educ., 347 U.S. 483 (1954) was "a narrowly drawn, and carefully limited, qualification upon usual precepts of constitutional adjudication and is not to be unnecessarily expanded in application." 373 U.S. at 532-33. The majority has not explained why it is diverging from that basic principle in this case. Further, as both the majority and concurrence acknowledge, see ante, at 36-38; ante, at 6 (Dooley, J., concurring), allowing same-sex couples to obtain the benefits and protections of marriage is a logical extension of Vermont's legislatively enacted public policy prohibiting discrimination on the basis of sex and sexual orientation, see 1991, No. 135 (Adj. Sess.), decriminalizing consensual homosexual conduct between adults, see 1977, No. 51, § 22, and permitting same-sex partners to adopt children, see 15A V.S.A. § 1-102(b) (codifying holding in B.L.V.B., 160 Vt. at 369, 628 A.2d at 1272, which allowed same-sex partner of natural parent to adopt parent's child without terminating parent's rights); 15A V.S.A. § 1-112 (giving family court jurisdiction to adjudicate issues pertaining to parental rights and responsibilities and child support with respect to adopted children of domestic partners). Yet, the majority suggests that there is "wisdom" in delaying relief for plaintiffs until the Legislature has had a chance to act, ante, at 43, much as the City of Memphis urged the "wisdom of proceeding slowly and gradually in its desegregation efforts." Watson, 373 U.S. at 528.

FN6. This rule requires the exclusion of evidence obtained as the result of unconstitutional searches and seizures.

FN7. Judicial authority is not, however, the ultimate source of constitutional authority. Within our constitutional framework, the people are the final arbiters of what law governs us; they retain the power to amend our fundamental law. If the people of Vermont wish to overturn a constitutionally based decision, as happened in Alaska and Hawaii, they may do so. The possibility that they may do so, however, should not, in my view, deprive these plaintiffs of the remedy to which they are entitled.

FN8. The majority misconstrues my opinion. See ante, at 27 n.13. I do not reach the issue of whether heightened scrutiny is appropriate for sex-based classifications under the Common Benefits Clause. See Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (courts should not formulate rules of constitutional law broader than is required by precise facts to which they are to be applied). I mention federal law and that of other states merely to acknowledge the approach of other jurisdictions on an issue that we have not yet decided. I analyze the sex-based classification under our current test for rational-basis review.

FN9. In its brief, the State notes that if the Court declares that heightened scrutiny is applicable, it might offer additional arguments and justifications to demonstrate a compelling State interest in the marriage statutes. Obviously, in its extensive filings both in the trial court and here, which included a one-hundred-page appellate brief, the State made every conceivable argument in support of the marriage laws, including what it perceived to be its best arguments. For the reasons stated by the majority, see ante, at 4 n.1, 37 n.14, I agree that it would be pointless to remand this matter for further proceedings in the trial court.

FN10. Under the State's analysis, a statute that required courts to give custody of male children to fathers and female children to mothers would not be sex discrimination. Although such a law would not treat men and women differently, I believe it would discriminate on the basis of sex. Apparently, the Legislature agrees. By prohibiting consideration of the sex of the child or parent in custody decisions, see 15 V.S.A. § 665(c), the Legislature undoubtedly intended to prohibit sex discrimination, even if the rules applied equally to men and women. See Harris v. Harris, 162 Vt. 174, 182, 647 A.2d 309, 314 (1994) (stating the family court's custody decision would have to be reversed if it had been based on preference that child remain with his father because of his gender).

FN11. I do not contend, as the majority suggests, that the real purpose of the exclusion of same-sex partners from the marriage laws was to maintain certain male and female stereotypes. See ante, at 28 n.13. As noted above, I agree that the original purpose was very likely not intentionally discriminatory toward same-sex couples. The question is whether the State may maintain a classification today only by giving credence to generally discredited sex-role stereotyping. I believe our decision in MacCallum says no. See Sunstein, supra, at 23, 27 (exclusion of same-sex couples from marriage is, in reality, impermissible sex-role stereotyping, and therefore, is discrimination on basis of sex); J. Culhane, Uprooting the Arguments Against Same-Sex Marriage, 20 Cardozo L.Rev. 1119, 1171-75 (1999) (accord).

FN12. See, e.g., United States v. Virginia, 518 U.S. 515, 533 (1996) (concluding that sex-based classifications are subject to heightened standard of review less rigorous than that imposed for race or national origin classifications); Frontiero v. Richardson, 411 U.S. 677, 684, 686 (1973) (plurality opinion) (concluding that sex is suspect classification under two-part test inquiring whether class is defined by immutable characteristic and whether there is history of invidious discrimination against class); Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 540 (Cal. 1971)

(applying federal two-part test and concluding that sex is immutable trait and women have historically labored under severe legal and social disabilities); Hewitt v. State Accident Ins. Fund Corp., 653 P.2d 970, 977 (Or. 1982) (applying federal two-part test and concluding that sex is immutable personal characteristic and purposeful unequal treatment of women is well known).

FN13. The question remains why I feel it is necessary to identify the class of persons being discriminated against in this case if the majority and I reach the same conclusion. It is important because I have concerns about the test that the majority devises to review equal-protection challenges under the Common Benefits Clause. The majority rejects the notion that the Court should accord some measure of heightened scrutiny for classifications denying benefits to historically disadvantaged groups. It argues that the history of the Common Benefits Clause supports the Court's adoption of a uniform standard that is reflective of the broad inclusionary principle at its core. Therefore, rather than accord any particular group heightened scrutiny, it will balance all the factors in the case and reach a just result. While this notion is superficially attractive in its attempt to achieve fundamental fairness for all Vermonters, it is flawed with respect to an equal-protection analysis. The guarantee of equal protection is about fundamental fairness in a large sense, but its most important purpose is to secure the rights of historically disadvantaged groups whose exclusion from full participation in all facets of society has resulted from hatred and prejudice.

I share Justice Dooley's concern that the new standard enunciated by the majority may not give sufficient deference to the Legislature's judgment in economic and commercial legislation. See ante, at 15-16 (Dooley, J., concurring). It is the Legislature's prerogative to decide whether, for example, to give "optometrists" more protection than "opticians." See Cleburne, 473 U.S. at 471 (Marshall, J., concurring in part and dissenting in part). Such classifications ought not to become a matter of serious constitutional review, even though optometrists and opticians comprise "a part of the community" and may have vital economic interests in the manner in which they are regulated. I am certain the majority would agree with that proposition and argue that its balancing of all the relevant factors in that kind of a case would not result in striking down a classification that treated those two groups differently. But therein lies my concern with the majority's approach. Although we might agree on the optometrists/opticians classification, a balancing of all relevant factors in all equal-protection cases puts the rule of law at "excessive risk." C. Sunstein, Foreward: Leaving Things Undecided, 110 Harvard L. Rev. 4, 78 (1996). As Professor Sunstein explains:

> The use of `tiers' has two important goals. The first is to ensure that courts are most skeptical in cases in which it is highly predictable that illegitimate motives are at work. . . . The second goal of a tiered system is to discipline judicial discretion while promoting planning and predictability for future cases. Without tiers, it would be difficult to predict judicial judgments under the Equal Protection Clause, and judges would make decisions based on ad hoc assessments of the equities. The Chancellor's foot[*] is not a promising basis for anti-discrimination law.

Id. The majority argues that subjective judgment is required to make choices about classes who are entitled to heightened review and, therefore, that a tiered approach is not more precise than the balancing-of-factors approach. See ante, at 24 n.10. But, in choosing the suspect class, it would be incumbent upon the Court to articulate its rationale, thereby providing predictive value in future cases of discrimination rather than depending on the "perspicacity of judges to see it." Cleburne, 473 U.S. at 466 (Marshall, J., concurring in part and

dissenting in part).

[*The reference to the Chancellor's foot in the Sunstein quote is from John Seldon's (1584-1654) critique of equity, which is relevant here:]

> Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the standard for the measure we call a "foot" a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the Chancellor's conscience.

J. Bartlett, Familiar Quotations, 263 (15th ed. 1980).

FN14. The State does not address the apparent conflict between the public purposes it asserts and the legislative policy of this State. Vermont does not prohibit the donation of sperm or the use of technologically assisted methods of reproduction. Thus, same-sex partners and single individuals may use technologically assisted reproduction, all without the benefit of marriage. It is impossible to accept that the classification in the marriage statutes serves as a reasonable deterrent to such methods.

Hillary GOODRIDGE & others [FN1] vs. DEPARTMENT OF PUBLIC HEALTH & another. [FN2]

SJC-08860

March 4, 2003. - November 18, 2003.

Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Sosman, & Cordy, JJ.

License. Marriage. Statute, Construction. Constitutional Law, Police power, Equal protection of laws. Due Process of Law, Marriage. Words, "Marriage."

Civil action commenced in the Superior Court Department on April 11, 2001.

The case was heard by Thomas E. Connolly, J., on motions for summary judgment.

The Supreme Judicial Court granted an application for direct appellate review.

Mary Lisa Bonauto (Gary D. Buseck with her) for Hillary Goodridge.

Judith S. Yogman, Assistant Attorney General, for Department of Public Health.

The following submitted briefs for amici curiae:

Joseph P.J. Vrabel, Mark D. Mason, & Martin W. Healy for Massachusetts Bar Association.

Leslie Cooper & James D. Esseks, of New York, Jon W. Davidson & Shannon Minter, of California, Elliot M. Mincberg & Judith E. Schaeffer, of the District of Columbia, & John Reinstein, Sarah R. Wunsch, Paul Holtzman, & Hugh Dun Rappaport for Urban League of Eastern Massachusetts & others.

Paul Benjamin Linton, of Illinois, & Thomas M. Harvey for Robert J. Araujo & others.

Dwight G. Duncan for Massachusetts Family Institute, Inc., & others.

Glen Lavy, of Arizona, Stephen W. Reed, of California, & Bertin C. Emmons for National Association for Research and Therapy of Homosexuality, Inc., & others.

Robert W. Ash & Vincent P. McCarthy, of Connecticut, & Philip E. Cleary for The Common Good Foundation & others.

Don Stenberg, Attorney General of Nebraska, Mark L. Shurtleff, Attorney General of Utah, Brent A. Burnett, Assistant Attorney General of Utah, & Mark Barnett, Attorney General of South Dakota, for the State of Utah & others.

Chester Darling & Michael Williams for Massachusetts Citizens Alliance & another.

Daniel Avila for The Catholic Action League of Massachusetts.

Joshua K. Baker, of California, & Robert G. Caprera for José Martín de Agar & others.

Wendy J. Herdlein, of California, & James R. Knudsen for the Honorable Philip Travis & others.

Steven W. Fitschen, of Virginia, for The National Legal Foundation.

Jeffrey A. Shafer & David R. Langdon, of Ohio, William C. Duncan, of Utah, & Wendy J. Herdlein, of California, for Marriage Law Project.

Lisa Rae, Kenneth Elmore, Arthur Berney, & Josephine Ross for The Religious Coalition for the Freedom to Marry & others.

Ann DiMaria for The Ethics & Religious Liberty Commission & others.

Anthony Mirenda, Vickie L. Henry, Lucy Fowler, John M. Granberry, Rachel N. Lessem, & Gabriel M. Helmer for Robert F. Williams & others.

Kenneth J. Parsigian for Peter W. Bardaglio & others. David Cruz, of New York, John Taylor Williams, Carol V. Rose, Debra Squires-Lee, Christopher Morrison, & Marni Goldstein Caputo for William E. Adams & others.

Martin J. Newhouse & Katharine Bolland for Coalition gaie et lesbienne du Québec & others.

Joseph Ureneck, pro se.

Teresa S. Collett, of Texas, & Luke Stanton for Free Market Foundation.

Peter F. Zupcofska, L. Tracee Whitley, Heidi A. Nadel, & Corin R. Swift for Boston Bar Association & another.

Mary Jo Johnson, Jonathan A. Shapiro, & Amy L. Nash for The Massachusetts Psychiatric Society & others.

Tony R. Maida, Nina Joan Kimball, & Justine H. Brousseau for Libby Adler & others.

Daryl J. Lapp, Kevin D. Batt, & Katharine Silbaugh for Monroe Inker & another.

David Zwiebel, Mordechai Biser, & Nathan J. Diament, of New York, & Abba Cohen, of the District of Columbia, for Agudath Israel of America & others.

MARSHALL, C.J.

Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty legal, financial, and social obligations. The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not. The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens. In reaching our conclusion we have given full deference to the arguments made by the Commonwealth. But it has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples.

We are mindful that our decision marks a change in the history of our marriage law. Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. "Our obligation is to define the liberty of all, not to mandate our own moral code." Lawrence v. Texas, 123 S.Ct. 2472, 2480 (2003) (Lawrence), quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992).

Whether the Commonwealth may use its formidable regulatory authority to bar same-sex couples from civil marriage is a question not previously addressed by a Massachusetts appellate court. [FN3] It is a question the United States Supreme Court left open as a matter of Federal law in Lawrence, supra at 2484, where it was not an issue. There, the Court affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner. The Court also reaffirmed the central role that decisions whether to marry or have children bear in shaping one's identity. Id. at 2481. The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.

Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law.

I

The plaintiffs are fourteen individuals from five Massachusetts counties. As of April 11, 2001, the date they filed their complaint, the plaintiffs Gloria Bailey, sixty years old, and Linda Davies, fifty-five years old, had been in a committed relationship for thirty years; the plaintiffs Maureen Brodoff, forty-nine years old, and Ellen Wade, fifty-two years old, had been in a

committed relationship for twenty years and lived with their twelve year old daughter; the plaintiffs Hillary Goodridge, forty-four years old, and Julie Goodridge, forty-three years old, had been in a committed relationship for thirteen years and lived with their five year old daughter; the plaintiffs Gary Chalmers, thirty-five years old, and Richard Linnell, thirty-seven years old, had been in a committed relationship for thirteen years and lived with their eight year old daughter and Richard's mother; the plaintiffs Heidi Norton, thirty-six years old, and Gina Smith, thirty-six years old, had been in a committed relationship for eleven years and lived with their two sons, ages five years and one year; the plaintiffs Michael Horgan, forty-one years old, and David Balmelli, forty-one years old, had been in a committed relationship for seven years; and the plaintiffs David Wilson, fifty-seven years old, and Robert Compton, fifty-one years old, had been in a committed relationship for four years and had cared for David's mother in their home after a serious illness until she died.

The plaintiffs include business executives, lawyers, an investment banker, educators, therapists, and a computer engineer. Many are active in church, community, and school groups. They have employed such legal means as are available to them--for example, joint adoption, powers of attorney, and joint ownership of real property--to secure aspects of their relationships. Each plaintiff attests a desire to marry his or her partner in order to affirm publicly their commitment to each other and to secure the legal protections and benefits afforded to married couples and their children.

The Department of Public Health (department) is charged by statute with safeguarding public health. See G.L. c. 17. Among its responsibilities, the department oversees the registry of vital records and statistics (registry), which "enforce[s] all laws" relative to the issuance of marriage licenses and the keeping of marriage records, see G.L. c. 17, § 4, and which promulgates policies and procedures for the issuance of marriage licenses by city and town clerks and registers. See, e.g., G.L. c. 207, §§ 20, 28A, and 37. The registry is headed by a registrar of vital records and statistics (registrar), appointed by the Commissioner of Public Health (commissioner) with the approval of the public health council and supervised by the commissioner. See G.L. c. 17, § 4.

In March and April, 2001, each of the plaintiff couples attempted to obtain a marriage license from a city or town clerk's office. As required under G.L. c. 207, they completed notices of intention to marry on forms provided by the registry, see G.L. c. 207, § 20, and presented these forms to a Massachusetts town or city clerk, together with the required health forms and marriage license fees. See G.L. c. 207, § 19. In each case, the clerk either refused to accept the notice of intention to marry or denied a marriage license to the couple on the ground that Massachusetts does not recognize same- sex marriage. [FN4], [FN5] Because obtaining a marriage license is a necessary prerequisite to civil marriage in Massachusetts, denying marriage licenses to the plaintiffs was tantamount to denying them access to civil marriage itself, with its appurtenant social and legal protections, benefits, and obligations. [FN6]

On April 11, 2001, the plaintiffs filed suit in the Superior Court against the department and the commissioner seeking a judgment that "the exclusion of the [p]laintiff couples and other qualified same-sex couples from access to marriage licenses, and the legal and social status of civil marriage, as well as the protections, benefits and obligations of marriage, violates Massachusetts law." See G.L. c. 231A. The plaintiffs alleged violation of the laws of the Commonwealth, including but not limited to their rights under arts. 1, 6, 7, 10, 12, and 16, and Part II, c. 1, § 1, art. 4, of the Massachusetts Constitution. [FN7], [FN8]

The department, represented by the Attorney General, admitted to a policy and practice of denying marriage licenses to same-sex couples. It denied that its actions violated any law or that the plaintiffs were entitled to relief. The parties filed cross motions for summary judgment.

A Superior Court judge ruled for the department. In a memorandum of decision and order dated May 7, 2002, he dismissed the plaintiffs' claim that the marriage statutes should be construed to permit marriage between persons of the same sex, holding that the plain wording of G.L. c. 207, as well as the wording of other marriage statutes, precluded that interpretation. Turning to the constitutional claims, he held that the marriage exclusion does not offend the liberty, freedom, equality, or due process provisions of the Massachusetts Constitution, and that the

Massachusetts Declaration of Rights does not guarantee "the fundamental right to marry a person of the same sex." He concluded that prohibiting same-sex marriage rationally furthers the Legislature's legitimate interest in safeguarding the "primary purpose" of marriage, "procreation." The Legislature may rationally limit marriage to opposite-sex couples, he concluded, because those couples are "theoretically ... capable of procreation," they do not rely on "inherently more cumbersome" noncoital means of reproduction, and they are more likely than same-sex couples to have children, or more children.

After the complaint was dismissed and summary judgment entered for the defendants, the plaintiffs appealed. Both parties requested direct appellate review, which we granted.

II

Although the plaintiffs refer in passing to "the marriage statutes," they focus, quite properly, on G.L. c. 207, the marriage licensing statute, which controls entry into civil marriage. As a preliminary matter, we summarize the provisions of that law.

General Laws c. 207 is both a gatekeeping and a public records statute. It sets minimum qualifications for obtaining a marriage license and directs city and town clerks, the registrar, and the department to keep and maintain certain "vital records" of civil marriages. The gatekeeping provisions of G.L. c. 207 are minimal. They forbid marriage of individuals within certain degrees of consanguinity, §§ 1 and 2, and polygamous marriages. See G.L. c. 207, § 4. See also G.L. c. 207, § 8 (marriages solemnized in violation of §§ 1, 2, and 4, are void ab initio). They prohibit marriage if one of the parties has communicable syphilis, see G.L. c. 207, § 28A, and restrict the circumstances in which a person under eighteen years of age may marry. See G.L. c. 207, §§ 7, 25, and 27. The statute requires that civil marriage be solemnized only by those so authorized. See G.L. c. 207, §§ 38-40.

The record-keeping provisions of G.L. c. 207 are more extensive. Marriage applicants file standard information forms and a medical certificate in any Massachusetts city or town clerk's office and tender a filing fee. G.L. c. 207, §§ 19-20, 28A. The clerk issues the marriage license, and when the marriage is solemnized, the individual authorized to solemnize the marriage adds additional information to the form and returns it (or a copy) to the clerk's office. G.L. c. 207, §§ 28, 30, 38-40 (this completed form is commonly known as the "marriage certificate"). The clerk sends a copy of the information to the registrar, and that information becomes a public record. See G.L. c. 17, § 4; G.L. c. 66, § 10. [FN9], [FN10]

In short, for all the joy and solemnity that normally attend a marriage, G.L. c. 207, governing entrance to marriage, is a licensing law. The plaintiffs argue that because nothing in that licensing law specifically prohibits marriages between persons of the same sex, we may interpret the statute to permit "qualified same sex couples" to obtain marriage licenses, thereby avoiding the question whether the law is constitutional. See School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 79 (1982), and cases cited. This claim lacks merit.

We interpret statutes to carry out the Legislature's intent, determined by the words of a statute interpreted according to "the ordinary and approved usage of the language." Hanlon v. Rollins, 286 Mass. 444, 447 (1934). The everyday meaning of "marriage" is "[t]he legal union of a man and woman as husband and wife," Black's Law Dictionary 986 (7th ed.1999), and the plaintiffs do not argue that the term "marriage" has ever had a different meaning under Massachusetts law. See, e.g., Milford v. Worcester, 7 Mass. 48, 52 (1810) (marriage "is an engagement, by which a single man and a single woman, of sufficient discretion, take each other for husband and wife"). This definition of marriage, as both the department and the Superior Court judge point out, derives from the common law. See Commonwealth v. Knowlton, 2 Mass. 530, 535 (1807) (Massachusetts common law derives from English common law except as otherwise altered by Massachusetts statutes and Constitution). See also Commonwealth v. Lane, 113 Mass. 458, 462-463 (1873) ("when the statutes are silent, questions of the validity of marriages are to be determined by the jus gentium, the common law of nations"); C.P. Kindregan, Jr., & M.L. Inker, Family Law and Practice § 1.2 (3d ed.2002). Far from being ambiguous, the undefined word "marriage," as used in G.L. c. 207, confirms the General Court's intent to hew to the term's

common-law and quotidian meaning concerning the genders of the marriage partners.

The intended scope of G.L. c. 207 is also evident in its consanguinity provisions. See Chandler v. County Comm'rs of Nantucket County, 437 Mass. 430, 435 (2002) (statute's various provisions may offer insight into legislative intent). Sections 1 and 2 of G.L. c. 207 prohibit marriages between a man and certain female relatives and a woman and certain male relatives, but are silent as to the consanguinity of male-male or female-female marriage applicants. See G.L. c. 207, §§ 1-2. The only reasonable explanation is that the Legislature did not intend that same-sex couples be licensed to marry. We conclude, as did the judge, that G.L. c. 207 may not be construed to permit same-sex couples to marry. [FN11]

III

A

The larger question is whether, as the department claims, government action that bars same-sex couples from civil marriage constitutes a legitimate exercise of the State's authority to regulate conduct, or whether, as the plaintiffs claim, this categorical marriage exclusion violates the Massachusetts Constitution. We have recognized the long-standing statutory understanding, derived from the common law, that "marriage" means the lawful union of a woman and a man. But that history cannot and does not foreclose the constitutional question.

The plaintiffs' claim that the marriage restriction violates the Massachusetts Constitution can be analyzed in two ways. Does it offend the Constitution's guarantees of equality before the law? Or do the liberty and due process provisions of the Massachusetts Constitution secure the plaintiffs' right to marry their chosen partner? In matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts frequently overlap, as they do here. See, e.g., M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996) (noting convergence of due process and equal protection principles in cases concerning parent-child relationships); Perez v. Sharp, 32 Cal.2d 711, 728 (1948) (analyzing statutory ban on interracial marriage as equal protection violation concerning regulation of fundamental right). See also Lawrence, supra at 2482 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests"); Bolling v. Sharpe, 347 U.S. 497 (1954) (racial segregation in District of Columbia public schools violates the due process clause of the Fifth Amendment to the United States Constitution), decided the same day as Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954) (holding that segregation of public schools in the States violates the equal protection clause of the Fourteenth Amendment). Much of what we say concerning one standard applies to the other.

We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage. In Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution. See Commonwealth v. Munson, 127 Mass. 459, 460-466 (1879) (noting that "[i]n Massachusetts, from very early times, the requisites of a valid marriage have been regulated by statutes of the Colony, Province, and Commonwealth," and surveying marriage statutes from 1639 through 1834). No religious ceremony has ever been required to validate a Massachusetts marriage. Id.

In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State. See DeMatteo v. DeMatteo, 436 Mass. 18, 31 (2002) ("Marriage is not a mere contract between two parties but a legal status from which certain rights and obligations arise"); Smith v. Smith, 171 Mass. 404, 409 (1898) (on marriage, the parties "assume[ ] new relations to each other and to the State"). See also French v. McAnarney, 290 Mass. 544, 546 (1935). While only the parties can mutually assent to marriage, the terms of the marriage--who may marry and what obligations, benefits, and liabilities attach to civil marriage--are set by the Commonwealth. Conversely, while only the parties can agree to end the marriage (absent the death of one of them or a marriage void ab initio), the Commonwealth defines the exit terms. See G.L. c. 208.

Civil marriage is created and regulated through exercise of the police power. See Commonwealth v. Stowell, 389 Mass. 171, 175 (1983) (regulation of marriage is properly within the scope of the police power). "Police power" (now more commonly termed the State's

regulatory authority) is an old-fashioned term for the Commonwealth's lawmaking authority, as bounded by the liberty and equality guarantees of the Massachusetts Constitution and its express delegation of power from the people to their government. In broad terms, it is the Legislature's power to enact rules to regulate conduct, to the extent that such laws are "necessary to secure the health, safety, good order, comfort, or general welfare of the community" (citations omitted). Opinion of the Justices, 341 Mass. 760, 785 (1960). [FN12] See Commonwealth v. Alger, 7 Cush. 53, 85 (1851).

Without question, civil marriage enhances the "welfare of the community." It is a "social institution of the highest importance." French v. McAnarney, supra. Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data.

Marriage also bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. "It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." Griswold v. Connecticut, 381 U.S. 479, 486 (1965). Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.

Tangible as well as intangible benefits flow from marriage. The marriage license grants valuable property rights to those who meet the entry requirements, and who agree to what might otherwise be a burdensome degree of government regulation of their activities. [FN13] See Leduc v. Commonwealth, 421 Mass. 433, 435 (1995), cert. denied, 519 U.S. 827 (1996) ("The historical aim of licensure generally is preservation of public health, safety, and welfare by extending the public trust only to those with proven qualifications"). The Legislature has conferred on "each party [in a civil marriage] substantial rights concerning the assets of the other which unmarried cohabitants do not have." Wilcox v. Trautz, 427 Mass. 326, 334 (1998). See Collins v. Guggenheim, 417 Mass. 615, 618 (1994) (rejecting claim for equitable distribution of property where plaintiff cohabited with but did not marry defendant); Feliciano v. Rosemar Silver Co., 401 Mass. 141, 142 (1987) (government interest in promoting marriage would be "subverted" by recognition of "a right to recover for loss of consortium by a person who has not accepted the correlative responsibilities of marriage"); Davis v. Misiano, 373 Mass. 261, 263 (1977) (unmarried partners not entitled to rights of separate support or alimony). See generally Attorney Gen. v. Desilets, 418 Mass. 316, 327-328 & nn. 10, 11 (1994).

The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that "hundreds of statutes" are related to marriage and to marital benefits. With no attempt to be comprehensive, we note that some of the statutory benefits conferred by the Legislature on those who enter into civil marriage include, as to property: joint Massachusetts income tax filing (G.L. c. 62C, § 6); tenancy by the entirety (a form of ownership that provides certain protections against creditors and allows for the automatic descent of property to the surviving spouse without probate) (G.L. c. 184, § 7); extension of the benefit of the homestead protection (securing up to $300,000 in equity from creditors) to one's spouse and children (G.L. c. 188, § 1); automatic rights to inherit the property of a deceased spouse who does not leave a will (G.L. c. 190, § 1); the rights of elective share and of dower (which allow surviving spouses certain property rights where the decedent spouse has not made adequate provision for the survivor in a will) (G.L. c. 191, § 15, and G.L. c. 189); entitlement to wages owed to a deceased employee (G.L. c. 149, § 178A [general] and G.L. c. 149, § 178C [public employees]); eligibility to continue certain businesses of a deceased spouse (e.g., G.L. c. 112, § 53 [dentist]); the right to share the medical policy of one's spouse (e.g., G.L. c. 175, § 108, Second [a] [3] [defining an insured's "dependent" to include one's spouse), see Connors v. Boston, 430 Mass. 31, 43 (1999) [domestic partners of city employees not

included within the term "dependent" as used in G.L. c. 32B, § 2]); thirty-nine week continuation of health coverage for the spouse of a person who is laid off or dies (e.g., G.L. c. 175, § 110G); preferential options under the Commonwealth's pension system (see G.L. c. 32, § 12[2] ["Joint and Last Survivor Allowance"]); preferential benefits in the Commonwealth's medical program, MassHealth (e.g., 130 Code Mass. Regs. § 515.012[A] prohibiting placing a lien on long-term care patient's former home if spouse still lives there); access to veterans' spousal benefits and preferences (e.g., G.L. c. 115, § 1 [defining "dependents"] and G.L. c. 31, § 26 [State employment] and § 28 [municipal employees]); financial protections for spouses of certain Commonwealth employees (fire fighters, police officers, prosecutors, among others) killed in the performance of duty (e.g., G.L. c. 32, §§ 100-103); the equitable division of marital property on divorce (G.L. c. 208, § 34); temporary and permanent alimony rights (G.L. c. 208, §§ 17 and 34); the right to separate support on separation of the parties that does not result in divorce (G.L. c. 209, § 32); and the right to bring claims for wrongful death and loss of consortium, and for funeral and burial expenses and punitive damages resulting from tort actions (G.L. c. 229, §§ 1 and 2; G.L. c. 228, § 1. See Feliciano v. Rosemar Silver Co., supra).

Exclusive marital benefits that are not directly tied to property rights include the presumptions of legitimacy and parentage of children born to a married couple (G.L. c. 209C, § 6, and G.L. c. 46, § 4B); and evidentiary rights, such as the prohibition against spouses testifying against one another about their private conversations, applicable in both civil and criminal cases (G.L. c. 233, § 20). Other statutory benefits of a personal nature available only to married individuals include qualification for bereavement or medical leave to care for individuals related by blood or marriage (G.L. c. 149, § 52D); an automatic "family member" preference to make medical decisions for an incompetent or disabled spouse who does not have a contrary health care proxy, see Shine v. Vega, 429 Mass. 456, 466 (1999); the application of predictable rules of child custody, visitation, support, and removal out-of-State when married parents divorce (e.g., G.L. c. 208, § 19 [temporary custody], § 20 [temporary support], § 28 [custody and support on judgment of divorce], § 30 [removal from Commonwealth], and § 31 [shared custody plan]; priority rights to administer the estate of a deceased spouse who dies without a will, and requirement that surviving spouse must consent to the appointment of any other person as administrator (G.L. c. 38, § 13 [disposition of body], and G.L. c. 113, § 8 [anatomical gifts]); and the right to interment in the lot or tomb owned by one's deceased spouse (G.L. c. 114, §§ 29-33).

Where a married couple has children, their children are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by civil marriage. Notwithstanding the Commonwealth's strong public policy to abolish legal distinctions between marital and nonmarital children in providing for the support and care of minors, see Department of Revenue v. Mason M., 439 Mass. 665 (2003); Woodward v. Commissioner of Social Sec., 435 Mass. 536, 546 (2002), the fact remains that marital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one's parentage.

It is undoubtedly for these concrete reasons, as well as for its intimately personal significance, that civil marriage has long been termed a "civil right." See, e.g., Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival"), quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Milford v. Worcester, 7 Mass. 48, 56 (1810) (referring to "civil rights incident to marriages"). See also Baehr v. Lewin, 74 Haw. 530, 561 (1993) (identifying marriage as a "civil right[ ]"); Baker v. State, 170 Vt. 194, 242 (1999) (Johnson, J., concurring in part and dissenting in part) (same). The United States Supreme Court has described the right to marry as "of fundamental importance for all individuals" and as "part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." Zablocki v. Redhail, 434 U.S. 374, 384 (1978). See Loving v. Virginia, supra ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men"). [FN14]

Without the right to marry--or more properly, the right to choose to marry--one is excluded from the full range of human experience and denied full protection of the laws for one's "avowed commitment to an intimate and lasting human relationship." Baker v. State, supra at 229. Because civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual's right to marry against undue government incursion. Laws may not "interfere directly and substantially with the right to marry." Zablocki v. Redhail, supra at 387. See Perez v. Sharp, 32 Cal.2d 711, 714 (1948) ("There can be no prohibition of marriage except for an important social objective and reasonable means"). [FN15]

Unquestionably, the regulatory power of the Commonwealth over civil marriage is broad, as is the Commonwealth's discretion to award public benefits. See Commonwealth v. Stowell, 389 Mass. 171, 175 (1983) (marriage); Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 652 (1981) (Medicaid benefits). Individuals who have the choice to marry each other and nevertheless choose not to may properly be denied the legal benefits of marriage. See Wilcox v. Trautz, 427 Mass. 326, 334 (1998); Collins v. Guggenheim, 417 Mass. 615, 618 (1994); Feliciano v. Rosemar Silver Co., 401 Mass. 141, 142 (1987). But that same logic cannot hold for a qualified individual who would marry if she or he only could.

B

For decades, indeed centuries, in much of this country (including Massachusetts) no lawful marriage was possible between white and black Americans. That long history availed not when the Supreme Court of California held in 1948 that a legislative prohibition against interracial marriage violated the due process and equality guarantees of the Fourteenth Amendment, Perez v. Sharp, 32 Cal.2d 711, 728 (1948), or when, nineteen years later, the United States Supreme Court also held that a statutory bar to interracial marriage violated the Fourteenth Amendment, Loving v. Virginia, 388 U.S. 1 (1967). [FN16] As both Perez and Loving make clear, the right to marry means little if it does not include the right to marry the person of one's choice, subject to appropriate government restrictions in the interests of public health, safety, and welfare. See Perez v. Sharp, supra at 717 ("the essence of the right to marry is freedom to join in marriage with the person of one's choice"). See also Loving v. Virginia, supra at 12. In this case, as in Perez and Loving, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance--the institution of marriage--because of a single trait: skin color in Perez and Loving, sexual orientation here. As it did in Perez and Loving, history must yield to a more fully developed understanding of the invidious quality of the discrimination. [FN17]

The Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language. See Planned Parenthood League of Mass., Inc. v. Attorney Gen., 424 Mass. 586, 590 (1997); Corning Glass Works v. Ann & Hope, Inc. of Danvers, 363 Mass. 409, 416 (1973). That the Massachusetts Constitution is in some instances more protective of individual liberty interests than is the Federal Constitution is not surprising. Fundamental to the vigor of our Federal system of government is that "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." Arizona v. Evans, 514 U.S. 1, 8 (1995). [FN18]

The individual liberty and equality safeguards of the Massachusetts Constitution protect both "freedom from" unwarranted government intrusion into protected spheres of life and "freedom to" partake in benefits created by the State for the common good. See Bachrach v. Secretary of the Commonwealth, 382 Mass. 268, 273 (1981); Dalli v. Board of Educ., 358 Mass. 753, 759 (1971). Both freedoms are involved here. Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family--these are among the most basic of every individual's liberty and due process rights. See, e.g., Lawrence, supra at 2481; Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992); Zablocki v. Redhail, 434 U.S. 374, 384 (1978); Roe v. Wade, 410 U.S. 113, 152-153 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Loving v. Virginia, supra. And central to personal freedom and security is the assurance that the laws will apply equally to persons in similar situations. "Absolute equality before the law is a fundamental principle of our own Constitution." Opinion of the Justices, 211 Mass. 618, 619

(1912). The liberty interest in choosing whether and whom to marry would be hollow if the Commonwealth could, without sufficient justification, foreclose an individual from freely choosing the person with whom to share an exclusive commitment in the unique institution of civil marriage.

The Massachusetts Constitution requires, at a minimum, that the exercise of the State's regulatory authority not be "arbitrary or capricious." Commonwealth v. Henry's Drywall Co., 366 Mass. 539, 542 (1974). [FN19] Under both the equality and liberty guarantees, regulatory authority must, at very least, serve "a legitimate purpose in a rational way"; a statute must "bear a reasonable relation to a permissible legislative objective." Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 270 (1992). See, e.g., Massachusetts Fed'n of Teachers v. Board of Educ., 436 Mass. 763, 778 (2002) (equal protection); Coffee-Rich, Inc. v. Commissioner of Pub. Health, 348 Mass. 414, 422 (1965) (due process). Any law failing to satisfy the basic standards of rationality is void.

The plaintiffs challenge the marriage statute on both equal protection and due process grounds. With respect to each such claim, we must first determine the appropriate standard of review. Where a statute implicates a fundamental right or uses a suspect classification, we employ "strict judicial scrutiny." Lowell v. Kowalski, 380 Mass. 663, 666 (1980). For all other statutes, we employ the " 'rational basis' test." English v. New England Med. Ctr., 405 Mass. 423, 428 (1989). For due process claims, rational basis analysis requires that statutes "bear[ ] a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare." Coffee-Rich, Inc. v. Commissioner of Pub. Health, supra, quoting Sperry & Hutchinson Co. v. Director of the Div. on the Necessaries of Life, 307 Mass. 408, 418 (1940). For equal protection challenges, the rational basis test requires that "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." English v. New England Med. Ctr., supra at 429, quoting Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring). [FN20]

The department argues that no fundamental right or "suspect" class is at issue here, [FN21] and rational basis is the appropriate standard of review. For the reasons we explain below, we conclude that the marriage ban does not meet the rational basis test for either due process or equal protection. Because the statute does not survive rational basis review, we do not consider the plaintiffs' arguments that this case merits strict judicial scrutiny.

The department posits three legislative rationales for prohibiting same-sex couples from marrying: (1) providing a "favorable setting for procreation"; (2) ensuring the optimal setting for child rearing, which the department defines as "a two-parent family with one parent of each sex"; and (3) preserving scarce State and private financial resources. We consider each in turn.

The judge in the Superior Court endorsed the first rationale, holding that "the state's interest in regulating marriage is based on the traditional concept that marriage's primary purpose is procreation." This is incorrect. Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. General Laws c. 207 contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married. See Franklin v. Franklin, 154 Mass. 515, 516 (1891) ("The consummation of a marriage by coition is not necessary to its validity"). [FN22] People who cannot stir from their deathbed may marry. See G.L. c. 207, § 28A. While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage. [FN23]

Moreover, the Commonwealth affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual. [FN24] If procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around

the permissible bounds of nonmarital child bearing and the creation of families by noncoital means. The attempt to isolate procreation as "the source of a fundamental right to marry," post at (Cordy, J., dissenting), overlooks the integrated way in which courts have examined the complex and overlapping realms of personal autonomy, marriage, family life, and child rearing. Our jurisprudence recognizes that, in these nuanced and fundamentally private areas of life, such a narrow focus is inappropriate.

The "marriage is procreation" argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage. Like "Amendment 2" to the Constitution of Colorado, which effectively denied homosexual persons equality under the law and full access to the political process, the marriage restriction impermissibly "identifies persons by a single trait and then denies them protection across the board." Romer v. Evans, 517 U.S. 620, 633 (1996). In so doing, the State's action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect. [FN25]

The department's first stated rationale, equating marriage with unassisted heterosexual procreation, shades imperceptibly into its second: that confining marriage to opposite-sex couples ensures that children are raised in the "optimal" setting. Protecting the welfare of children is a paramount State policy. Restricting marriage to opposite-sex couples, however, cannot plausibly further this policy. "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household." Troxel v. Granville, 530 U.S. 57, 63 (2000). Massachusetts has responded supportively to "the changing realities of the American family," id. at 64, and has moved vigorously to strengthen the modern family in its many variations. See, e.g., G.L. c. 209C (paternity statute); G.L. c. 119, § 39D (grandparent visitation statute); Blixt v. Blixt, 437 Mass. 649 (2002), cert. denied, 537 U.S. 1189 (2003) (same); E.N.O. v. L.M.M., 429 Mass. 824, cert. denied, 528 U.S. 1005 (1999) (de facto parent); Youmans v. Ramos, 429 Mass. 774, 782 (1999) (same); and Adoption of Tammy, 416 Mass. 205 (1993) (coparent adoption). Moreover, we have repudiated the common-law power of the State to provide varying levels of protection to children based on the circumstances of birth. See G.L. c. 209C (paternity statute); Powers v. Wilkinson, 399 Mass. 650, 661 (1987) ("Ours is an era in which logic and compassion have impelled the law toward unburdening children from the stigma and the disadvantages heretofore attendant upon the status of illegitimacy"). The "best interests of the child" standard does not turn on a parent's sexual orientation or marital status. See e.g., Doe v. Doe, 16 Mass.App.Ct. 499, 503 (1983) (parent's sexual orientation insufficient ground to deny custody of child in divorce action). See also E.N.O. v. L.M.M., supra at 829-830 (best interests of child determined by considering child's relationship with biological and de facto same-sex parents); Silvia v. Silvia, 9 Mass.App.Ct. 339, 341 & n. 3 (1980) (collecting support and custody statutes containing no gender distinction).

The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children. There is thus no rational relationship between the marriage statute and the Commonwealth's proffered goal of protecting the "optimal" child rearing unit. Moreover, the department readily concedes that people in same-sex couples may be "excellent" parents. These couples (including four of the plaintiff couples) have children for the reasons others do--to love them, to care for them, to nurture them. But the task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws. While establishing the parentage of children as soon as possible is crucial to the safety and welfare of children, see Culliton v. Beth Israel Deaconness Med. Ctr., 435 Mass. 285, 292 (2001), same-sex couples must undergo the sometimes lengthy and intrusive process of second-parent adoption to establish their joint parentage. While the enhanced income provided by marital benefits is an important source of security and stability for married couples and their children, those benefits are denied to families headed by same-sex couples. See, e.g., note 6, supra. While the laws of divorce provide clear and reasonably predictable guidelines for child support, child custody, and property division on dissolution of a marriage, same-sex couples who dissolve their relationships find themselves and their children

in the highly unpredictable terrain of equity jurisdiction. See E.N.O. v. L.M.M., supra. Given the wide range of public benefits reserved only for married couples, we do not credit the department's contention that the absence of access to civil marriage amounts to little more than an inconvenience to same-sex couples and their children. Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of "a stable family structure in which children will be reared, educated, and socialized." Post at (Cordy, J., dissenting). [FN26]

No one disputes that the plaintiff couples are families, that many are parents, and that the children they are raising, like all children, need and should have the fullest opportunity to grow up in a secure, protected family unit. Similarly, no one disputes that, under the rubric of marriage, the State provides a cornucopia of substantial benefits to married parents and their children. The preferential treatment of civil marriage reflects the Legislature's conclusion that marriage "is the foremost setting for the education and socialization of children" precisely because it "encourages parents to remain committed to each other and to their children as they grow." Post at (Cordy, J., dissenting).

In this case, we are confronted with an entire, sizeable class of parents raising children who have absolutely no access to civil marriage and its protections because they are forbidden from procuring a marriage license. It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation.

The third rationale advanced by the department is that limiting marriage to opposite-sex couples furthers the Legislature's interest in conserving scarce State and private financial resources. The marriage restriction is rational, it argues, because the General Court logically could assume that same-sex couples are more financially independent than married couples and thus less needy of public marital benefits, such as tax advantages, or private marital benefits, such as employer-financed health plans that include spouses in their coverage.

An absolute statutory ban on same-sex marriage bears no rational relationship to the goal of economy. First, the department's conclusory generalization-- that same-sex couples are less financially dependent on each other than opposite-sex couples--ignores that many same-sex couples, such as many of the plaintiffs in this case, have children and other dependents (here, aged parents) in their care. [FN27] The department does not contend, nor could it, that these dependents are less needy or deserving than the dependents of married couples. Second, Massachusetts marriage laws do not condition receipt of public and private financial benefits to married individuals on a demonstration of financial dependence on each other; the benefits are available to married couples regardless of whether they mingle their finances or actually depend on each other for support.

The department suggests additional rationales for prohibiting same-sex couples from marrying, which are developed by some amici. It argues that broadening civil marriage to include same-sex couples will trivialize or destroy the institution of marriage as it has historically been fashioned. Certainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries. But it does not disturb the fundamental value of marriage in our society.

Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. [FN28] If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit. [FN29]

It has been argued that, due to the State's strong interest in the institution of marriage as a stabilizing social structure, only the Legislature can control and define its boundaries. Accordingly, our elected representatives legitimately may choose to exclude same-sex couples from civil marriage in order to assure all citizens of the Commonwealth that (1) the benefits of our marriage laws are available explicitly to create and support a family setting that is, in the Legislature's view, optimal for child rearing, and (2) the State does not endorse gay and lesbian parenthood as the equivalent of being raised by one's married biological parents. [FN30] These arguments miss the point. The Massachusetts Constitution requires that legislation meet certain criteria and not extend beyond certain limits. It is the function of courts to determine whether these criteria are met and whether these limits are exceeded. In most instances, these limits are defined by whether a rational basis exists to conclude that legislation will bring about a rational result. The Legislature in the first instance, and the courts in the last instance, must ascertain whether such a rational basis exists. To label the court's role as usurping that of the Legislature, see, e.g., post at (Cordy, J., dissenting), is to misunderstand the nature and purpose of judicial review. We owe great deference to the Legislature to decide social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues. [FN31]

The history of constitutional law "is the story of the extension of constitutional rights and protections to people once ignored or excluded." United States v. Virginia, 518 U.S. 515, 557 (1996) (construing equal protection clause of the Fourteenth Amendment to prohibit categorical exclusion of women from public military institute). This statement is as true in the area of civil marriage as in any other area of civil rights. See, e.g., Turner v. Safley, 482 U.S. 78 (1987); Loving v. Virginia, 388 U.S. 1 (1967); Perez v. Sharp, 32 Cal.2d 711 (1948). As a public institution and a right of fundamental importance, civil marriage is an evolving paradigm. The common law was exceptionally harsh toward women who became wives: a woman's legal identity all but evaporated into that of her husband. See generally C.P. Kindregan, Jr., & M.L. Inker, Family Law and Practice §§ 1.9 and 1.10 (3d ed.2002). Thus, one early Nineteenth Century jurist could observe matter of factly that, prior to the abolition of slavery in Massachusetts, "the condition of a slave resembled the connection of a wife with her husband, and of infant children with their father. He is obliged to maintain them, and they cannot be separated from him." Winchendon v. Hatfield, 4 Mass. 123, 129 (1808). But since at least the middle of the Nineteenth Century, both the courts and the Legislature have acted to ameliorate the harshness of the common-law regime. In Bradford v. Worcester, 184 Mass. 557, 562 (1904), we refused to apply the common-law rule that the wife's legal residence was that of her husband to defeat her claim to a municipal "settlement of paupers." In Lewis v. Lewis, 370 Mass. 619, 629 (1976), we abrogated the common-law doctrine immunizing a husband against certain suits because the common-law rule was predicated on "antediluvian assumptions concerning the role and status of women in marriage and in society." Id. at 621. Alarms about the imminent erosion of the "natural" order of marriage were sounded over the demise of antimiscegenation laws, the expansion of the rights of married women, and the introduction of "no-fault" divorce. [FN32] Marriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution.

We also reject the argument suggested by the department, and elaborated by some amici, that expanding the institution of civil marriage in Massachusetts to include same-sex couples will lead to interstate conflict. We would not presume to dictate how another State should respond to today's decision. But neither should considerations of comity prevent us from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution. The genius of our Federal system is that each State's Constitution has vitality specific to its own traditions, and that, subject to the minimum requirements of the Fourteenth Amendment, each State is free to address difficult issues of individual liberty in the manner its own Constitution demands.

Several amici suggest that prohibiting marriage by same-sex couples reflects community consensus that homosexual conduct is immoral. Yet Massachusetts has a strong affirmative policy of preventing discrimination on the basis of sexual orientation. See G.L. c. 151B (employment, housing, credit, services); G.L. c.

265, § 39 (hate crimes); G.L. c. 272, § 98 (public accommodation); G.L. c. 76, § 5 (public education). See also, e.g., Commonwealth v. Balthazar, 366 Mass. 298 (1974) (decriminalization of private consensual adult conduct); Doe v. Doe, 16 Mass.App.Ct. 499, 503 (1983) (custody to homosexual parent not per se prohibited).

The department has had more than ample opportunity to articulate a constitutionally adequate justification for limiting civil marriage to opposite-sex unions. It has failed to do so. The department has offered purported justifications for the civil marriage restriction that are starkly at odds with the comprehensive network of vigorous, gender-neutral laws promoting stable families and the best interests of children. It has failed to identify any relevant characteristic that would justify shutting the door to civil marriage to a person who wishes to marry someone of the same sex.

The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual. [FN33] "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (construing Fourteenth Amendment). Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.

IV

We consider next the plaintiffs' request for relief. We preserve as much of the statute as may be preserved in the face of the successful constitutional challenge. See Mayor of Boston v. Treasurer & Receiver Gen., 384 Mass. 718, 725 (1981); Dalli v. Board of Educ., 358 Mass. 753, 759 (1971). See also G.L. c. 4, § 6, Eleventh.

Here, no one argues that striking down the marriage laws is an appropriate form of relief. Eliminating civil marriage would be wholly inconsistent with the Legislature's deep commitment to fostering stable families and would dismantle a vital organizing principle of our society. [FN34] We face a problem similar to one that recently confronted the Court of Appeal for Ontario, the highest court of that Canadian province, when it considered the constitutionality of the same-sex marriage ban under Canada's Federal Constitution, the Charter of Rights and Freedoms (Charter). See Halpern v. Toronto (City), 172 O.A.C. 276 (2003). Canada, like the United States, adopted the common law of England that civil marriage is "the voluntary union for life of one man and one woman, to the exclusion of all others." Id. at, quoting Hyde v. Hyde, [1861-1873] All E.R. 175 (1866). In holding that the limitation of civil marriage to opposite- sex couples violated the Charter, the Court of Appeal refined the common-law meaning of marriage. We concur with this remedy, which is entirely consonant with established principles of jurisprudence empowering a court to refine a common-law principle in light of evolving constitutional standards. See Powers v. Wilkinson, 399 Mass. 650, 661-662 (1987) (reforming the common-law rule of construction of "issue"); Lewis v. Lewis, 370 Mass. 619, 629 (1976) (abolishing common-law rule of certain interspousal immunity).

We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others. This reformulation redresses the plaintiffs' constitutional injury and furthers the aim of marriage to promote stable, exclusive relationships. It advances the two legitimate State interests the department has identified: providing a stable setting for child rearing and conserving State resources. It leaves intact the Legislature's broad discretion to regulate marriage. See Commonwealth v. Stowell, 389 Mass. 171, 175 (1983).

In their complaint the plaintiffs request only a declaration that their exclusion and the exclusion of other qualified same-sex couples from access to civil marriage violates Massachusetts law. We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution. We vacate the

summary judgment for the department. We remand this case to the Superior Court for entry of judgment consistent with this opinion. Entry of judgment shall be stayed for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this opinion. See, e.g., Michaud v. Sheriff of Essex County, 390 Mass. 523, 535-536 (1983).

So ordered.

GREANEY, J. (concurring).

I agree with the result reached by the court, the remedy ordered, and much of the reasoning in the court's opinion. In my view, however, the case is more directly resolved using traditional equal protection analysis.

(a) Article 1 of the Declaration of Rights, as amended by art. 106 of the Amendments to the Massachusetts Constitution, provides:

"All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."

This provision, even prior to its amendment, guaranteed to all people in the Commonwealth--equally--the enjoyment of rights that are deemed important or fundamental. The withholding of relief from the plaintiffs, who wish to marry, and are otherwise eligible to marry, on the ground that the couples are of the same gender, constitutes a categorical restriction of a fundamental right. The restriction creates a straightforward case of discrimination that disqualifies an entire group of our citizens and their families from participation in an institution of paramount legal and social importance. This is impermissible under art. 1.

Analysis begins with the indisputable premise that the deprivation suffered by the plaintiffs is no mere legal inconvenience. The right to marry is not a privilege conferred by the State, but a fundamental right that is protected against unwarranted State interference. See Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("the right to marry is of fundamental importance for all individuals"); Loving v. Virginia, 388 U.S. 1, 12 (1967) (freedom to marry is "one of the vital personal rights essential to the orderly pursuit of happiness by free men" under due process clause of Fourteenth Amendment); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (marriage is one of "basic civil rights of man"). See also Turner v. Safley, 482 U.S. 78, 95-96 (1987) (prisoners' right to marry is constitutionally protected). This right is essentially vitiated if one is denied the right to marry a person of one's choice. See Zablocki v. Redhail, supra at 384 (all recent decisions of United States Supreme Court place "the decision to marry as among the personal decisions protected by the right of privacy"). [FN1]

Because our marriage statutes intend, and state, the ordinary understanding that marriage under our law consists only of a union between a man and a woman, they create a statutory classification based on the sex of the two people who wish to marry. See Baehr v. Lewin, 74 Haw. 530, 564 (1993) (plurality opinion) (Hawaii marriage statutes created sex-based classification); Baker v. State, 170 Vt. 194, 253 (1999) (Johnson, J., concurring in part and dissenting in part) (same). That the classification is sex based is self- evident. The marriage statutes prohibit some applicants, such as the plaintiffs, from obtaining a marriage license, and that prohibition is based solely on the applicants' gender. As a factual matter, an individual's choice of marital partner is constrained because of his or her own sex. Stated in particular terms, Hillary Goodridge cannot marry Julie Goodridge because she (Hillary) is a woman. Likewise, Gary Chalmers cannot marry Richard Linnell because he (Gary) is a man. Only their gender prevents Hillary and Gary from marrying their chosen partners under the present law. [FN2]

A classification may be gender based whether or not the challenged government action apportions benefits or burdens uniformly along gender lines. This is so because constitutional protections extend to individuals and not to categories of people. Thus, when an individual desires to marry, but cannot marry his or her chosen partner because of the traditional opposite-sex restriction, a violation of art. 1 has occurred. See Commonwealth v. Chou, 433 Mass. 229, 237-238 (2001) (assuming statute enforceable only across gender lines may offend Massachusetts equal rights amendment). I find it disingenuous, at best, to suggest that such an individual's right

to marry has not been burdened at all, because he or she remains free to chose another partner, who is of the opposite sex.

The equal protection infirmity at work here is strikingly similar to (although, perhaps, more subtle than) the invidious discrimination perpetuated by Virginia's antimiscegenation laws and unveiled in the decision of Loving v. Virginia, supra. In its landmark decision striking down Virginia's ban on marriages between Caucasians and members of any other race on both equal protection and substantive due process grounds, the United States Supreme Court soundly rejected the proposition that the equal application of the ban (i.e., that it applied equally to whites and blacks) made unnecessary the strict scrutiny analysis traditionally required of statutes drawing classifications according to race, see id. at 8-9, and concluded that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." Id. at 12. That our marriage laws, unlike antimiscegenation laws, were not enacted purposely to discriminate in no way neutralizes their present discriminatory character.

With these two propositions established (the infringement on a fundamental right and a sex-based classification), the enforcement of the marriage statutes as they are currently understood is forbidden by our Constitution unless the State can present a compelling purpose further by the statutes that can be accomplished in no other reasonable manner. [FN3] See Blixt v. Blixt, 437 Mass. 649, 655-656 (2002), cert. denied, 537 U.S. 1189 (2003); Lowell v. Kowalski, 380 Mass. 663, 667-669 (1980). This the State has not done. The justifications put forth by the State to sustain the statute's exclusion of the plaintiffs are insufficient for the reasons explained by the court to which I add the following observations.

The rights of couples to have children, to adopt, and to be foster parents, regardless of sexual orientation and marital status, are firmly established. See E.N.O. v. L.M.M., 429 Mass. 824, 829, cert. denied, 528 U.S. 1005 (1999); Adoption of Tammy, 416 Mass. 205, 210-211 (1993). As recognized in the court's opinion, and demonstrated by the record in this case, however, the State's refusal to accord legal recognition to unions of same-sex couples has had the effect of creating a system in which children of same-sex couples are unable to partake of legal protections and social benefits taken for granted by children in families whose parents are of the opposite sex. The continued maintenance of this caste-like system is irreconcilable with, indeed, totally repugnant to, the State's strong interest in the welfare of all children and its primary focus, in the context of family law where children are concerned, on "the best interests of the child." The issue at stake is not one, as might ordinarily be the case, that can be unilaterally and totally deferred to the wisdom of the Legislature. "While the State retains wide latitude to decide the manner in which it will allocate benefits, it may not use criteria which discriminatorily burden the exercise of a fundamental right." Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 652 (1981). Nor can the State's wish to conserve resources be accomplished by invidious distinctions between classes of citizens. See Plyler v. Doe, 457 U.S. 202, 216-217, 227 (1982). [FN4]

A comment is in order with respect to the insistence of some that marriage is, as a matter of definition, the legal union of a man and a woman. To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question we are asked to decide. [FN5] This case calls for a higher level of legal analysis. Precisely, the case requires that we confront ingrained assumptions with respect to historically accepted roles of men and women within the institution of marriage and requires that we reexamine these assumptions in light of the unequivocal language of art. 1, in order to ensure that the governmental conduct challenged here conforms to the supreme charter of our Commonwealth. "A written constitution is the fundamental law for the government of a sovereign State. It is the final statement of the rights, privileges and obligations of the citizens and the ultimate grant of the powers and the conclusive definition of the limitations of the departments of State and of public officers.... To its provisions the conduct of all governmental affairs must conform. From its terms there is no appeal." Loring v. Young, 239 Mass. 349, 376-377 (1921). I do not doubt the sincerity of deeply held moral or religious beliefs that make inconceivable to some the notion that any change in the common-law definition of what constitutes a legal civil marriage is now, or ever would be,

warranted. But, as matter of constitutional law, neither the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families. See Lawrence v. Texas, 123 S.Ct. 2472, 2486 (2003) (O'Connor, J., concurring) (moral disapproval, with no other valid State interest, cannot justify law that discriminates against groups of persons); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992) ("Our obligation is to define the liberty of all, not to mandate our own moral code").

(b) I am hopeful that our decision will be accepted by those thoughtful citizens who believe that same-sex unions should not be approved by the State. I am not referring here to acceptance in the sense of grudging acknowledgment of the court's authority to adjudicate the matter. My hope is more liberating. The plaintiffs are members of our community, our neighbors, our coworkers, our friends. As pointed out by the court, their professions include investment advisor, computer engineer, teacher, therapist, and lawyer. The plaintiffs volunteer in our schools, worship beside us in our religious houses, and have children who play with our children, to mention just a few ordinary daily contacts. We share a common humanity and participate together in the social contract that is the foundation of our Commonwealth. Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect. We should do so because it is the right thing to do. The union of two people contemplated by G.L. c. 207 "is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." Griswold v. Connecticut, 381 U.S. 479, 486 (1965). Because of the terms of art. 1, the plaintiffs will no longer be excluded from that association. [FN6]

SPINA, J. (dissenting, with whom Sosman and Cordy, JJ., join).

What is at stake in this case is not the unequal treatment of individuals or whether individual rights have been impermissibly burdened, but the power of the Legislature to effectuate social change without interference from the courts, pursuant to art. 30 of the Massachusetts Declaration of Rights. [FN1] The power to regulate marriage lies with the Legislature, not with the judiciary. See Commonwealth v. Stowell, 389 Mass. 171, 175 (1983). Today, the court has transformed its role as protector of individual rights into the role of creator of rights, and I respectfully dissent.

1. Equal protection. Although the court did not address the plaintiffs' gender discrimination claim, G.L. c. 207 does not unconstitutionally discriminate on the basis of gender. [FN2] A claim of gender discrimination will lie where it is shown that differential treatment disadvantages one sex over the other. See Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, 378 Mass. 342, 349-352 (1979). See also United States v. Virginia, 518 U.S. 515 (1996). General Laws c. 207 enumerates certain qualifications for obtaining a marriage license. It creates no distinction between the sexes, but applies to men and women in precisely the same way. It does not create any disadvantage identified with gender as both men and women are similarly limited to marrying a person of the opposite sex. See Commonwealth v. King, 374 Mass. 5, 15-22 (1977) (law prohibiting prostitution not discriminatory based on gender because of equal application to men and women).

Similarly, the marriage statutes do not discriminate on the basis of sexual orientation. As the court correctly recognizes, constitutional protections are extended to individuals, not couples. Ante n. 15. The marriage statutes do not disqualify individuals on the basis of sexual orientation from entering into marriage. All individuals, with certain exceptions not relevant here, are free to marry. Whether an individual chooses not to marry because of sexual orientation or any other reason should be of no concern to the court.

The court concludes, however, that G.L. c. 207 unconstitutionally discriminates against the individual plaintiffs because it denies them the "right to marry the person of one's choice" where that person is of the same sex. Ante at. To reach this result the court relies on Loving v. Virginia, 388 U.S. 1, 12 (1967), and transforms "choice"

into the essential element of the institution of marriage. The Loving case did not use the word "choice" in this manner, and it did not point to the result that the court reaches today. In Loving, the Supreme Court struck down as unconstitutional a statute that prohibited Caucasians from marrying non-Caucasians. It concluded that the statute was intended to preserve white supremacy and invidiously discriminated against non-Caucasians because of their race. See id. at 11-12. The "choice" to which the Supreme Court referred was the "choice to marry," and it concluded that with respect to the institution of marriage, the State had no compelling interest in limiting the choice to marry along racial lines. Id. The Supreme Court did not imply the existence of a right to marry a person of the same sex. To the same effect is Perez v. Sharp, 32 Cal.2d 711 (1948), on which the court also relies.

Unlike the Loving and Sharp cases, the Massachusetts Legislature has erected no barrier to marriage that intentionally discriminates against anyone. Within the institution of marriage, [FN3] anyone is free to marry, with certain exceptions that are not challenged. In the absence of any discriminatory purpose, the State's marriage statutes do not violate principles of equal protection. See Washington v. Davis, 426 U.S. 229, 240 (1976) ("invidious quality of a law claimed to be ... discriminatory must ultimately be traced to a ... discriminatory purpose"); Dickerson v. Attorney Gen., 396 Mass. 740, 743 (1986) (for purpose of equal protection analysis, standard of review under State and Federal Constitutions is identical). See also Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, supra. This court should not have invoked even the most deferential standard of review within equal protection analysis because no individual was denied access to the institution of marriage.

2. Due process. The marriage statutes do not impermissibly burden a right protected by our constitutional guarantee of due process implicit in art. 10 of our Declaration of Rights. There is no restriction on the right of any plaintiff to enter into marriage. Each is free to marry a willing person of the opposite sex. Cf. Zablocki v. Redhail, 434 U.S. 374 (1978) (fundamental right to marry impermissibly burdened by statute requiring court approval when subject to child support order).

Substantive due process protects individual rights against unwarranted government intrusion. See Aime v. Commonwealth, 414 Mass. 667, 673 (1993). The court states, as we have said on many occasions, that the Massachusetts Declaration of Rights may protect a right in ways that exceed the protection afforded by the Federal Constitution. Ante at. See Arizona v. Evans, 514 U.S. 1, 8 (1995) (State courts afforded broader protection of rights than granted by United States Constitution). However, today the court does not fashion a remedy that affords greater protection of a right. Instead, using the rubric of due process it has redefined marriage.

Although art. 10 may afford greater protection of rights than the due process clause of the Fourteenth Amendment, our treatment of due process challenges adheres to the same standards followed in Federal due process analysis. See Commonwealth v. Ellis, 429 Mass. 362, 371 (1999). When analyzing a claim that the State has impermissibly burdened an individual's fundamental or other right or liberty interest, "[w]e begin by sketching the contours of the right asserted. We then inquire whether the challenged restriction burdens that right." Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 646 (1981). Where a right deemed "fundamental" is implicated, the challenged restriction will be upheld only if it is "narrowly tailored to further a legitimate and compelling governmental interest." Aime v. Commonwealth, supra at 673. To qualify as "fundamental" the asserted right must be "objectively, 'deeply rooted in this Nation's history and tradition,' [Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)] ... and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' " Washington v. Glucksberg, 521 U.S. 702, 720-721 (1997), quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937) (right to assisted suicide does not fall within fundamental right to refuse medical treatment because novel and unsupported by tradition) (citations omitted). See Three Juveniles v. Commonwealth, 390 Mass. 357, 367 (1983) (O'Connor, J., dissenting), cert. denied sub nom. Keefe v. Massachusetts, 465 U.S. 1068 (1984). Rights that are not considered fundamental merit due process protection if they have been irrationally burdened. See Massachusetts Fed'n of Teachers v. Board of Educ., 436 Mass. 763, 777-779 & n. 14 (2002).

Although this court did not state that same-sex marriage is a fundamental right worthy of strict scrutiny protection, it nonetheless deemed it a constitutionally protected right by applying rational basis review. Before applying any level of constitutional analysis there must be a recognized right at stake. Same-sex marriage, or the "right to marry the person of one's choice" as the court today defines that right, does not fall within the fundamental right to marry. Same-sex marriage is not "deeply rooted in this Nation's history," and the court does not suggest that it is. Except for the occasional isolated decision in recent years, see, e.g., Baker v. State, 170 Vt. 194 (1999), same-sex marriage is not a right, fundamental or otherwise, recognized in this country. Just one example of the Legislature's refusal to recognize same-sex marriage can be found in a section of the legislation amending G.L. c. 151B to prohibit discrimination in the workplace on the basis of sexual orientation, which states: "Nothing in this act shall be construed so as to legitimize or validate a 'homosexual marriage'...." St.1989, c. 516, § 19. In this Commonwealth and in this country, the roots of the institution of marriage are deeply set in history as a civil union between a single man and a single woman. There is no basis for the court to recognize same-sex marriage as a constitutionally protected right.

3. Remedy. The remedy that the court has fashioned both in the name of equal protection and due process exceeds the bounds of judicial restraint mandated by art. 30. The remedy that construes gender specific language as gender neutral amounts to a statutory revision that replaces the intent of the Legislature with that of the court. Article 30 permits the court to apply principles of equal protection and to modify statutory language only if legislative intent is preserved. See, e.g., Commonwealth v. Chou, 433 Mass. 229, 238-239 (2001) (judicial rewriting of gender language permissible only when Legislature intended to include both men and women). See also Lowell v. Kowalski, 380 Mass. 663, 670 (1980). Here, the alteration of the gender- specific language alters precisely what the Legislature unambiguously intended to preserve, the marital rights of single men and women. Such a dramatic change in social institutions must remain at the behest of the people through the democratic process.

Where the application of equal protection principles do not permit rewriting a statute in a manner that preserves the intent of the Legislature, we do not rewrite the statute. In Dalli v. Board of Educ., 358 Mass. 753 (1971), the court refused to rewrite a statute in a manner that would include unintended individuals. "To attempt to interpret this [statute] as including those in the category of the plaintiff would be to engage in a judicial enlargement of the clear statutory language beyond the limit of our judicial function. We have traditionally and consistently declined to trespass on legislative territory in deference to the time tested wisdom of the separation of powers as expressed in art. [30] of the Declaration of Rights of the Constitution of Massachusetts even when it appeared that a highly desirable and just result might thus be achieved." Id. at 759. Recently, in Connors v. Boston, 430 Mass. 31 (1999), we refused to expand health insurance coverage to include domestic partners because such an expansion was within the province of the Legislature, where policy affecting family relationships is most appropriate and frequently considered. Id. at 42-43. Principles of equal protection do not permit the marriage statutes to be changed in the manner that we have seen today.

This court has previously exercised the judicial restraint mandated by art. 30 and declined to extend due process protection to rights not traditionally coveted, despite recognition of their social importance. See Tobin's Case, 424 Mass. 250, 252-253 (1997) (receiving workers' compensation benefits not fundamental right); Doe v. Superintendent of Schs. of Worcester, 421 Mass. 117, 129 (1995) (declaring education not fundamental right); Williams v. Secretary of the Executive Office of Human Servs., 414 Mass. 551, 565 (1993) (no fundamental right to receive mental health services); Matter of Tocci, 413 Mass. 542, 548 n. 4 (1992) (no fundamental right to practice law); Commonwealth v. Henry's Drywall Co., 366 Mass. 539, 542 (1974) (no fundamental right to pursue one's business). Courts have authority to recognize rights that are supported by the Constitution and history, but the power to create novel rights is reserved for the people through the democratic and legislative processes.

Likewise, the Supreme Court exercises restraint in the application of substantive due process " 'because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.' [Collins v. Harker

Heights, 503 U.S. 115, 125 (1992).] By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' [id.], lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court, Moore [v. East Cleveland, 431 U.S. 494, 502 (1977)] (plurality opinion)." Washington v. Glucksberg, supra at 720.

The court has extruded a new right from principles of substantive due process, and in doing so it has distorted the meaning and purpose of due process. The purpose of substantive due process is to protect existing rights, not to create new rights. Its aim is to thwart government intrusion, not invite it. The court asserts that the Massachusetts Declaration of Rights serves to guard against government intrusion into each individual's sphere of privacy. Ante at. Similarly, the Supreme Court has called for increased due process protection when individual privacy and intimacy are threatened by unnecessary government imposition. See, e.g., Lawrence v. Texas, 123 S.Ct. 2472 (2003) (private nature of sexual behavior implicates increased due process protection); Eisenstadt v. Baird, 405 U.S. 438 (1972) (privacy protection extended to procreation decisions within nonmarital context); Griswold v. Connecticut, 381 U.S. 479 (1965) (due process invoked because of intimate nature of procreation decisions). These cases, along with the Moe case, focus on the threat to privacy when government seeks to regulate the most intimate activity behind bedroom doors. The statute in question does not seek to regulate intimate activity within an intimate relationship, but merely gives formal recognition to a particular marriage. The State has respected the private lives of the plaintiffs, and has done nothing to intrude in the relationships that each of the plaintiff couples enjoy. Cf. Lawrence v. Texas, supra at 2484 (case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter"). Ironically, by extending the marriage laws to same-sex couples the court has turned substantive due process on its head and used it to interject government into the plaintiffs' lives.

SOSMAN, J. (dissenting, with whom Spina and Cordy, JJ., join).

In applying the rational basis test to any challenged statutory scheme, the issue is not whether the Legislature's rationale behind that scheme is persuasive to us, but only whether it satisfies a minimal threshold of rationality. Today, rather than apply that test, the court announces that, because it is persuaded that there are no differences between same-sex and opposite-sex couples, the Legislature has no rational basis for treating them differently with respect to the granting of marriage licenses. [FN1] Reduced to its essence, the court's opinion concludes that, because same-sex couples are now raising children, and withholding the benefits of civil marriage from their union makes it harder for them to raise those children, the State must therefore provide the benefits of civil marriage to same-sex couples just as it does to opposite-sex couples. Of course, many people are raising children outside the confines of traditional marriage, and, by definition, those children are being deprived of the various benefits that would flow if they were being raised in a household with married parents. That does not mean that the Legislature must accord the full benefits of marital status on every household raising children. Rather, the Legislature need only have some rational basis for concluding that, at present, those alternate family structures have not yet been conclusively shown to be the equivalent of the marital family structure that has established itself as a successful one over a period of centuries. People are of course at liberty to raise their children in various family structures, as long as they are not literally harming their children by doing so. See Blixt v. Blixt, 437 Mass. 649, 668-670 (2002) (Sosman, J., dissenting), cert. denied, 537 U.S. 1189 (2003). That does not mean that the State is required to provide identical forms of encouragement, endorsement, and support to all of the infinite variety of household structures that a free society permits.

Based on our own philosophy of child rearing, and on our observations of the children being raised by same-sex couples to whom we are personally close, we may be of the view that what matters to children is not the gender, or sexual orientation, or even the number of the adults who raise them, but rather whether those adults provide the children with a nurturing, stable, safe, consistent, and supportive

environment in which to mature. Same-sex couples can provide their children with the requisite nurturing, stable, safe, consistent, and supportive environment in which to mature, just as opposite-sex couples do. It is therefore understandable that the court might view the traditional definition of marriage as an unnecessary anachronism, rooted in historical prejudices that modern society has in large measure rejected and biological limitations that modern science has overcome.

It is not, however, our assessment that matters. Conspicuously absent from the court's opinion today is any acknowledgment that the attempts at scientific study of the ramifications of raising children in same-sex couple households are themselves in their infancy and have so far produced inconclusive and conflicting results. Notwithstanding our belief that gender and sexual orientation of parents should not matter to the success of the child rearing venture, studies to date reveal that there are still some observable differences between children raised by opposite-sex couples and children raised by same-sex couples. See post at--(Cordy, J., dissenting). Interpretation of the data gathered by those studies then becomes clouded by the personal and political beliefs of the investigators, both as to whether the differences identified are positive or negative, and as to the untested explanations of what might account for those differences. (This is hardly the first time in history that the ostensible steel of the scientific method has melted and buckled under the intense heat of political and religious passions.) Even in the absence of bias or political agenda behind the various studies of children raised by same-sex couples, the most neutral and strict application of scientific principles to this field would be constrained by the limited period of observation that has been available. Gay and lesbian couples living together openly, and official recognition of them as their children's sole parents, comprise a very recent phenomenon, and the recency of that phenomenon has not yet permitted any study of how those children fare as adults and at best minimal study of how they fare during their adolescent years. The Legislature can rationally view the state of the scientific evidence as unsettled on the critical question it now faces: Are families headed by same- sex parents equally successful in rearing children from infancy to adulthood as families headed by parents of opposite sexes? Our belief that children raised by same-sex couples should fare the same as children raised in traditional families is just that: a passionately held but utterly untested belief. The Legislature is not required to share that belief but may, as the creator of the institution of civil marriage, wish to see the proof before making a fundamental alteration to that institution.

Although ostensibly applying the rational basis test to the civil marriage statutes, it is abundantly apparent that the court is in fact applying some undefined stricter standard to assess the constitutionality of the marriage statutes' exclusion of same-sex couples. While avoiding any express conclusion as to any of the proffered routes by which that exclusion would be subjected to a test of strict scrutiny--infringement of a fundamental right, discrimination based on gender, or discrimination against gays and lesbians as a suspect classification--the opinion repeatedly alludes to those concepts in a prolonged and eloquent prelude before articulating its view that the exclusion lacks even a rational basis. See, e.g., ante at (noting that State Constitution is "more protective of individual liberty and equality," demands "broader protection for fundamental rights," and is "less tolerant of government intrusion into the protected spheres of private life" than Federal Constitution); ante at (describing decision to marry and choice of marital partner as "among life's momentous acts of self-definition"); ante at-- (repeated references to "right to marry" as "fundamental"); ante at-- (repeated comparisons to statutes prohibiting interracial marriage, which were predicated on suspect classification of race); ante at--(characterizing ban on same-sex marriage as "invidious" discrimination that "deprives individuals of access to an institution of fundamental legal, personal, and social significance" and again noting that Massachusetts Constitution "protects matters of personal liberty against government incursion" more zealously than Federal Constitution); ante at (characterizing "whom to marry, how to express sexual intimacy, and whether and how to establish a family" as "among the most basic of every individual's liberty and due process rights"); ante at ("liberty interest in choosing whether and whom to marry would be hollow" if Commonwealth could "foreclose an individual from freely choosing the person" to marry); ante at (opining that in "overlapping realms of personal autonomy, marriage, family life and child-rearing," characterized as "fundamentally private areas of life," court uses "integrated"

analysis instead of "narrow focus"). See also ante at n. 29 (suggesting that prohibition on same-sex marriage "impose[s] limits on personal beliefs"); ante at n. 31] (suggesting that "total deference" to Legislature in this case would be equivalent to "strip[ping]" judiciary "of its constitutional authority to decide challenges" in such areas as forced sterilization, antimiscegenation statutes, and abortion, even though all cited examples pertain to fundamental rights analyzed under strict scrutiny, not under rational basis test); ante at (civil marriage as "a right of fundamental importance"); ante at (noting State policy of "preventing discrimination on the basis of sexual orientation"); ante at, (prohibition against same-sex marriage inconsistent with "gender neutral laws promoting stable families," and "rooted in persistent prejudices against" homosexuals); ante at (prohibition against same-sex marriage "violated the basic premises of individual liberty"). In short, while claiming to apply a mere rational basis test, the court's opinion works up an enormous head of steam by repeated invocations of avenues by which to subject the statute to strict scrutiny, apparently hoping that that head of steam will generate momentum sufficient to propel the opinion across the yawning chasm of the very deferential rational basis test.

Shorn of these emotion-laden invocations, the opinion ultimately opines that the Legislature is acting irrationally when it grants benefits to a proven successful family structure while denying the same benefits to a recent, perhaps promising, but essentially untested alternate family structure. Placed in a more neutral context, the court would never find any irrationality in such an approach. For example, if the issue were government subsidies and tax benefits promoting use of an established technology for energy efficient heating, the court would find no equal protection or due process violation in the Legislature's decision not to grant the same benefits to an inventor or manufacturer of some new, alternative technology who did not yet have sufficient data to prove that that new technology was just as good as the established technology. That the early results from preliminary testing of the new technology might look very promising, or that the theoretical underpinnings of the new technology might appear flawless, would not make it irrational for the Legislature to grant subsidies and tax breaks to the established technology and deny them to the still unproved newcomer in the field. While programs that affect families and children register higher on our emotional scale than programs affecting energy efficiency, our standards for what is or is not "rational" should not be bent by those emotional tugs. Where, as here, there is no ground for applying strict scrutiny, the emotionally compelling nature of the subject matter should not affect the manner in which we apply the rational basis test.

Or, to the extent that the court is going to invoke such emotion-laden and value-laden rhetoric as a means of heightening the degree of scrutiny to be applied, the same form of rhetoric can be employed to justify the Legislature's proceeding with extreme caution in this area. In considering whether the Legislature has a rational reason for postponing a dramatic change to the definition of marriage, it is surely pertinent to the inquiry to recognize that this proffered change affects not just a load-bearing wall of our social structure but the very cornerstone of that structure. See post at--(Cordy, J., dissenting). Before making a fundamental alteration to that cornerstone, it is eminently rational for the Legislature to require a high degree of certainty as to the precise consequences of that alteration, to make sure that it can be done safely, without either temporary or lasting damage to the structural integrity of the entire edifice. The court today blithely assumes that there are no such dangers and that it is safe to proceed (see ante at--, an assumption that is not supported by anything more than the court's blind faith that it is so.

More importantly, it is not our confidence in the lack of adverse consequences that is at issue, or even whether that confidence is justifiable. The issue is whether it is rational to reserve judgment on whether this change can be made at this time without damaging the institution of marriage or adversely affecting the critical role it has played in our society. Absent consensus on the issue (which obviously does not exist), or unanimity amongst scientists studying the issue (which also does not exist), or a more prolonged period of observation of this new family structure (which has not yet been possible), it is rational for the Legislature to postpone any redefinition of marriage that would include same-sex couples until such time as it is certain that that redefinition will not have unintended and undesirable social consequences. Through the political process, the people may decide when the benefits of extending civil marriage to same-sex couples have been shown to outweigh

whatever risks--be they palpable or ephemeral--are involved. However minimal the risks of that redefinition of marriage may seem to us from our vantage point, it is not up to us to decide what risks society must run, and it is inappropriate for us to abrogate that power to ourselves merely because we are confident that "it is the right thing to do." Ante at (Greaney, J., concurring).

As a matter of social history, today's opinion may represent a great turning point that many will hail as a tremendous step toward a more just society. As a matter of constitutional jurisprudence, however, the case stands as an aberration. To reach the result it does, the court has tortured the rational basis test beyond recognition. I fully appreciate the strength of the temptation to find this particular law unconstitutional--there is much to be said for the argument that excluding gay and lesbian couples from the benefits of civil marriage is cruelly unfair and hopelessly outdated; the inability to marry has a profound impact on the personal lives of committed gay and lesbian couples (and their children) to whom we are personally close (our friends, neighbors, family members, classmates, and co-workers); and our resolution of this issue takes place under the intense glare of national and international publicity. Speaking metaphorically, these factors have combined to turn the case before us into a "perfect storm" of a constitutional question. In my view, however, such factors make it all the more imperative that we adhere precisely and scrupulously to the established guideposts of our constitutional jurisprudence, a jurisprudence that makes the rational basis test an extremely deferential one that focuses on the rationality, not the persuasiveness, of the potential justifications for the classifications in the legislative scheme. I trust that, once this particular "storm" clears, we will return to the rational basis test as it has always been understood and applied. Applying that deferential test in the manner it is customarily applied, the exclusion of gay and lesbian couples from the institution of civil marriage passes constitutional muster. I respectfully dissent.

CORDY, J. (dissenting, with whom Spina and Sosman, JJ., join).

The court's opinion concludes that the Department of Public Health has failed to identify any "constitutionally adequate reason" for limiting civil marriage to opposite-sex unions, and that there is no "reasonable relationship" between a disqualification of same-sex couples who wish to enter into a civil marriage and the protection of public health, safety, or general welfare. Consequently, it holds that the marriage statute cannot withstand scrutiny under the Massachusetts Constitution. Because I find these conclusions to be unsupportable in light of the nature of the rights and regulations at issue, the presumption of constitutional validity and significant deference afforded to legislative enactments, and the "undesirability of the judiciary substituting its notions of correct policy for that of a popularly elected Legislature" responsible for making such policy, Zayre Corp. v. Attorney Gen., 372 Mass. 423, 433 (1977), I respectfully dissent. Although it may be desirable for many reasons to extend to same-sex couples the benefits and burdens of civil marriage (and the plaintiffs have made a powerfully reasoned case for that extension), that decision must be made by the Legislature, not the court.

If a statute either impairs the exercise of a fundamental right protected by the due process or liberty provisions of our State Constitution, or discriminates based on a constitutionally suspect classification such as sex, it will be subject to strict scrutiny when its validity is challenged. See Blixt v. Blixt, 437 Mass. 649, 655-656, 660-661 (2002), cert. denied, 537 U.S. 1189 (2003) (fundamental right); Lowell v. Kowalski, 380 Mass. 663, 666 (1980) (sex-based classification). If it does neither, a statute "will be upheld if it is 'rationally related to a legitimate State purpose.' " Hallett v. Wrentham, 398 Mass. 550, 557 (1986), quoting Paro v. Longwood Hosp., 373 Mass. 645, 649 (1977). This test, referred to in State and Federal constitutional jurisprudence as the "rational basis test," [FN1] is virtually identical in substance and effect to the test applied to a law promulgated under the State's broad police powers (pursuant to which the marriage statutes and most other licensing and regulatory laws are enacted): that is, the law is valid if it is reasonably related to the protection of public health, safety, or general welfare. See, e.g., Leigh v. Board of Registration in Nursing, 395 Mass. 670, 682-683 (1985) (applying rational basis review to question of State exercise of police power).

The Massachusetts marriage statute does not impair the exercise of a recognized fundamental right, or discriminate on the basis of sex in

violation of the equal rights amendment to the Massachusetts Constitution. Consequently, it is subject to review only to determine whether it satisfies the rational basis test. Because a conceivable rational basis exists upon which the Legislature could conclude that the marriage statute furthers the legitimate State purpose of ensuring, promoting, and supporting an optimal social structure for the bearing and raising of children, it is a valid exercise of the State's police power.

A. Limiting marriage to the union of one man and one woman does not impair the exercise of a fundamental right. Civil marriage is an institution created by the State. In Massachusetts, the marriage statutes are derived from English common law, see Commonwealth v. Knowlton, 2 Mass. 530, 534 (1807), and were first enacted in colonial times. Commonwealth v. Munson, 127 Mass. 459, 460 (1879). They were enacted to secure public interests and not for religious purposes or to promote personal interests or aspirations. (See discussion infra at--). As the court notes in its opinion, the institution of marriage is "the legal union of a man and woman as husband and wife," ante at, and it has always been so under Massachusetts law, colonial or otherwise.

The plaintiffs contend that because the right to choose to marry is a "fundamental" right, the right to marry the person of one's choice, including a member of the same sex, must also be a "fundamental" right. While the court stops short of deciding that the right to marry someone of the same sex is "fundamental" such that strict scrutiny must be applied to any statute that impairs it, it nevertheless agrees with the plaintiffs that the right to choose to marry is of fundamental importance ("among the most basic" of every person's "liberty and due process rights") and would be "hollow" if an individual was foreclosed from "freely choosing the person with whom to share ... the ... institution of civil marriage." Ante at. Hence, it concludes that a marriage license cannot be denied to an individual who wishes to marry someone of the same sex. In reaching this result the court has transmuted the "right" to marry into a right to change the institution of marriage itself. This feat of reasoning succeeds only if one accepts the proposition that the definition of the institution of marriage as a union between a man and a woman is merely "conclusory" (as suggested, ante at [Greaney, J., concurring]), rather than the basis on which the "right" to partake in it has been deemed to be of fundamental importance. In other words, only by assuming that "marriage" includes the union of two persons of the same sex does the court conclude that restricting marriage to opposite-sex couples infringes on the "right" of same-sex couples of "marry." [FN2]

The plaintiffs ground their contention that they have a fundamental right to marry a person of the same sex in a long line of Supreme Court decisions, e.g., Turner v. Safley, 482 U.S. 78 (1987); Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942); that discuss the importance of marriage. In context, all of these decisions and their discussions are about the "fundamental" nature of the institution of marriage as it has existed and been understood in this country, not as the court has redefined it today. Even in that context, its "fundamental" nature is derivative of the nature of the interests that underlie or are associated with it. [FN3] An examination of those interests reveals that they are either not shared by same-sex couples or not implicated by the marriage statutes.

Supreme Court cases that have described marriage or the right to marry as "fundamental" have focused primarily on the underlying interest of every individual in procreation, which, historically, could only legally occur within the construct of marriage because sexual intercourse outside of marriage was a criminal act. [FN4] In Skinner v. Oklahoma, supra, the first case to characterize marriage as a "fundamental" right, the Supreme Court stated, as its rationale for striking down a sterilization statute, that "[m]arriage and procreation are fundamental to the very existence of the race." Id. at 541. In concluding that a sterilized individual "is forever deprived of a basic liberty," id., the Court was obviously referring to procreation rather than marriage, as this court recognized in Matter of Moe, 385 Mass. 555, 560 (1982). Similarly, in Loving v. Virginia, supra, in which the United States Supreme Court struck down Virginia's antimiscegenation statute, the Court implicitly linked marriage with procreation in describing marriage as "fundamental to our very existence." Id. at 12. In Zablocki v. Redhail, supra, the Court expressly linked the right to marry with the right to procreate, concluding that "if [the plaintiff's] right to procreate means anything at all, it must imply some right to enter the only relationship in

which the State ... allows sexual relations legally to take place." Id. at 386. Once again, in Turner v. Safley, supra, striking a State regulation that curtailed the right of an inmate to marry, the Court included among the important attributes of such marriages the "expectation that [the marriage] ultimately will be fully consummated." Id. at 96. See Milford v. Worcester, 7 Mass. 48, 52 (1810) (purpose of marriage is "to regulate, chasten, and refine, the intercourse between the sexes; and to multiply [and] preserve ... the species"). Because same-sex couples are unable to procreate on their own, any right to marriage they may possess cannot be based on their interest in procreation, which has been essential to the Supreme Court's denomination of the right to marry as fundamental.

Supreme Court cases recognizing a right to privacy in intimate decision-making, e.g., Griswold v. Connecticut, supra (striking down statute prohibiting use of contraceptives); Roe v. Wade, 410 U.S. 113 (1973) (striking down statute criminalizing abortion), have also focused primarily on sexual relations and the decision whether or not to procreate, and have refused to recognize an "unlimited right" to privacy. Id. at 154. Massachusetts courts have been no more willing than the Federal courts to adopt a "universal[ ]" "privacy doctrine," Marcoux v. Attorney Gen., 375 Mass. 63, 67 (1978), or to derive "controversial 'new' rights from the Constitution." Aime v. Commonwealth, 414 Mass. 667, 674 n. 10 (1993).

What the Griswold Court found "repulsive to the notions of privacy surrounding the marriage relationship" was the prospect of "allow[ing] the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives." Griswold v. Connecticut, supra at 485-486. See Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 658 (1981), quoting L. Tribe, American Constitutional Law 924 (1978) (finding it "difficult to imagine a clearer case of bodily intrusion" than being forced to bear a child). When Justice Goldberg spoke of "marital relations" in the context of finding it "difficult to imagine what is more private or more intimate than a husband and wife's marital relations[hip]," Griswold v. Connecticut, supra at 495 (Goldberg, J., concurring), he was obviously referring to sexual relations. [FN5] Similarly, in Lawrence v. Texas, 123 S.Ct. 2472 (2003), it was the criminalization of private sexual behavior that the Court found violative of the petitioners' liberty interest.

In Massachusetts jurisprudence, protected decisions generally have been limited to those concerning "whether or not to beget or bear a child," Matter of Moe, 385 Mass. 555, 564 (1982) (see Opinion of the Justices, 423 Mass. 1201, 1234-1235 [1996] ["focus of (the Griswold and Roe cases) and the cases following them has been the intrusion ... into the especially intimate aspects of a person's life implicated in procreation and childbearing"]); how to raise a child, see Care & Protection of Robert, 408 Mass. 52, 58, 60 (1990); or whether or not to accept medical treatment, see Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 430 (1986); Superintendent of Belchertown State Sch. v. Saikewicz, 373 Mass. 728, 742 (1977), none of which is at issue here. See also Commonwealth v. Balthazar, 366 Mass. 298, 301 (1974) (statute punishing unnatural and lascivious acts does not apply to sexual conduct engaged in by adults in private, in light of "articulation of the constitutional right of an individual to be free from government regulation of certain sex related activities").

The marriage statute, which regulates only the act of obtaining a marriage license, does not implicate privacy in the sense that it has found constitutional protection under Massachusetts and Federal law. Cf. Commonwealth v. King, 374 Mass. 5, 14 (1977) (solicitation of prostitution "while in a place to which the public had access" implicated no "constitutionally protected rights of privacy"); Marcoux v. Attorney Gen., supra at 68 (right to privacy, at most, protects conduct "limited more or less to the hearth"). It does not intrude on any right that the plaintiffs have to privacy in their choices regarding procreation, an intimate partner or sexual relations. [FN6] The plaintiffs' right to privacy in such matters does not require that the State officially endorse their choices in order for the right to be constitutionally vindicated.

Although some of the privacy cases also speak in terms of personal autonomy, no court has ever recognized such an open-ended right. "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected...." Washington v. Glucksberg, 521 U.S. 702, 727 (1997). Such

decisions are protected not because they are important, intimate, and personal, but because the right or liberty at stake is "so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty" that it is protected by due process. Id. Accordingly, the Supreme Court has concluded that while the decision to refuse unwanted medical treatment is fundamental, Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 278 (1990), because it is deeply rooted in our nation's history and tradition, the equally personal and profound decision to commit suicide is not because of the absence of such roots. Washington v. Glucksberg, supra.

While the institution of marriage is deeply rooted in the history and traditions of our country and our State, the right to marry someone of the same sex is not. No matter how personal or intimate a decision to marry someone of the same sex might be, the right to make it is not guaranteed by the right of personal autonomy.

The protected right to freedom of association, in the sense of freedom of choice "to enter into and maintain certain intimate human relationships," Roberts v. United States Jaycees, 468 U.S. 609, 617 (1984) (as an element of liberty or due process rather than free speech), is similarly limited and unimpaired by the marriage statute. As recognized by the Supreme Court, that right affords protection only to "certain kinds of highly personal relationships," id. at 618, such as those between husband and wife, parent and child, and among close relatives, id. at 619, that "have played a critical role in the culture and traditions of the Nation," id. at 618-619, and are "deeply rooted in this Nation's history and tradition." Moore v. East Cleveland, 431 U.S. 494, 498-499, 503 (1977) (distinguishing on this basis between family and nonfamily relationships). Unlike opposite-sex marriages, which have deep historic roots, or the parent-child relationship, which reflects a "strong tradition" founded on "the history and culture of Western civilization" and "is now established beyond debate as an enduring American tradition," Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); or extended family relationships, which have been "honored throughout our history," Moore v. East Cleveland, supra at 505, same-sex relationships, although becoming more accepted, are certainly not so "deeply rooted in this Nation's history and tradition" as to warrant such enhanced constitutional protection.

Although "expressions of emotional support and public commitment" have been recognized as among the attributes of marriage, which, "[t]aken together ... form a constitutionally protected marital relationship" (emphasis added), Turner v. Safley, 482 U.S. 78, 95, 96 (1987), those interests, standing alone, are not the source of a fundamental right to marry. While damage to one's "status in the community" may be sufficient harm to confer standing to sue, Lowell v. Kowalski, 380 Mass. 663, 667 (1980), such status has never been recognized as a fundamental right. See Paul v. Davis, 424 U.S. 693, 701 (1976) (mere damage to reputation does not constitute deprivation of "liberty").

Finally, the constitutionally protected interest in child rearing, recognized in Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925); and Care & Protection of Robert, supra at 58, 60, is not implicated or infringed by the marriage statute here. The fact that the plaintiffs cannot marry has no bearing on their independently protected constitutional rights as parents which, as with opposite-sex parents, are limited only by their continued fitness and the best interests of their children. Bezio v. Patenaude, 381 Mass. 563, 579 (1980) (courts may not use parent's sexual orientation as reason to deny child custody).

Because the rights and interests discussed above do not afford the plaintiffs any fundamental right that would be impaired by a statute limiting marriage to members of the opposite sex, they have no fundamental right to be declared "married" by the State.

Insofar as the right to marry someone of the same sex is neither found in the unique historical context of our Constitution [FN7] nor compelled by the meaning ascribed by this court to the liberty and due process protections contained within it, should the court nevertheless recognize it as a fundamental right? The consequences of deeming a right to be "fundamental" are profound, and this court, as well as the Supreme Court, has been very cautious in recognizing them. [FN8] Such caution is required by separation of powers principles. If a right is found to be "fundamental," it is, to a great extent, removed from "the arena of public debate and legislative action"; utmost care must be taken when breaking new ground in this field "lest the

liberty protected by the Due Process Clause be subtly transformed into the policy preferences of [judges]." Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

"[T]o rein in" the otherwise potentially unlimited scope of substantive due process rights, id. at 722, both Federal and Massachusetts courts have recognized as "fundamental" only those "rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' [Moore v. East Cleveland, supra at 503] ... and 'implicit in the concept of ordered liberty.' " Id. at 720-721, quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937). See Dutil, petitioner, 437 Mass. 9, 13 (2002) (same). In the area of family-related rights in particular, the Supreme Court has emphasized that the "Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted." Moore v. East Cleveland, supra. [FN9]

Applying this limiting principle, the Supreme Court, as noted above, declined to recognize a fundamental right to physician-assisted suicide, which would have required "revers[ing] centuries of legal doctrine and practice, and strik [ing] down the considered policy choice of almost every State." Washington v. Glucksberg, supra at 723. While recognizing that public attitudes toward assisted suicide are currently the subject of "earnest and profound debate," the Court nevertheless left the continuation and resolution of that debate to the political arena, "as it should be in a democratic society." Id. at 719, 735.

Similarly, Massachusetts courts have declined to recognize rights that are not so deeply rooted. [FN10] As this court noted in considering whether to recognize a right of terminally ill patients to refuse life-prolonging treatment, "the law always lags behind the most advanced thinking in every area," and must await "some common ground, some consensus." Superintendent of Belchertown State Sch. v. Saikewicz, 373 Mass. 728, 737 (1977), quoting Burger, The Law and Medical Advances, 67 Annals Internal Med. Supp. 7, 15, 17 (1967). See Blixt v. Blixt, 437 Mass. 649, 662-663 n. 22 (2002) ("social consensus about family relationships is relevant to the constitutional limits on State intervention").

This is not to say that a statute that has no rational basis must nevertheless be upheld as long as it is of ancient origin. However, "[t]he long history of a certain practice ... and its acceptance as an uncontroversial part of our national and State tradition do suggest that [the court] should reflect carefully before striking it down." Colo v. Treasurer & Receiver Gen., 378 Mass. 550, 557 (1979). As this court has recognized, the "fact that a challenged practice 'is followed by a large number of states ... is plainly worth considering in determining whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." ' " Commonwealth v. Kostka, 370 Mass. 516, 533 (1976), quoting Leland v. Oregon, 343 U.S. 790, 798 (1952).

Although public attitudes toward marriage in general and same-sex marriage in particular have changed and are still evolving, "the asserted contemporary concept of marriage and societal interests for which [plaintiffs] contend" are "manifestly [less] deeply founded" than the "historic institution" of marriage. Matter of the Estate of Cooper, 187 A.D.2d 128, 133-134 (N.Y.1993). Indeed, it is not readily apparent to what extent contemporary values have embraced the concept of same-sex marriage. Perhaps the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures," Atkins v. Virginia, 536 U.S. 304, 312 (2002), quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989). No State Legislature has enacted laws permitting same-sex marriages; and a large majority of States, as well as the United States Congress, have affirmatively prohibited the recognition of such marriages for any purpose. See P. Greenberg, State Laws Affecting Lesbians and Gays, National Conference of State Legislatures Legisbriefs at 1 (April/May 2001) (reporting that, as of May, 2001, thirty-six States had enacted "defense of marriage" statutes); 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000) (Federal Defense of Marriage Act).

Given this history and the current state of public opinion, as reflected in the actions of the people's elected representatives, it cannot be said that "a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither ... [is] a right to same-sex marriage ... implicit in the concept of ordered

liberty, such that neither liberty nor justice would exist if it were sacrificed." Baehr v. Lewin, 74 Haw. 530, 556-557 (1993). See Dean v. District of Columbia, 653 A.2d 307, 333 (D.C.1995) (per curiam) (Ferren, J., concurring in part and dissenting in part); Baker v. Nelson, 291 Minn. 310, 312 (1971), appeal dismissed, 409 U.S. 810 (1972); Storrs v. Holcomb, 168 Misc.2d 898, 899-900 (N.Y.Sup.Ct.1996), dismissed, 245 A.D.2d 943 (N.Y.1997). [FN11]. The one exception was the Alaska Superior Court, which relied on that State's Constitution's express and broadly construed right to privacy. Brause, 1998 WL 88743 at *3-*4. [FN12] In such circumstances, the law with respect to same- sex marriages must be left to develop through legislative processes, subject to the constraints of rationality, lest the court be viewed as using the liberty and due process clauses as vehicles merely to enforce its own views regarding better social policies, a role that the strongly worded separation of powers principles in art. 30 of the Declaration of Rights of our Constitution forbids, and for which the court is particularly ill suited.

B. The marriage statute, in limiting marriage to heterosexual couples, does not constitute discrimination on the basis of sex in violation of the Equal Rights Amendment to the Massachusetts Constitution. In his concurrence, Justice Greaney contends that the marriage statute constitutes discrimination on the basis of sex in violation of art. 1 of the Declaration of Rights as amended by art. 106 of the Amendments to the Constitution of the Commonwealth, the Equal Rights Amendment (ERA). [FN13] Such a conclusion is analytically unsound and inconsistent with the legislative history of the ERA.

The central purpose of the ERA was to eradicate discrimination against women and in favor of men or vice versa. See Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, 378 Mass. 342, 357 (1979). Consistent with this purpose, we have construed the ERA to prohibit laws that advantage one sex at the expense of the other, but not laws that treat men and women equally, id. at 346-349 (assuming that "separate but equal" treatment of males and females would be constitutionally permissible). The Massachusetts marriage statute does not subject men to different treatment from women; each is equally prohibited from precisely the same conduct. See Baker v. State, 170 Vt. 194, 215 n. 13 (1999) ("there is no discrete class subject to differential treatment solely on the basis of sex"). Compare Commonwealth v. King, 374 Mass. 5, 16 (1977) (law prohibiting prostitution applied to both male and female prostitutes and therefore did not discriminate), and Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 274-275 (1979) (declining to characterize veterans' preference as sex discrimination because it applied to both male and female veterans), with Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, supra, and Lowell v. Kowalski, 380 Mass. 663 (1980) (where statutes and rules at issue advantaged one sex over another).

Of course, a statute that on its face treats protected groups equally may still harm, stigmatize, or advantage one over the other. Such was the circumstance in Loving v. Virginia, 388 U.S. 1 (1967), where the Supreme Court struck down a State statute that made interracial marriage a crime, as constituting invidious discrimination on the basis of race. While the statute purported to apply equally to whites and nonwhites, the Court found that it was intended and structured to favor one race (white) and disfavor all others (nonwhites). The statute's legislative history demonstrated that its purpose was not merely to punish interracial marriage, but to do so for the sole benefit of the white race. As the Supreme Court readily concluded, the Virginia law was "designed to maintain White Supremacy." Id. at 11. Consequently, there was a fit between the class that the law was intended to discriminate against (nonwhite races) and the classification enjoying heightened protection (race).

By contrast, here there is no evidence that limiting marriage to opposite-sex couples was motivated by sexism in general or a desire to disadvantage men or women in particular. Moreover, no one has identified any harm, burden, disadvantage, or advantage accruing to either gender as a consequence of the Massachusetts marriage statute. In the absence of such effect, the statute limiting marriage to couples of the opposite sex does not violate the ERA's prohibition of sex discrimination. [FN14]

This conclusion is buttressed by the legislative history of the ERA, which was adopted by the voters on November 2, 1976, after being approved by constitutional conventions of the Legislature on August 15, 1973, (by a vote of 261-0) and May 14, 1975 (by a vote of 217-55).

In anticipation of its adoption, the Legislature enacted and, on June 21, 1975, the Governor approved a "Resolve providing for an investigation and study by a special commission relative to the effect of the ratification of the proposed amendments to the Constitution of the Commonwealth of Massachusetts and the Constitution of the United States prohibiting discrimination on account of sex upon the laws, business communities and public in the Commonwealth." Res.1975, c. 26. One of the principal tasks of the commission was to catalog the aspects of the General Laws that would have to be amended for the statutory code to comply with the mandate of the proposed amendment that equality not be abridged on the basis of sex. [FN15]

On October 19, 1976, just before the general election at which the amendment was to be considered, the commission filed its Interim Report, which focused on the effect of the Massachusetts ERA on the laws of the Commonwealth. 1976 Senate Doc. No. 1689. A section of the report, entitled "Areas Unaffected by the Equal Rights Amendment," addressed some of the legal regimes that would not be affected by the adoption of the ERA. One such area was "Homosexual Marriage," about which the commission stated:

"An equal rights amendment will have no effect upon the allowance or denial of homosexual marriages. The equal rights amendment is not concerned with the relationship of two persons of the same sex; it only addresses those laws or public-related actions which treat persons of opposite sexes differently. The Washington Court of Appeals has already stated that the equal rights amendment to its state constitution did not afford a basis for validating homosexual marriages. In Colorado, the attorney general has likewise issued an opinion that the state equal rights amendment did not validate homosexual marriage. There are no cases which have used a state equal rights amendment to either validate or require the allowance of homosexual marriages." (Footnotes omitted.) Id. at 21-22. [FN16]

The views of the commission were reflected in the public debate surrounding the passage of the ERA that focused on gender equality. See, e.g., Referenda reviewed, Boston Globe, Nov. 1, 1976, at 26; Voters' guide on nine state referendum measures, Boston Herald American, Nov. 1, 1976, at 17. Claims that the ERA might be the basis for validating marriages between same-sex couples were labelled as "exaggerated" and "unfounded." For example, before the vote, the Boston Globe published an editorial discussing and urging favorable action on the ERA. In making its case, it noted that "[t]hose urging a no vote ... argue that the amendment would ... legitimize marriage between people of the same sex [and other changes]. In reality, the proposed amendment would require none of these things. Mass. ballot issues ... 1 Equal Rights Amendment. Boston Globe, Nov. 1, 1976, at 29. And in the aftermath of the vote, the Boston Globe heralded the electorate's acceptance of "the arguments of proponents that the proposal would not result in many far-reaching or threatening changes." Referendums fared poorly, Boston Globe, Nov. 4, 1976, at 29.

While the court, in interpreting a constitutional amendment, is not bound to accept either the views of a legislative commission studying and reporting on the amendment's likely effects, or of public commentary and debate contemporaneous with its passage, it ought to be wary of completely disregarding what appears to be the clear intent of the people recently recorded in our constitutional history. This is particularly so where the plain wording of the amendment does not require the result it would reach.

C. The marriage statute satisfies the rational basis standard. The burden of demonstrating that a statute does not satisfy the rational basis standard rests on the plaintiffs. It is a weighty one. "[A] reviewing court will presume a statute's validity, and make all rational inferences in favor of it.... The Legislature is not required to justify its classifications, nor provide a record or finding in support of them." (Citation omitted.) Paro v. Longwood Hosp., 373 Mass. 645, 650 (1977). The statute "only need[s to] be supported by a conceivable rational basis." Fine v. Contributory Retirement Appeal Bd., 401 Mass. 639, 641 (1988). See Massachusetts Fed'n of Teachers v. Board of Educ., 436 Mass. 763, 771-772 (2002). As this court stated in Shell Oil Co. v. Revere, 383 Mass. 682, 687-688 (1981):

"[I]t is not the court's function to launch an inquiry to resolve a debate which has already been settled in the legislative forum. '[I]t [is] the judge's duty ... to give effect to the will of the people as expressed in the statute by their representative body. It is in this way ... that the

doctrine of separation of powers is given meaning.' Commonwealth v. Leis, 355 Mass. 189, 202 (1969) (Kirk, J., concurring).

"This respect for the legislative process means that it is not the province of the court to sit and weigh conflicting evidence supporting or opposing a legislative enactment....

"Although persons challenging the constitutionality of legislation may introduce evidence in support of their claim that the legislation is irrational ... they will not prevail if 'the question is at least debatable' in view of the evidence which may have been available to the Legislature. United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938)."

The "time tested wisdom of the separation of powers" requires courts to avoid "judicial legislation in the guise of new constructions to meet real or supposed new popular viewpoints, preserving always to the Legislature alone its proper prerogative of adjusting the statutes to changed conditions." Pielech v. Massasoit Greyhound, Inc., 423 Mass. 534, 539, 540 (1996), cert. denied, 520 U.S. 1131 (1997), quoting Commonwealth v. A Juvenile, 368 Mass. 580, 595 (1975).

In analyzing whether a statute satisfies the rational basis standard, we look to the nature of the classification embodied in the enactment, then to whether the statute serves a legitimate State purpose, and finally to whether the classification is reasonably related to the furtherance of that purpose. With this framework, we turn to the challenged statute, G.L. c. 207, which authorizes local town officials to issue licenses to couples of the opposite sex authorizing them to enter the institution of civil marriage.

1. Classification. The nature of the classification at issue is readily apparent. Opposite-sex couples can obtain a license and same-sex couples cannot. The granting of this license, and the completion of the required solemnization of the marriage, opens the door to many statutory benefits and imposes numerous responsibilities. The fact that the statute does not permit such licenses to be issued to couples of the same sex thus bars them from civil marriage. The classification is not drawn between men and women or between heterosexuals and homosexuals, any of whom can obtain a license to marry a member of the opposite sex; rather, it is drawn between same-sex couples and opposite-sex couples.

2. State purpose. The court's opinion concedes that the civil marriage statute serves legitimate State purposes, but further investigation and elaboration of those purposes is both helpful and necessary.

Civil marriage is the institutional mechanism by which societies have sanctioned and recognized particular family structures, and the institution of marriage has existed as one of the fundamental organizing principles of human society. See C.N. Degler, The Emergence of the Modern American Family, in The American Family in Social-Historical Perspective 61 (3d ed.1983); A.J. Hawkins, Introduction, in Revitalizing the Institution of Marriage for the Twenty-First Century: An Agenda for Strengthening Marriage xiv (2002); C. Lasch, Social Pathologists and the Socialization of Reproduction, in The American Family in Social-Historical Perspective, supra at 80; W.J. O'Donnell & D.A. Jones, Marriage and Marital Alternatives 1 (1982); L. Saxton, The Individual, Marriage, and the Family 229-230, 260 (1968); M.A. Schwartz & B.M. Scott, Marriages and Families: Diversity and Change 4 (1994); Wardle, "Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 Harv. J.L. & Pub. Pol'y 771, 777-780 (2001); J.Q. Wilson, The Marriage Problem: How Our Culture Has Weakened Families 28, 40, 66-67 (2002). Marriage has not been merely a contractual arrangement for legally defining the private relationship between two individuals (although that is certainly part of any marriage). Rather, on an institutional level, marriage is the "very basis of the whole fabric of civilized society," J.P. Bishop, Commentaries on the Law of Marriage and Divorce, and Evidence in Matrimonial Suits § 32 (1852), and it serves many important political, economic, social, educational, procreational, and personal functions.

Paramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized. See Milford v. Worcester, 7 Mass. 48, 52 (1810) (civil marriage "intended to regulate,

chasten, and refine, the intercourse between the sexes; and to multiply, preserve, and improve the species"). See also P. Blumstein & P. Schwartz, American Couples: Money, Work, Sex 29 (1983); C.N. Degler, supra at 61; G. Douglas, Marriage, Cohabitation, and Parenthood--From Contract to Status?, in Cross Currents: Family Law and Policy in the United States and England 223 (2000); S.L. Nock, The Social Costs of De-Institutionalizing Marriage, in Revitalizing the Institution of Marriage for the Twenty-First Century: An Agenda for Strengthening Marriage, supra at 7; L. Saxton, supra at 239- 240, 242; M.A. Schwartz & B.M. Scott, supra at 4-6; Wardle, supra at 781-796; J.Q. Wilson, supra at 23-32. Admittedly, heterosexual intercourse, procreation, and child care are not necessarily conjoined (particularly in the modern age of widespread effective contraception and supportive social welfare programs), but an orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth. The institution of marriage is that mechanism.

The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed. See G.L. c. 209C, § 6 ("a man is presumed to be the father of a child ... if he is or has been married to the mother and the child was born during the marriage, or within three hundred days after the marriage was terminated by death, annulment or divorce"). Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child. [FN17] Similarly, aside from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. See J.Q. Wilson, supra at 23-32. See also P. Blumstein & P. Schwartz, supra at 29; C.N. Degler, supra at 61; G. Douglas, supra at 223; S.L. Nock, supra at 7; L. Saxton, supra at 239-240, 242; M.A. Schwartz & B.M. Scott, supra at 4-6; Wardle, supra at 781-796. The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic.

The marital family is also the foremost setting for the education and socialization of children. Children learn about the world and their place in it primarily from those who raise them, and those children eventually grow up to exert some influence, great or small, positive or negative, on society. The institution of marriage encourages parents to remain committed to each other and to their children as they grow, thereby encouraging a stable venue for the education and socialization of children. See P. Blumstein & P. Schwartz, supra at 26; C.N. Degler, supra at 61; S.L. Nock, supra at 2-3; C. Lasch, supra at 81; M.A. Schwartz & B.M. Scott, supra at 6-7. More macroscopically, construction of a family through marriage also formalizes the bonds between people in an ordered and institutional manner, thereby facilitating a foundation of interconnectedness and interdependency on which more intricate stabilizing social structures might be built. See M. Grossberg, Governing the Hearth: Law and Family in Nineteenth-Century America 10 (1985); C. Lasch, supra; L. Saxton, supra at 260; J.Q. Wilson, supra at 221.

This court, among others, has consistently acknowledged both the institutional importance of marriage as an organizing principle of society, and the State's interest in regulating it. See French v. McAnarney, 290 Mass. 544, 546 (1935) ("Marriage is not merely a contract between the parties. It is the foundation of the family. It is a social institution of the highest importance. The Commonwealth has a deep interest that its integrity is not jeopardized"); Milford v. Worcester, 7 Mass. 48, 52 (1810) ("Marriage, being essential to the peace and harmony, and to the virtues and improvements of civil society, it has been, in all well-regulated governments, among the first attentions of the civil magistrate to regulate [it]"). See also Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the [human] race"); Maynard v. Hill, 125 U.S. 190, 211 (1888) (marriage "is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would

be neither civilization nor progress"); Murphy v. Ramsey, 114 U.S. 15, 45 (1885) ("no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth ... than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman ... the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement"); Reynolds v. United States, 98 U.S. 145, 165 (1878) ("Upon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal").

It is undeniably true that dramatic historical shifts in our cultural, political, and economic landscape have altered some of our traditional notions about marriage, including the interpersonal dynamics within it, [FN18] the range of responsibilities required of it as an institution, [FN19] and the legal environment in which it exists. [FN20] Nevertheless, the institution of marriage remains the principal weave of our social fabric. See C.N. Degler, supra at 61; A.J. Hawkins, Introduction, in Revitalizing the Institution of Marriage for the Twenty-First Century: An Agenda for Strengthening Marriage xiv (2002); C. Lasch, supra at 80; W.J. O'Donnell & D.A. Jones, Marriage and Marital Alternatives 1 (1982); L. Saxton, supra at 229-230, 260; M.A. Schwartz & B.M. Scott, supra at 4; Wardle, supra at 777-780; J.Q. Wilson, supra at 28, 40, 66-67. A family defined by heterosexual marriage continues to be the most prevalent social structure into which the vast majority of children are born, nurtured, and prepared for productive participation in civil society, see Children's Living Arrangements and Characteristics: March, 2002, United States Census Bureau Current Population Reports at 3 (June, 2003) (in 2002, 69% of children lived with two married parents, 23% lived with their mother, 5% lived with their father, and 4% lived in households with neither parent present).

It is difficult to imagine a State purpose more important and legitimate than ensuring, promoting, and supporting an optimal social structure within which to bear and raise children. At the very least, the marriage statute continues to serve this important State purpose. [FN21]

3. Rational relationship. The question we must turn to next is whether the statute, construed as limiting marriage to couples of the opposite sex, remains a rational way to further that purpose. Stated differently, we ask whether a conceivable rational basis exists on which the Legislature could conclude that continuing to limit the institution of civil marriage to members of the opposite sex furthers the legitimate purpose of ensuring, promoting, and supporting an optimal social structure for the bearing and raising of children. [FN22]

In considering whether such a rational basis exists, we defer to the decision- making process of the Legislature, and must make deferential assumptions about the information that it might consider and on which it may rely. See Shell Oil Co. v. Revere, 383 Mass. 682, 688 (1981) (court considers "evidence which may have been available to the Legislature" [emphasis added]); Slome v. Chief of Police of Fitchburg, 304 Mass. 187, 189 (1939) ("any rational basis of fact that can be reasonably conceived" may support legislative finding); Mutual Loan Co. v. Martell, 200 Mass. 482, 487 (1909), aff'd, 222 U.S. 225 (1911) ("Legislature may be supposed to have known" relevant facts).

We must assume that the Legislature (1) might conclude that the institution of civil marriage has successfully and continually provided this structure over several centuries [FN23]; (2) might consider and credit studies that document negative consequences that too often follow children either born outside of marriage or raised in households lacking either a father or a mother figure, [FN24] and scholarly commentary contending that children and families develop best when mothers and fathers are partners in their parenting [FN25]; and (3) would be familiar with many recent studies that variously: support the proposition that children raised in intact families headed by same-sex couples fare as well on many measures as children raised in similar families headed by opposite-sex couples [FN26]; support the proposition that children of same-sex couples fare worse on some measures [FN27]; or reveal notable differences between the two groups of children that warrant further study. [FN28]

We must also assume that the Legislature would be aware of the critiques of the methodologies used in virtually all of the comparative studies of

children raised in these different environments, cautioning that the sampling populations are not representative, that the observation periods are too limited in time, [FN29] that the empirical data are unreliable, and that the hypotheses are too infused with political or agenda driven bias. See, e.g., R. Lerner & A.K. Nagai, No Basis: What the Studies Don't Tell Us About Same-Sex Parenting, Marriage Law Project (Jan.2001) (criticizing forty-nine studies on same-sex parenting -- at least twenty-six of which were cited by amici in this case--as suffering from flaws in formulation of hypotheses, use of experimental controls, use of measurements, sampling and statistical testing, and finding false negatives); Stacey, (How) Does the Sexual Orientation of Parents Matter, 66 Am. Soc. Rev. 159, 159-166 (2001) (highlighting problems with sampling pools, lack of longitudinal studies, and political hypotheses).

Taking all of this available information into account, the Legislature could rationally conclude that a family environment with married opposite-sex parents remains the optimal social structure in which to bear children, and that the raising of children by same-sex couples, who by definition cannot be the two sole biological parents of a child and cannot provide children with a parental authority figure of each gender, [FN30] presents an alternative structure for child rearing that has not yet proved itself beyond reasonable scientific dispute to be as optimal as the biologically based marriage norm. See Baker v. State, 170 Vt. 194, 222 (1999) ("conceivable that the Legislature could conclude that opposite-sex partners offer advantages in th[e] area [of child rearing], although ... experts disagree and the answer is decidedly uncertain"). Cf. Marcoux v. Attorney Gen., 375 Mass. 63, 65 (1978). Working from the assumption that a recognition of same-sex marriages will increase the number of children experiencing this alternative, the Legislature could conceivably conclude that declining to recognize same-sex marriages remains prudent until empirical questions about its impact on the upbringing of children are resolved. [FN31]

The fact that the Commonwealth currently allows same-sex couples to adopt, see Adoption of Tammy, 416 Mass. 205 (1993), does not affect the rationality of this conclusion. The eligibility of a child for adoption presupposes that at least one of the child's biological parents is unable or unwilling, for some reason, to participate in raising the child. In that sense, society has "lost" the optimal setting in which to raise that child--it is simply not available. In these circumstances, the principal and overriding consideration is the "best interests of the child," considering his or her unique circumstances and the options that are available for that child. The objective is an individualized determination of the best environment for a particular child, where the normative social structure--a home with both the child's biological father and mother--is not an option. That such a focused determination may lead to the approval of a same-sex couple's adoption of a child does not mean that it would be irrational for a legislator, in fashioning statutory laws that cannot make such individualized determinations, to conclude generally that being raised by a same-sex couple has not yet been shown to be the absolute equivalent of being raised by one's married biological parents.

That the State does not preclude different types of families from raising children does not mean that it must view them all as equally optimal and equally deserving of State endorsement and support. [FN32] For example, single persons are allowed to adopt children, but the fact that the Legislature permits single-parent adoption does not mean that it has endorsed single parenthood as an optimal setting in which to raise children or views it as the equivalent of being raised by both of one's biological parents. [FN33] The same holds true with respect to same-sex couples--the fact that they may adopt children means only that the Legislature has concluded that they may provide an acceptable setting in which to raise children who cannot be raised by both of their biological parents. The Legislature may rationally permit adoption by same-sex couples yet harbor reservations as to whether parenthood by same-sex couples should be affirmatively encouraged to the same extent as parenthood by the heterosexual couple whose union produced the child. [FN34]

In addition, the Legislature could conclude that redefining the institution of marriage to permit same-sex couples to marry would impair the State's interest in promoting and supporting heterosexual marriage as the social institution that it has determined best normalizes, stabilizes, and links the acts of procreation and child rearing. While the plaintiffs argue that they only want to take part in the same stabilizing institution, the Legislature conceivably could

conclude that permitting their participation would have the unintended effect of undermining to some degree marriage's ability to serve its social purpose. See Commonwealth v. Stowell, 389 Mass. 171, 175 (1983) (given State's broad concern with institution of marriage, it has "legitimate interest in prohibiting conduct which may threaten that institution").

As long as marriage is limited to opposite-sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavor; that if they are to procreate, then society has endorsed the institution of marriage as the environment for it and for the subsequent rearing of their children; and that benefits are available explicitly to create a supportive and conducive atmosphere for those purposes. If society proceeds similarly to recognize marriages between same-sex couples who cannot procreate, it could be perceived as an abandonment of this claim, and might result in the mistaken view that civil marriage has little to do with procreation: just as the potential of procreation would not be necessary for a marriage to be valid, marriage would not be necessary for optimal procreation and child rearing to occur. [FN35] In essence, the Legislature could conclude that the consequence of such a policy shift would be a diminution in society's ability to steer the acts of procreation and child rearing into their most optimal setting. [FN36] Hall-Omar Baking Co. v. Commissioner of Labor & Indus., 344 Mass. 695, 700 (1962) ("Legislative classification is valid if it is rational and bears some relationship to the object intended to be accomplished" [emphasis added]).

The court recognizes this concern, but brushes it aside with the assumption that permitting same-sex couples to marry "will not diminish the validity or dignity of opposite-sex marriage," ante at, and that "we have no doubt that marriage will continue to be a vibrant and revered institution." Ante at. Whether the court is correct in its assumption is irrelevant. What is relevant is that such predicting is not the business of the courts. A rational Legislature, given the evidence, could conceivably come to a different conclusion, or could at least harbor rational concerns about possible unintended consequences of a dramatic redefinition of marriage. [FN37]

There is no question that many same-sex couples are capable of being good parents, and should be (and are) permitted to be so. The policy question that a legislator must resolve is a different one, and turns on an assessment of whether the marriage structure proposed by the plaintiffs will, over time, if endorsed and supported by the State, prove to be as stable and successful a model as the one that has formed a cornerstone of our society since colonial times, or prove to be less than optimal, and result in consequences, perhaps now unforeseen, adverse to the State's legitimate interest in promoting and supporting the best possible social structure in which children should be born and raised. Given the critical importance of civil marriage as an organizing and stabilizing institution of society, it is eminently rational for the Legislature to postpone making fundamental changes to it until such time as there is unanimous scientific evidence, or popular consensus, or both, that such changes can safely be made. [FN38]

There is no reason to believe that legislative processes are inadequate to effectuate legal changes in response to evolving evidence, social values, and views of fairness on the subject of same-sex relationships. [FN39] Deliberate consideration of, and incremental responses to rapidly evolving scientific and social understanding is the norm of the political process--that it may seem painfully slow to those who are already persuaded by the arguments in favor of change is not a sufficient basis to conclude that the processes are constitutionally infirm. See, e.g., Massachusetts Fed'n of Teachers v. Board of Educ., 436 Mass. 763, 778 (2002); Mobil Oil v. Attorney Gen., 361 Mass. 401, 417 (1972) (Legislature may proceed piecemeal in addressing perceived injustices or problems). The advancement of the rights, privileges, and protections afforded to homosexual members of our community in the last three decades has been significant, and there is no reason to believe that that evolution will not continue. Changes of attitude in the civic, social, and professional communities have been even more profound. Thirty years ago, The Diagnostic and Statistical Manual, the seminal handbook of the American Psychiatric Association, still listed homosexuality as a mental disorder. Today, the Massachusetts Psychiatric Society, the American Psychoanalytic Association, and many other psychiatric, psychological, and social science organizations have joined in an amicus brief on

behalf of the plaintiffs' cause. A body of experience and evidence has provided the basis for change, and that body continues to mount. The Legislature is the appropriate branch, both constitutionally and practically, to consider and respond to it. It is not enough that we as Justices might be personally of the view that we have learned enough to decide what is best. So long as the question is at all debatable, it must be the Legislature that decides. The marriage statute thus meets the requirements of the rational basis test. Accord Standhardt v. Superior Court, 77 P.3d 451 (Ariz.Ct.App.2003) (marriage statutes rationally related to State's legitimate interest in encouraging procreation and child rearing within marriage); Baker v. Nelson, 291 Minn. 310, 313 (1971) ("equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry"); Singer v. Hara, 11 Wash.App. 247, 262-263 (1974) ("There can be no doubt that there exists a rational basis for the state to limit the definition of marriage to exclude same-sex relationships").

D. Conclusion. While "the Massachusetts Constitution protects matters of personal liberty against government intrusion at least as zealously, and often more so than does the Federal Constitution," ante at--, this case is not about government intrusions into matters of personal liberty. It is not about the rights of same-sex couples to choose to live together, or to be intimate with each other, or to adopt and raise children together. It is about whether the State must endorse and support their choices by changing the institution of civil marriage to make its benefits, obligations, and responsibilities applicable to them. While the courageous efforts of many have resulted in increased dignity, rights, and respect for gay and lesbian members of our community, the issue presented here is a profound one, deeply rooted in social policy, that must, for now, be the subject of legislative not judicial action.

1. Julie Goodridge, David Wilson, Robert Compton, Michael Horgan, Edward Balmelli, Maureen Brodoff, Ellen Wade, Gary Chalmers, Richard Linnell, Heidi Norton, Gina Smith, Gloria Bailey, and Linda Davies.

2. Commissioner of Public Health.

3. For American appellate courts that have recently addressed this issue, see Standhardt v. Superior Court, 77 P.3d 451 (Ariz.Ct.App.2003); Dean v. District of Columbia, 653 A.2d 307 (D.C.1995); Baehr v. Lewin, 74 Haw. 530 (1993); Baker v. State, 170 Vt. 194, 242 (1999). Earlier cases include Adams v. Howerton, 486 F.Supp. 1119 (C.D.Cal.1980), aff'd, 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982); Jones v. Hallahan, 501 S.W.2d 588 (Ky.Ct.App.1973); Baker v. Nelson, 291 Minn. 310 (1971), appeal dismissed, 409 U.S. 810 (1972); Singer v. Hara, 11 Wash.App. 247 (1974). See also Halpern v. Toronto (City), 172 O.A.C. 276 (2003); Egale Canada, Inc. v. Canada (Attorney Gen.), 13 B.C.L.R. (4th) 1 (2003).

4. General Laws c. 207, § 37, provides: "The commissioner of public health shall furnish to the clerk or registrar of every town a printed list of all legal impediments to marriage, and the clerk or registrar shall forthwith post and thereafter maintain it in a conspicuous place in his office." The record does not reveal whether any of the clerks' offices that considered the plaintiffs' applications for a marriage license had posted such a list of impediments, or whether such list included as an impediment that the applicants are of the same sex.

5. The plaintiffs alleged that they met all of the facial qualifications to obtain marriage licenses pursuant to G.L. c. 207, and the department does not contest this assertion.

6. The complaint alleged various circumstances in which the absence of the full legal protections of civil marriage has harmed them and their children. For example, Hillary and Julie Goodridge alleged that, when Julie gave birth to their daughter (whom Hillary subsequently coadopted) during a delivery that required the infant's transfer to neonatal intensive care, Hillary "had difficulty gaining access to Julie and their newborn daughter at the hospital"; Gary Chalmers and Richard Linnell alleged that "Gary pays for a family health insurance policy at work which covers only him and their daughter because Massachusetts law does not consider Rich to be a 'dependent.' This means that their household must purchase a separate individual policy of health insurance for Rich at considerable expense.... Gary has a pension plan at work, but under state law, because he is a municipal employee, that plan does not allow him the same range of options in providing for his beneficiary that a married spouse has and

thus he cannot provide the same security to his family that a married person could if he should predecease Rich."

7. Article 1, as amended by art. 106 of the Amendments to the Massachusetts Constitution, provides: "All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."
Article 6 provides: "No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public...."
Article 7 provides: "Government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people; and not for the profit, honor, or private interest of any one man, family or class of men: Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it."
Article 10 provides, in relevant part: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws...."
Article 12 provides, in relevant part: "[N]o subject shall be ... deprived of his property, immunities, or privileges, put out of the protection of the law ... or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."
Article 16, as amended by art. 77 of the Amendments, provides, in relevant part: "The right of free speech shall not be abridged." Part II, c. 1, § 1, art. 4, as amended by art. 112, provides, in pertinent part, that "full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this Commonwealth."

8. The department claims that the plaintiffs have waived their art. 12 and art. 16 claims on appeal. Because our holding today does not turn on art. 12 or art. 16, we do not consider the department's waiver argument.

9. The marital forms forwarded by the clerk or register must contain the "date of record, date and place of marriage, name, residence and official station of the person by whom solemnized; for each of the parties to be married the name, date and place of birth, residence, age, number of the marriage, as first or second, and if previously married, whether widowed or divorced, and the birth- given names of their parents." G.L. c. 46, § 1.

10. "The record of a marriage made and kept as provided by law by the person by whom the marriage was solemnized, or by the clerk or registrar, or a copy thereof duly certified, shall be prima facie evidence of such marriage." G.L. c. 207, § 45. A "certificate of the [c]ommissioner's copy, signed by the [c]ommissioner or the [r]egistar, is admissible as evidence of the record." Secretary of the Commonwealth v. City Clerk of Lowell, 373 Mass. 178, 181-182 (1977).

11. We use the terms "same sex" and "opposite sex" when characterizing the couples in question, because these terms are more accurate in this context than the terms "homosexual" or "heterosexual," although at times we use those terms when we consider them appropriate. Nothing in our marriage law precludes people who identify themselves (or who are identified by others) as gay, lesbian, or bisexual from marrying persons of the opposite sex. See Baehr v. Lewin, 74 Haw. 530, 543 n. 11, 547 n. 14 (1993).

12. "The term public welfare has never been and cannot be precisely defined. Sometimes it has been said to include public convenience, comfort, peace and order, prosperity, and similar concepts, but not to include 'mere expediency.' " Opinion of the Justices, 333 Mass. 773, 778 (1955).

13. For example, married persons face substantial restrictions, simply because they are married, on their ability freely to dispose of their

assets. See, e.g., G.L. c. 208, § 34 (providing for the payment of alimony and the equitable division of property on divorce); G.L. c. 191, § 15, and G.L. c. 189 (rights of elective share and dower).

14. Civil marriage enjoys a dual and in some sense paradoxical status as both a State-conferred benefit (with its attendant obligations) and a multi-faceted personal interest of "fundamental importance." Zablocki v. Redhail, 434 U.S. 376, 383 (1978). As a practical matter, the State could not abolish civil marriage without chaotic consequences. The "right to marry," id. at 387, is different from rights deemed "fundamental" for equal protection and due process purposes because the State could, in theory, abolish all civil marriage while it cannot, for example, abolish all private property rights.

15. The department argues that this case concerns the rights of couples (same sex and opposite sex), not the rights of individuals. This is incorrect. The rights implicated in this case are at the core of individual privacy and autonomy. See, e.g., Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State"); Perez v. Sharp, 32 Cal.2d 711, 716 (1948) ("The right to marry is the right of individuals, not of racial groups"). See also A.Z. v. B.Z., 431 Mass. 150, 162 (2000), quoting Moore v. East Cleveland, 431 U.S. 494, 499 (1977) (noting "freedom of personal choice in matters of marriage and family life"). While two individuals who wish to marry may be equally aggrieved by State action denying them that opportunity, they do not "share" the liberty and equality interests at stake.

16. The department argues that the Loving decision did not profoundly alter the by-then common conception of marriage because it was decided at a time when antimiscegenation statutes were in "full-scale retreat." But the relationship the department draws between popular consensus and the constitutionality of a statute oppressive to a minority group ignores the successful constitutional challenges to an antimiscegenation statute, initiated some twenty years earlier. When the Supreme Court of California decided Perez v. Sharp, 32 Cal.2d 711, 728 (1948), a precursor to Loving, racial inequality was rampant and normative, segregation in public and private institutions was commonplace, the civil rights movement had not yet been launched, and the "separate but equal" doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896), was still good law. The lack of popular consensus favoring integration (including interracial marriage) did not deter the Supreme Court of California from holding that State's antimiscegenation statute to violate the plaintiffs' constitutional rights. Neither the Perez court nor the Loving Court was content to permit an unconstitutional situation to fester because the remedy might not reflect a broad social consensus.

17. Recently, the United States Supreme Court has reaffirmed that the Constitution prohibits a State from wielding its formidable power to regulate conduct in a manner that demeans basic human dignity, even though that statutory discrimination may enjoy broad public support. The Court struck down a statute criminalizing sodomy. See Lawrence, supra at 2478 ("The liberty protected by the Constitution allows homosexual persons the right to make this choice").

18. We have recognized that our Constitution may more extensively protect individual rights than the Federal Constitution in widely different contexts. See, e.g., Horsemen's Benevolent & Protective Ass'n v. State Racing Comm'n, 403 Mass. 692 (1989) (freedom from intrusive drug testing in highly regulated industry); Cepulonis v. Secretary of the Commonwealth, 389 Mass. 930 (1983) (inmates' right to register to vote); Batchelder v. Allied Stores Int'l, Inc., 388 Mass. 83 (1983) (freedom to solicit signatures for ballot access in public election); Moe v. Secretary of Admin. & Fin., 382 Mass. 629 (1981) (right to State Medicaid payment for medically necessary abortions); Coffee-Rich, Inc. v. Commissioner of Pub. Health, 348 Mass. 414 (1965) (freedom to pursue one's lawful business).

19. The Massachusetts Constitution empowers the General Court to enact only those orders, laws, statutes, and ordinances "wholesome and reasonable," that are not "repugnant or contrary" to the Constitution, and that, in the Legislature's judgment, advance the "good and welfare" of the Commonwealth, its government, and all of its subjects. Part II, c. 1, § 1, art. 4. See Opinion of the Justices, 360 Mass. 877, 883 (1971), quoting Jones v. Robbins, 8 Gray 329, 343 (1857) (powers vested in government are set down in

the Massachusetts Constitution "in a few plain, clear and intelligible propositions, for the better guidance and control, both of legislators and magistrates").

20. Not every asserted rational relationship is a "conceivable" one, and rationality review is not "toothless." Murphy v. Commissioner of the Dep't of Indus. Accs., 415 Mass. 218, 233 (1993), citing Mathews v. Lucas, 427 U.S. 495, 510 (1976). Statutes have failed rational basis review even in circumstances where no fundamental right or "suspect" classification is implicated. See, e.g., Murphy v. Commissioner of the Dep't of Indus. Accs., 415 Mass. 218, 226-227 (1993) (fee imposed on retention of counsel in administrative proceedings); Secretary of the Commonwealth v. City Clerk of Lowell, 373 Mass. 178, 186 (1977) (selection of surname for nonmarital child); Aetna Cas. & Sur. Co. v. Commissioner of Ins., 358 Mass. 272, 280- 281 (1970) (automobile insurance ratesetting); Coffee-Rich, Inc. v. Commissioner of Pub. Health, 348 Mass. 414, 422 (1965) (sale of wholesome product); Mansfield Beauty Academy, Inc. v. Board of Registration of Hairdressers, 326 Mass. 624, 627 (1951) (right to charge for materials furnished to models by trade school); Opinion of the Justices, 322 Mass. 755, 760-761 (1948) (proposed statute concerning regulating cemeteries); Boston Elevated Ry. v. Commonwealth, 310 Mass. 528, 556-557 (1942) (legislation impairing contract right); Durgin v. Minot, 203 Mass. 26, 28 (1909) (statute authorizing certain board of health regulations).

21. Article 1 of the Massachusetts Constitution specifically prohibits sex- based discrimination. See post at (Greaney, J., concurring). We have not previously considered whether "sexual orientation" is a "suspect" classification. Our resolution of this case does not require that inquiry here.

22. Our marriage law does recognize that the inability to participate in intimate relations may have a bearing on one of the central expectations of marriage. Since the earliest days of the Commonwealth, the divorce statutes have permitted (but not required) a spouse to choose to divorce his or her impotent mate. See St. 1785, c. 69, § 3. While infertility is not a ground to void or terminate a marriage, impotency (the inability to engage in sexual intercourse) is, at the election of the disaffected spouse. See G.L. c. 207, § 14 (annulment); G.L. c. 208, § 1 (divorce). Cf. Martin v. Otis, 233 Mass. 491, 495 (1919) ("impotency does not render a marriage void, but only voidable at the suit of the party conceiving himself or herself to be wronged"); Smith v. Smith, 171 Mass. 404, 408 (1898) (marriage nullified because husband's incurable syphilis "leaves him no foundation on which the marriage relation could properly rest"). See also G.L. c. 207, § 28A. However, in Hanson v. Hanson, 287 Mass. 154 (1934), a decree of annulment for nonconsummation was reversed where the wife knew before the marriage that her husband had syphilis and voluntarily chose to marry him. We held that, given the circumstances of the wife's prior knowledge of the full extent of the disease and her consent to be married, the husband's condition did not go "to the essence" of the marriage. Id. at 159.

23. It is hardly surprising that civil marriage developed historically as a means to regulate heterosexual conduct and to promote child rearing, because until very recently unassisted heterosexual relations were the only means short of adoption by which children could come into the world, and the absence of widely available and effective contraceptives made the link between heterosexual sex and procreation very strong indeed. Punitive notions of illegitimacy, see Powers v. Wilkinson, 399 Mass. 650, 661 (1987), and of homosexual identity, see Lawrence, supra at 2478-2479, further cemented the common and legal understanding of marriage as an unquestionably heterosexual institution. But it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been. As one dissent acknowledges, in "the modern age," "heterosexual intercourse, procreation, and childcare are not necessarily conjoined." Post at (Cordy, J., dissenting).

24. Adoption and certain insurance coverage for assisted reproductive technology are available to married couples, same-sex couples, and single individuals alike. See G.L. c. 210, § 1; Adoption of Tammy, 416 Mass. 205 (1993) (adoption); G.L. c. 175, § 47H; G.L. c. 176A, § 8K; G.L. c. 176B, § 4J; and G.L. c. 176G, § 4 (insurance coverage). See also Woodward v. Commissioner of Social Sec., 435 Mass. 536, 546 (2002) (posthumous reproduction); Culliton v. Beth Israel Deaconness Med. Ctr., 435 Mass. 285, 293 (2001) (gestational surrogacy).

25. Because our laws expressly or implicitly sanction so many kinds of opposite-sex marriages that do not or will never result in unassisted reproduction, it is erroneous to claim, as the dissent does, that the "theoretical[ ]" procreative capacity of opposite-sex couples, post at (Cordy, J., dissenting), sufficiently justifies excluding from civil marriage same-sex couples who actually have children.

26. The claim that the constitutional rights to bear and raise a child are "not implicated or infringed" by the marriage ban, post at (Cordy, J., dissenting), does not stand up to scrutiny. The absolute foreclosure of the marriage option for the class of parents and would-be parents at issue here imposes a heavy burden on their decision to have and raise children that is not suffered by any other class of parent.

27. It is also true that civil marriage creates legal dependency between spouses, which is simply not available to unmarried couples. See Part III A, supra.

28. Justice Cordy suggests that we have "transmuted the 'right' to marry into the right to change the institution of marriage itself," post at (Cordy, J., dissenting), because marriage is intimately tied to the reproductive systems of the marriage partners and to the "optimal" mother and father setting for child rearing. Post at (Cordy, J., dissenting). That analysis hews perilously close to the argument, long repudiated by the Legislature and the courts, that men and women are so innately and fundamentally different that their respective "proper spheres" can be rigidly and universally delineated. An abundance of legislative enactments and decisions of this court negate any such stereotypical premises.

29. We are concerned only with the withholding of the benefits, protections, and obligations of civil marriage from a certain class of persons for invalid reasons. Our decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons. It in no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage. Our concern, rather, is whether historical, cultural, religious, or other reasons permit the State to impose limits on personal beliefs concerning whom a person should marry.

30. Justice Cordy's dissenting opinion, post at-- and nn. 24-28 (Cordy, J., dissenting), makes much of the current "battle of the experts" concerning the possible long-term effects on children of being raised in households headed by same-sex parents. We presume that the Legislature is aware of these studies, see Mutual Loan Co. v. Martell, 200 Mass. 482, 487 (1909), aff'd, 222 U.S. 225 (1911), and has drawn the conclusion that a child's best interest is not harmed by being raised and nurtured by same-sex parents. See G.L. c. 210, § 7. See also Adoption of Tammy, 416 Mass. 205 (1993); 110 Code Mass. Regs. § 1.09(3) (2000) ("The Department [of Social Services] shall not deny to any person the opportunity to become an adoptive or foster parent, on the basis of the ... sexual orientation ... of the person, or of the child, involved"). Either the Legislature's openness to same-sex parenting is rational in light of its paramount interests in promoting children's well- being, or irrational in light of its so-called conclusion that a household headed by opposite-sex married parents is the "optimal" setting for raising children. See post at (Cordy, J., dissenting). We give full credit to the Legislature for enacting a statutory scheme of child-related laws that is coherent, consistent, and harmonious. See New England Div. of the Am. Cancer Soc'y v. Commissioner of Admin., 437 Mass. 172, 180 (2002).

31. If total deference to the Legislature were the case, the judiciary would be stripped of its constitutional authority to decide challenges to statutes pertaining to marriage, child rearing, and family relationships, and, conceivably, unconstitutional laws that provided for the forced sterilization of habitual criminals; prohibited miscegenation; required court approval for the marriage of persons with child support obligations; compelled a pregnant unmarried minor to obtain the consent of both parents before undergoing an abortion; and made sodomy a criminal offense, to name just a few, would stand.

Indeed, every State court that has recently considered the issue we decide today has exercised its duty in the same way, by carefully scrutinizing the statutory ban on same-sex marriages in light of relevant State constitutional provisions. See Brause vs. Bureau of Vital Statistics, No. 3AN-95-6562CJ (Alaska Super.Ct., Feb. 27, 1998) (concluding marriage statute violated right to privacy provision in Alaska Constitution) (superseded by

constitutional amendment, art. I, § 25 of the Constitution of Alaska); Baehr v. Lewin, 74 Haw. 530, 571-580 (1993) (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanding case to lower court for further proceedings); Baker v. State, 170 Vt. 194, 197-198 (1999) (concluding marriage statute violated Vermont Constitution's common benefits clause). But see Standhardt v. Superior Court, 77 P.3d 451 (Ariz.Ct.App.2003) (marriage statute does not violate liberty interests under either Federal or Arizona Constitution). See also Halpern v. Toronto (City), 172 O.A.C. 276 (2003) (concluding marriage statute violated equal protection provisions of Canada's Charter of Rights and Freedoms); Eagle Canada, Inc. v. Canada (Attorney Gen.), 13 B.C.L.R. (4th) 1 (2003) (same).

32. One prominent historian of marriage notes, for example, that in the Nineteenth Century, the Reverend Theodore Woolsey led the charge against expanding the grounds for divorce, arguing that the "the only divinely approved (and therefore truly legitimate) reason for divorce was adultery" and that only the innocent party to a marriage terminated by reason of adultery be permitted to remarry. Cott, Public Vows: A History of Marriage and the Nation 106 (2000). See id. at 44-45, for a general discussion of resistence to the demise of antimiscegenation laws.

33. It is not dispositive, for purposes of our constitutional analysis, whether the Legislature, at the time it incorporated the common-law definition of marriage into the first marriage laws nearly three centuries ago, did so with the intent of discriminating against or harming persons who wish to marry another of the same sex. We are not required to impute an invidious intent to the Legislature in determining that a statute of long standing has no applicability to present circumstances or violates the rights of individuals under the Massachusetts Constitution. That the Legislature may have intended what at the time of enactment was a perfectly reasonable form of discrimination--or a result not recognized as a form of discrimination--was not enough to salvage from later constitutional challenge laws burdening nonmarital children or denying women's equal partnership in marriage. See, e.g., Trimble v. Gordon, 430 U.S. 762 (1977) (nonmarital children); Angelini v. OMD Corp., 410 Mass. 653, 662, 663 (1987) ("The traditional common law rules which discriminated against children born out of wedlock have been discarded" and "[w]e have recognized that placing additional burdens on [nonmarital] children is unfair because they are not responsible for their [status]"); Silvia v. Silvia, 9 Mass.App.Ct. 339, 340-341 (1980) (there now exists "a comprehensive statutory and common law pattern which places marital and parental obligations on both the husband and wife"). We are concerned with the operation of challenged laws on the parties before us, and we do not inhibit our inquiry on the ground that a statute's original enactors had a benign or at the time constitutionally unassailable purpose. See Colo v. Treasurer & Receiver Gen., 378 Mass. 550, 557 (1979), quoting Walz v. Tax Comm'n of the City of N.Y., 397 U.S. 664, 678 (1970) ("the mere fact that a certain practice has gone unchallenged for a long period of time cannot alone immunize it from constitutional invalidity, 'even when that span of time covers our entire national existence and indeed predates it' "); Merit Oil Co. v. Director of Div. on the Necessaries of Life, 319 Mass. 301, 305 (1946) (constitutional contours of State's regulatory authority coextensive "with the changing needs of society").

34. Similarly, no one argues that the restrictions on incestuous or polygamous marriages are so dependent on the marriage restriction that they too should fall if the marriage restriction falls. Nothing in our opinion today should be construed as relaxing or abrogating the consanguinity or polygamous prohibitions of our marriage laws. See G.L. c. 207, §§ 1, 2, and 4. Rather, the statutory provisions concerning consanguinity or polygamous marriages shall be construed in a gender neutral manner. See Califano v. Westcott, 443 U.S. 76, 92-93 (1979) (construing word "father" in unconstitutional, underinclusive provision to mean "parent"); Browne's Case, 322 Mass. 429, 430 (1948) (construing masculine pronoun "his" to include feminine pronoun "her"). See also G.L. c. 4, § 6, Fourth ("words of one gender may be construed to include the other gender and the neuter unless such construction would be "inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute").

1. It makes no difference that the referenced decisions consider the right to marry in the context of the Fourteenth Amendment to the United States Constitution rather than in the

context of our Constitution. As explained by the court, ante at n. 18, a fundamental right under the Federal Constitution enjoys at least a comparable measure of protection under our State Constitution. See Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 651 (1981).

2. In her separate opinion in Baker v. State, 170 Vt. 194, 253 (1999) (Johnson, J., concurring in part and dissenting in part), Justice Johnson described the equal protection defect in Vermont's marriage statutes in a slightly different, but no less persuasive, fashion:
"A woman is denied the right to marry another woman because her would-be partner is a woman, not because one or both are lesbians. Similarly, a man is denied the right to marry another man because his would-be partner is a man, not because one or both are gay. Thus, an individual's right to marry a person of the same sex is prohibited solely on the basis of sex, not on the basis of sexual orientation. Indeed, sexual orientation does not appear as a qualification for marriage under the marriage statutes. The State makes no inquiry into the sexual practices or identities of a couple seeking a license."

3. Some might say that the use of the so-called strict scrutiny formula is too facile in the sense that, once a court focuses on the formula as a dispositional tool, the result is automatically preordained--the statute will fail because the State cannot possibly sustain its heavy burden to overcome the presumption of arbitrary and invidious discrimination. This is not so. See, e.g., Blixt v. Blixt, 437 Mass. 649, 656-657 (2002), cert. denied, 537 U.S. 1189 (2003) (concluding G.L. c. 119, § 39D, grandparent visitation statute, furthered compelling State interest in mitigating potential harm to children in nonintact families).

4. The argument, made by some in the case, that legalization of same-sex marriage in Massachusetts will be used by persons in other States as a tool to obtain recognition of a marriage in their State that is otherwise unlawful, is precluded by the provisions of G.L. c. 207, §§ 11, 12, and 13.

5. Because marriage is, by all accounts, the cornerstone of our social structure, as well as the defining relationship in our personal lives, confining eligibility in the institution, and all of its accompanying benefits and responsibilities, to opposite-sex couples is basely unfair. To justify the restriction in our marriage laws by accusing the plaintiffs of attempting to change the institution of marriage itself, terminates the debate at the outset without any accompanying reasoned analysis.

6. Justice Cordy's separate opinion points out, correctly, that, when art. 1 was revised by the people in 1976, it was not then intended to be relied on to approve same sex marriage. Post at (Cordy, J., dissenting). (Justice Spina adverts to the same proposition in his separate opinion, post at [Spina, J., dissenting]). Decisions construing the provision cited in Justice Cordy's opinion are interesting, but obviously inapposite because they have not dealt in any significant way with the issue before us. Nonetheless, the separate opinion concludes, from what was intended in 1976, and from various cases discussing art. 1, that the revised provision cannot be used to justify the result I reach.
In so reasoning, the separate opinion places itself squarely on the side of the original intent school of constitutional interpretation. As a general principle, I do not accept the philosophy of the school. The Massachusetts Constitution was never meant to create dogma that adopts inflexible views of one time to deny lawful rights to those who live in another. The provisions of our Constitution are, and must be, adaptable to changing circumstances and new societal phenomena, and, unless and until the people speak again on a specific subject, conformable in their concepts of liberty and equality to what is fair, right, and just. I am cognizant of the voters' intent in passing the amendment to art. 1 in 1976. Were the revision alone the basis for change, I would be reluctant to construe it favorably to the plaintiffs, in view of the amendment's recent passage and the voters' intent. The court's opinion, however, rests in part on well-established principles of equal protection that are independent of the amendment. It is on these principles that I base my opinion.

1. Article 30 of the Massachusetts Declaration of Rights provides that "the judicial [department] shall never exercise the legislative and executive powers ... to the end it may be a government of laws and not of men."

2. Article 1 of the Massachusetts Declaration of Rights, as amended by art. 106 of the Amendments, the Equal Rights Amendment, states: "Equality under the law shall not be

denied or abridged because of sex, race, color, creed or national origin."

3. Marriage is the civil union between a single man and a single woman. See Milford v. Worcester, 7 Mass. 48, 52 (1810).

1. The one difference that the court acknowledges--that sexual relations between persons of the same sex does not result in pregnancy and childbirth--it immediately brushes aside on the theory that civil marriage somehow has nothing to do with begetting children. Ante at--. For the reasons explained in detail in Justice Cordy's dissent, in which I join, the reasons justifying the civil marriage laws are inextricably linked to the fact that human sexual intercourse between a man and a woman frequently results in pregnancy and childbirth. Indeed, as Justice Cordy outlines, that fact lies at the core of why society fashioned the institution of marriage in the first place. Post at (Cordy, J., dissenting).

1. The rational basis standard applied under the Massachusetts Constitution and the Fourteenth Amendment to the United States Constitution is the same. See Chebacco Liquor Mart, Inc. v. Alcoholic Beverages Control Comm'n, 429 Mass. 721, 722-723 (1999).

2. The same semantic sleight of hand could transform every other restriction on marriage into an infringement of a right of fundamental importance. For example, if one assumes that a group of mature, consenting, committed adults can form a "marriage," the prohibition on polygamy (G.L. c. 207, § 4), infringes on their "right" to "marry." In legal analysis as in mathematics, it is fundamentally erroneous to assume the truth of the very thing that is to be proved.

3. Casting the right to civil marriage as a "fundamental right" in the constitutional sense is somewhat peculiar. It is not referred to as such in either the State or Federal Constitution, and unlike other recognized fundamental rights (such as the right to procreate, the right to be free of government restraint, or the right to refuse medical treatment), civil marriage is wholly a creature of State statute. If by enacting a civil marriage statutory scheme Massachusetts has created a fundamental right, then it could never repeal its own statute without violating the fundamental rights of its inhabitants.

4. For example, see G.L. c. 272, §§ 14 and 18, the Massachusetts adultery and fornication statutes.

5. While the facts of Griswold v. Connecticut, 381 U.S. 479 (1965), involved a married couple, later decisions clarify that its holding was not premised on the marriage relationship. See Carey v. Populations Servs. Int'l, 431 U.S. 678, 687 (1977) (stating that Griswold rested on the "right of the individual " to be free from governmental interference with child-bearing decisions [emphasis in original]); Eisenstadt v. Baird, 405 U.S. 438, 453- 454 (1972) (same).

6. Contrast Lawrence v. Texas, 123 S.Ct. 2472 (2003), in which the United States Supreme Court struck down the Texas criminal sodomy statute because it constituted State intrusion on some of these very choices.

7. The statutes from which our current marriage laws derive were enacted prior to or shortly after the adoption of our Constitution in 1780, and "may well be considered ... as affording some light in regard to the views and intentions of [the Constitution's] founders." Merriam v. Secretary of the Commonwealth, 375 Mass. 246, 253 (1978).

8. Tobin's Case, 424 Mass. 250, 252-253 (1997) (no fundamental right to receive workers' compensation benefits); Doe v. Superintendent of Schs. of Worcester, 421 Mass. 117, 129 (1995) (no fundamental right to education); Williams v. Secretary of the Executive Office of Human Servs., 414 Mass. 551, 565 (1993) (no fundamental right to receive mental health services); Matter of Tocci, 413 Mass. 542, 548 n. 4 (1992) (no fundamental right to practice law); Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 269 n. 5 (1992) (no fundamental right to operate motor vehicle); English v. New England Med. Ctr., Inc., 405 Mass. 423, 429 (1989), cert. denied, 493 U.S. 1056 (1990) (no fundamental right to recover tort damages); Commonwealth v. Henry's Drywall Co., 366 Mass. 539, 542 (1974) (no fundamental right to pursue one's business). Cf. Aime v. Commonwealth, 414 Mass. 667, 674 n. 10 (1993) (recognizing right to be free from physical restraint "does not involve judicial derivation of controversial 'new' rights from the Constitution"). See generally Williams v. Secretary of the Executive Office of Human Servs., supra at 566 (recognizing fundamental

right to receive mental health services "would represent an enormous and unwarranted extension of the judiciary into the [Department of Mental Health]'s authority"); Ford v. Grafton, 44 Mass.App.Ct. 715, 730-731, cert. denied, 525 U.S. 1040 (1998), quoting DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 203 (1989) ("people of Massachusetts may choose by legislation to [provide remedies for "grievous harm"] ... however, 'they should not have [such remedies] thrust upon them by this Court's expansion of the Due Process Clause ...").

9. See Michael H. v. Gerald D., 491 U.S. 110, 122-123 & n. 3, 127 (1989) (plurality opinion) (limits on substantive due process rights center on "respect for the teachings of history"); Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring) (same).

10. Compare Curtis v. School Comm. of Falmouth, 420 Mass. 749, 756 (1995), cert. denied, 516 U.S. 1067 (1996), quoting Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); Aime v. Commonwealth, supra at 676 ("right to be free from governmental detention and restraint is firmly embedded in the history of Anglo-American law"); Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 430 (1986) (right to make decisions to accept or reject medical treatment "has its roots deep in our history" and "has come to be widely recognized and respected"); and Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 649 (1981) (characterizing decision whether to bear a child as "hold[ing] a particularly important place in the history of the right of privacy" and finding "something approaching consensus" on right to refuse unwanted infringement of bodily integrity), with Trigones v. Attorney Gen., 420 Mass. 859, 863 (1995), quoting Medina v. California, 505 U.S. 437, 445 (1992) (upholding statute that does not "offend some principle of justice so rooted in the tradition and conscience of our people as to be ranked fundamental"); Three Juveniles v. Commonwealth, 390 Mass. 357, 364 (1983), cert. denied sub nom. Keefe v. Massachusetts, 465 U.S. 1068 (1984) (declining to find fundamental right to child-parent privilege where "[n]either Congress nor the Legislature of any State has seen fit to adopt a rule granting [such] a privilege ..."); Commonwealth v. Stowell, 389 Mass. 171, 174 (1983), quoting Roe v. Wade, 410 U.S. 113, 152 (1973) (declining to recognize right not "implicit in the concept of ordered liberty").

11. Because of the absence of deep historical roots, every court but one that has considered recognizing a fundamental right to same-sex marriage, has declined to do so.

12. See, e.g., Standhardt v. Superior Court, 77 P.3d 451 (Ariz.Ct.App.2003); Dean v. District of Columbia, 653 A.2d 307, 333 (D.C.1995) (per curiam) (Ferren, J., concurring in part and dissenting in part); Baehr v. Lewin, 74 Haw. 530, 556-557 (1993); Baker v. Nelson, 291 Minn. 310, 312-314 (1971); Storrs v. Holcomb, 168 Misc.2d 898, 899-900 (N.Y.Sup.Ct.1996), dismissed, 245 A.D.2d 943 (N.Y.1997). The one exception was the Alaska Superior Court, which relied on that State's Constitution's express and broadly construed right to privacy. Brause vs. Bureau of Vital Statistics, No. 3AN-95-6562CJ (Alaska Super.Ct. Feb. 27, 1998).

13. Article 106 is referred to as the Equal Rights Amendment.

14. Justice Greaney views Loving v. Virginia, 388 U.S. 1 (1967), as standing analogously for the proposition that just as a person cannot be barred from marrying another person because of his or her race, a person cannot be barred from marrying another person because of his or her sex. Ante at (Greaney, J., concurring). While superficially attractive, this analogy does not withstand closer scrutiny. Unlike Virginia's antimiscegenation statute, neither the purpose nor effect of the Massachusetts marriage statute is to advantage or disadvantage one gender over the other. This distinction is critical and was central to the Loving decision. More fundamentally, the statute at issue burdened marriage with a requirement that was both constitutionally suspect and unrelated to protecting either the underlying purposes or nature of the institution. In contrast, the limitation of marriage to one man and one woman preserves both its structure and its historic purposes.

15. The commission was composed of five State representatives, three State senators and three gubernatorial appointees. All of the gubernatorial appointees were attorneys.

16. The Washington case cited by the commission was Singer v. Hara, 11 Wash.App. 247 (1974).

17. Modern DNA testing may reveal actual paternity, but it establishes only a genetic relationship between father and child.

18. The normative relationship between husband and wife has changed markedly due to the overwhelming movement toward gender equality both at home and in the marketplace.

19. The availability of a variety of social welfare programs and public education has in many instances affected the status of the marital family as the only environment dedicated to the care, protection, and education of children.

20. No-fault divorce has made the dissolution of marriage much easier than ever before.

21. "It is important to distinguish the individual interests in domestic relations from the social interest in the family and marriage as social institutions." Pound, Individual Interests in the Domestic Relations, 14 Mich. L.Rev. 177, 177 (1916). The court's opinion blurs this important distinction and emphasizes the personal and emotional dimensions that often accompany marriage. It is, however, only society's interest in the institution of marriage as a stabilizing social structure that justifies the statutory benefits and burdens that attend to the status provided by its laws. Personal fulfilment and public celebrations or announcements of commitment have little if anything to do with the purpose of the civil marriage laws, or with a legitimate public interest that would justify them.

22. In support of its conclusion that the marriage statute does not satisfy the rational basis test, the court emphasizes that "[t]he department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children." Ante at. This surprising statement misallocates the burden of proof in a constitutional challenge to the rational basis of a statute (see supra at--). It is the plaintiffs who must prove that supporting and promoting one form of relationship by providing (as is pointed out) literally hundreds of benefits, could not conceivably affect the decision- making of anyone considering whether to bear and raise a child. The department is not required to present "evidence" of anything.

23. See C.N. Degler, The Emergence of the Modern American Family, in The American Family in Social-Historical Perspective 61 (3d ed.1983); A.J. Hawkins, Introduction, in Revitalizing the Institution of Marriage for the Twenty-First Century: An Agenda for Strengthening Marriage xiv (2002); C. Lasch, Social Pathologists and the Socialization of Reproduction, in The American Family in Social-Historical Perspective, 80 (3d ed.1983); W.J. O'Donnell & D.A. Jones, The Law of Marriage and Marital Alternatives 1 (1982); L. Saxton, The Individual, Marriage and the Family 229-230, 260 (1968); M.A. Schwartz & B.M. Scott, Marriages and Families: Diversity and Change 4 (1994); Wardle, "Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 Harv. J.L. & Pub. Pol'y 771, 777- 780 (2001); J.Q. Wilson, The Marriage Problem: How Our Culture has Weakened Families 28, 40, 66-67 (2002).

24. See Rodney, Behavioral Differences between African American Male Adolescents with Biological Fathers and Those Without Biological Fathers in the Home, 30 J. Black Stud. 45, 53 (1999) (African-American juveniles who lived with their biological fathers displayed fewer behavioral problems than those whose biological fathers were absent from home); Chilton, Family Disruption, Delinquent Conduct and the Effect of Subclassification, 37 Am. Soc. Rev. 93, 95 (1972) (proportion of youth charged with juvenile offenses who were not living in husband-wife family was larger than comparable proportion of youth charged with juvenile offenses who were living in husband-wife family); Hoffmann, A National Portrait of Family Structure and Adolescent Drug Use, 60 J. Marriage & Fam. 633 (1998) (children from households with both mother and father reported relatively low use of drugs, whereas children from households without their natural mothers and from other family type households had highest prevalence of drug use). See also D. Blankenhorn, Fatherless America: Confronting Our Most Urgent Social Problem 25 (1995).

25. H.B. Biller & J.L. Kimpton, The Father and the School-Aged Child, in The Role of The Father in Child Development 143 (3d ed.1997); H.B. Biller, Fathers and Families: Paternal

Factors in Child Development 1-3 (1993); Lynne Marie Kohm, The Homosexual "Union": Should Gay and Lesbian Partnerships be Granted the Same Status as Marriage? 22 J. Contemp. L. 51, 61 & nn.53, 54 (1996) ("[s]tatistics continue to show that the most stable family for children to grow up in is that consisting of a father and a mother").

26. See, e.g., Patterson, Family Relationships of Lesbians and Gay Men, 62 J. Marriage & Fam. 1052, 1060, 1064-1065 (2000) (concluding that there are no significant differences between children of same-sex parents and children of heterosexual parents in aspects of personal development).

27. See, e.g., Cameron, Homosexual Parents, 31 Adolescence 757, 770-774 (1996) (concluding results of limited study consonant with notion that children raised by homosexuals disproportionately experience emotional disturbance and sexual victimization).

28. See, e.g., Stacey, (How) Does the Sexual Orientation of Parents Matter?, 66 Amer. Soc. Rev. 159, 172, 176-179 (2001) (finding significant statistical differences in parenting practices, gender roles, sexual behavior but noting that "heterosexism" and political implications have constrained research). See also Coleman, Reinvestigating Remarriage: Another Decade of Progress, 62 J. Marriage & Fam. 1288 (2000) (concluding that future studies of the impact of divorce and remarriage on children should focus on "nontraditional" stepfamilies, particularly same-sex couples with children, because the impact of such arrangements have been overlooked in other studies).

29. In Massachusetts, for example, the State's adoption laws were only recently interpreted to permit adoption by same-sex partners. Adoption of Tammy, 416 Mass. 205 (1993). It is fair to assume that most of the children affected by that ruling, who properly would be the subject of study in their teenage and adult years, are still only children today.

30. This family structure raises the prospect of children lacking any parent of their own gender. For example, a boy raised by two lesbians as his parents has no male parent. Contrary to the suggestion that concerns about such a family arrangement is based on "stereotypical" views about the differences between sexes, ante at n. 28, concern about such an arrangement remains rational. It is, for example, rational to posit that the child himself might invoke gender as a justification for the view that neither of his parents "understands" him, or that they "don't know what he is going through," particularly if his disagreement or dissatisfaction involves some issue pertaining to sex. Given that same-sex couples raising children are a very recent phenomenon, the ramifications of an adolescent child's having two parents but not one of his or her own gender have yet to be fully realized and cannot yet even be tested in significant numbers. But see note 25, supra, regarding studies of children raised without parents of each gender.

31. The same could be true of any other potentially promising but recent innovation in the relationships of persons raising children.

32. The plaintiffs also argue that because the State requires insurance companies to provide coverage for diagnosing and treating infertility unrestricted to those who are married, G.L. c. 175, § 47H, limiting marriage to opposite-sex couples is contrary to its currently stated public policy, and, therefore no longer rational. This argument is not persuasive. The fact that the Legislature has seen fit to require that health insurers cover the medical condition of infertility, for all subscribers, is not inconsistent with the State's policy of encouraging and endorsing heterosexual marriage as the optimum structure in which to bear and raise children. There is no rule that requires the State to limit every law bearing on birth and child rearing to the confines of heterosexual marriage in order to vindicate its policy of supporting that structure as optimal. Just as the insurance laws relating to infertility coverage cannot be said to be a State endorsement of childbirth out of wedlock, they cannot be said to represent an abandonment of the State's policy regarding a preference that children be born into and raised in the context of heterosexual marriage.

33. Indeed, just recently, this court reasoned that the Legislature could permissibly conclude that children being raised by single parents "may be at heightened risk for certain kinds of harm when compared with children of so- called intact families," because such children "may not have or be able to draw on the resources of two parents" when having to cope with some form of loss. Blixt v. Blixt, 437 Mass. 649, 663, 664 (2002), cert. denied, 537 U.S. 1189 (2003). In

that case, the differences between single parents and parents raising a child together sufficed to justify subjecting single parents to the grandparent visitation statute, G.L. c. 119, § 39D. Id. at 662-664. Because the statute implicated fundamental parental rights, its classifications had to survive strict scrutiny, id. at 660, not the mere rational basis test at issue in today's opinion. The fact that single people can adopt children did not insulate them from differential treatment with respect to their parental rights.

34. Similarly, while the fact that our laws have evolved to include a strong affirmative policy against discrimination on the basis of sexual orientation, have decriminalized intimate adult conduct, and have abolished the legal distinctions between marital and nonmarital children, may well be a reason to celebrate a more open and humane society, they ought not be the basis on which to conclude that there is no longer a rational basis for the current marriage law. See ante at. To conclude the latter based on the former threatens the process of social reform in a democratic society. States must be free to experiment in the realm of social and civil relations, incrementally and without concern that a step or two in one direction will determine the outcome of the experiment as a matter of law. If they are not, those who argue "slippery slope" will have more ammunition than ever to resist any effort at progressive change or social experimentation, and will be able to put the lie to the arguments of the proponents of such efforts, that an incremental step forward does not preordain a result which neither the people nor their elected representatives may yet be prepared to accept.

35. The court contends that the exclusive and permanent commitment of the marriage partnership rather than the begetting of children is the sine qua non of civil marriage, ante at, and that "the 'marriage is procreation' argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage." Ante at. The court has it backward. Civil marriage is the product of society's critical need to manage procreation as the inevitable consequence of intercourse between members of the opposite sex. Procreation has always been at the root of marriage and the reasons for its existence as a social institution. Its structure, one man and one woman committed for life, reflects society's judgment as how optimally to manage procreation and the resultant child rearing. The court, in attempting to divorce procreation from marriage, transforms the form of the structure into its purpose. In doing so, it turns history on its head.

The court compounds its error by likening the marriage statute to Colorado's "Amendment 2" which was struck by the United States Supreme Court in Romer v. Evans, 517 U.S. 620, 633 (1996). That amendment repealed all Colorado laws and ordinances that barred discrimination against homosexuals, and prohibited any governmental entity from adopting similar statutes. The amendment withdrew from homosexuals, but no others, legal protection from a broad range of injuries caused by private and governmental discrimination, "imposing a broad and undifferentiated disability on a single named group." Id. at 632. As the Court noted, its sheer breadth seems "inexplicable by anything but animus toward the class it affects." Id. The comparison to the Massachusetts marriage statute, which limits the institution of marriage (created to manage procreation) to opposite-sex couples who can theoretically procreate, is completely inapposite.

36. Although the marriage statute is overinclusive because it comprehends within its scope infertile or voluntarily nonreproductive opposite-sex couples, this overinclusiveness does not make the statute constitutionally infirm. See Massachusetts Fed'n of Teachers v. Board of Educ., 436 Mass. 763, 778 (2002) ("Some degree of overinclusiveness or underinclusiveness is constitutionally permissible ..."). The overinclusiveness present here is constitutionally permissible because the Commonwealth has chosen, reasonably, not to test every prospective married couple for fertility and not to demand of fertile prospective married couples whether or not they will procreate. It is satisfied, rather, to allow every couple whose biological opposition makes procreation theoretically possible to join the institution.

37. Concerns about such unintended consequences cannot be dismissed as fanciful or far-fetched. Legislative actions taken in the 1950's and 1960's in areas as widely arrayed as domestic relations law and welfare legislation have had significant unintended adverse consequences in subsequent decades including the dramatic increase in children born out of

wedlock, and the destabilization of the institution of marriage. See Nonmarital Childbearing in the United States 1940-99, National Center for Health Statistics, 48 Nat'l Vital Stat. Reps. at 2 (Oct.2000) (nonmarital childbirths increased from 3.8% of annual births in 1940 to 33% in 1999); M.D. Bramlett, Cohabitation, Marriage, Divorce, and Remarriage in the United States, National Center for Health Statistics, Vital & Health Stat. at 4-5 (July 2002) (due to higher divorce rates and postponement of marriage, proportion of people's lives spent in marriage declined significantly during later half of Twentieth Century).

38. "[T]he State retains wide latitude to decide the manner in which it will allocate benefits." Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 652 (1981). To the extent that the Legislature concludes that one form of social relationship is more optimal than another for the bearing and raising of children, it is free to promote and support the one and not the other, so long as its conclusion is rational, and does not discriminatorily burden the exercise of a fundamental right. Id. Cf. Rust v. Sullivan, 500 U.S. 173, 192-193 (1991) ("Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problems in another way").

39. Legislatures in many parts of the country continue to consider various means of affording same-sex couples the types of benefits and legal structures that married couples enjoy. For example, in 1999 the California Legislature established the first Statewide domestic partner registry in the nation, and in each of the years 2001, 2002, and 2003 substantially expanded the rights and benefits accruing to registered partners. Cal. Fam.Code §§ 297 et seq. (West Supp.2003). See also comments of Massachusetts Senate President Robert Traviglini to the effect that he intends to bring civil union legislation to the floor of the Senate for a vote. Mass. Senate Eyes Civil Unions: Move Comes as SJC Mulls Gay Marriages, Boston Globe, Sept. 7, 2003, at A1.

SJC-09163

OPINIONS OF THE JUSTICES TO THE SENATE.

To the Honorable the Senate of the Commonwealth of Massachusetts:

The undersigned Justices of the Supreme Judicial Court respectfully submit their answers to the question set forth in an order adopted by the Senate on December 11, 2003, and transmitted to the Justices on December 12, 2003. The order indicates that there is pending before the General Court a bill, Senate No. 2175, entitled "An Act relative to civil unions." A copy of the bill was transmitted with the order. As we describe more fully below, the bill adds G. L. c. 207A to the General Laws, which provides for the establishment of "civil unions" for same-sex "spouses," provided the individuals meet certain qualifications described in the bill.[1]

The order indicates that grave doubt exists as to the constitutionality of the bill if enacted into law and requests the opinions of the Justices on the following "important question of law":

[1] The bill also amends G. L. c. 151B by prohibiting discrimination against civilly joined spouses.

> "Does Senate, No. 2175, which prohibits same-sex couples from entering into marriage but allows them to form civil unions with all 'benefits, protections, rights and responsibilities' of marriage, comply with the equal protection and due process requirements of the Constitution of the Commonwealth and articles 1, 6, 7, 10, 12 and 16 of the Declaration of Rights?"[2]

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[2] Article 1 of the Massachusetts Declaration of Rights, as amended by art. 106 of the Amendments to the Massachusetts Constitution, provides: "All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."

Article 6 of the Massachusetts Declaration of Rights provides: "No . . . men, have any other title to obtain

advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public . . . ."

Article 7 of the Massachusetts Declaration of Rights provides, in relevant part: "Government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people; and not for the profit, honor, or private interest of any one man, family or class of men . . . ."

Article 10 of the Massachusetts Declaration of Rights

Under Part II, c. 3, art. 2, of the Constitution of the Commonwealth, as amended by art. 85 of the Amendments, "[e]ach branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions." "[A] solemn occasion exists 'when the Governor or either branch of the Legislature, having some action in view, has serious doubts as to their power and authority to take such action, under the Constitution, or under existing statutes.'" Answer of the Justices, 364 Mass. 838, 844 (1973), quoting Answer of the Justices, 148 Mass. 623, 626 (1889). The pending bill involves an important question of law

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provides, in relevant part: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. . . ."

Because our determination does not turn on art. 12 or art. 16, we do not recite them here. See Goodridge v. Department of Pub. Health, ante 309, 316 n.8 (2003) (Goodridge).

and the Senate has indicated "grave doubt" as to its constitutionality. We therefore address the question. See Opinion of the Justices, 430 Mass. 1205, 1207 (2000).

1. Background of the proposed legislation. In Goodridge v. Department of Pub. Health, ante 309 (2003) (Goodridge), the court considered the constitutional question "[w]hether the Commonwealth may use its formidable regulatory authority to bar same-sex couples from civil marriage . . . ." Id. at 312-313. The court concluded that it may not do so, determining that the Commonwealth had failed to articulate a rational basis for denying civil marriage to same-sex couples. The court stated that the Massachusetts Constitution "affirms the dignity and equality of all individuals" and "forbids the creation of second-class citizens." Id. at 312. The court concluded that in "[l]imiting the protections, benefits, and obligations of civil marriage to opposite-sex couples," G. L. c. 207, the marriage licensing law, "violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution." Goodridge at 342.

In so concluding, the court enumerated some of the concrete tangible benefits that flow from civil marriage, including, but not limited to, rights in property, probate, tax, and evidence law that are conferred on married couples. Id. at 322-325. The court also noted that "intangible benefits flow from marriage," id. at 322, intangibles that are important components of marriage as a "civil right." Id. at 325. The court stated that

"[m]arriage also bestows enormous private and social advantages on those who choose to marry . . . [and] is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family." Id. at 322. "Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." Id. Therefore, without the right to choose to marry, same-sex couples are not only denied full protection of the laws, but are "excluded from the full range of human experience." Id. at 326.

The court stated that the denial of civil marital status "works a deep and scarring hardship on a very real segment of the community for no rational reason." Id. at 341. These omnipresent hardships include, but are by no means limited to, the absence of predictable rules of child support and property division, and even uncertainty concerning whether one will be allowed to visit one's sick child or one's partner in a hospital. See, e.g., id. at 315 n.6, 335. See also id. at 348 (Greaney, J., concurring) ("The continued maintenance of this caste-like system is irreconcilable with, indeed, totally repugnant to, the State's strong interest in the welfare of all children and its primary focus . . . on 'the best interests of the child'"). All of these stem from the status of same-sex couples and their children as "outliers to the marriage laws." Id. at 335.

After reviewing the marriage ban under the deferential rational basis standard, the court concluded that the Department of Public Health "failed to identify any relevant characteristic that would justify shutting the door to civil marriage to a person who wishes to marry someone of the same sex." Id. at 341.

The Goodridge decision by the court made no reference to the concept of "civil unions," nor did the separate concurring opinion of Justice Greaney. Rather, it was the lawfulness under the Massachusetts Constitution of the bar to civil marriage itself, "a vital social institution," id. at 313, that the court was asked to decide. The court decided the question after extensively reviewing the government's justifications for the marriage ban.

In response to the plaintiffs' specific request for relief, the court preserved the marriage licensing statute, but refined the common-law definition of civil marriage to mean "the voluntary union of two persons as spouses, to the exclusion of all others." Id. at 343. The entry of judgment was stayed "for 180 days to permit the Legislature to take such action as it may deem appropriate." Id. at 344. The purpose of the stay was to afford the Legislature an opportunity to conform the existing statutes to the provisions of the Goodridge decision.

2. Provisions of the bill. The order of the Senate plainly reflects that Senate No. 2175 is proposed action in response to the Goodridge opinion. The bill states that the "purpose" of the act is to provide "eligible same-sex couples the opportunity to

obtain the benefits, protections, rights and responsibilities afforded to opposite sex couples by the marriage laws of the commonwealth, without entering into a marriage," declares that it is the "public policy" of the Commonwealth that "spouses in a civil union" "shall have all the benefits, protections, rights and responsibilities afforded by the marriage laws," Senate No. 2175, § 2, and recites "that the Commonwealth's laws should be revised to give same-sex couples the opportunity to obtain the legal protections, benefits, rights and responsibilities associated with civil marriage, while preserving the traditional, historic nature and meaning of the institution of civil marriage." Id. at § 1. To that end, the bill proposes G. L. c. 207A, which establishes the institution of "civil union," eligibility for which is limited to "[t]wo persons . . . [who] are of the same sex . . . ."

The proposed law states that "spouses" in a civil union shall be "joined in it with a legal status equivalent to marriage." Senate No. 2175, § 5. The bill expressly maintains that "marriage" is reserved exclusively for opposite-sex couples by providing that "[p]ersons eligible to form a civil union with each other under this chapter shall not be eligible to enter into a marriage with each other under chapter 207." Id. Notwithstanding, the proposed law purports to make the institution of a "civil union" parallel to the institution of civil "marriage." For example, the bill provides that "spouses

in a civil union shall have all the same benefits, protections, rights and responsibilities under law as are granted to spouses in a marriage." In addition, terms that denote spousal relationships, such as "husband," "wife," "family," and "next of kin," are to be interpreted to include spouses in a civil union "as those terms are used in any law." Id. The bill goes on to enumerate a nonexclusive list of the legal benefits that will adhere to spouses in a civil union, including property rights, joint State income tax filing, evidentiary rights, rights to veteran benefits and group insurance, and the right to the issuance of a "civil union" license, identical to a marriage license under G. L. c. 207, "as if a civil union was a marriage."

3. Analysis. As we stated above, in Goodridge the court was asked to consider the constitutional question "whether the Commonwealth may use its formidable regulatory authority to bar same-sex couples from civil marriage." The court has answered the question. We have now been asked to render an advisory opinion on Senate No. 2175, which creates a new legal status, "civil union," that is purportedly equal to "marriage," yet separate from it. The constitutional difficulty of the proposed civil union bill is evident in its stated purpose to "preserv[e] the traditional, historic nature and meaning of the institution of civil marriage." Senate No. 2175, § 1. Preserving the institution of civil marriage is of course a legislative priority of the highest order, and one to which the Justices accord the General Court the greatest deference. We recognize the efforts

of the Senate to draft a bill in conformity with the Goodridge opinion. Yet the bill, as we read it, does nothing to "preserve" the civil marriage law, only its constitutional infirmity. This is not a matter of social policy but of constitutional interpretation. As the court concluded in Goodridge, the traditional, historic nature and meaning of civil marriage in Massachusetts is as a wholly secular and dynamic legal institution, the governmental aim of which is to encourage stable adult relationships for the good of the individual and of the community, especially its children. The very nature and purpose of civil marriage, the court concluded, renders unconstitutional any attempt to ban all same-sex couples, as same-sex couples, from entering into civil marriage.

The same defects of rationality evident in the marriage ban considered in Goodridge are evident in, if not exaggerated by, Senate No. 2175. Segregating same-sex unions from opposite-sex unions cannot possibly be held rationally to advance or "preserve" what we stated in Goodridge were the Commonwealth's legitimate interests in procreation, child rearing, and the conservation of resources. See Goodridge, supra at 341. Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status. The holding in Goodridge, by which we are bound, is that group classifications based on unsupportable distinctions, such as that embodied in the proposed bill, are invalid under the Massachusetts Constitution. The

history of our nation has demonstrated that separate is seldom, if ever, equal.[3]

[3] The separate opinion of Justice Sosman (separate opinion) correctly notes that this court has not recognized sexual orientation as a suspect classification. It does so by referring to Brown v. Board of Educ., 347 U.S. 483 (1954), and stating that that case "involved a classification . . . that is expressly prohibited by our Constitution." Post at n.6. The Brown case was decided under the Federal Constitution and made no reference to "suspect classifications." It held that "separate but equal" segregation in the context of public schools violated "the equal protection of the laws guaranteed by the Fourteenth Amendment" to the United States Constitution. Brown v. Board of Educ., supra at 495. The Fourteenth Amendment does not expressly prohibit discrimination against any particular class of persons, racial, religious, sexual, or otherwise, but instead elegantly decries the denial of equal protection of the laws "to any person" within

the jurisdiction of the United States. Similarly, our decision in Goodridge did not depend on reading a particular suspect class into the Massachusetts Constitution, but on the equally elegant and universal pronouncements of that document. See note 2, supra.

In any event, we fail to understand why the separate opinion chastises us for adopting the constitutional test (rational basis) that is more likely to permit the legislation at issue. We did not apply a strict scrutiny standard in Goodridge. Under the even more lenient rational basis test, nothing presented to us as a justification for the existing distinction was in any way rationally related to the objectives of the marriage laws. Now, we answer that this proposed legislation fails to provide a rational basis for the different nomenclature.

In Goodridge, the court acknowledged, as we do here, that "[m]any people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors." Id. at 312. The court stated then, and we reaffirm, that the State may not interfere with these convictions, or with the decision of any religion to refuse to perform religious marriages of same-sex couples. Id. at 337-338 n.29. These matters of belief and conviction are properly outside the reach of judicial review or government interference. But neither may the government, under the guise of protecting "traditional" values, even if they be the traditional values of the majority, enshrine in law an invidious discrimination that our Constitution, "as a charter of governance for every person properly within its reach," forbids. Id. at 312.

The bill's absolute prohibition of the use of the word "marriage" by "spouses" who are the same sex is more than semantic. The dissimilitude between the terms "civil marriage" and "civil union" is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status. The denomination of this difference by the separate opinion of Justice Sosman (separate opinion) as merely a "squabble over the

name to be used" so clearly misses the point that further discussion appears to be useless.[4] Post at . If, as the separate opinion posits, the proponents of the bill believe that no message is conveyed by eschewing the word "marriage" and replacing it with "civil union" for same-sex "spouses," we doubt that the attempt to circumvent the court's decision in Goodridge would be so purposeful. For no rational reason the marriage laws of the Commonwealth discriminate against a defined class; no amount of tinkering with language will eradicate that stain. The bill would have the effect of maintaining and fostering a stigma

[4] The separate opinion enlists Shakespeare in the cause of trying to convince us that words are unimportant. Post at n.1. But whatever may pertain to two teenagers in love does not disguise the importance of the choice of words employed by the government to discriminate between two groups of persons regulated in their conduct by the government. The separate opinion fails to appreciate that it is not the word "union" that incorporates a pejorative value judgment, but the distinction between the words "marriage" and "union." If, as the separate opinion suggests, the Legislature were to jettison the term "marriage" altogether, it might well be rational and permissible. Post at n.5. What is not permissible is to retain the word for some and not for others, with all the distinctions thereby engendered.

of exclusion that the Constitution prohibits. It would deny to same-sex "spouses" only a status that is specially recognized in society and has significant social and other advantages. The Massachusetts Constitution, as was explained in the Goodridge opinion, does not permit such invidious discrimination, no matter how well intentioned.

The separate opinion maintains that, because same-sex civil marriage is not recognized under Federal law and the law of many States, there is a rational basis for the Commonwealth to distinguish same-sex from opposite-sex "spouses." Post at . There is nothing in the bill, including its careful and comprehensive findings (see Senate No. 2175, § 1), to suggest that the rationale for the bill's distinct nomenclature was chosen out of deference to other jurisdictions. This is but a post hoc, imaginative theory created in the separate opinion to justify different treatment for a discrete class. Even if the different term were used for the reason the separate opinion posits, and not in order to label the unions of same-sex couples as less worthy than those of opposite sex couples, we would remain unpersuaded. "Our concern," as the court stated in Goodridge, "is with the Massachusetts Constitution as a charter of governance for every person properly within its reach." Id. at 312.

We are well aware that current Federal law prohibits recognition by the Federal government of the validity of same-sex marriages legally entered into in any State, and that it permits

other States to refuse to recognize the validity of such marriages. The argument in the separate opinion that, apart from the legal process, society will still accord a lesser status to those marriages is irrelevant. Courts define what is constitutionally permissible, and the Massachusetts Constitution does not permit this type of labeling. That there may remain personal residual prejudice against same-sex couples is a proposition all too familiar to other disadvantaged groups. That such prejudice exists is not a reason to insist on less than the Constitution requires. We do not abrogate the fullest measure of protection to which residents of the Commonwealth are entitled under the Massachusetts Constitution. Indeed, we would do a grave disservice to every Massachusetts resident, and to our constitutional duty to interpret the law, to conclude that the strong protection of individual rights guaranteed by the Massachusetts Constitution should not be available to their fullest extent in the Commonwealth because those rights may not be acknowledged elsewhere. We do not resolve, nor would we attempt to, the consequences of our holding in other jurisdictions. See id. at 340-341.[5] But, as the court held in Goodridge, under our Federal system of dual sovereignty, and subject to the minimum requirements of the Fourteenth Amendment to the United States Constitution, "each State is free to address

[5] Nor are we unaware that revisions will be necessary to effectuate the administrative details of our decision. These alterations can be made without perpetuating the discrimination that flows from separate nomenclature.

difficult issues of individual liberty in the manner its own Constitution demands." Id. at 341.

We recognize that the pending bill palliates some of the financial and other concrete manifestations of the discrimination at issue in Goodridge. But the question the court considered in Goodridge was not only whether it was proper to withhold tangible benefits from same-sex couples, but also whether it was constitutional to create a separate class of citizens by status discrimination, and withhold from that class the right to participate in the institution of civil marriage, along with its concomitant tangible and intangible protections, benefits, rights, and responsibilities. Maintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage is the constitutional infirmity at issue.

4. Conclusion. We are of the opinion that Senate No. 2175 violates the equal protection and due process requirements of the Constitution of the Commonwealth and the Massachusetts Declaration of Rights. Further, the particular provisions that render the pending bill unconstitutional, §§ 2 and 3 of proposed G. L. c. 207A, are not severable from the remainder. The bill maintains an unconstitutional, inferior, and discriminatory status for same-sex couples, and the bill's remaining provisions are too entwined with this purpose to stand independently. See Murphy v. Commissioner of the Dep't of Indus. Accs., 418 Mass. 165, 169 (1994).

The answer to the question is "No."

The foregoing answer and opinion are submitted by the Chief Justice and the Associate Justices subscribing hereto on the third day of February, 2004.

Margaret H. Marshall

John M. Greaney

Roderick L. Ireland

Judith A. Cowin

In response to this court's decision in Goodridge v. Department of Pub. Health, ante 309 (2003) (Goodridge), the Senate is considering a bill that would make available to same-sex couples all of the protections, benefits, rights, responsibilities, and legal incidents that are now available to married opposite-sex couples, but would denominate the legal relationship thus created as a "civil union" instead of a civil "marriage." The question submitted to us by the Senate thus asks, in substance, whether the Massachusetts Constitution would be violated by utilizing the term "civil union" instead of "marriage" to identify the otherwise identical package of State law rights and benefits to be made available to same-sex couples.

In response to the court's invitation to submit amicus briefs on this question, we have received, from both sides of the issue, impassioned and sweeping rhetoric out of all proportion to the narrow question before us. Both sides appear to have ignored the fundamental import of the proposed legislation, namely, that same-sex couples who are civilly "united" will have literally every single right, privilege, benefit, and obligation of every sort that our State law confers on opposite-sex couples who are civilly "married." Under this proposed bill, there are no substantive differences left to dispute -- there is only, on both sides, a squabble over the name to be used.[1] There is, from the

[1] The insignificance of according a different name to the same thing has long been recognized:

amici on one side, an implacable determination to retain some distinction, however trivial, between the institution created for same-sex couples and the institution that is available to opposite-sex couples. And, from the amici on the other side, there is an equally implacable determination that no distinction, no matter how meaningless, be tolerated. As a result, we have a pitched battle over who gets to use the "m" word.

This does not strike me a dispute of any constitutional dimension whatsoever, and today's response from the Justices -- unsurprisingly -- cites to no precedent suggesting that the choice of differing titles for various statutory programs has ever posed an issue of constitutional dimension, here or anywhere else. And, rather than engage in any constitutional analysis of the claimed statutory naming rights, today's answer to the Senate's question merely repeats the impassioned rhetoric that has been submitted to us as if it were constitutional law,

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> "What's in a name? That which we call a rose
> By any other name would smell as sweet;
> So Romeo would, were he not Romeo call'd,
> Retain that dear perfection which he owes
> Without that title."

W. Shakespeare, Romeo and Juliet, Act II, Scene II.

opining that any difference in names represents an "attempt to circumvent" the court's decision in Goodridge. Ante at .

A principle premise of the Justices's answer is that this specific issue has somehow already been decided by Goodridge. It has not. In Goodridge, the court was presented with a statutory scheme that afforded same-sex couples absolutely none of the benefits, rights, or privileges that same-sex couples could obtain under Massachusetts law by way of civil marriage. At length, the Goodridge opinion identified the vast array of benefits, rights, and privileges that were effectively withheld from same-sex couples (and their children), Goodridge, supra at 323-325, and concluded that "[l]imiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution." Id. at 342. The ostensible reasoning behind that conclusion was that there was no "rational basis" for depriving same-sex couples (and their children) of those protections, benefits, and obligations. Id. at 331, 341.

Today's question presents the court with the diametric opposite of the statutory scheme reviewed in Goodridge. Where the prior scheme accorded same-sex couples (and their children) absolutely none of the benefits, rights, or privileges that State law confers on opposite-sex married couples (and their children), the proposed bill would accord them all of those substantive benefits, rights, and privileges. Nothing in Goodridge addressed

the very limited issue that is presented by the question now before us, i.e., whether the Constitution mandates that the license that qualifies same-sex couples for that identical array of State law benefits, rights, and privileges be called a "marriage" license. In other words, where Goodridge addressed whether there was any rational basis for the enormous substantive difference between the treatment of same-sex couples and the treatment of opposite-sex couples, the present question from the Senate asks whether a single difference in form alone -- the name of the licensing scheme -- would violate the Constitution. Repeated quotations of dicta from Goodridge -- which is essentially all that today's answer to the Senate consists of -- simply does not answer the question that is before us.

Rather, according to Goodridge itself, we must consider whether there is any "rational basis" for giving the licensure program for same-sex couples a different name from the licensure program for opposite-sex couples, despite the fact that the two programs confer identical benefits, rights, and privileges under State law. Nowhere does today's answer to the Senate actually analyze whether there is or is not a conceivable rational basis for that distinction in name. Instead, the answer pays lip service to the rational basis test in a footnote and, in conclusory fashion, announces that, because the different name would still connote "a different status," it somehow lacks a rational basis and is contrary to Goodridge. Ante at & n.3,

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While we have no precedent for the application of the rational basis test (or the strict scrutiny test, for that matter) to as insignificant an issue as what a statutory program is to be called, it would seem logical that the Legislature could call a program by a different name as long as there was any difference between that program and the other program in question. The black-letter law concerning the extremely deferential nature of the rational basis test should not need to be repeated here. Suffice it to say that a statutory classification need be supported only "by a conceivable, rational basis," Fine v. Contributory Retirement Appeal Bd., 401 Mass. 639, 641 (1988), and that the Legislature "is not required to justify its classifications, nor to provide a record or finding in support of them." Paro v. Longwood Hosp., 373 Mass. 645, 650 (1977). As such, a statute is not rendered infirm by its failure to recite a rational basis for its enactment, nor are we limited to a consideration of any specific basis identified by the statute itself. "[I]t is irrelevant for constitutional analysis whether a reason now advanced in support of a statutory classification is one that actually motivated the Legislature." Prudential Ins. Co. v. Commissioner of Revenue, 429 Mass. 560, 568 (1999), citing FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993).

At first blush, one would say that the very identity between the package of benefits, rights, and privileges accorded same-sex couples under the proposed bill and the package of benefits,

rights, and privileges accorded opposite-sex couples under existing State law means that there is no reason to give those two packages different names. Where the stated purpose of the proposed bill is to eliminate all substantive differences between those two types of couples, what conceivable purpose is served by retaining a different title for their respective licensing schemes?

The problem, however, is simple: it is beyond the ability of the Legislature -- and even beyond the ability of this court, no matter how activist it becomes in support of this cause -- to confer a package of benefits and obligations on same-sex "married" couples that would be truly identical to the entire package of benefits and obligations that being "married" confers on opposite-sex couples. That difference stems from the fact that, Goodridge notwithstanding, neither Federal law nor the law of other States will recognize same-sex couples as "married" merely because Massachusetts has given them a license called a "marriage" license. That fact, by itself, will result in many substantive differences between what it would mean for a same-sex couple to receive a Massachusetts "marriage" license and what it means for an opposite-sex couple to receive a Massachusetts "marriage" license. Those differences are real, and, in some cases, quite stark. Their very existence makes it rational to call the license issued to same-sex couples by a different name, as it unavoidably -- and, to many, regrettably -- cannot confer a truly equal package of rights, privileges, and benefits on those

couples, no matter what name it is given.

Just as Goodridge identified the vast array of State benefits, rights, and privileges that are conferred based on marital status, a vast array of Federal benefits, rights, and privileges are also conferred based on marital status. However, whatever Massachusetts chooses to call the license it grants to same-sex couples, the Federal government will not, for purposes of any Federal statute or program, treat it as a "marriage." See 1 U.S.C. § 7 (2000) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife"). As such, same-sex "married" couples will not be treated as "married" for such purposes as Federal taxation (both income taxes and, even more significantly, estate taxes), Social Security benefits (of any kind), immigration, or Federal programs providing health care or nursing home care benefits, to name but a few. And, where those Federal programs set the eligibility requirements for many of our federally funded State programs, those corresponding State programs will not be allowed to treat same-sex couples as married either, thus excluding them from (or profoundly affecting the calculation of) entitlement to benefits under many such State programs. State officials -- not just Federal officials -- will,

of necessity, have to differentiate between same-sex and opposite-sex couples for all of these State programs. One may decry the unfairness of this different treatment at the hands of the Federal government and its programs, just as the plaintiffs in Goodridge decried the unfairness of different treatment under State law, but neither this court nor the Legislature has any power to eradicate those differences or to obviate the need that will arise to distinguish between same-sex and opposite-sex couples for many purposes.

Yet another significant difference stems from the fact that, at present, most States will refuse to recognize a "marriage" license issued by Massachusetts to a same-sex couple. See 28 U.S.C. § 1738C (2000) (States not required to recognize relationship between same-sex couples as marriage even if another State treats that relationship as marriage); P. Greenberg, State Laws Affecting Lesbians and Gays, National Conference of State Legislatures Legisbriefs at 1 (April/May 2001) (reporting that, as of May, 2001, thirty-six States had enacted "defense of marriage" statutes). Not only would such a couple be deprived of any benefits of being "married" if that couple moved to another State, but such a couple would not have access to that State's courts for purposes of obtaining a divorce or separation and the necessary orders (with respect to alimony, child support, or child custody) that accompany a divorce or separation. See, e.g., Rosengarten v. Downes, 71 Conn. App. 372, 380-381, appeal dismissed, 261 Conn. 936, 936 n.* (2002) (where Connecticut law

did not recognize validity of same-sex couple's union as marriage, court lacked subject matter jurisdiction over dissolution action); Rosenberg, Breaking Up is Hard to do, Newsweek 44 (July 7, 2003), noting that, "[i]f gay couples think it's tough to get married, they may find it's even harder to split up"). Ironically, a "marriage" license issued to a same-sex couple will not only fail to entitle that couple to the same array of benefits that normally attend the marriage of opposite-sex couples, but it will not subject them to the same obligations, either -- their status as a "married" couple, and therefore all of the obligations that attend that status, can be made to disappear by the simple expedient of moving to another State that will not recognize them as "married." Opposite-sex couples, once "married" in Massachusetts, cannot shed that status and its significant obligations so easily.

It would be rational for the Legislature to give different names to the license accorded to these two groups, when the obligations they are undertaking and the benefits they are receiving are, in practical effect, so very different, and where, for purposes of the vast panoply of federally funded State programs, State officials will have to differentiate between them. That these differences stem from laws and practices outside our own jurisdiction does not make those differences any less significant. They will have a very real effect on the everyday lives of same-sex couples, and the lives of their children, that will unavoidably make their ostensible "marriage"

a very different legal institution from the "marriage" enjoyed by opposite-sex couples.[2] That lack of recognition in other jurisdictions is not simply a matter affecting the intangibles of "status" or "personal residual prejudice," ante at , but is a difference that gives rise to a vast assortment of highly

[2] While many hope that, by way of litigation and lobbying efforts, same-sex couples will ultimately obtain recognition of their Massachusetts "marriages" by the Federal government and by other States, no one predicts, even on the most optimistic scenario, that such widespread recognition will be achieved anytime in the near future. It remains to be seen whether it will be achieved at all, as it presently faces considerable -- and vehement -- opposition from various quarters. The Legislature is entitled to structure and name its licensing programs based on conditions as they presently exist. It is not required to assume the success of yet-to-be-filed litigation and lobbying efforts around the country.

tangible, concrete consequences. It is not the naming of the legal institution that confers "a different status" on same-sex couples, ante at ; rather, that difference in terminology reflects the reality that, for many purposes, same-sex couples will have "a different status."

Not only will the institution itself be different, but those very differences would, in many areas, justify (and, in some cases, require) modifications of our own State law in ways that are unique to same-sex couples in order to address those differences. Such modifications range from the mundane (and almost automatic) to very substantive and complex. To begin with the mundane, while the proposed bill specifies that same-sex couples in "civil unions" can file joint Massachusetts income tax returns, such couples will not be allowed to file joint Federal income tax returns; when, on their Massachusetts returns, they encounter the numerous cross-references to what was entered on a particular line of their Federal return, what figure are they to use? Some regulation or instruction, applicable only to the tax returns of same-sex couples, will inevitably have to be promulgated. On a more substantive level, would it not be permissible (and, in the view of many, appropriate) for the Legislature to provide some form of tax benefit to same-sex couples to recognize that they have been deprived of certain deductions, credits, or other benefits on their Federal income taxes or Federal estate taxes? See, e.g., G. L. c. 62, § 3 (B)

(a) (9) (providing tax deduction to persons renting their homes where Federal tax law only allows deduction for mortgage interest paid by owners). See also Massachusetts Teachers Ass'n v. Secretary of the Commonwealth, 384 Mass. 209, 238-240 (1981). Would it not also be permissible (and, in the view of many, appropriate) to establish a program of benefits for same-sex couples and their children to offset the hardship they will encounter as a result of being denied Social Security benefits, health care benefits, and the many other benefits that opposite-sex married couples (and their children) receive under Federal programs and federally funded State programs? See, e.g., St. 1997, c. 43, § 210 (providing welfare benefits to aliens excluded from Federal benefits program); Doe v. Commissioner of Transitional Assistance, 437 Mass. 521, 534-535 (2002). And, would it not be desirable to try and formulate some mechanism -- admittedly complex and difficult to fashion -- by which same-sex couples who move out of State could still have resort to Massachusetts courts to enforce the obligations of their union in the event one party or the other wished to dissolve it? Cf. Vt. Stat. Ann. tit. 15, § 1206 (2002) (persons seeking to dissolve civil union must meet residency requirement).

I recognize that the proposed bill does not contain any measures addressing any of these problems. The question, however, is whether it is rational to envision a need to differentiate between these two types of licenses -- after all, the 180-day deadline imposed by Goodridge does not realistically

allow for a review of every one of the "hundreds of statutes" in Massachusetts alone that are "related to marriage and to marital benefits," Goodridge, supra at 323, let alone review how differences in Federal law and the law of other States will frustrate the goal of complete equality and require separate statutory or regulatory remedies for same-sex couples in Massachusetts. It is understandable, therefore, that the proposed bill sets forth as its initial goal the overarching proposition that these two programs should be equal and leaves to another day the painstaking task of revising the "hundreds" of provisions that might, in order to obtain equality in a more pragmatic sense, need substantial revision.[3] Moreover, it makes

[3] Beyond the array of problems posed by differences in Federal law and the law of other States, some provisions may need substantial modification merely in order to make sense in their application to same-sex couples. For example, the presumption of paternity (G. L. c. 209C, § 6) reflects reality with respect to an overwhelming majority of those children born of a woman who is married to a man. As to same-sex couples, however, who cannot conceive and bear children without the aid of a third party, the presumption is, in every case, a physical and biological impossibility. It is also expressly gender based: if a married man impregnates a woman who is not his wife, the law contains no presumption that overrides the biological mother's status and presumes the child to be that of the biological father's wife. By comparison, if a married woman becomes impregnated by a man who is not her husband, the presumption makes her husband the legal father of the child, depriving the biological father of what would otherwise be his parental rights. See Michael H. v. Gerald D., 491 U.S. 110 (1989); Matter of Walter, 408 Mass. 584 (1990). Applying these concepts to same-sex couples results in some troubling anomalies: applied literally, the presumption would mean very different things based on whether the same-sex couple was comprised of two women as opposed to two men. For the women, despite the necessary involvement of a third party, the law would recognize the rights of the "mother" who bore the child and presume that the mother's female spouse was the child's "father" or legal "parent." For the men, the necessary involvement of a third party would produce the exact opposite

eminent sense to obtain some direct experience with this first in the nation proposed program of "civil unions" that are to be the complete functional equivalent of "marriage"; that experience will both identify where the theoretically identical treatment is not identical in reality and simultaneously inform those seeking genuine equality what remedies might best be fashioned to "close the gap." Indeed, once the euphoria of Goodridge subsides, the reality of the still less than truly equal status of same-sex couples will emerge, and it will emerge in pragmatic ways far beyond the purely symbolic issue of what their legal status is to be named. There will surely be more to address than mere "administrative details." Ante at n.5.

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result -- the biological mother of the child would retain all her rights, while one (but not both) of the male spouses could claim parental rights as the child's father. Would it not make sense to rethink precisely how this biologically impossible presumption of paternity ought to apply to same-sex couples, and perhaps make some modification that would clarify its operation in this novel context?

Where the rights and obligations conferred on same-sex couples by Goodridge will not in fact be identical to the rights and obligations of opposite-sex married couples, where State officials will have to differentiate between them under essentially all federally funded State programs, and where it is rational to envision different, yet constitutional, treatment of same-sex couples in the future to address those remaining differences, it is eminently rational to give a different name to the legal status being conferred on same-sex couples by the proposed bill. It is not enough to say that eligibility for current federally funded State programs, or for some future programs or statutory modifications unique to same-sex couples, could be confirmed by some other means; under the rational basis test, the sole question is whether a different name for the license being issued is a rational method of identifying those persons who would be eligible for constitutionally permissible differing treatment in future. It clearly is.

It is of no consequence that the actual purpose that has motivated the proposed bill may be different from that just articulated. See Prudential Ins. Co. v. Commissioner of Revenue, 429 Mass. 560, 568 (1999), citing FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993). The criticism that my articulated rationale "is but a post hoc, imaginative theory created . . . to justify different treatment," and not the actual rationale of the bill's proponents, ante at , is therefore beside the point. The rational basis test asks whether there is

any conceivable basis for the distinction at issue. The test does not require that the Legislature disclose its actual motives or that those motives be pure.[4] Nor does the test even place the burden on the Commonwealth to demonstrate the existence of a rational basis -- rather, it is on those seeking to challenge the legislation to demonstrate the absence of any conceivable basis.

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[4] Remarkably, four Justices proclaim that, even if the Legislature creates differences between these statutory schemes for good faith reasons in an attempt to achieve equality, "separate nomenclature" could not be used because its use would still "perpetuat[e] . . . discrimination." Ante at n.5. Apparently, even if the statutory schemes are substantively different and those differences stem from good and valid reasons, there is some constitutional requirement that the statutory schemes bear the exact same name. Again, no precedent whatsoever is cited for this proposition, and it is nonsensical to suggest that substantively different programs must be named identically.

In my view, the proposed difference in name passes muster under the rational basis test.

A more fundamental problem with the answer given to the Senate today is that it does not apply the rational basis test, but instead announces, without qualification, that the Massachusetts Constitution prohibits "invidious discrimination" or "status discrimination" against, or the imposition of a "different status," "second-class status" or "stigma" on, same-sex couples.[5] Ante at , , , . Of course, if the

[5] Today's answer to the Senate also assumes that such "invidious discrimination" may be found in the mere name of the proposed licensing scheme. If the name chosen were itself insulting or derogatory in some fashion, I would agree, but the term "civil union" is a perfectly dignified title for this program -- it connotes no disrespect. Rather, four Justices today assume that anything other than the precise word "marriage" is somehow demeaning. Not only do we have an insistence that the name be identical to the name used to describe the legal union of opposite-sex couples, but an apparent insistence that the name include the word "marriage." From the dogmatic tenor of today's answer to the Senate, it would appear that the court would find constitutional infirmity in legislation calling the legal union of same-sex couples by any name other than "marriage," even if that legislation simultaneously provided that the union of opposite-sex couples was to be called by the precise same name.

Today's answer assumes, in substance, that the "right to choose to marry" as recognized in Goodridge, supra at 326, includes the constitutional right to have the legal relationship bear that precise term. Given that Goodridge itself recognized that the Legislature could abolish the institution of marriage if it chose, id. at 326 n.14, it is hard to identify how the Constitution would be violated if the Legislature chose merely to rename it. Rather than imbuing the word "marriage" with constitutional significance, there is much to be said for the argument that the secular legal institution, which has gradually come to mean something very different from its original religious counterpart, be given a name that distinguishes it from the religious sacrament of "marriage." Different religions now take very differing positions on such elemental matters as who is

Massachusetts Constitution contained any "equal rights amendment" making sexual orientation the equivalent of the prohibited categories of "sex, race, color, creed or national origin" (art. 1 of the Declaration of Rights, as amended by art. 106 of the Amendments to the Massachusetts Constitution), I would readily agree with those general pronouncements. However, our Constitution contains no such amendment, and Goodridge itself did not go so far as to accept the plaintiffs' argument that the court itself, absent such an amendment, should nevertheless treat sexual orientation as a suspect classification for purposes of equal protection analysis. Goodridge, supra at 331 n.21. Nor did Goodridge rely on the alternative claim that a "fundamental

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eligible to be "married" within that faith, or whether (and under what circumstances) the bonds of that "marriage" may be dissolved. The Legislature could, rationally and permissibly, decide that the time has come to jettison the term "marriage" and to use some other term to stand for the secular package of rights, benefits, privileges, and obligations of couples who have entered into that civil, secular compact. Retaining the same term merely perpetuates and adds to the confusion as to what the term means. Whatever the nature of this constitutional right "to choose to marry," Goodridge, supra at 326, there is no right to have the State continue to use any particular term with which to describe that legal relationship.

right" was at stake, such that a "strict scrutiny" analysis was to be applied. Id. at 330-331. Rather, the court purported to apply a mere rational basis analysis, the extremely deferential test that is applied to any classification that does not impinge on fundamental rights or employ a suspect classification.

The Goodridge opinion employed repeated analogies to cases involving fundamental rights and suspect classifications, while ostensibly not adopting either predicate for strict scrutiny. Id. at 359-361 (Sosman, J., dissenting). Today's answer to the Senate's question discards the fig leaf of the rational basis test and, relying exclusively on the rhetoric rather than the purported reasoning of Goodridge, assumes that discrimination on the basis of sexual orientation is prohibited by our Constitution as if sexual orientation were indeed a suspect classification.[6]

[6] This assumption is most explicit in the answer's invocation of the concept of "separate but equal," suggesting that the different naming of the statutory scheme contains the same type of constitutional defect as that identified in Brown v. Board of Educ., 347 U.S. 483, 495 (1954). See ante at . Of course, that landmark case involved a classification (and resulting separation) based on race, a classification that is expressly prohibited by our Constitution (art. 1 of the Declaration of Rights, as amended by art. 106 of the Amendments of the Massachusetts Constitution) and has long been recognized as a "suspect" classification requiring strict scrutiny for purposes of equal protection analysis under the Fourteenth Amendment to the United States Constitution. See McLaughlin v. Florida, 379 U.S. 184, 191-192 (1964), citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954), and Korematsu v. United States, 323 U.S. 214, 216 (1944). Classifications based on race, and hence any separate but allegedly equal treatment of the races, "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." McLaughlin v. Florida, supra at 192. It is that "historical fact" concerning the "central purpose" of the Fourteenth Amendment, id., not how "elegantly [it] decries the denial of

If that is the view of a majority of the Justices, they should identify the new test they have apparently adopted for determining that a classification ranks as "suspect" -- other types of persons making claims of a denial of equal protection will need to know whether they, too, can qualify as a "suspect" classification under that new test and thereby obtain strict scrutiny analysis of any statute, regulation, or program that uses that classification. No analysis of why sexual orientation should be treated as a suspect classification was provided in Goodridge, and none is provided today. Yet that is, apparently, the interpretation that is now being given to Goodridge. The

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equal protection of the laws 'to any person,'" ante at n.3, that subjects racial classifications to strict scrutiny. Here, we have no constitutional provision that has, as either its "central" or even its peripheral purpose, the elimination of discrimination based on sexual orientation. And, notwithstanding the "elegant and universal pronouncements" of our Constitution, id., all but a very few classifications are reviewed under the mere rational basis test.

footnote disclaimer of any resort to "suspect classification" and corresponding "strict scrutiny" analysis, ante at n.3, rings hollow in light of the sweeping text of today's answer.

Here, as in Goodridge, I remain of the view that the rational basis test is the test to be applied to this issue and, at least in theory, all but one of the Justices in Goodridge applied that test. That same test should be applied to the question before us, and, because this proposed legislation passes that test, I would advise the Senate that Senate No. 2175 does not violate the equal protection or due process requirements of the Constitution of the Commonwealth and the Massachusetts Declaration of Rights.

Martha B. Sosman

I agree with the opinion of Justice Sosman.

Francis X. Spina

"Shorn of [its] emotion-laden invocations," Goodridge v. Department of Pub. Health, ante 309, 361 (2003) (Sosman, J., dissenting), and reduced to its legal essence, the court's Goodridge decision held that "[l]imiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution." Goodridge v. Department of Pub. Health, supra at 342. This holding, while monumental in effect, rested on the slender reed of the court's conclusion that the Department of Public Health had failed to articulate a rational basis for denying civil marriage to couples of the same sex, while permitting civil marriage under Massachusetts law for similarly situated heterosexual couples.

What was before the court, in fairness, was a yawning chasm between hundreds of protections and benefits provided under Massachusetts law for some, and none at all for others. That a classification with such attendant advantages afforded to one group over another could not withstand scrutiny under the rational basis standard does little to inform us about whether an entirely different statutory scheme, such as the one pending before the Senate, that provides all couples similarly situated with an identical bundle of legal rights and benefits under licenses that differ in name only, would satisfy that standard.

A mere difference in name, that does not differentiate on the basis of a constitutionally protected or suspect classification or create any legally cognizable advantage for one group over another under Massachusetts law, may not even raise a due process or equal protection claim under our Constitution, and the rational basis test may be irrelevant to the court's consideration of such a statute, once enacted.

Assuming, however, that a difference in statutory name would itself have to rest on a rational basis, I would withhold judgment until such time as the Legislature completed its deliberative process before concluding that there was or was not such a basis. Although in normal circumstances, "[t]he [L]egislature is not required to justify its classifications, nor provide a record or finding in support of them," id. at 379 (Cordy, J., dissenting), quoting Paro v. Longwood Hosp., 373 Mass. 645, 750 (1977), and its enactments need only be supported by a "conceivable" rational basis, Goodridge v. Department of Pub. Health, supra, quoting Fine v. Contributory Retirement Appeal Bd., 401 Mass. 639, 641 (1988), it would not be surprising, in light of the Goodridge decision, to find ample documentation of its reasoning and objectives in the proceedings leading up to the legislation's enactment.

In sum, if the new statutory scheme is subjected to and passes the rational basis test, it would be constitutional, and while one could speculate now as to what conceivable bases might exist to justify the difference (see, e.g., ante at (opinion

of Sosman, J.), there is no reason to prejudge the point, and no basis on which to pronounce the task to be impossible.

Robert J. Cordy

SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

Mark Lewis and Dennis Winslow, et al. v. Gwendolyn L. Harris, etc., et al. (A-68-05)

Argued February 15, 2006 -- Decided October 25, 2006

ALBIN, J., writing for a majority of the Court.

Plaintiffs are seven same-sex couples who have been in permanent committed relationships for more than ten years. Each seeks to marry his or her partner and to enjoy the legal, financial, and social benefits that marriage affords. After being denied marriage licenses in their respective municipalities, plaintiffs sued challenging the constitutionality of the State's marriage statutes.

In a complaint filed in the Superior Court, Law Division, plaintiffs sought a declaration that laws denying same-sex marriage violated the liberty and equal protection guarantees of Article I, Paragraph 1 of the New Jersey Constitution. They also sought injunctive relief compelling the defendant State officials to grant them marriage licenses. (The named defendants are Gwendolyn L. Harris, former Commissioner of the Department of Human Services, Clifton R. Lacy, former Commissioner of the Department of Health and Senior Services, and Joseph Komosinski, former Acting State Registrar of Vital Statistics. For the purpose of this decision, they are being referred to collectively as the "State.")

Both parties moved for summary judgment. The trial court, Superior Court Judge Linda Feinberg, entered summary judgment in the State's favor and dismissed the complaint. Plaintiffs appealed. In a split decision, the Appellate Division affirmed. Judge Stephen Skillman wrote the majority opinion in which he concluded that New Jersey's marriage statutes do not contravene the substantive due process and equal protection guarantees of Article I, Paragraph 1 of the State Constitution. He determined that only the Legislature could authorize same-sex marriages.

Appellate Division Judge Anthony Parrillo filed a concurring opinion. Although joining Judge Skillman's opinion, Judge Parrillo added his view of the twofold nature of the relief sought by plaintiffs -- the right to marry and the rights of marriage. He submitted that it was the Legislature's role to weigh the benefits and costs flowing from a profound change in the meaning of marriage.

Appellate Division Judge Donald Collester, Jr., dissented. He concluded that the substantive due process and equal protection guarantees of Article I, Paragraph 1 obligate the State to afford same-sex couples the right to marry on terms equal to those afforded opposite-sex couples.

The matter came before the Court as an appeal as of right by virtue of the dissent in the Appellate Division.

HELD: Denying committed same-sex couples the financial and social benefits and privileges given to their married heterosexual counterparts bears no substantial relationship to a legitimate governmental purpose. The Court holds that under the equal protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution, committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by opposite-sex couples under the civil marriage statutes. The name to be given to the statutory scheme that provides full rights and benefits to same-sex couples, whether marriage or some other term, is a matter left to the democratic process.

1. As this case presents no factual dispute, the Court addresses solely questions of law. The Court perceives plaintiffs' equal protection claim to have two components: whether committed same-sex couples have a constitutional right to the benefits and privileges afforded to married heterosexual couples, and, if so, whether they have a constitutional right to have their relationship recognized by the name of marriage. (pp. 19-21)

2. In attempting to discern the substantive rights that are "fundamental" under Article I, Paragraph 1, of the State Constitution, the Court has followed the general standard adopted by the United States Supreme Court in construing

the Due Process Clause of the Fourteenth Amendment. First, the asserted fundamental liberty interest must be clearly identified. In this case, the identified right is the right of same-sex couples to marry. Second, the liberty interest in same-sex marriage must be objectively and deeply rooted in the traditions, history, and conscience of the people of this State. (pp. 21-25)

3. New Jersey's marriage laws, which were first enacted in 1912, limit marriage to heterosexual couples. The recently enacted Domestic Partnership Act explicitly acknowledges that same-sex couples cannot marry. Although today there is a national debate over whether same-sex marriages should be authorized by the states, the framers of the 1947 New Jersey Constitution could not have imagined that the liberty right protected by Article I, Paragraph 1 embraced same-sex marriage. (pp. 25-28)

4. Times and attitudes have changed. There has been a developing understanding that discrimination against gays and lesbians is no longer acceptable in this State. On the federal level, the United States Supreme Court has struck down laws that have unconstitutionally targeted gays and lesbians for disparate treatment. Although plaintiffs rely on the federal cases to support the argument that they have a fundamental right to marry under our State Constitution, those cases fall far short of establishing a fundamental right to same-sex marriage "deeply rooted in the traditions, history, and conscience of the people of this State." Despite the rich diversity of this State, the tolerance and goodness of its people, and the many recent advances made by gays and lesbians toward achieving social acceptance and equality under the law, the Court cannot find that the right to same-sex marriage is a fundamental right under our constitution. (pp. 28-33)

5. The Court has construed the expansive language of Article I, Paragraph 1 to embrace the fundamental guarantee of equal protection, thereby requiring the Court to determine whether the State's marriage laws permissibly distinguish between same-sex and heterosexual couples. The test the Court has applied to equal protection claims is a flexible one that includes three factors: 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. (pp. 34-36)

6. In conducting its equal protection analysis, the Court discerns two distinct issues. The first is whether same-sex couples have the right to the statutory benefits and privileges conferred on heterosexual married couples. Assuming that right, the next issue is whether committed same-sex partners have a constitutional right to define their relationship by the name of marriage. (p. 37)

7. New Jersey's courts and its Legislature have been at the forefront of combating sexual orientation discrimination and advancing equality of treatment toward gays and lesbians. In 1992, through an amendment to the Law Against Discrimination (LAD), New Jersey became the fifth state to prohibit discrimination on the basis of "affectional or sexual orientation." In making sexual orientation a protected category, the Legislature committed New Jersey to the goal of eradicating discrimination against gays and lesbians. In 2004, the Legislature added "domestic partnership status" to the categories protected by the LAD. (pp. 37-40)

8. Discrimination on the basis of sexual orientation is also outlawed in our criminal law and public contracts law. The Legislature, moreover, created the New Jersey Human Relations Council to promote educational programs aimed at reducing bias and bias-related acts, identifying sexual orientation as a protected category. In 2004, the Legislature passed the Domestic Partnership Act, which confers certain benefits and rights on same-sex partners who enter into a partnership under the Act. (pp. 40-42)

9. The Domestic Partnership Act has failed to bridge the inequality gap between committed same-sex couples and married opposite-sex couples. Significantly, the economic and financial inequities that are borne by same-sex domestic partners are also borne by their children. Further, even though same-sex couples are provided fewer benefits and rights by the Act, they are subject to more stringent requirements to enter into a domestic partnership than opposite-sex couples entering a marriage. (pp. 43-48)

10. At this point, the Court does not consider whether committed 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. Cast in that light, the issue is not about the transformation of the traditional definition of marriage, but about the unequal dispensation of benefits and privileges to one of two similarly situated classes of people. (p. 48)

11. The State does not argue that limiting marriage to the union of a man and a woman is needed to encourage procreation or to create the optimal living environment for children. Other than sustaining the traditional definition of marriage, which is not implicated in this discussion, the State has not articulated any legitimate public need for depriving committed same-sex couples of the host of benefits and privileges that are afforded to married heterosexual couples. There is, on the one hand, no rational basis for giving gays and lesbians full civil rights as individuals while, on the other hand, giving them an incomplete set of rights when they enter into committed same-sex relationships. To the extent that families are strengthened by encouraging monogamous relationships, whether heterosexual or homosexual, the Court cannot discern a public need that would justify the legal disabilities that now afflict same-sex domestic partnerships. (pp. 48-51)

12. In arguing to uphold the system of disparate treatment that disfavors same-sex couples, the State offers as a justification the interest in uniformity with other states' laws. Our current laws concerning same-sex couples are more in line with those of Vermont, Massachusetts, and Connecticut than the majority of other states. Equality of treatment is a dominant theme of our laws and a central guarantee of our State Constitution. This is fitting for a state with so diverse a population. Article I, Paragraph 1 protects not only the rights of the majority but also the rights of the disfavored and the disadvantaged; they too are promised a fair opportunity for "pursuing and obtaining safety and happiness." (pp. 51-56)

13. The equal protection requirement of Article I, Paragraph 1 leaves the Legislature with two apparent options. The Legislature could simply amend the marriage statutes to include same-sex couples, or it could create a separate statutory structure, such as a civil union. Because this State has no experience with a civil union construct, the Court will not speculate that identical schemes offering equal rights and benefits would create a distinction that would offend Article I, Paragraph 1, and will not presume that a difference in name is of constitutional magnitude. New language is developing to describe new social and familial relationships, and in time will find a place in our common vocabulary. However the Legislature may act, same-sex couples will be free to call their relationships by the name they choose and to sanctify their relationships in religious ceremonies in houses of worship. (pp. 57-63)

14. In the last two centuries, the institution of marriage has reflected society's changing social mores and values. Legislatures, along with courts, have played a major role in ushering marriage into the modern era of equality of partners. The great engine for social change in this country has always been the democratic process. Although courts can ensure equal treatment, they cannot guarantee social acceptance, which must come through the evolving ethos of a maturing society. Plaintiffs' quest does not end here. They must now appeal to their fellow citizens whose voices are heard through their popularly elected representatives. (pp. 63-64)

15. To bring the State into compliance with Article I, Paragraph 1 so that plaintiffs can exercise their full constitutional rights, the Legislature must either amend the marriage statutes or enact an appropriate statutory structure within 180 days of the date of this decision. (p. 65)

The judgment of the Appellate Division is MODIFIED and, as MODIFIED, is AFFIRMED.

CHIEF JUSTICE PORITZ has filed a separate **CONCURRING and DISSENTING** opinion, in which **JUSTICES LONG** and **ZAZZALI** join. She concurs in the finding of the majority that denying the rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution. She dissents from the majority's distinguishing those rights and benefits from the right to the title of marriage. She also dissents from the majority's conclusion that there is no fundamental due process right to same-sex marriage encompassed within the concept of "liberty" guaranteed by Article I, Paragraph 1. She is of the view that persons who exercise their autonomous liberty interest to choose same-sex partners have a fundamental right to participate in a state-sanctioned civil marriage.

JUSTICES LaVECCHIA, WALLACE, and RIVERA-SOTO join in JUSTICE ALBIN's opinion. CHIEF JUSTICE PORITZ filed a separate concurring and dissenting opinion in which JUSTICES LONG and ZAZZALI join.

SUPREME COURT OF NEW JERSEY
A-68 September Term 2005

MARK LEWIS and DENNIS WINSLOW; SAUNDRA HEATH and CLARITA ALICIA TOBY; CRAIG HUTCHISON and CHRIS LODEWYKS; MAUREEN KILIAN and CINDY MENEGHIN; SARAH and SUYIN LAEL; MARILYN MANEELY and DIANE MARINI; and KAREN and MARCYE NICHOLSON-MCFADDEN,

Plaintiffs-Appellants,

v.

GWENDOLYN L. HARRIS, in her official capacity as Commissioner of the New Jersey Department of Human Services; CLIFTON R. LACY, in his official capacity as the Commissioner of the New Jersey Department of Health and Senior Services; and JOSEPH KOMOSINSKI, in his official capacity as Acting State Registrar of Vital Statistics of the New Jersey State Department of Health and Senior Services,

Defendants-Respondents.

Argued February 15, 2006 – Decided October 25, 2006

On appeal from the Superior Court, Appellate Division, whose opinions are reported at 378 N.J. Super. 168 (2005).

David S. Buckel, a member of the New York bar, argued the cause for appellants (Gibbons, Del Deo, Dolan, Griffinger &

Vecchione, attorneys; Mr. Buckel, Susan L. Sommer, a member of the New York bar, Lawrence S. Lustberg and Megan Lewis, on the briefs).

Patrick DeAlmeida, Assistant Attorney General argued the cause for respondents (Anne Milgram, Acting Attorney General of New Jersey, attorney; Mr. DeAlmeida and Mary Beth Wood, on the briefs).

David R. Oakley submitted a brief on behalf of amicus curiae Alliance for Marriage, Inc. (Anderl & Oakley, attorneys).

Edward L. Barocas, Legal Director, submitted a brief on behalf of amici curiae American Civil Liberties Union of New Jersey, American-Arab Anti-Discrimination Committee, Asian American Legal Defense and Education Fund, Hispanic Bar Association of New Jersey, and The National Organization for Women of New Jersey.

Howard M. Nashel submitted a brief on behalf of amici curiae American Psychological Association and New Jersey Psychological Association (Nashel, Kates, Nussman, Rapone & Ellis, attorneys).

Franklyn C. Steinberg, III, submitted a brief on behalf of amicus curiae The Anscombe Society at Princeton University.

Douglas S. Eakeley submitted a brief on behalf of amicus curiae City of Asbury Park (Lowenstein Sandler, attorneys).

Kevin H. Marino and John A. Boyle submitted a brief on behalf of amici curiae Asian Equality, Equality Federation, People for the American Way Foundation and Vermont Freedom to Marry Task Force (Marino & Associates, attorneys; Paul A. Saso, of counsel).

Mark L. Hopkins submitted a brief on behalf of amicus curiae Clergy of New Jersey.

Richard F. Collier, Jr., submitted a brief on behalf of amicus curiae Family Leader Foundation (Collier & Basil, attorneys).

Dennis M. Caufield submitted a brief on behalf of amicus curiae Family Research Council.

Leslie A. Farber and Thomas H. Prol submitted a brief on behalf of amici curiae Garden State Equality Education Fund, Inc. and Garden State Equality, LLC, a Continuing Political Committee (Leslie A. Farber, attorneys; Mr. Prol, of counsel).

Alan E. Kraus submitted a brief on behalf of amici curiae Human Rights Campaign, Human Rights Campaign Foundation, Children of Lesbians and Gays Everywhere (COLAGE), Family Pride Coalition, Freedom to Marry, Gay & Lesbian Advocates & Defenders (GLAD), National Center for Lesbian Rights, National Gay and Lesbian Task Force, New Jersey Lesbian and Gay Coalition (NJLGC), and Parents, Families and Friends of Lesbians and Gays (PFLAG) (Latham & Watkins, attorneys).

Kevin Costello submitted a brief on behalf of amicus curiae Legal Momentum (Levow & Costello, attorneys).

Cliona A. Levy submitted a brief on behalf of amicus curiae Madeline Marzano-Lesnevich (Sonnenschein Nath & Rosenthal, attorneys).

Demetrios K. Stratis submitted a brief on behalf of amici curiae Monmouth Rubber & Plastics, Corp. and John M. Bonforte, Sr., (Demetrios K. Stratis, attorneys; Mr. Stratis and Vincent P. McCarthy, on the brief).

Stephen M. Orlofsky and Jordana Cooper submitted a brief on behalf of amici curiae National Association of Social Workers and National Association of Social Workers New Jersey Chapter (Blank Rome, attorneys).

Steven G. Sanders submitted a brief on behalf of amicus curiae National Black Justice Coalition (Arseneault, Fassett & Mariano, attorneys).

Robert R. Fuggi, Jr., submitted a brief on behalf of amicus curiae National Legal Foundation (Fuggi & Fuggi, attorneys).

Michael Behrens submitted a brief on behalf of amici curiae The New Jersey Coalition to Preserve and Protect Marriage, The New Jersey Family Policy Council and The New Jersey Catholic Conference (Messina & Laffey, attorneys).

Debra E. Guston and Trayton M. Davis, a member of the New York bar, submitted a brief on behalf of amici curiae New Jersey Religious Leaders and National and Regional Religious Organizations in Support of Marriage (Guston & Guston, attorneys).

Stuart A. Hoberman, President, submitted a brief on behalf of amicus curiae New Jersey State Bar Association (Mr. Hoberman, attorney; Felice T. Londa, Andrew J. DeMaio, Gail Oxfeld Kanef, Robert A Knee, Scott A. Laterra and Thomas J. Snyder, on the brief).

R. William Potter submitted a brief on behalf of amici curiae Princeton Justice Project and Undergraduate Student Government of Princeton University (Potter and Dickson, attorneys; Mr. Potter and Linda A. Colligan, on the brief).

Michael P. Laffey submitted a brief on behalf of amicus curiae Professors of Psychology and Psychiatry.

Adam N. Saravay submitted a brief on behalf of amicus curiae Professors of the History of Marriage, Families, and the Law (McCarter & English, attorneys; Mr. Saravay and Sydney E. Dickey, on the brief).

Donald D. Campbell submitted a letter in lieu of brief on behalf of amici curiae United Families International and United Families-New Jersey (Campbell & Campbell, attorneys).

Ralph Charles Coti submitted a brief on behalf of amici curiae James Q. Wilson, Douglas Allen, Ph.D., David Blankenhorn, Lloyd R. Cohen, J.D., Ph.D., John Coverdale, J.D., Nicholas Eberstadt, Ph.D., Robert P. George, J.D., Harold James, Ph.D., Leon R. Kass, M.D., Ph.D., Douglas W. Kmiec and Katherine Shaw Spaht (Coti & Segrue, attorneys).

JUSTICE ALBIN delivered the opinion of the Court.

The statutory and decisional laws of this State protect individuals from discrimination based on sexual orientation. When those individuals are gays and lesbians who follow the inclination of their sexual orientation and enter into a committed relationship with someone of the same sex, our laws treat them, as couples, differently than heterosexual couples. As committed same-sex partners, they are not permitted to marry or to enjoy the multitude of social and financial benefits and privileges conferred on opposite-sex married couples.

In this case, we must decide whether persons of the same sex have a fundamental right to marry that is encompassed within

the concept of liberty guaranteed by Article I, Paragraph 1 of the New Jersey Constitution. Alternatively, we must decide whether Article I, Paragraph 1's equal protection guarantee requires that committed same-sex couples be given on equal terms the legal benefits and privileges awarded to married heterosexual couples and, if so, whether that guarantee also requires that the title of marriage, as opposed to some other term, define the committed same-sex legal relationship.

Only rights that are deeply rooted in the traditions, history, and conscience of the people are deemed to be fundamental. Although we cannot find that a fundamental right to same-sex marriage exists in this State, the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution. With this State's legislative and judicial commitment to eradicating sexual orientation discrimination as our backdrop, we now hold that denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee of Article I, Paragraph 1. To comply with this constitutional mandate, the Legislature must either amend the marriage statutes to include same-sex couples or create a parallel statutory structure, which will provide for, on equal terms, the rights and benefits enjoyed and burdens and

obligations borne by married couples. We will not presume that a separate statutory scheme, which uses a title other than marriage, contravenes equal protection principles, so long as the rights and benefits of civil marriage are made equally available to same-sex couples. The name to be given to the statutory scheme that provides full rights and benefits to same-sex couples, whether marriage or some other term, is a matter left to the democratic process.

I.

A.

Plaintiffs are seven same-sex couples who claim that New Jersey's laws, which restrict civil marriage to the union of a man and a woman, violate the liberty and equal protection guarantees of the New Jersey Constitution. Each plaintiff has been in a "permanent committed relationship" for more than ten years and each seeks to marry his or her partner and to enjoy the legal, financial, and social benefits that are afforded by marriage. When the seven couples applied for marriage licenses in the municipalities in which they live, the appropriate licensing officials told them that the law did not permit same-sex couples to marry. Plaintiffs then filed a complaint in the Superior Court, Law Division, challenging the constitutionality of the State's marriage statutes.

In terms of the value they place on family, career, and community service, plaintiffs lead lives that are remarkably similar to those of opposite-sex couples.[1] Alicia Toby and Saundra Heath, who reside in Newark, have lived together for seventeen years and have children and grandchildren. Alicia is an ordained minister in a church where her pastoral duties include coordinating her church's HIV prevention program. Saundra works as a dispatcher for Federal Express.

Mark Lewis and Dennis Winslow reside in Union City and have been together for fourteen years. They both are pastors in the Episcopal Church. In their ministerial capacities, they have officiated at numerous weddings and signed marriage certificates, though their own relationship cannot be similarly sanctified under New Jersey law. When Dennis's father was suffering from a serious long-term illness, Mark helped care for him in their home as would a devoted son-in-law.

Diane Marini and Marilyn Maneely were committed partners for fourteen years until Marilyn's death in 2005.[2] The couple lived in Haddonfield, where Diane helped raise, as though they were her own, Marilyn's five children from an earlier marriage.

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[1] The following sketches of plaintiffs' lives come from affidavits submitted to the trial court in 2003 and from factual assertions in the complaint. We assume that their familial relationships remain unchanged.

[2] As a result of Marilyn's passing, Diane, who remains a party to this action, seeks only declaratory relief.

Diane's mother considered Marilyn her daughter-in-law and Marilyn's children her grandchildren. The daily routine of their lives mirrored those of "other suburban married couples [their] age." Marilyn was a registered nurse. Diane is a businesswoman who serves on the planning board in Haddonfield, where she is otherwise active in community affairs.

Karen and Marcye Nicholson-McFadden have been committed partners for seventeen years, living together for most of that time in Aberdeen. There, they are raising two young children conceived through artificial insemination, Karen having given birth to their daughter and Marcye to their son. They own an executive search firm where Marcye works full-time and Karen at night and on weekends. Karen otherwise devotes herself to daytime parenting responsibilities. Both are generally active in their community, with Karen serving on the township zoning board.

Suyin and Sarah Lael have resided together in Franklin Park for most of the sixteen years of their familial partnership. Suyin is employed as an administrator for a non-profit corporation, and Sarah is a speech therapist. They live with their nine-year-old adopted daughter and two other children who they are in the process of adopting. They legally changed their surname and that of their daughter to reflect their status as

one family. Like many other couples, Suyin and Sarah share holidays with their extended families.

Cindy Meneghin and Maureen Kilian first met in high school and have been in a committed relationship for thirty-two years. They have lived together for twenty-three years in Butler where they are raising a fourteen-year-old son and a twelve-year-old daughter. Through artificial insemination, Cindy conceived their son and Maureen their daughter. Cindy is a director of web services at Montclair State University, and Maureen is a church administrator. They are deeply involved in their children's education, attending after-school activities and PTA meetings. They also play active roles in their church, serving with their children in the soup kitchen to help the needy.

Chris Lodewyks and Craig Hutchison have been in a committed relationship with each other since their college days thirty-five years ago. They have lived together in Pompton Lakes for the last twenty-three years. Craig works in Summit, where he is an investment asset manager and president of the Summit Downtown Association. He also serves as the vice-chairman of the board of trustees of a YMCA camp for children. Chris, who is retired, helps Craig's elderly mother with daily chores, such as getting to the eye doctor.

The seeming ordinariness of plaintiffs' lives is belied by the social indignities and economic difficulties that they daily

face due to the inferior legal standing of their relationships compared to that of married couples. Without the benefits of marriage, some plaintiffs have had to endure the expensive and time-consuming process of cross-adopting each other's children and effectuating legal surname changes. Other plaintiffs have had to contend with economic disadvantages, such as paying excessive health insurance premiums because employers did not have to provide coverage to domestic partners, not having a right to "family leave" time, and suffering adverse inheritance tax consequences.

When some plaintiffs have been hospitalized, medical facilities have denied privileges to their partners customarily extended to family members. For example, when Cindy Meneghin contracted meningitis, the hospital's medical staff at first ignored her pleas to allow her partner Maureen to accompany her to the emergency room. After Marcye Nicholson-McFadden gave birth to a son, a hospital nurse challenged the right of her partner Karen to be present in the newborn nursery to view their child. When Diane Marini received treatment for breast cancer, medical staff withheld information from her partner Marilyn "that would never be withheld from a spouse or even a more distant relative." Finally, plaintiffs recount the indignities,

embarrassment, and anguish that they as well as their children have suffered in attempting to explain their family status.[3]

B.

In a complaint filed in the Superior Court, plaintiffs sought both a declaration that the laws denying same-sex marriage violated the liberty and equal protection guarantees of Article I, Paragraph 1 of the New Jersey Constitution and injunctive relief compelling defendants to grant them marriage licenses.[4] The defendants named in the complaint are Gwendolyn L. Harris, the then Commissioner of the New Jersey Department of Human Services responsible for implementing the State's marriage statutes; Clifton R. Lacy, the then Commissioner of the New Jersey Department of Health and Senior Services responsible for the operation of the State Registrar of Vital Statistics; and Joseph Komosinski, the then Acting State Registrar of Vital

[3] While plaintiffs' appeal was pending before the Appellate Division, the Legislature enacted the Domestic Partnership Act, L. 2003, c. 246, affording certain rights and benefits to same-sex couples who enter into domestic partnerships. With the passage of the Act and subsequent amendments, some of the inequities plaintiffs listed in their complaint and affidavits have been remedied. See discussion infra Part IV.A-B. For example, under the Domestic Partnership Act, same-sex domestic partners now have certain hospital visitation and medical decision-making rights. N.J.S.A. 26:8A-2(c).

[4] The initial complaint in this case was filed on June 26, 2002. That complaint was replaced by the "amended complaint" now before us. All references in this opinion are to the amended complaint.

Statistics of the Department of Health and Senior Services responsible for supervising local registration of marriage records.[5] The departments run by those officials have oversight duties relating to the issuance of marriage licenses.

The complaint detailed a number of statutory benefits and privileges available to opposite-sex couples through New Jersey's civil marriage laws but denied to committed same-sex couples. Additionally, in their affidavits, plaintiffs asserted that the laws prohibiting same-sex couples to marry caused harm to their dignity and social standing, and inflicted psychic injuries on them, their children, and their extended families.

The State moved to dismiss the complaint for failure to state a claim upon which relief could be granted, see R. 4:6-2(e), and later both parties moved for summary judgment, see R. 4:46-2(c). The trial court entered summary judgment in favor of the State and dismissed the complaint.

In an unpublished opinion, the trial court first concluded that marriage is restricted to the union of a man and a woman under New Jersey law. The court maintained that the notion of "same-sex marriage was so foreign" to the legislators who in 1912 passed the marriage statute that "a ban [on same-sex marriage] hardly needed mention." The court next rejected

[5] Each defendant was sued in his or her official capacity and therefore stands as an alter ego of the State. For the sake of simplicity, we refer to defendants as "the State."

plaintiffs' argument that same-sex couples possess a fundamental right to marriage protected by the State Constitution, finding that such a right was not so rooted in the collective conscience and traditions of the people of this State as to be deemed fundamental. Last, the court held that the marriage laws did not violate the State Constitution's equal protection guarantee. The court determined that "limiting marriage to mixed-gender couples is a valid and reasonable exercise of government authority" and that the rights of gays and lesbians could "be protected in ways other than alteration of the traditional understanding of marriage." Plaintiffs were attempting "not to lift a barrier to marriage," according to the court, but rather "to change its very essence." To accomplish that end, the court suggested that plaintiffs would have to seek relief from the Legislature, which at the time was considering the passage of a domestic partnership act.

C.

A divided three-judge panel of the Appellate Division affirmed. Lewis v. Harris, 378 N.J. Super. 168, 194 (App. Div. 2005). Writing for the majority, Judge Skillman determined that New Jersey's marriage statutes do not contravene the substantive due process and equal protection guarantees of Article I, Paragraph 1 of the State Constitution. Id. at 188-89. In

analyzing the substantive due process claim, Judge Skillman concluded that "[m]arriage between members of the same sex is clearly not a fundamental right." Id. at 183 (internal quotation marks omitted). He reached that conclusion because he could find no support for such a proposition in the text of the State Constitution, this State's history and traditions, or contemporary social standards. Id. at 183-84. He noted that "[o]ur leading religions view marriage as a union of men and women recognized by God" and that "our society considers marriage between a man and woman to play a vital role in propagating the species and in providing the ideal environment for raising children." Id. at 185.[6]

In rebuffing plaintiffs' equal protection claim, Judge Skillman looked to the balancing test that governs such claims -- a consideration of "'the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.'" Id. at 189 (quoting Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985)). Starting with the premise that there is no fundamental right to same-sex marriage, Judge Skillman reasoned that plaintiffs could not demonstrate the existence of an "affected" or "claimed" right.

[6] It should be noted that the "Attorney General disclaim[ed] reliance upon promotion of procreation and creating the optimal environment for raising children as justifications for the limitation of marriage to members of the opposite sex." Id. at 185 n.2.

Id. at 189-90 (internal quotation marks omitted). From that viewpoint, the State was not required to show that a public need for limiting marriage to opposite-sex couples outweighed a non-existent affected right to same-sex marriage. Id. at 190.

Judge Skillman chronicled the legislative progress made by same-sex couples through such enactments as the Domestic Partnership Act and expressed his view of the constricted role of judges in setting social policy: "A constitution is not simply an empty receptacle into which judges may pour their own conceptions of evolving social mores." Id. at 176-79. In the absence of a constitutional mandate, he concluded that only the Legislature could authorize marriage between members of the same sex. Id. at 194. Judge Skillman, however, emphasized that same-sex couples "may assert claims that the due process and equal protection guarantees of [the State Constitution] entitle them to additional legal benefits provided by marriage." Ibid.

In a separate opinion, Judge Parrillo fully concurred with Judge Skillman's reasoning, but added his view of the twofold nature of the relief sought by plaintiffs -- "the right to marry and the rights of marriage." Id. at 194-95 (Parrillo, J., concurring). Judge Parrillo observed that the right to marry necessarily includes significant "economic, legal and regulatory benefits," the so-called rights of marriage. Id. at 195. With regard to those "publicly-conferred tangible [and] intangible

benefits" incident to marriage that are denied to same-sex couples, Judge Parrillo asserted plaintiffs are free to challenge "on an ad-hoc basis" any "particular statutory exclusion resulting in disparate or unfair treatment." Ibid. He concluded, however, that courts had no constitutional authority to alter "a core feature of marriage," namely "its binary, opposite-sex nature." Id. at 199-200. He maintained that "[p]rocreative heterosexual intercourse is and has been historically through all times and cultures an important feature of that privileged status, and that characteristic is a fundamental, originating reason why the State privileges marriage." Id. at 197. He submitted that it was the Legislature's role "to weigh the societal costs against the societal benefits flowing from a profound change in the public meaning of marriage." Id. at 200.

In dissenting, Judge Collester concluded that the substantive due process and equal protection guarantees of Article I, Paragraph 1 obligate the State to afford same-sex couples the right to marry on terms equal to those afforded to opposite-sex couples. Id. at 218-20 (Collester, J., dissenting). He charted the evolving nature of the institution of marriage and of the rights and protections afforded to same-sex couples, and reasoned that outdated conceptions of marriage "cannot justify contemporary violations of constitutional

guarantees." Id. at 206-10. He described the majority's argument as circular: Plaintiffs have no constitutional right to marry because this State's laws by definition do not permit same-sex couples to marry. Id. at 204. That paradigm, Judge Collester believed, unfairly insulated the State's marriage laws from plaintiffs' constitutional claims and denied "plaintiffs the right to enter into lawful marriage in this State with the person of their choice." Id. at 204, 211. Judge Collester dismissed the notion that "procreation or the ability to procreate is central to marriage" today and pointed out that four plaintiffs in this case gave birth to children after artificial insemination. Id. at 211-12. He further asserted that if marriage indeed is "the optimal environment for child rearing," then denying plaintiffs the right to marry their committed partners is fundamentally unfair to their children. Id. at 212-13 (internal quotation marks omitted). Because the current marriage laws prohibit "a central life choice to some and not others based on sexual orientation" and because he could find no rational basis for limiting the right of marriage to opposite-sex couples, Judge Collester determined that the State had deprived plaintiffs of their right to substantive due process and equal protection of the laws. Id. at 216-20.

We review this case as of right based on the dissent in the Appellate Division. See R. 2:2-1(a)(2). We granted the motions

of a number of individuals and organizations to participate as amici curiae.

II.

This appeal comes before us from a grant of summary judgment in favor of the State. See R. 4:46-2(c). As this case raises no factual disputes, we address solely questions of law, and thus are not bound to defer to the legal conclusions of the lower courts. See Balsamides v. Protameen Chems., Inc., 160 N.J. 352, 372 (1999) (stating that "matters of law are subject to a de novo review").

Plaintiffs contend that the State's laws barring members of the same sex from marrying their chosen partners violate the New Jersey Constitution. They make no claim that those laws contravene the Federal Constitution. Plaintiffs present a twofold argument. They first assert that same-sex couples have a fundamental right to marry that is protected by the liberty guarantee of Article I, Paragraph 1 of the State Constitution. They next assert that denying same-sex couples the right to marriage afforded to opposite-sex couples violates the equal protection guarantee of that constitutional provision.

In defending the constitutionality of its marriage laws, the State submits that same-sex marriage has no historical roots in the traditions or collective conscience of the people of New

Jersey to give it the ranking of a fundamental right, and that limiting marriage to opposite-sex couples is a rational exercise of social policy by the Legislature. The State concedes that state law and policy do not support the argument that limiting marriage to heterosexual couples is necessary for either procreative purposes or providing the optimal environment for raising children.[7] Indeed, the State not only recognizes the right of gay and lesbian parents to raise their own children, but also places foster children in same-sex parent homes through the Division of Youth and Family Services.

The State rests its case on age-old traditions, beliefs, and laws, which have defined the essential nature of marriage to be the union of a man and a woman. The long-held historical view of marriage, according to the State, provides a sufficient basis to uphold the constitutionality of the marriage statutes. Any change to the bedrock principle that limits marriage to persons of the opposite sex, the State argues, must come from the democratic process.

The legal battle in this case has been waged over one overarching issue -- the right to marry. A civil marriage license entitles those wedded to a vast array of economic and social benefits and privileges -- the rights of marriage.

[7] Unlike the Appellate Division, we will not rely on policy justifications disavowed by the State, even though vigorously advanced by amici curiae.

Plaintiffs have pursued the singular goal of obtaining the right to marry, knowing that, if successful, the rights of marriage automatically follow. We do not have to take that all-or-nothing approach. We perceive plaintiffs' equal protection claim to have two components: whether committed same-sex couples have a constitutional right to the benefits and privileges afforded to married heterosexual couples, and, if so, whether they have the constitutional right to have their "permanent committed relationship" recognized by the name of marriage. After we address plaintiffs' fundamental right argument, we will examine those equal protection issues in turn.

III.

Plaintiffs contend that the right to marry a person of the same sex is a fundamental right secured by the liberty guarantee of Article I, Paragraph 1 of the New Jersey Constitution. Plaintiffs maintain that the liberty interest at stake is "the right of every adult to choose whom to marry without intervention of government." Plaintiffs do not profess a desire to overthrow all state regulation of marriage, such as the prohibition on polygamy and restrictions based on consanguinity and age.[8] They therefore accept some limitations on "the

[8] Plaintiffs concede that the State can insist on the binary nature of marriage, limiting marriage to one per person at any

exercise of personal choice in marriage." They do claim, however, that the State cannot regulate marriage by defining it as the union between a man and a woman without offending our State Constitution. In assessing their liberty claim, we must 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 Article I, Paragraph 1. We thus begin with the text of Article I, Paragraph 1, which provides:

> All persons are by nature free and independent, and have certain natural and unalienable 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.
>
> [N.J. Const. art. I, ¶ 1.]

The origins of Article I, Paragraph 1 date back to New Jersey's 1844 Constitution.[9] That first paragraph of our Constitution is, in part, "a 'general recognition of those absolute rights of the citizen which were a part of the common

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given time. As Judge Skillman pointed out, polygamists undoubtedly would insist that the essential nature of marriage is the coupling of people of the opposite sex while defending multiple marriages on religious principles. Lewis, supra, 378 N.J. Super. at 187-88.

[9] The text of Article I, Paragraph 1 of the 1947 New Jersey Constitution largely parallels the language of the 1844 Constitution. Compare N.J. Const. art. I, ¶ 1, with N.J. Const. of 1844 art. I, ¶ 1.

law.'" King v. S. Jersey Nat'l Bank, 66 N.J. 161, 178 (1974) (quoting Ransom v. Black, 54 N.J.L. 446, 448 (Sup. Ct. 1892), aff'd per curiam, 65 N.J.L. 688 (E. & A. 1893)). In attempting to discern those substantive rights that are fundamental under Article I, Paragraph 1, we have adopted the general standard followed by the United States Supreme Court in construing the Due Process Clause of the Fourteenth Amendment of the Federal Constitution. We "look to 'the traditions and [collective] conscience of our people to determine whether a principle is so rooted [there] . . . as to be ranked as fundamental.'" Ibid. (internal quotation marks omitted) (alterations in original) (quoting Griswold v. Connecticut, 381 U.S. 479, 493, 85 S. Ct. 1678, 1686, 14 L. Ed. 2d 510, 520 (1965) (Goldberg, J., concurring)); see also Watkins v. Nelson, 163 N.J. 235, 245 (2000); Doe v. Poritz, 142 N.J. 1, 120 (1995); State v. Parker, 124 N.J. 628, 648 (1991), cert. denied, 503 U.S. 939, 112 S. Ct. 1483, 117 L. Ed. 2d 625 (1992).

Under Article I, Paragraph 1, as under the Fourteenth Amendment's substantive due process analysis, determining whether a fundamental right exists involves a two-step inquiry. First, the asserted fundamental liberty interest must be clearly identified. See Washington v. Glucksberg, 521 U.S. 702, 721, 117 S. Ct. 2258, 2268, 138 L. Ed. 2d 772, 788 (1997). Second, that liberty interest must be objectively and deeply rooted in

the traditions, history, and conscience of the people of this State. See King, supra, 66 N.J. at 178; see also Glucksberg, supra, 521 U.S. at 720-21, 117 S. Ct. at 2268, 138 L. Ed. 2d at 787-88 (stating that liberty interest must be "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty" (internal quotation marks omitted)).

How the right is defined may dictate whether it is deemed fundamental. One such example is Glucksberg, supra, a case involving a challenge to Washington's law prohibiting and criminalizing assisted suicide. 521 U.S. at 705-06, 117 S. Ct. at 2261, 138 L. Ed. 2d at 779. In that case, the Supreme Court stated that the liberty interest at issue was not the "'liberty to choose how to die,'" but rather the "right to commit suicide with another's assistance." Id. at 722-24, 117 S. Ct. at 2269, 138 L. Ed. 2d at 789-90. Having framed the issue that way, the Court concluded that the right to assisted suicide was not deeply rooted in the nation's history and traditions and therefore not a fundamental liberty interest under substantive due process. Id. at 723, 728, 117 S. Ct. at 2269, 2271, 138 L. Ed. 2d at 789, 792.

The right to marriage is recognized as fundamental by both our Federal and State Constitutions. See, e.g., Zablocki v. Redhail, 434 U.S. 374, 383-84, 98 S. Ct. 673, 679-80, 54 L. Ed.

2d 618, 628-29 (1978); J.B. v. M.B., 170 N.J. 9, 23-24 (2001). That broadly stated right, however, is "subject to reasonable state regulation." Greenberg, supra, 99 N.J. at 572. Although the fundamental right to marriage extends even to those imprisoned, Turner v. Safley, 482 U.S. 78, 95-96, 107 S. Ct. 2254, 2265, 96 L. Ed. 2d 64, 83 (1987), and those in noncompliance with their child support obligations, Zablocki, supra, 434 U.S. at 387-91, 98 S. Ct. at 681-83, 54 L. Ed. 2d at 631-33, it does not extend to polygamous, incestuous, and adolescent marriages, N.J.S.A. 2C:24-1; N.J.S.A. 37:1-1, -6. In this case, the liberty interest at stake is not some undifferentiated, abstract right to marriage, but rather the right of people of the same sex to marry. Thus, we are concerned only with the question of whether the right to same-sex marriage is deeply rooted in this State's history and its people's collective conscience.[10]

In answering that question, we are not bound by the nation's experience or the precedents of other states, although they may

[10] The dissent posits that we have defined the right too narrowly and that the fundamental right to marry involves nothing less than "the liberty to choose, as a matter of personal autonomy." Post at __ (slip op. at 11). That expansively stated formulation, however, would eviscerate any logic behind the State's authority to forbid incestuous and polygamous marriages. For example, under the dissent's approach, the State would have no legitimate interest in preventing a sister and brother or father and daughter (assuming child bearing is not involved) from exercising their "personal autonomy" and "liberty to choose" to marry.

provide guideposts and persuasive authority. See Doe v. Poritz, supra, 142 N.J. at 119-20 (stating that although practice "followed by a large number of states is not conclusive[,] . . . it is plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (internal quotation marks omitted)). Our starting point is the State's marriage laws.

Plaintiffs do not dispute that New Jersey's civil marriage statutes, N.J.S.A. 37:1-1 to 37:2-41, which were first enacted in 1912, limit marriage to heterosexual couples. That limitation is clear from the use of gender-specific language in the text of various statutes. See, e.g., N.J.S.A. 37:1-1 (describing prohibited marriages in terms of opposite-sex relatives); N.J.S.A. 37:2-10 (providing that "husband" is not liable for debts of "wife" incurred before or after marriage); N.J.S.A. 37:2-18.1 (providing release rights of curtesy and dower for "husband" and "wife"). More recently, in passing the Domestic Partnership Act to ameliorate some of the economic and social disparities between committed same-sex couples and married heterosexual couples, the Legislature explicitly acknowledged that same-sex couples cannot marry. See N.J.S.A. 26:8A-2(e).

Three decades ago, Justice (then Judge) Handler wrote that "[d]espite winds of change," there was almost a universal recognition that "a lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female." M.T. v. J.T., 140 N.J. Super. 77, 83-84 (App. Div.), certif. denied, 71 N.J. 345 (1976). With the exception of Massachusetts, every state's law, explicitly or implicitly, defines marriage to mean the union of a man and a woman.[11]

Although today there is a nationwide public debate raging over whether same-sex marriage should be authorized under the laws or constitutions of the various states, the framers of the 1947 New Jersey Constitution, much less the drafters of our

[11] Alaska Const. art. I, § 25; Ark. Const. amend. 83, § 1; Ga. Const. art. I, § IV, ¶ I; Haw. Const. art. I, § 23; Kan. Const. art. XV, § 16; Ky. Const. § 233a; La. Const. art. XII, § 15; Mich. Const. art. I, § 25; Miss. Const. art. 14, § 263A; Mo. Const. art. I, § 33; Mont. Const. art. XIII, § 7; Neb. Const. art. I, § 29; Nev. Const. art. I, § 21; N.D. Const. art. XI, § 28; Ohio Const. art. XV, § 11; Okla. Const. art. II, § 35; Or. Const. art. XV, § 5a; Tex. Const. art. I, § 32; Utah Const. art. I, § 29; Ala. Code § 30-1-19; Ariz. Rev. Stat. § 25-101; Cal. Fam. Code § 308.5; Colo. Rev. Stat. § 14-2-104; Conn. Gen. Stat. § 45a-727a; Del. Code Ann. tit. 13, § 101; Fla. Stat. § 741.212; Idaho Code Ann. § 32-201; 750 Ill. Comp. Stat. 5/201, 5/212; Ind. Code § 31-11-1-1; Iowa Code § 595.2; Me. Rev. Stat. Ann. tit. 19-A, §§ 650, 701; Md. Code Ann., Fam. Law § 2-201; Minn. Stat. §§ 517.01, 517.03; N.H. Rev. Stat. Ann. §§ 457:1, 457:2; N.J.S.A. 37:1-1, -3; N.M. Stat. § 40-1-18; N.Y. Dom. Rel. Law §§ 12, 50; N.C. Gen. Stat. §§ 51-1, 51-1.2; 23 Pa. Cons. Stat. §§ 1102, 1704; R.I. Gen. Laws §§ 15-1-1, 15-1-2, 15-2-1; S.C. Code Ann. § 20-1-15; S.D. Codified Laws § 25-1-1; Tenn. Code Ann. § 36-3-113; Vt. Stat. Ann. tit. 15, § 8; Va. Code Ann. §§ 20-45.2, 20-45.3; Wash. Rev. Code § 26.04.020(1)(c); W. Va. Code § 48-2-104(c); Wis. Stat. §§ 765.001(2), 765.01; Wyo. Stat. Ann. § 20-1-101.

marriage statutes, could not have imagined that the liberty right protected by Article I, Paragraph 1 embraced the right of a person to marry someone of his or her own sex. See, e.g., Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) ("The institution of marriage as a union of man and woman . . . is as old as the book of Genesis."), appeal dismissed, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972); Nancy F. Cott, Public Vows: A History of Marriage and the Nation 2-3 (2000) (describing particular model of marriage "deeply implanted" in United States history to be "lifelong, faithful monogamy, formed by the mutual consent of a man and a woman"); see also 1 U.S.C.A. § 7 (defining under Federal Defense of Marriage Act "the word 'marriage' [to] mean[] only a legal union between one man and one woman as husband and wife").

Times and attitudes have changed, and there has been a developing understanding that discrimination against gays and lesbians is no longer acceptable in this State, as is evidenced by various laws and judicial decisions prohibiting differential treatment based on sexual orientation. See, e.g., N.J.S.A. 10:5-4 (prohibiting discrimination on basis of sexual orientation); N.J.S.A. 26:8A-1 to -13 (affording various rights to same-sex couples under Domestic Partnership Act); In re Adoption of a Child by J.M.G., 267 N.J. Super. 622, 623, 625 (Ch. Div. 1993) (determining that lesbian partner was entitled

to adopt biological child of partner). See generally Joshua Kaplan, Unmasking the Federal Marriage Amendment: The Status of Sexuality, 6 Geo. J. Gender & L. 105, 123-24 (2005) (noting that "1969 is widely recognized as the beginning of the gay rights movement," which is considered "relatively new to the national agenda"). On the federal level, moreover, the United States Supreme Court has struck down laws that have unconstitutionally targeted gays and lesbians for disparate treatment.

In Romer v. Evans, Colorado passed an amendment to its constitution that prohibited all legislative, executive, or judicial action designed to afford homosexuals protection from discrimination based on sexual orientation. 517 U.S. 620, 623-24, 116 S. Ct. 1620, 1623, 134 L. Ed. 2d 855, 860-61 (1996). The Supreme Court declared that Colorado's constitutional provision violated the Fourteenth Amendment's Equal Protection Clause because it "impos[ed] a broad and undifferentiated disability on a single named group" and appeared to be motivated by an "animus toward" gays and lesbians. Id. at 632, 116 S. Ct. at 1627, 1628, 134 L. Ed. 2d at 865-66. The Court concluded that a state could not make "a class of persons a stranger to its laws." Id. at 635, 116 S. Ct. at 1629, 134 L. Ed. 2d at 868.

More recently, in Lawrence v. Texas, the Court invalidated on Fourteenth Amendment due process grounds Texas's sodomy

statute, which made it a crime for homosexuals "to engage in certain intimate sexual conduct." 539 U.S. 558, 562, 578, 123 S. Ct. 2472, 2475, 2484, 156 L. Ed. 2d 508, 515, 525-26 (2003). The Court held that the "liberty" protected by the Due Process Clause prevented Texas from controlling the destiny of homosexuals "by making their private sexual conduct a crime." Id. at 578, 123 S. Ct. at 2484, 156 L. Ed. 2d at 525. The Lawrence Court, however, pointedly noted that the case did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Ibid. In a concurring opinion, Justice O'Connor concluded that the Texas law, as applied to the private, consensual conduct of homosexuals, violated the Equal Protection Clause, but strongly suggested that a state's legitimate interest in "preserving the traditional institution of marriage" would allow for distinguishing between heterosexuals and homosexuals without offending equal protection principles. Id. at 585, 123 S. Ct. at 2487-88, 156 L. Ed. 2d at 530 (O'Connor, J., concurring).

Plaintiffs rely on the Romer and Lawrence cases to argue that they have a fundamental right to marry under the New Jersey Constitution, not that they have such a right under the Federal Constitution. Although those recent cases openly advance the civil rights of gays and lesbians, they fall far short of

establishing a right to same-sex marriage deeply rooted in the traditions, history, and conscience of the people of this State.

Plaintiffs also rely on Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), to support their claim that the right to same-sex marriage is fundamental. In Loving, the United States Supreme Court held that Virginia's antimiscegenation statutes, which prohibited and criminalized interracial marriages, violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Id. at 2, 87 S. Ct. at 1818, 18 L. Ed. 2d at 1012. Although the Court reaffirmed the fundamental right of marriage, the heart of the case was invidious discrimination based on race, the very evil that motivated passage of the Fourteenth Amendment. Id. at 10-12, 87 S. Ct. at 1823-24, 18 L. Ed. 2d at 1017-18. The Court stated that "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." Id. at 10, 87 S. Ct. at 1823, 18 L. Ed. 2d at 1017. For that reason, the Court concluded that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." Id. at 12, 87 S. Ct. at 1823, 18 L. Ed. 2d at 1018. From the fact-specific background of that case, which dealt with intolerable racial distinctions that patently violated the Fourteenth Amendment, we cannot find

support for plaintiffs claim that there is a fundamental right to same-sex marriage under our State Constitution. We add that all of the United States Supreme Court cases cited by plaintiffs, Loving, Turner, and Zablocki, involved heterosexual couples seeking access to the right to marriage and did not implicate directly the primary question to be answered in this case.

Within the concept of liberty protected by Article I, Paragraph 1 of the New Jersey Constitution are core rights of such overriding value that we consider them to be fundamental. Determining whether a particular claimed right is fundamental is a task that requires both caution and foresight. When engaging in a substantive due process analysis under the Fourteenth Amendment, the United States Supreme Court has instructed that it must "exercise the utmost care" before finding new rights, which place important social issues beyond public debate, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of [the] Court." Glucksberg, supra, 521 U.S. at 720, 117 S. Ct. at 2267-68, 138 L. Ed. 2d at 787 (internal quotation marks omitted). In searching for the meaning of "liberty" under Article I, Paragraph 1, we must resist the temptation of seeing in the majesty of that word only a mirror image of our own strongly felt opinions and beliefs. Under the guise of newly found

rights, we must be careful not to impose our personal value system on eight-and-one-half million people, thus bypassing the democratic process as the primary means of effecting social change in this State. That being said, this Court will never abandon its responsibility to protect the fundamental rights of all of our citizens, even the most alienated and disfavored, no matter how strong the winds of popular opinion may blow.

Despite the rich diversity of this State, the tolerance and goodness of its people, and the many recent advances made by gays and lesbians toward achieving social acceptance and equality under the law, we cannot find that a right to same-sex marriage is so deeply rooted in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right. When looking for the source of our rights under the New Jersey Constitution, we need not look beyond our borders. Nevertheless, we do take note that no jurisdiction, not even Massachusetts, has declared that there is a fundamental right to same-sex marriage under the federal or its own constitution.[12]

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[12] See Dean v. District of Columbia, 653 A.2d 307, 331 (D.C. 1995); Standhardt v. Superior Court of Ariz., 77 P.3d 451, 459-60 (Ariz. Ct. App. 2003); Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993); Morrison v. Sadler, 821 N.E.2d 15, 34 (Ind. Ct. App. 2005); Baker, supra, 191 N.W.2d at 186; Hernandez v. Robles, Nos. 86-89, 2006 N.Y. LEXIS 1836, at *14-15 (N.Y. July 6, 2006) (plurality opinion); Andersen v. State, 2006 Wash. LEXIS 598, at *38-43, *68 (Wash. July 26, 2006) (plurality opinion); see also

Having decided that there is no fundamental right to same-sex marriage does not end our inquiry. See WHS Realty Co. v. Town of Morristown, 323 N.J. Super. 553, 562-63 (App. Div.) (recognizing that although provision of municipal service is not fundamental right, inequitable provision of that service is subject to equal protection analysis), certif. denied, 162 N.J. 489 (1999). We now must examine whether those laws that deny to committed same-sex couples both the right to and the rights of marriage afforded to heterosexual couples offend the equal protection principles of our State Constitution.

IV.

Article I, Paragraph 1 of the New Jersey Constitution sets forth the first principles of our governmental charter -- that every person possesses the "unalienable rights" to enjoy life, liberty, and property, and to pursue happiness. Although our State Constitution nowhere expressly states that every person shall be entitled to the equal protection of the laws, we have construed the expansive language of Article I, Paragraph 1 to embrace that fundamental guarantee. Sojourner A. v. N.J. Dep't of Human Servs., 177 N.J. 318, 332 (2003); Greenberg, supra, 99

Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) (stating that it was not necessary to reach fundamental right issue in light of finding that no rational basis existed for denying same-sex couples right to marry under state constitution).

N.J. at 568. Quite simply, that first paragraph to our State Constitution "protect[s] against injustice and against the unequal treatment of those who should be treated alike." Greenberg, supra, 99 N.J. at 568.

Plaintiffs claim that the State's marriage laws have relegated them to "second-class citizenship" by denying them the "tangible and intangible" benefits available to heterosexual couples through marriage. Depriving same-sex partners access to civil marriage and its benefits, plaintiffs contend, violates Article I, Paragraph 1's equal protection guarantee. We must determine whether the State's marriage laws permissibly distinguish between same-sex and heterosexual couples.

When a statute is challenged on the ground that it does not apply evenhandedly to similarly situated people, our equal protection jurisprudence requires that the legislation, in distinguishing between two classes of people, bear a substantial relationship to a legitimate governmental purpose. Caviglia v. Royal Tours of Am., 178 N.J. 460, 472-73 (2004); Barone v. Dep't of Human Servs., 107 N.J. 355, 368 (1987). The test that we have applied to such equal protection claims involves the weighing of three factors: 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. Greenberg, supra, 99 N.J. at 567; Robinson v. Cahill, 62 N.J.

473, 491-92, cert. denied, 414 U.S. 976, 94 S. Ct. 292, 38 L. Ed. 2d 219 (1973). The test is a flexible one, measuring the importance of the right against the need for the governmental restriction.[13] See Sojourner A., supra, 177 N.J. at 333. Under that approach, each claim is examined "on a continuum that reflects the nature of the burdened right and the importance of the governmental restriction." Ibid. Accordingly, "the more personal the right, the greater the public need must be to justify governmental interference with the exercise of that right." George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 29 (1994); see also Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6, 43 (1976), cert. denied, 430 U.S. 977, 97 S. Ct. 1672, 52 L. Ed. 2d 373 (1977). Unless the public need justifies statutorily limiting the exercise of a claimed right, the State's action is deemed arbitrary. See Robinson, supra, 62 N.J. at 491-92.

A.

[13] Our state equal protection analysis differs from the more rigid, three-tiered federal equal protection methodology. When a statute is challenged under the Fourteenth Amendment's Equal Protection Clause, one of three tiers of review applies -- strict scrutiny, intermediate scrutiny, or rational basis -- depending on whether a fundamental right, protected class, or some other protected interest is in question. Clark v. Jeter, 486 U.S. 456, 461, 108 S. Ct. 1910, 1914, 100 L. Ed. 2d 465, 471 (1988). All classifications must at a minimum survive rational basis review, the lowest tier. Ibid.

In conducting this equal protection analysis, we discern two distinct issues. The first is whether committed same-sex couples have the right to the statutory benefits and privileges conferred on heterosexual married couples. Next, assuming a right to equal benefits and privileges, the issue is whether committed same-sex partners have a constitutional right to define their relationship by the name of marriage, the word that historically has characterized the union of a man and a woman. In addressing plaintiffs' claimed interest in equality of treatment, we begin with a retrospective look at the evolving expansion of rights to gays and lesbians in this State.

Today, in New Jersey, it is just as unlawful to discriminate against individuals on the basis of sexual orientation as it is to discriminate against them on the basis of race, national origin, age, or sex. See N.J.S.A. 10:5-4. Over the last three decades, through judicial decisions and comprehensive legislative enactments, this State, step by step, has protected gay and lesbian individuals from discrimination on account of their sexual orientation.

In 1974, a New Jersey court held that the parental visitation rights of a divorced homosexual father could not be denied or restricted based on his sexual orientation. In re J.S. & C., 129 N.J. Super. 486, 489 (Ch. Div. 1974), aff'd per curiam, 142 N.J. Super. 499 (App. Div. 1976). Five years later,

the Appellate Division stated that the custodial rights of a mother could not be denied or impaired because she was a lesbian. M.P. v. S.P., 169 N.J. Super. 425, 427 (App. Div. 1979). This State was one of the first in the nation to judicially recognize the right of an individual to adopt a same-sex partner's biological child.[14] J.M.G., supra, 267 N.J. Super. at 625, 626, 631 (recognizing "importance of the emotional benefit of formal recognition of the relationship between [the non-biological mother] and the child" and that there is not one correct family paradigm for creating "supportive, loving environment" for children); see also In re Adoption of Two Children by H.N.R., 285 N.J. Super. 1, 3 (App. Div. 1995) (finding that "best interests" of children supported adoption by same-sex partner of biological mother). Additionally, this Court has acknowledged that a woman can be the "psychological parent" of children born to her former same-sex partner during their committed relationship, entitling the woman to visitation with the children. V.C. v. M.J.B., 163 N.J. 200, 206-07, 230, cert. denied, 531 U.S. 926, 121 S. Ct. 302, 148 L. Ed. 2d 243 (2000); see also id. at 232 (Long, J., concurring) (noting that no one "particular model of family life" has monopoly on

[14] Unlike New Jersey, a number of states prohibit adoption by same-sex couples. See Kari E. Hong, Parens Patriarchy: Adoption, Eugenics, and Same-Sex Couples, 40 Cal. W. L. Rev. 1, 2-3 (2003) (detailing states that have enacted measures to restrict adoption by same-sex couples).

"'family values'" and that "[t]hose qualities of family life on which society places a premium . . . are unrelated to the particular form a family takes"). Recently, our Appellate Division held that under New Jersey's change of name statute an individual could assume the surname of a same-sex partner. In re Application for Change of Name by Bacharach, 344 N.J. Super. 126, 130-31, 136 (App. Div. 2001).

Perhaps more significantly, New Jersey's Legislature has been at the forefront of combating sexual orientation discrimination and advancing equality of treatment toward gays and lesbians. In 1992, through an amendment to the Law Against Discrimination (LAD), L. 1991, c. 519, New Jersey became the fifth state[15] in the nation to prohibit discrimination on the basis of "affectional or sexual orientation."[16] See N.J.S.A. 10:5-4. In making sexual orientation a protected category, the Legislature committed New Jersey to the goal of eradicating

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[15] At the time of New Jersey's amendment, only four other states, Wisconsin, Massachusetts, Connecticut, and Hawaii, had adopted similar anti-discrimination provisions. See L. 1981, c. 112 (codified at Wis. Stat. §§ 111.31 to 111.39 (1982)); St. 1989, c. 516 (codified at Mass. Gen. Laws ch. 151B, §§ 1 to 10 (1989)); Public Act No. 91-58 (codified at Conn. Gen. Stat. §§ 46a-81a to -81r (1991)); L. 1991, c. 2 (codified at Haw. Rev. Stat. §§ 378-1 to -6 (1991)); L. 1991, c. 519 (codified at N.J.S.A. 10:5-1 to -42 (1992)).

[16] "Affectional or sexual orientation" is defined to mean "male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation." N.J.S.A. 10:5-5(hh).

discrimination against gays and lesbians. See also Fuchilla v. Layman, 109 N.J. 319, 334 ("[T]he overarching goal of the [LAD] is nothing less than the eradication of the cancer of discrimination." (internal quotation marks omitted)), cert. denied, 488 U.S. 826, 109 S. Ct. 75, 102 L. Ed. 2d 51 (1988). In 2004, the Legislature added "domestic partnership status" to the categories protected by the LAD. L. 2003, c. 246.

The LAD guarantees that gays and lesbians, as well as same-sex domestic partners, will not be subject to discrimination in pursuing employment opportunities, gaining access to public accommodations, obtaining housing and real property, seeking credit and loans from financial institutions, and engaging in business transactions. N.J.S.A. 10:5-12. The LAD declares that access to those opportunities and basic needs of modern life is a civil right. N.J.S.A. 10:5-4.

Additionally, discrimination on the basis of sexual orientation is outlawed in various other statutes. For example, the Legislature has made it a bias crime for a person to commit certain offenses with the purpose to intimidate an individual on account of sexual orientation, N.J.S.A. 2C:16-1(a)(1), and has provided a civil cause of action against the offender, N.J.S.A. 2A:53A-21. It is a crime for a public official to deny a person any "right, privilege, power or immunity" on the basis of sexual orientation. N.J.S.A. 2C:30-6(a). It is also unlawful to

discriminate against gays and lesbians under the Local Public Contracts Law and the Public Schools Contracts Law. N.J.S.A. 40A:11-13; N.J.S.A. 18A:18A-15. The Legislature, moreover, formed the New Jersey Human Relations Council to promote educational programs aimed at reducing bias and bias-related acts, identifying sexual orientation as a protected category, N.J.S.A. 52:9DD-8, and required school districts to adopt anti-bullying and anti-intimidation policies to protect, among others, gays and lesbians, N.J.S.A. 18A:37-14, -15(a).

In 2004, the Legislature passed the Domestic Partnership Act, L. 2003, c. 246, making available to committed same-sex couples "certain rights and benefits that are accorded to married couples under the laws of New Jersey."[17] N.J.S.A. 26:8A-2(d). With same-sex partners in mind, the Legislature declared that "[t]here are a significant number of individuals in this State who choose to live together in important personal, emotional and economic committed relationships," N.J.S.A. 26:8A-2(a), and that those "mutually supportive relationships should be formally recognized by statute," N.J.S.A. 26:8A-2(c). The Legislature also acknowledged that such relationships "assist

[17] The rights and benefits provided by the Domestic Partnership Act extend to two classes of people -- persons who "are of the same sex and therefore unable to enter into a marriage with each other that is recognized by New Jersey law" and persons "who are each 62 years of age or older and not of the same sex." N.J.S.A. 26:8A-4(b)(5).

the State by their establishment of a private network of support for the financial, physical and emotional health of their participants." N.J.S.A. 26:8A-2(b).

For those same-sex couples who enter into a domestic partnership, the Act provides a limited number of rights and benefits possessed by married couples, including "statutory protection against various forms of discrimination against domestic partners; certain visitation and decision-making rights in a health care setting; certain tax-related benefits; and, in some cases, health and pension benefits that are provided in the same manner as for spouses." N.J.S.A. 26:8A-2(c). Later amendments to other statutes have provided domestic partners with additional rights pertaining to funeral arrangements and disposition of the remains of a deceased partner, L. 2005, c. 331, inheritance privileges when the deceased partner dies without a will, L. 2005, c. 331, and guardianship rights in the event of a partner's incapacitation, L. 2005, c. 304.

In passing the Act, the Legislature expressed its clear understanding of the human dimension that propelled it to provide relief to same-sex couples. It emphasized that the need for committed same-sex partners "to have access to these rights and benefits is paramount in view of their essential relationship to any reasonable conception of basic human dignity and autonomy, and the extent to which they will play an integral

role in enabling these persons to enjoy their familial relationships as domestic partners." N.J.S.A. 26:8A-2(d).

Aside from federal decisions such as Romer, supra, and Lawrence, supra, this State's decisional law and sweeping legislative enactments, which protect gays and lesbians from sexual orientation discrimination in all its virulent forms, provide committed same-sex couples with a strong interest in equality of treatment relative to comparable heterosexual couples.

B.

We next examine the extent to which New Jersey's laws continue to restrict committed same-sex couples from enjoying the full benefits and privileges available through marriage. Although under the Domestic Partnership Act same-sex couples are provided with a number of important rights, they still are denied many benefits and privileges accorded to their similarly situated heterosexual counterparts. Thus, the Act has failed to bridge the inequality gap between committed same-sex couples and married opposite-sex couples. Among the rights afforded to married couples but denied to committed same-sex couples are the right to

> (1) a surname change without petitioning the court, see Bacharach, supra, 344 N.J. Super. at 135-36;

(2) ownership of property as tenants by the entirety, N.J.S.A. 46:3-17.2, which would allow for both automatic transfer of ownership on death, N.J.S.A. 46:3-17.5, and protection against severance and alienation, N.J.S.A. 46:3-17.4;

(3) survivor benefits under New Jersey's Workers' Compensation Act, N.J.S.A. 34:15-13;

(4) back wages owed to a deceased spouse, N.J.S.A. 34:11-4.5;

(5) compensation available to spouses, children, and other relatives of homicide victims under the Criminal Injuries Compensation Act, N.J.S.A. 52:4B-10(c), -2;

(6) free tuition at any public institution of higher education for surviving spouses and children of certain members of the New Jersey National Guard, N.J.S.A. 18A:62-25;

(7) tuition assistance for higher education for spouses and children of volunteer firefighters and first-aid responders, N.J.S.A. 18A:71-78.1;

(8) tax deductions for spousal medical expenses, N.J.S.A. 54A:3-3(a);

(9) an exemption from the realty transfer fee for transfers between spouses, N.J.S.A. 46:15-10(j), -6.1; and

(10) the testimonial privilege given to the spouse of an accused in a criminal action, N.J.S.A. 2A:84A-17(2).

In addition, same-sex couples certified as domestic partners receive fewer workplace protections than married couples. For example, an employer is not required to provide health insurance

coverage for an employee's domestic partner. N.J.S.A. 34:11A-20(b). Because the New Jersey Family Leave Act does not include domestic partners within the definition of family member, N.J.S.A. 34:11B-3(j), gay and lesbian employees are not entitled to statutory leave for the purpose of caring for an ill domestic partner, see N.J.S.A. 34:11B-4(a). The disparity of rights and remedies also extends to the laws governing wills. For instance, a bequest in a will by one domestic partner to another is not automatically revoked after termination of the partnership, as it would be for a divorced couple, N.J.S.A. 3B:3-14. For that reason, the failure to revise a will prior to death may result in an estranged domestic partner receiving a bequest that a divorced spouse would not. There is also no statutory provision permitting the payment of an allowance for the support and maintenance of a surviving domestic partner when a will contest is pending. See N.J.S.A. 3B:3-30 (stating that support and maintenance may be paid out of decedent's estate to surviving spouse pending will contest).

The Domestic Partnership Act, notably, does not provide to committed same-sex couples the family law protections available to married couples. The Act provides no comparable presumption of dual parentage to the non-biological parent of a child born

to a domestic partner, N.J.S.A. 9:17-43, -44.[18] As a result, domestic partners must rely on costly and time-consuming second-parent adoption procedures.[19] The Act also is silent on critical issues relating to custody, visitation, and partner and child support in the event a domestic partnership terminates. See, e.g., N.J.S.A. 9:2-4 (providing custody rights to divorced spouses).[20] For example, the Act does not place any support obligation on the non-biological partner-parent who does not adopt a child born during a committed relationship. Additionally, there is no statutory mechanism for post-relationship support of a domestic partner. See N.J.S.A. 2A:34-23 (providing for spousal support following filing of matrimonial complaint). Contrary to the law that applies to divorcing spouses, see N.J.S.A. 2A:34-23, -23.1, the Act states that a court shall not be required to equitably distribute

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[18] Every statutory provision applicable to opposite-sex couples might not be symmetrically applicable to same-sex couples. The presumption of parentage would apply differently for same-sex partners inasmuch as both partners could not be the biological parents of the child. It appears that the presumption in such circumstances would be that the non-biological partner consented to the other partner either conceiving or giving birth to a child.

[19] But see In re Parentage of Child of Robinson, 383 N.J. Super. 165, 176 (Ch. Div. 2005) (declaring that same-sex partner was entitled to statutory presumption of parenthood afforded to husbands).

[20] To obtain custody or visitation rights, the non-biological parent must petition the courts to be recognized as a psychological parent. See V.C., supra, 163 N.J. at 206, 230 (declaring former lesbian partner of biological mother of twins "psychological parent," and awarding regular visitation).

property acquired by one or both partners during the domestic partnership on termination of the partnership. N.J.S.A. 26:8A-10(a)(3).

Significantly, the economic and financial inequities that are borne by same-sex domestic partners are borne by their children too. With fewer financial benefits and protections available, those children are disadvantaged in a way that children in married households are not. Children have the same universal needs and wants, whether they are raised in a same-sex or opposite-sex family, yet under the current system they are treated differently.

Last, even though they are provided fewer benefits and rights, same-sex couples are subject to more stringent requirements to enter into a domestic partnership than opposite-sex couples entering into marriage. The Act requires that those seeking a domestic partnership share "a common residence;" prove that they have assumed joint responsibility "for each other's common welfare as evidenced by joint financial arrangements or joint ownership of real or personal property;" "agree to be jointly responsible for each other's basic living expenses during the domestic partnership;" and show that they "have chosen to share each other's lives in a committed relationship of mutual caring." N.J.S.A. 26:8A-4(b)(1), (2), (6). Opposite-

sex couples do not have to clear those hurdles to obtain a marriage license. See N.J.S.A. 37:1-1 to -12.3.

Thus, under our current laws, committed same-sex couples and their children are not afforded the benefits and protections available to similar heterosexual households.

C.

We now must assess the public need for denying the full benefits and privileges that flow from marriage to committed same-sex partners. At this point, we do not consider whether committed 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. Cast in that light, the issue is not about the transformation of the traditional definition of marriage, but about the unequal dispensation of benefits and privileges to one of two similarly situated classes of people. We therefore must determine whether there is a public need to deny committed same-sex partners the benefits and privileges available to heterosexual couples.

The State does not argue that limiting marriage to the union of a man and a woman is needed to encourage procreation or to create the optimal living environment for children. Other than sustaining the traditional definition of marriage, which is not implicated in this discussion, the State has not articulated

any legitimate public need for depriving same-sex couples of the host of benefits and privileges catalogued in Section IV.B. Perhaps that is because the public policy of this State is to eliminate sexual orientation discrimination and support legally sanctioned domestic partnerships. The Legislature has designated sexual orientation, along with race, national origin, and sex, as a protected category in the Law Against Discrimination. N.J.S.A. 10:5-4, -12. Access to employment, housing, credit, and business opportunities is a civil right possessed by gays and lesbians. See ibid. Unequal treatment on account of sexual orientation is forbidden by a number of statutes in addition to the Law Against Discrimination.

The Legislature has recognized that the "rights and benefits" provided in the Domestic Partnership Act are directly related "to any reasonable conception of basic human dignity and autonomy." N.J.S.A. 26:8A-2(d). It is difficult to understand how withholding the remaining "rights and benefits" from committed same-sex couples is compatible with a "reasonable conception of basic human dignity and autonomy." There is no rational basis for, on the one hand, giving gays and lesbians full civil rights in their status as individuals, and, on the other, giving them an incomplete set of rights when they follow the inclination of their sexual orientation and enter into committed same-sex relationships.

Disparate treatment of committed same-sex couples, moreover, directly disadvantages their children. We fail to see any legitimate governmental purpose in disallowing the child of a deceased same-sex parent survivor benefits under the Workers' Compensation Act or Criminal Injuries Compensation Act when children of married parents would be entitled to such benefits. Nor do we see the governmental purpose in not affording the child of a same-sex parent, who is a volunteer firefighter or first-aid responder, tuition assistance when the children of married parents receive such assistance. There is something distinctly unfair about the State recognizing the right of same-sex couples to raise natural and adopted children and placing foster children with those couples, and yet denying those children the financial and social benefits and privileges available to children in heterosexual households. Five of the seven plaintiff couples are raising or have raised children. There is no rational basis for visiting on those children a flawed and unfair scheme directed at their parents. To the extent that families are strengthened by encouraging monogamous relationships, whether heterosexual or homosexual, we cannot discern any public need that would justify the legal disabilities that now afflict same-sex domestic partnerships.

There are more than 16,000 same-sex couples living in committed relationships in towns and cities across this State.

Ruth Padawer, Gay Couples, At Long Last, Feel Acknowledged, The Rec., Aug. 15, 2001, at 104. Gays and lesbians work in every profession, business, and trade. They are educators, architects, police officers, fire officials, doctors, lawyers, electricians, and construction workers. They serve on township boards, in civic organizations, and in church groups that minister to the needy. They are mothers and fathers. They are our neighbors, our co-workers, and our friends. In light of the policies reflected in the statutory and decisional laws of this State, we cannot find a legitimate public need for an unequal legal scheme of benefits and privileges that disadvantages committed same-sex couples.

D.

In arguing to uphold the system of disparate treatment that disfavors same-sex couples, the State offers as a justification the interest in uniformity with other states' laws. Unlike other states, however, New Jersey forbids sexual orientation discrimination, and not only allows same-sex couples to adopt children, but also places foster children in their households. Unlike New Jersey, other states have expressed open hostility toward legally recognizing committed same-sex relationships.[21]

[21] A number of states declare that they will not recognize domestic relationships other than the union of a man and a

See Symposium, State Marriage Amendments: Developments, Precedents, and Significance, 7 Fla. Coastal L. Rev. 403, 403 (2005) (noting that "[s]ince November 1998, nineteen states have passed state marriage amendments . . . defining marriage as the union of a man and a woman" and "[v]oters in thirteen states ratified [those amendments] in the summer and fall of 2004 alone and by overwhelming margins").

Today, only Connecticut and Vermont, through civil union, and Massachusetts, through marriage, extend to committed same-sex couples the full rights and benefits offered to married heterosexual couples. See Conn. Gen. Stat. §§ 46b-38aa to -38pp; Vt. Stat. Ann. tit. 15, §§ 1201-1207; Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003). A few jurisdictions, such as New Jersey, offer some but not all of those rights under domestic partnership schemes.[22]

The high courts of Vermont and Massachusetts have found that the denial of the full benefits and protections of marriage to committed same-sex couples violated their respective state

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woman, and specifically prohibit any marriage, civil union, domestic partnership, or other state sanctioned arrangement between persons of the same sex. See, e.g., Ga. Const. art. I, § IV, ¶ I(b); Kan. Const. art. XV, § 16(b); Ky. Const. § 233a; La. Const. art. XII, § 15; Mich. Const. art. I, § 25; Neb. Const. art. I, § 29; N.D. Const. art. XI, § 28; Ohio Const. art. XV, § 11; Utah Const. art. I, § 29; Alaska Stat. § 25.05.013; Okla. Stat. tit. 51, § 255(A)(2); Tex. Fam. Code Ann. § 6.204(b); Va. Code Ann. § 20-45.3.

[22] See Cal. Fam. Code §§ 297-299.6; Haw. Rev. Stat. §§ 572C-1 to -7; Me. Rev. Stat. Ann. tit. 22, § 2710; N.J.S.A. 26:8A-1 to -13; D.C. Code §§ 32-701 to -710.

constitutions.[23] In Baker v. State, the Vermont Supreme Court held that same-sex couples are entitled "to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples" under the Common Benefits Clause of the Vermont Constitution, "its counterpart [to] the Equal Protection Clause of the Fourteenth Amendment." 744 A.2d 864, 870, 886 (Vt. 1999). To remedy the constitutional violation, the Vermont Supreme Court referred the matter to the state legislature. Id. at 886. Afterwards, the Vermont Legislature enacted the nation's first civil union law. See Vt. Stat. Ann. tit. 15, §§ 1201-1207; see also Mark Strasser, Equal Protection at the Crossroads: On Baker, Common Benefits, and Facial Neutrality, 42 Ariz. L. Rev. 935, 936 n.8 (2000).

[23] The Hawaii Supreme Court was the first state high court to rule that sexual orientation discrimination possibly violated the equal protection rights of same-sex couples under a state constitution. See Encyclopedia of Everyday Law, Gay Couples, http://law.enotes.com/everyday-law-encyclopedia/gay-couples (last visited Oct. 10, 2006). In Baehr, supra, the Hawaii Supreme Court concluded that the marriage statute "discriminates based on sex against the applicant couples in the exercise of the civil right of marriage, thereby implicating the equal protection clause of article I, section 5 of the Hawaii Constitution" and remanded for an evidentiary hearing on whether there was a compelling government interest furthered by the sex-based classification. 852 P.2d at 57, 59. After the remand but before the Hawaii Supreme Court had a chance to address the constitutionality of the statute, Hawaii passed a constitutional amendment stating that "[t]he legislature shall have the power to reserve marriage to opposite-sex couples." Haw. Const. art. I, § 23. The Hawaii Legislature enacted a statute conferring certain rights and benefits on same-sex couples through a reciprocal beneficiary relationship. Haw. Rev. Stat. §§ 572C-1 to -7.

In Goodridge, supra, the Supreme Judicial Court of Massachusetts declared that Massachusetts, consistent with its own constitution, could not "deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry." 798 N.E.2d at 948. Finding that the State's ban on same-sex marriage did "not meet the rational basis test for either due process or equal protection" under the Massachusetts Constitution, the high court redefined civil marriage to allow two persons of the same sex to marry. Id. at 961, 969. Massachusetts is the only state in the nation to legally recognize same-sex marriage.[24] In contrast to Vermont and Massachusetts, Connecticut did not act pursuant to a court decree when it passed a civil union statute.

Vermont, Massachusetts, and Connecticut represent a distinct minority view. Nevertheless, our current laws concerning same-sex couples are more in line with the legal constructs in those states than the majority of other states.

[24] After rendering its decision, the Massachusetts Supreme Judicial Court issued an opinion advising the state legislature that a proposed bill prohibiting same-sex couples from entering into marriage but allowing them to form civil unions would violate the equal protection and due process requirements of the Massachusetts Constitution and Declaration of Rights. Opinions of the Justices to the Senate, 802 N.E.2d 565, 566, 572 (Mass. 2004). The court later upheld the validity of an initiative petition, which if successful would amend the Massachusetts Constitution to define "'marriage only as the union of one man and one woman.'" Schulman v. Attorney General, 850 N.E.2d 505, 506-07 (Mass. 2006).

In protecting the rights of citizens of this State, we have never slavishly followed the popular trends in other jurisdictions, particularly when the majority approach is incompatible with the unique interests, values, customs, and concerns of our people. See New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S. Ct. 371, 386-87, 76 L. Ed. 747, 771 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). Equality of treatment is a dominant theme of our laws and a central guarantee of our State Constitution, and fitting for a State with so diverse a population. The New Jersey Constitution not only stands apart from other state constitutions, but also "may be a source of 'individual liberties more expansive than those conferred by the Federal Constitution.'" State v. Novembrino, 105 N.J. 95, 144-45 (1987) (quoting Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81, 100 S. Ct. 2035, 2040, 64 L. Ed. 2d 741, 752 (1980)). Indeed, we have not hesitated to find that our State Constitution provides our citizens with greater rights to privacy, free speech, and equal protection than those available under the United States Constitution. See, e.g., State v. McAllister, 184 N.J. 17, 26, 32-33 (2005) (concluding that New Jersey Constitution recognizes interest in

privacy of bank records, unlike Federal Constitution); N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326, 332, 349, 374 (1994) (holding that free speech protection of New Jersey Constitution requires, subject to reasonable restrictions, privately-owned shopping centers to permit speech on political and societal issues on premises, unlike First Amendment of Federal Constitution), cert. denied, 516 U.S. 812, 116 S. Ct. 62, 133 L. Ed. 2d 25 (1995); Right to Choose v. Byrne, 91 N.J. 287, 298, 310 (1982) (holding that restriction of Medicaid funding to those abortions that are "necessary to save the life of the mother" violates equal protection guarantee of New Jersey Constitution although same restriction does not violate United States Constitution).

Article I, Paragraph 1 protects not just the rights of the majority, but also the rights of the disfavored and the disadvantaged; they too are promised a fair opportunity "of pursuing and obtaining safety and happiness." N.J. Const. art. I, ¶ 1. Ultimately, we have the responsibility of ensuring that every New Jersey citizen receives the full protection of our State Constitution. In light of plaintiffs' strong interest in rights and benefits comparable to those of married couples, the State has failed to show a public need for disparate treatment. We conclude that denying to committed same-sex couples the financial and social benefits and privileges given to their

married heterosexual counterparts bears no substantial relationship to a legitimate governmental purpose. We now hold that under the equal protection guarantee of Article I, Paragraph 1 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.

V.

The equal protection requirement of Article I, Paragraph 1 leaves the Legislature with two apparent options. The Legislature could simply amend the marriage statutes to include same-sex couples, or it could create a separate statutory structure, such as a civil union, as Connecticut and Vermont have done. See Conn. Gen. Stat. §§ 46b-38aa to -38pp; Vt. Stat. Ann. tit. 15, §§ 1201-1207.

Plaintiffs argue that even equal social and financial benefits would not make them whole unless they are allowed to call their committed relationships by the name of marriage. They maintain that a parallel legal structure, called by a name other than marriage, which provides the social and financial benefits they have sought, would be a separate-but-equal classification that offends Article I, Paragraph 1. From plaintiffs' standpoint, the title of marriage is an intangible right, without which they are consigned to second-class

citizenship. Plaintiffs seek not just legal standing, but also social acceptance, which in their view is the last step toward true equality. Conversely, the State asserts that it has a substantial interest in preserving the historically and almost universally accepted definition of marriage as the union of a man and a woman. For the State, if the age-old definition of marriage is to be discarded, such change must come from the crucible of the democratic process. The State submits that plaintiffs seek by judicial decree "a fundamental change in the meaning of marriage itself," when "the power to define marriage rests with the Legislature, the branch of government best equipped to express the judgment of the people on controversial social questions."

Raised here is the perplexing question -- "what's in a name?" -- and is a name itself of constitutional magnitude after the State is required to provide full statutory rights and benefits to same-sex couples? 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.

We do not know how the Legislature will proceed to remedy the equal protection disparities that currently exist in our statutory scheme. The Legislature is free to break from the historical traditions that have limited the definition of marriage to heterosexual couples or to frame a civil union style structure, as Vermont and Connecticut have done. Whatever path the Legislature takes, our starting point must be to presume the constitutionality of legislation. Caviglia, supra, 178 N.J. at 477 ("A legislative enactment is presumed to be constitutional and the burden is on those challenging the legislation to show that it lacks a rational basis."). We will give, as we must, deference to any legislative enactment unless it is unmistakably shown to run afoul of the Constitution. Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 285 (1998) (stating that presumption of statute's validity "can be rebutted only upon a showing that the statute's repugnancy to the Constitution is clear beyond a reasonable doubt" (internal quotation marks omitted)), cert. denied, 527 U.S. 1021, 119 S. Ct. 2365, 144 L. Ed. 2d 770 (1999). Because this State has no experience with a civil union construct that provides equal rights and benefits to same-sex couples, we will not speculate that identical schemes called by different names would create a distinction that would offend Article I, Paragraph 1. We will not presume that a difference in name alone is of constitutional magnitude.

"A legislature must have substantial latitude to establish classifications," and therefore determining "what is 'different' and what is 'the same'" ordinarily is a matter of legislative discretion. Plyler v. Doe, 457 U.S. 202, 216, 102 S. Ct. 2382, 2394, 72 L. Ed. 2d 786, 798-99 (1982); see also Greenberg, supra, 99 N.J. at 577 ("Proper classification for equal protection purposes is not a precise science. . . . As long as the classifications do not discriminate arbitrarily between persons who are similarly situated, the matter is one of legislative prerogative.").[25] If the Legislature creates a separate statutory structure for same-sex couples by a name other than marriage, it probably will state its purpose and reasons for enacting such legislation. To be clear, it is not our role to suggest whether the Legislature should either amend the marriage statutes to include same-sex couples or enact a civil union scheme. Our 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.

Despite the extraordinary remedy crafted in this opinion extending equal rights to same-sex couples, our dissenting

[25] We note that what we have done and whatever the Legislature may do will not alter federal law, which only confers marriage rights and privileges to opposite-sex married couples. See 1 U.S.C.A. § 7 (defining marriage, under Federal Defense of Marriage Act, as "legal union between one man and one woman").

colleagues are willing to part ways from traditional principles of judicial restraint to reach a constitutional issue that is not before us. Before the Legislature has been given the opportunity to act, the dissenters are willing to substitute their judicial definition of marriage for the statutory definition, for the definition that has reigned for centuries, for the definition that is accepted in forty-nine states and in the vast majority of countries in the world. Although we do not know whether the Legislature will choose the option of a civil union statute, the dissenters presume in advance that our legislators cannot give any reason to justify retaining the definition of marriage solely for opposite sex couples. A proper respect for a coordinate branch of government counsels that we defer until it has spoken. Unlike our colleagues who are prepared immediately to overthrow the long established definition of marriage, we believe that our democratically elected representatives should be given a chance to address the issue under the constitutional mandate set forth in this opinion.

We cannot escape the reality that the shared societal meaning of marriage -- passed down through the common law into our statutory law -- has always been the union of a man and a woman. To alter that meaning would render a profound change in the public consciousness of a social institution of ancient

origin. When such change is not compelled by a constitutional imperative, it must come about through civil dialogue and reasoned discourse, and the considered judgment of the people in whom we place ultimate trust in our republican form of government. Whether an issue with such far-reaching social implications as how to define marriage falls within the judicial or the democratic realm, to many, is debatable. Some may think that this Court should settle the matter, insulating it from public discussion and the political process. Nevertheless, a court must discern not only the limits of its own authority, but also when to exercise forbearance, recognizing that the legitimacy of its decisions rests on reason, not power. We will not short-circuit the democratic process from running its course.

New language is developing to describe new social and familial relationships, and in time will find its place in our common vocabulary. Through a better understanding of those new relationships and acceptance forged in the democratic process, rather than by judicial fiat, the proper labels will take hold. However the Legislature may act, same-sex couples will be free to call their relationships by the name they choose and to sanctify their relationships in religious ceremonies in houses of worship. See Bacharach, supra, 344 N.J. Super. at 135 (noting that state laws and policies are not offended if same-

sex couples choose to "exchange rings, proclaim devotion in a public or private ceremony, [or] call their relationship a marriage"); Lynn D. Wardle, Is Marriage Obsolete?, 10 Mich. J. Gender & L. 189, 191-92 ("What is deemed a 'marriage' for purposes of law may not be exactly the same as what is deemed marriage for other purposes and in other settings [such as] religious doctrines . . . .").

The institution of marriage reflects society's changing social mores and values. In the last two centuries, that institution has undergone a great transformation, much of it through legislative action. The Legislature broke the grip of the dead hand of the past and repealed the common law decisions that denied a married woman a legal identity separate from that of her husband.[26] Through the passage of statutory laws, the Legislature gave women the freedom to own property, to contract, to incur debt, and to sue.[27] The Legislature has played a major role, along with the courts, in ushering marriage into the

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[26] See Newman v. Chase, 70 N.J. 254, 260 n.4 (1976) (noting that prior to Married Women's Property Act of 1852 "the then prevailing rule" entitled husband "to the possession and enjoyment of his wife's real estate during their joint lives"); Nancy F. Cott, Public Vows: A History of Marriage and the Nation 12 (2000) (explaining that marriage resulted in husband becoming "the one full citizen in the household"); Hendrick Hartog, Man and Wife in America: A History 99 (2000) (stating that "merger" of wife's identity led to wife's loss of control over property and over her contractual capacity).

[27] See, e.g., L. 1906, c. 248 (May 17, 1906) (affording married women right to sue); L. 1852, c. 171 (Mar. 25, 1852) (providing married women property rights).

modern era. See, e.g., Reva B. Siegal, Symposium, The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings 1860-1930, 82 Geo. L.J. 2127, 2148-49 (1994) (discussing courts' role in reformulation of married women's rights).

Our decision today significantly advances the civil rights of gays and lesbians. We have decided that our State Constitution guarantees that every statutory right and benefit conferred to heterosexual couples through civil marriage must be made available to committed same-sex couples. Now the Legislature must determine whether to alter the long accepted definition of marriage. The great engine for social change in this country has always been the democratic process. Although courts can ensure equal treatment, they cannot guarantee social acceptance, which must come through the evolving ethos of a maturing society. Plaintiffs' quest does not end here. Their next appeal must be to their fellow citizens whose voices are heard through their popularly elected representatives.

VI.

To comply with the equal protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution, the State must provide to committed same-sex couples, on equal terms, the full

rights and benefits enjoyed by heterosexual married couples. The State can fulfill that constitutional requirement in one of two ways. It can either amend the marriage statutes to include same-sex couples or enact a parallel statutory structure by another name, in which same-sex couples would not only enjoy the rights and benefits, but also bear the burdens and obligations of civil marriage. If the State proceeds with a parallel scheme, it cannot make entry into a same-sex civil union any more difficult than it is for heterosexual couples to enter the state of marriage.[28] It may, however, regulate that scheme similarly to marriage and, for instance, restrict civil unions based on age and consanguinity and prohibit polygamous relationships.

The constitutional relief that we give to plaintiffs cannot be effectuated immediately or by this Court alone. The implementation of this constitutional mandate will require the cooperation of the Legislature. To bring the State into compliance with Article I, Paragraph 1 so that plaintiffs can exercise their full constitutional rights, the Legislature must

[28] We note, for example, that the Domestic Partnership Act requires, as a condition to the establishment of a domestic partnership, that the partners have "a common residence" and be "otherwise jointly responsible for each other's common welfare." N.J.S.A. 26:8A-4(b)(1). Such a condition is not placed on heterosexual couples who marry and thus could not be imposed on same-sex couples who enter into a civil union.

either amend the marriage statutes or enact an appropriate statutory structure within 180 days of the date of this decision.

For the reasons explained, we affirm in part and modify in part the judgment of the Appellate Division.

JUSTICES LaVECCHIA, WALLACE, and RIVERA-SOTO join in JUSTICE ALBIN's opinion. CHIEF JUSTICE PORITZ filed a separate opinion concurring in part and dissenting in part in which JUSTICES LONG and ZAZZALI join.

SUPREME COURT OF NEW JERSEY
A-68 September Term 2005

MARK LEWIS and DENNIS WINSLOW; SAUNDRA HEATH and CLARITA ALICIA TOBY; CRAIG HUTCHISON and CHRIS LODEWYKS; MAUREEN KILIAN and CINDY MENEGHIN; SARAH and SUYIN LAEL; MARILYN MANEELY and DIANE MARINI; and KAREN and MARCYE NICHOLSON-MCFADDEN,

Plaintiffs-Appellants,

v.

GWENDOLYN L. HARRIS, in her official capacity as Commissioner of the New Jersey Department of Human Services; CLIFTON R. LACY, in his official capacity as the Commissioner of the New Jersey Department of Health and Senior Services; and JOSEPH KOMOSINSKI, in his official capacity as Acting State Registrar of Vital Statistics of the New Jersey State Department of Health and Senior Services,

Defendants-Respondents.

CHIEF JUSTICE PORITZ, concurring and dissenting.

I concur with the determination of the majority that "denying the rights and benefits to committed same-sex couples

that are statutorily given to their heterosexual counterparts violates the equal protection guarantee of Article I, Paragraph 1[,]" of the New Jersey Constitution.[1] Ante at ___ (slip op. at 6). I can find no principled basis, however, on which to distinguish those rights and benefits from the right to the title of marriage, and therefore dissent from the majority's opinion insofar as it declines to recognize that right among all of the other rights and benefits that will be available to same-sex couples in the future.

I dissent also from the majority's conclusion that there is no fundamental due process right to same-sex marriage "encompassed within the concept of liberty guaranteed by Article I, Paragraph 1." Ante at ___ (slip op. at 5-6). The majority acknowledges, as it must, that there is a universally accepted fundamental right to marriage "deeply rooted" in the

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[1] Article I, Paragraph 1, states:

> All persons are by nature free and independent, and have certain natural and unalienable 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.
>
> [N.J. Const. art. I, ¶ 1.]

This language constitutes our State equivalent of the Due Process and Equal Protection Clauses of the Federal Constitution.

"traditions, history, and conscience of the people." Ante at ___ (slip op. at 6). Yet, by asking whether there is a right to same-sex marriage, the Court avoids the more difficult questions of personal dignity and autonomy raised by this case. Under the majority opinion, it appears that persons who exercise their individual liberty interest to choose same-sex partners can be denied the fundamental right to participate in a state-sanctioned civil marriage. I would hold that plaintiffs' due process rights are violated when the State so burdens their liberty interests.

I.

The majority has provided the procedural and factual context for the issues the Court decides today. I will not repeat that information except as it is directly relevant to the analytical framework that supports this dissent. In that vein, then, some initial observations are appropriate. Plaintiffs have not sought relief in the form provided by the Court -- they have asked, simply, to be married. To be sure, they have claimed the specific rights and benefits that are available to all married couples, and in support of their claim, they have explained in some detail how the withholding of those benefits has measurably affected them and their children. As the majority points out, same-sex couples have been forced to cross-adopt their partners'

children, have paid higher health insurance premiums than those paid by heterosexual married couples, and have been denied family leave-time even though, like heterosexual couples, they have children who need care. Ante at ___ (slip op. at 11). Further, those burdens represent only a few of the many imposed on same-sex couples because of their status, because they are unable to be civilly married. The majority addresses those specific concerns in its opinion.

But there is another dimension to the relief plaintiffs' seek. In their presentation to the Court, they speak of the deep and symbolic significance to them of the institution of marriage. They ask to participate, not simply in the tangible benefits that civil marriage provides -- although certainly those benefits are of enormous importance -- but in the intangible benefits that flow from being civilly married. Chief Justice Marshall, writing for the Massachusetts Supreme Judicial Court, has conveyed some sense of what that means:

> Marriage also bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. "It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial

> or social projects." Griswold v. Connecticut, 381 U.S. 479, 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.
>
> [Goodridge v. Dep't. of Pub. Health, 798 N.E. 2d 941, 954-55 (Mass. 2003).]

Plaintiffs are no less eloquent. They have presented their sense of the meaning of marriage in affidavits submitted to the Court:

> In our relationship, Saundra and I have the same level of love and commitment as our married friends. But being able to proudly say that we are married is important to us. Marriage is the ultimate expression of love, commitment, and honor that you can give to another human being.
>
> * * * *
>
> Alicia and I live our life together as if it were a marriage. I am proud that Alicia and I have the courage and the values to take on the responsibility to love and cherish and provide for each other. When I am asked about my relationship, I want my words to match my life, so I want to say I am married and know that my relationship with Alicia is immediately understood, and after that nothing more needs be explained.
>
> * * * *
>
> I've seen that there is a significant respect that comes with the declaration

> "[w]e're married." Society endows the institution of marriage with not only a host of rights and responsibilities, but with a significant respect for the relationship of the married couple. When you say that you are married, others know immediately that you have taken steps to create something special. . . . The word "married" gives you automatic membership in a vast club of people whose values are clarified by their choice of marriage. With a marriage, everyone can instantly relate to you and your relationship. They don't have to wonder what kind of relationship it is or how to refer to it or how much to respect it.
>
> * * * *
>
> My parents long to talk about their three married children, all with spouses, because they are proud and happy that we are all in committed relationships. They want to be able to use the common language of marriage to describe each of their children's lives. Instead they have to use a different language, which discounts and cheapens their family as well as mine[, because I have a same-sex partner and cannot be married].

By those individual and personal statements, plaintiffs express a deep yearning for inclusion, for participation, for the right to marry in the deepest sense of that word. When we say that the Legislature cannot deny the tangible benefits of marriage to same-sex couples, but then suggest that "a separate statutory scheme, which uses a title other than marriage," is presumptively constitutional, ante at ___ (slip op. at 7), we

demean plaintiffs' claim. What we "name" things matters, language matters.

In her book Making all the Difference: Inclusion, Exclusion, and American Law, Martha Minnow discusses "labels" and the way they are used:

> Human beings use labels to describe and sort their perceptions of the world. The particular labels often chosen in American culture can carry social and moral consequences while burying the choices and responsibility for those consequences.
>
> . . . .
>
> Language and labels play a special role in the perpetuation of prejudice about differences.
>
> [Martha Minnow, Making all the Difference: Inclusion, Exclusion, and American Law 4, 6 (1990).]

We must not underestimate the power of language. Labels set people apart as surely as physical separation on a bus or in school facilities. Labels are used to perpetuate prejudice about differences that, in this case, are embedded in the law. By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately, the message is that what same-sex couples have is

not as important or as significant as "real" marriage, that such lesser relationships cannot have the name of marriage.[2]

II.

A.

Beginning with Robinson v. Cahill, this Court has repeatedly rejected a "mechanical" framework for due process and equal protection analyses under Article I, Paragraph 1 of our State Constitution. 62 N.J. 473, 491-92 (1973). See Right to Choose v. Byrne, 91 N.J. 287, 308-09 (1982); Greenberg v. Kimmelman 99 N.J. 552, 567-68 (1985); Planned Parenthood v. Farmer, 165 N.J. 609, 629-30 (2000); Sojourner A. v. N.J. Dept. of Human Serv., 177 N.J. 318, 332-33 (2003). Chief Justice Weintraub described the process by which the courts should conduct an Article I review:

> [A] court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary. In that process,

[2] Professor Michael Wald, in Same-Sex Couple Marriage: A Family Policy Perspective similarly states that "if a State passed a civil union statute for same-sex couples that paralleled marriage, it would be sending a message that these unions were in some way second class units unworthy of the term 'marriage'[,] . . . that these are less important family relationships." 9 Va. J. Soc. Pol'y. & L. 291, 338 (2001).

> if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial.
>
> [Robinson, supra, 62 N.J. at 492 (citation omitted).]

Later, the Court "reaffirmed that approach [because] it provided a . . . flexible analytical framework for the evaluation of equal protection and due process claims." Sojourner A., supra, 177 N.J. at 333. There, we restated the nature of the weighing process:

> In keeping with Chief Justice Weintraub's direction, we "consider the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." [In so doing] we are able to examine each claim on a continuum that reflects the nature of the burdened right and the importance of the governmental restriction.
>
> [Ibid. (quoting Planned Parenthood, supra, 165 N.J. at 630).]

The majority begins its discussion, as it should, with the first prong of the test, the nature of the affected right. Ante at ___ (slip op. at 37). The inquiry is grounded in substantive due process concerns that include whether the affected right is so basic to the liberty interests found in

Article I, Paragraph 1, that it is "fundamental."[3] When we ask the question whether there is a fundamental right to same-sex marriage "rooted in the traditions, and collective conscience of our people," ante at ___ (slip op. at 22), we suggest the answer, and it is "no".[4] That is because the liberty interest has been framed "so narrowly as to make inevitable the conclusion that the claimed right could not be fundamental because historically it has been denied to those who now seek to exercise it." Hernandez v. Robles, Nos. 86-89, 2006 N.Y. LEXIS 1836, at *56-57, 2006 N.Y. slip op. 5239, at *14 (Kaye, C.J., dissenting from majority decision upholding law limiting marriage to heterosexual couples). When we ask, however, whether there is a fundamental right to marriage rooted in the

[3] Professor Laurence Tribe has described in metaphoric terms, the relationship between due process and equal protection analyses. Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name, 117 Harv. L. Rev. 1893, 1897-98. His understanding is especially apt in respect of New Jersey's test. He finds in judges "conclusions" a "narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix . . . [representing] a single, unfolding tale of equal liberty and increasingly universal dignity." Ibid. This case is a paradigm for the interlocking concepts that support both the due process and the equal protection inquiry.

[4] The majority understands that "[h]ow the right is defined may dictate whether it is deemed fundamental." Ante at ___ (slip op. at 24). By claiming that the broad right to marriage is "undifferentiated" and "abstract," and by focusing on the narrow question of the right to same-sex marriage, the Court thereby removes the right from the traditional concept of marriage. Ante at ___ (slip op. at 24-25).

traditions, history and conscience of our people, there is universal agreement that the answer is "yes." See Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); Turner v. Safley; 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1977); see also J.B. v. M.B., 170 N.J. 9, 23-24 (2001) (noting that the right to marry is a fundamental right protected by both the federal and state constitutions); In re Baby M., 109 N.J. 396, 447 (1988) (same); Greenberg v. Kimmelman, 99 N.J. 552, 571 (1985) (same). What same-sex couples seek is admission to that most valuable institution, what they seek is the liberty to choose, as a matter of personal autonomy, to commit to another person, a same-sex person, in a civil marriage. 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. As Judge Collester points out in his dissent below, "[t]he argument is circular: plaintiffs cannot marry because by definition they cannot marry." Lewis v. Harris, 378 N.J. Super. 168, 204 (App. Div. 2005) (Collester, J., dissenting); see Hernandez v. Robles, Nos. 86-89, 2006 N.Y. LEXIS 1836 at *63-64, 2006 N.Y. slip op. 5239, at *23-24 (Kaye, C.J., dissenting) ("It is no answer that same-sex couples can be excluded from marriage because 'marriage,' by definition, does not include them. In the end, 'an argument

that marriage is heterosexual because it 'just is' amounts to circular reasoning.'" (quoting Halpern v. Attorney Gen. of Can., 65 O.R.3d 161, 181 (2003))).

I also agree with Judge Collester that Loving should have put to rest the notion that fundamental rights can be found only in the historical traditions and conscience of the people. See id. at 205. Had the United States Supreme Court followed the traditions of the people of Virginia, the Court would have sustained the law that barred marriage between members of racial minorities and caucasians. The Court nevertheless found that the Lovings, an interracial couple, could not be deprived of "the freedom to marry [that] has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." Loving, supra, 388 U.S. at 12, 87 S. Ct. at 1824, 18 L. Ed. at 1018. Most telling, the Court did not frame the issue as a right to interracial marriage but, simply, as a right to marry sought by individuals who had traditionally been denied that right. Loving teaches that the fundamental right to marry no more can be limited to same-race couples than it can be limited to those who choose a committed relationship with persons of the opposite sex. By imposing that limitation on same-sex couples, the majority denies them access to one of our most cherished institutions simply because they are homosexuals.

Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), in overruling Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), made a different but equally powerful point. In Bowers, the Court had sustained a Georgia statute that made sodomy a crime. 478 U.S. at 189, 106 S. Ct. at 2843, 93 L. Ed. 2d at 145. When it rejected the Bowers holding seventeen years later, the Court stated bluntly that "Bowers was not correct when it was decided, and it is not correct today." Lawrence, supra, 539 U.S. at 578, 123 S. Ct. at 2484, 156 L. Ed. 2d at 525. Justice Kennedy explained further that "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." Id. at 579, 123 S. Ct. at 2484, 156 L. Ed. 2d at 526.

We are told that when the Justices who decided Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), finally rejected legal segregation in public schools, they were deeply conflicted over the issue. Michael J. Klarman, Brown and Lawrence (and Goodridge), 104 Mich. L. Rev. 431, 433 (2005). "The sources of constitutional interpretation to which they ordinarily looked for guidance -- text, original understanding, precedent, and custom -- indicated that school

segregation was permissible. By contrast, most of the Justices privately condemned segregation, which Justice Hugo Black called 'Hitler's creed.' Their quandary was how to reconcile their legal and moral views." Ibid. (footnote omitted). Today, it is difficult to believe that "Brown was a hard case for the Justices." Ibid.

Without analysis, our Court turns to history and tradition and finds that marriage has never been available to same-sex couples. That may be so -- but the Court has not asked whether the limitation in our marriage laws, "once thought necessary and proper in fact serve[s] only to oppress." I would hold that plaintiffs have a liberty interest in civil marriage that cannot be withheld by the State. Framed differently, the right that is burdened under the first prong of the Court's equal protection/due process test is a right of constitutional dimension.

B.

Although the majority rejects the argument I find compelling, it does grant a form of relief to plaintiffs on equal protection grounds, finding a source for plaintiffs' interest outside of the Constitution. Ante at ___ (slip op. at 43, 58-59). Having previously separated the right to the tangible "benefits and privileges" of marriage from the right to

the "name of marriage," and having dismissed the right to the name of marriage for same-sex couples because it is not part of our history or traditions, the majority finds the right to the tangible benefits of marriage in enactments and decisions of the legislative, executive, and judicial branches protecting gays and lesbians from discrimination, allowing adoption by same-sex partners, and conferring some of the benefits of marriage on domestic partners. Ante at ___ (slip op. at 28-29, 37-43, 49).

The enactments and decisions relied on by the majority as a source of same-sex couples' interest in equality of treatment are belied by the very law at issue in this case that confines the right to marry to heterosexual couples. Moreover, as the majority painstakingly demonstrates, the Domestic Partnership Act, N.J.S.A. 26:8A-1 to -13, does not provide many of the tangible benefits that accrue automatically when heterosexual couples marry. Ante at ___ (slip op. at 43-48). New Jersey's statutes reflect both abhorrence of sexual orientation discrimination and a desire to prevent same-sex couples from having access to one of society's most cherished institutions, the institution of marriage. Plaintiffs' interests arise out of constitutional principles that are integral to the liberty of a free people and not out of the legislative provisions described by the majority. In any case, it is clear that civil marriage and all of the benefits it represents is absolutely denied same-

sex couples, and, therefore, that same-sex couples' fundamental rights are not simply burdened but are denied altogether (the second prong of the Court's test).

Finally, the majority turns to the third prong -- whether there is a public need to deprive same-sex couples of the tangible benefits and privileges available to heterosexual couples. Ante at ___ (slip op. at 48). Because the State has argued only that historically marriage has been limited to opposite-sex couples, and because the majority has accepted the State's position and declined to find that same-sex couples have a liberty interest in the choice to marry, the majority is able to conclude that no interest has been advanced by the State to support denying the rights and benefits of marriage to same-sex couples. Ante at ___ (slip op. at 48-49, 51). Without any state interest to justify the denial of tangible benefits, the Court finds that the Legislature must provide those benefits to same-sex couples. Ante at ____ (slip op. at 48-51). I certainly agree with that conclusion but would take a different route to get there.

Although the State has not made the argument, I note that the Appellate Division, and various amici curiae, have claimed the "promotion of procreation and creating the optimal environment for raising children as justifications for the limitation of marriage to members of the opposite sex." Lewis,

supra, 378 N.J. Super. at 185 n.2. That claim retains little viability today. Recent social science studies inform us that "same-sex couples increasingly form the core of families in which children are conceived, born, and raised." Gregory N. Herek, Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective, 61 Am. Psychol. 607, 611 (2006). It is not surprising, given that data, that the State does not advance a "promotion of procreation" position to support limiting marriage to heterosexuals. Further, "[e]mpirical studies comparing children raised by sexual minority parents with those raised by otherwise comparable heterosexual parents have not found reliable disparities in mental health or social adjustment," id. at 613, suggesting that the "optimal environment" position is equally weak. Without such arguments, the State is left with the "but that is the way it has always been" circular reasoning discussed supra at ___ (slip op. at 11-12).

C.

Perhaps the political branches will right the wrong presented in this case by amending the marriage statutes to recognize fully the fundamental right of same-sex couples to marry. That possibility does not relieve this Court of its responsibility to decide constitutional questions, no matter how difficult. Deference 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. Alexander Hamilton, in his essay, Judges as Guardians of the Constitution, The Federalist No. 78, (Benjamin Fletcher Wright ed., 1961) spoke of the role of the courts and of judicial independence. He argued that "the courts of justice are . . . the bulwarks of a limited Constitution against legislative encroachments" because he believed that the judicial branch was the only branch capable of opposing "oppressions [by the elected branches] of the minor party in the community." Id. at 494. 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 by same-sex couples "is not a matter of social policy but of constitutional interpretation." Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004). It is a question for this Court to decide.

III.

In his essay Three Questions for America, Professor Ronald Dworkin talks about the alternative of recognizing "a special 'civil union' status" that is not "marriage but nevertheless provides many of the legal and material benefits of marriage." N.Y. Rev. Books, Sept. 21, 2006 at 24, 30. He explains:

> Such a step reduces the discrimination, but falls far short of eliminating it. The institution of marriage is unique: it is a distinct mode of association and commitment with long traditions of historical, social, and personal meaning. It means something slightly different to each couple, no doubt. For some it is primarily a union that sanctifies sex, for others a social status, for still others a confirmation of the most profound possible commitment. But each of these meanings depends on associations that have been attached to the institution by centuries of experience. We can no more now create an alternate mode of commitment carrying a parallel intensity of meaning than we can now create a substitute for poetry or for love. The status of marriage is therefore a social resource of irreplaceable value to those to whom it is offered: it enables two people together to create value in their lives that they could not create if that institution had never existed. We know that people of the same sex often love one another with the same passion as people of different sexes do and that they want as much as heterosexuals to have the benefits and experience of the married state. If we allow a heterosexual couple access to that wonderful resource but deny it to a homosexual couple, we make it possible for one pair but not the other to realize what they both believe to be an important value in their lives.
>
> [Ibid.]

On this day, the majority parses plaintiffs' rights to hold that plaintiffs must have access to the tangible benefits of state-sanctioned heterosexual marriage. I would extend the Court's mandate to require that same-sex couples have access to

the "status" of marriage and all that the status of marriage entails.

Justices Long and Zazzali join in this opinion.

SUPREME COURT OF NEW JERSEY

NO. A-68 SEPTEMBER TERM 2005

ON APPEAL FROM Appellate Division, Superior Court

MARK LEWIS and DENNIS WINSLOW; et al.,

Plaintiffs-Appellants,

v.

GWENDOLYN L. HARRIS, in her official capacity as Commissioner of the New Jersey Department of Human Services; et al.,

Defendants-Respondents.

DECIDED October 25, 2006

Chief Justice Poritz PRESIDING

OPINION BY Justice Albin

CONCURRING/DISSENTING OPINION BY Chief Justice Poritz

DISSENTING OPINION BY

CHECKLIST	AFFIRM IN PART/ MODIFY IN PART	CONCUR IN PART/DISSENT IN PART	
CHIEF JUSTICE PORITZ		X	
JUSTICE LONG		X	
JUSTICE LaVECCHIA	X		
JUSTICE ZAZZALI		X	
JUSTICE ALBIN	X		
JUSTICE WALLACE	X		
JUSTICE RIVERA-SOTO	X		
TOTALS	4	3	

Court of Appeal for British Columbia

Citation: ***Barbeau v. British Columbia (Attorney General),*** 2003 BCCA 251

Date: 20030501

Docket: CA029017; CA029048

Docket: CA029017

Between:

Dawn Barbeau and Elizabeth Barbeau
Peter Cook and Murray Warren,
Jane Hamilton and Joy Masuhara

Appellants
(Petitioners)

And

The Attorney General of British Columbia and
The Attorney General of Canada

Respondents
(Defendants)

- and -

Docket: CA029048

Between:

EGALE Canada Inc.,
David Shortt and Shane McCloskey,
Melinda Roy and Tanya Chambers,
Lloyd Thornhill and Robert Peacock,
Robin Roberts and Diana Denny,
Wendy Young and Mary Theresa Healy

Appellants
(Petitioners)

And

The Attorney General of Canada,
The Attorney General of British Columbia, and
The Director of Vital Statistics for British Columbia

Respondents
(Respondents)

Before: The Honourable Madam Justice Prowse

The Honourable Mr. Justice Mackenzie
The Honourable Mr. Justice Low

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K.W. Smith and R.J. Hughes	Counsel for the Intervenors, Coalition of Canadian Liberal Rabbis for Same-Sex Marriage
D.G. Cowper, Q.C. and C. Silver	Counsel for the Intervenor, B.C. Coalition for Marriage and Family
I.T. Benson	Counsel for the Intervenor, Interfaith Coalition for Marriage
Place and Dates of Hearing:	Vancouver, British Columbia February 10-12, 2003
Place and Date of Judgment:	Vancouver, British Columbia May 1, 2003

Written Reasons by:
The Honourable Madam Justice Prowse
Concurring Reasons by:
The Honourable Mr. Justice Mackenzie (Page 84, para. 164)
Concurred in by:

The Honourable Mr. Justice Low

INDEX

Reasons for Judgment of the Honourable Madam Justice Prowse:

I. INTRODUCTION

[1] The primary issues addressed on these appeals are whether there is a common law bar to the marriage of same-sex couples, and, if so, whether that bar should be struck down as offending the ***Canadian Charter of Rights and Freedoms*** (the "Charter"), or Charter values.

[2] These issues have recently been canvassed by the Ontario Divisional Court in ***Halpern v. Canada (Attorney General)***, [2002] O.J. No. 2714, (2002) 215 D.L.R. (4th) 223. Similar issues were dealt with by the Superior Court of Quebec in ***Hendricks v. Québec (Attorney General)***, [2002] J.Q. No. 3816.

[3] In ***Halpern***, the court held that there was a common law bar to marriage between same-sex couples; that the common law bar contravened s. 15 of the Charter; and that the contravention of s. 15 could not be saved under s. 1. This decision has been appealed to the Ontario Court of Appeal which has reserved its decision.

[4] In ***Hendricks***, the court held that s. 5 of the ***Federal Law - Civil Law Harmonization Act No. 1***, S.C. 2001, c. 4 (the "***FCHA***"), s. 1.1 of the ***Modernization of Benefits and Obligations Act***, S.C. 2000, c. 12 (the "***MBOA***"), and part of para. 2 of Article 365, ***Civil Code of Québec***, S.Q. 1991, c. 64, which operate as a bar to same-sex marriages, contravene s. 15 of the Charter and cannot be justified under s. 1. This judgment has also been appealed.

[5] In ***Halpern***, the court declared the common law bar to same-sex marriage to be constitutionally invalid and inoperative and suspended the remedy for a period of 24 months. Mr. Justice LaForme would have granted immediate declaratory relief and reformulated the common law definition of marriage to mean "the lawful union of two persons to the exclusion of all others". The entered order provides that "in the event that Parliament does not act accordingly prior to the expiration of 24 months ...", the common law definition of marriage shall be reformulated as stated by Mr. Justice LaForme.

[6] In ***Hendricks***, Madam Justice Lemelin declared the statutory bars to same-sex marriage to be of no force and effect and stayed that declaration for two years.

II. CONCLUSION

[7] For the reasons which follow, I conclude that there is a common law bar to same-sex marriage; that it contravenes s. 15

of the Charter; and that it cannot be justified under s. 1 of the Charter. I would grant the declaratory relief set forth at para. 158, *infra*, and reformulate the common law definition of marriage to mean "the lawful union of two persons to the exclusion of all others". I would suspend these remedies until July 12, 2004, solely to give the federal and provincial governments time to review and revise legislation to accord with this decision.

III. NATURE OF APPEALS

[8] These are appeals from the decision of a Supreme Court judge, rendered October 2, 2001, dismissing the petitions of the individual appellants, and of EGALE Canada Inc. ("EGALE"), for declarations, *inter alia*, that the issuer of marriage licences under s. 31 of the ***Marriage Act***, R.S.B.C. 1996, c. 282, is permitted to issue marriage licences to couples of the same sex; that there is no legal bar to the marriage of two persons of the same sex; or, if there is such a bar, it is of no effect; and for orders of *mandamus* to compel the issuance of marriage licences to the individual appellants and to other same-sex couples who otherwise meet the requirements of the Act.

[9] The reasons for judgment of the trial judge are reported at (2001), 95 B.C.L.R. (3d) 122.

IV. ISSUES ON APPEALS

[10] The appellants submit that the learned trial judge erred in finding:

(1) that the Constitution of Canada bars recognition of same-sex marriages and that neither the federal nor provincial governments has the power to provide for same-sex marriages, except by way of a constitutional amendment;

(2) that there is a common law bar to same-sex marriage in Canada;

(3) in the alternative, that if there is a common law bar to same-sex marriage, that bar does not breach the individual appellants' rights under ss. 2, 6, 7 and 28 of the Charter;

(4) in the alternative, that if there is a common law bar to same-sex marriage, and assuming that the common law bar breaches the equality rights of the individual appellants under s. 15 of the Charter, that such breach is justifiable under s. 1 of the Charter.

[11] The respondents, the Attorney General of Canada ("AGC") and the Attorney General of British Columbia ("AGBC") agree with the appellants that the trial judge erred as set forth in the first ground of appeal, *supra*. The AGC also submits that the learned trial judge erred in finding that, to the extent there is a common law bar to same-sex marriages, that bar breaches the individual appellants' rights under s. 15 of the Charter.

[12] The AGBC takes no position with respect to the allegations of Charter breaches or the application of s. 1 of the Charter.

[13] There is also a significant issue as to the appropriate remedy in the event this court resolves the substantive issues in favour of the appellants.

V. THE PARTIES AND THE INTERVENORS

[14] Each of the individual appellants is living in a committed same-sex relationship and wishes to marry the person with whom he/she is living. These appellants are of different ages, ethnicities and religions. Some of them have cohabited for a relatively short time, while others have spent decades of their lives together. Some of them have raised children; others intend to do so in the future.

[15] The affidavits sworn by the individual appellants reveal that their reasons for wanting to marry are the same as for many heterosexual couples. Those reasons include: love, reinforcing family support, social recognition, ensuring legal protection, financial and emotional security, religious or spiritual fulfillment, providing a supportive environment for children, and strengthening their commitment to their relationship. They simply want what heterosexual couples have — the right to marry the person with whom they are living in a committed relationship.

[16] The appellant, EGALE ("Equality for Gays and Lesbians Everywhere"), is a national organization committed to the advancement of equality for lesbians, gays, bisexuals and transgendered people in Canada.

[17] The intervenor, the B.C. Coalition for Marriage and Family (the "B.C. Coalition"), is an umbrella group made up of three organizations: the Focus on the Family (Canada) Association, the Alliance for Social Justice, and Real Women of British Columbia.

[18] The intervenor, the Interfaith Coalition for Marriage (the "Interfaith Coalition"), is comprised of the Catholic Archdiocese of Vancouver, the Islamic Society of North America, the B.C. Muslim Association, the Evangelical

Fellowship of Canada, the Catholic Civil Rights League and the B.C. Council of Sikhs.

[19] The intervenor, the Coalition of Canadian Liberal Rabbis for Same-Sex Marriage (the "Liberal Rabbis"), consists of a group of reform, reconstructionist and Jewish renewal rabbis.

[20] The B.C. Coalition and the Interfaith Coalition were granted intervenor status by order of Madam Justice Rowles, made June 6, 2002 (reasons released July 4, 2002). The Liberal Rabbis were granted intervenor status by order of Madam Justice Rowles pronounced June 21, 2002.

[21] The B.C. Coalition and the Interfaith Coalition support the position taken by the AGC, except that they also support the conclusion of the trial judge that the Constitution of Canada bars same-sex marriages, and that neither the federal nor the provincial governments has the power to legislate with respect to same-sex marriages in the absence of a constitutional amendment.

[22] The Liberal Rabbis generally support the position of the appellants.

[23] The intervenors were granted status on the basis that they would neither seek nor be granted costs, and that any additional disbursements incurred by the parties as a result of their intervention would be borne by the intervenors.

VI. PROCEDURAL BACKGROUND

[24] Between December 1998 and October 2000, at least nine same-sex couples applied to the B.C. Director of Vital Statistics (the "Director") for marriage licences. In each case, the Director had denied the requests. The denial was based on a legal opinion the Director received from the Ministry of Attorney General advising that there was a common law bar to same-sex marriages, that the appellants, therefore, did not have the capacity to marry at law, and that only the federal government had the power to remove the common law bar by enacting legislation to redefine marriage or to change the rules concerning capacity to marry.

[25] On July 20, 2000, the AGBC filed a petition in the B.C. Supreme Court (No. L001944) seeking an order declaring that a person appointed an issuer of marriage licences pursuant to s. 31 of the ***Marriage Act*** is permitted to issue a marriage licence to persons of the same sex, and declaring that persons are not barred from marrying one another solely on the basis that they are of the same sex. (This petition was subsequently withdrawn on July 16, 2001, following a change in government.)

[26] On October 13, 2000, EGALE and five of the appellant couples filed a petition in the B.C. Supreme Court (No. L002698) challenging the Director's decision not to issue the couples marriage licences and seeking related relief.

[27] On November 7, 2000, three additional same-sex couples filed a petition in the B.C. Supreme Court (No. L003197) challenging the Director's decision not to issue the couples marriage licences and seeking additional relief.

[28] Chief Justice Brenner made an order on November 28, 2002 directing that the two petitions be heard at the same time. He also granted intervenor status to the B.C. Coalition and the Interfaith Coalition.

[29] The petitions were heard by the trial judge between July 23 and August 3, 2001. The reasons of the trial judge were delivered October 2, 2001 (followed by a corrigendum on October 4, 2001). On October 4, 2002, the trial judge issued his reasons for judgment with respect to costs.

[30] The petitioners appealed the decision of the trial judge and, by consent order dated December 7, 2001, the appeals were directed to be heard at the same time.

VII. DECISION OF THE TRIAL JUDGE

[31] The trial judge summarized his conclusions with respect to the issues before him in his "Summary of Opinion and Disposition" at paras. 8-12 of his reasons for judgment:

> Under Canadian law, marriage is a legal relationship between two persons of opposite sex. The legal relationship does not extend to same-sex couples.
>
> Marriage was defined by common, or judge-made law. Judges should only change the common law in incremental steps. A change to define marriage as the legal union of two individuals, regardless of sex, is not incremental. The change would have broad legal ramifications and would require, at the least, rules to govern the formation and dissolution of same-sex unions. Any permitted change to the common law of marriage must be made by legislation.
>
> Parliament may not enact legislation to change the legal meaning of marriage to include same-sex unions. Under s. 91(26) of the *Constitution Act, 1867*, Parliament was given exclusive legislative jurisdiction over marriage, a specific kind of legal relationship. By attempting to change the legal nature of marriage, Parliament would be self-

> defining a legislative power conferred upon it by the Constitution rather than enacting legislation pursuant to the power. Parliament would be attempting to amend the Constitution without recourse to the amendment process provided by the *Constitution Act, 1982.* Alternatively, Parliament would be attempting to enact legislation in respect of civil rights exclusively within the legislative authority of the province.
>
> "Marriage", as a federal head of power with legal meaning at confederation, is not amenable to *Charter* scrutiny. One part of the Constitution may not be used to amend another. Alternatively, if the legal relationship of "marriage" is subject to *Charter* scrutiny, its legal character does not infringe the petitioners' fundamental freedoms of expression or association, their mobility rights or their rights of liberty and security of the person, but does infringe their equality rights.
>
> The infringement of the petitioners' equality rights is a reasonable and demonstrably justified limit in a free and democratic society and is saved by s. 1 of the *Charter.*

[32] In his reasons on costs dated October 4, 2002, the trial judge ordered that the parties bear their own costs since "the basis of disposition [of the petitions] differed from grounds raised by either of them." ([2002] B.C.J. No. 2239, para. 8.) That remark is a reference to the fact that the primary constitutional basis upon which the trial judge dismissed the petitions was raised by the trial judge during the course of the hearing and resolved on the basis of oral and written submissions he solicited from the parties in that regard.

[33] I will elaborate on the trial judge's reasons for his conclusions as I address each of the individual grounds of appeal.

VIII. DISCUSSION OF THE ISSUES

A. The Evidence

[34] The evidence before the trial judge consisted of the affidavits of the individual appellants setting forth their personal history, the history of their relationships and their reasons for wanting to marry. Those affidavits are referred to by the trial judge at paras. 14-43 of his reasons. I will repeat here only his summary (at para. 45):

> The difference between these [the appellant couples] and heterosexual couples is that the former choose and prefer a committed relationship and sexual relations with a person of the same, rather than opposite, sex. Because they are gay or lesbian, these couples have been told they cannot gain recognition as married persons.

[35] The parties and the intervenors also filed affidavits by individuals having expertise in various fields, including individual and comparative religions, history, anthropology, ethics and law, sociology, gender studies, linguistics, lesbian and gay studies, theology, education, economics, and philosophy. Those affidavits include opinions on such topics as the history of marriage; whether same-sex marriages have ever been recognized within societies; if so, whether same-sex marriages have ever represented a norm within those societies; the beliefs of various religious groups with respect to marriage in general and same-sex marriage in particular; the potential consequences within specific religions, and within society generally, if same-sex marriages are recognized at law, etc. While these affidavits were enlightening, several overstepped the boundary between opinion evidence on a matter in issue, and advocacy for a particular result.

[36] I note that the expert evidence in these cases was similar to the expert evidence before the courts in ***Halpern*** and ***Hendricks***. Many of the same experts provided opinions, particularly in ***Halpern***. Thus, the evidentiary foundation for the decisions in those cases paralleled, but was not identical to, the evidentiary foundation before the trial judge in these proceedings. It should be noted that the expert evidence was untested by cross-examination. Further, a degree of caution must be exercised in approaching the evidence of individuals purporting to speak on behalf of entire religious groups.

> [37] In his reasons for judgment, under the heading "The Evolution of Parallelism", the trial judge discussed the relatively recent developments in Canadian statutory law which have extended economic and other benefits and obligations to same-sex couples which had previously been available only to married couples. These changes are set forth in some detail at paras. 47-70 of the trial judge's reasons. They include changes to statutes in relation to spousal support, guardianship, adoption, pension entitlement and medical decision-making. In British Columbia, many of these changes were accomplished by defining the word "spouse" in the relevant legislation to include same-sex partners.

[38] The trial judge noted that, unlike married couples, common-law and same-sex couples only acquire the rights and obligations available to married couples following a period of cohabitation, the length of which varies from province to province. He did not suggest, nor could it reasonably be suggested, that same-sex couples enjoy all of the rights of married couples, except the right to marry. What can be said is that there has been a movement over the last several years to provide same-sex couples with many benefits (and corresponding obligations) they had been denied under previous legislation because of their same-sex status.

[39] I note that the appellants rely on these changes in the law to argue that any further change to the common law to permit same-sex marriages could properly be termed "incremental". The AGC, B.C. Coalition, and Interfaith Coalition, on the other hand, rely on these changes to suggest that the goal of same-sex couples of achieving parity with opposite-sex couples has been substantially met, and that the law should not take the further step requested by the appellants. They say that the further changes sought by the appellants would so fundamentally alter the concept of marriage that marriage would become unrecognizable and unacceptable to those who oppose such a change, particularly those whose religious beliefs preclude them from accepting same-sex marriages.

C. Is there a Common Law Bar to Same-Sex Marriage?

[40] I preface this discussion by observing that (subject to the resolution of the first ground of appeal), it is common ground between the parties that the federal government has jurisdiction over marriage, including the capacity to marry, pursuant to s. 91(26) of the ***Constitution Act, 1867*** under the heading: "Marriage and Divorce". The provinces, in turn, have jurisdiction to legislate with respect to the conditions governing the celebration of marriage under s. 92(12) of the ***Constitution Act, 1867*** under the heading: "The Solemnization of Marriage in the Province", and to legislate with respect to "Property and Civil Rights in the Province" under s. 92(13).

[41] The parties agree that neither Parliament, nor the provincial legislature, has enacted legislation which prohibits same-sex marriages. From a historical viewpoint, however, it must be remembered that same-sex conduct constituted a criminal offence in Canada until 1969. Thus, the prospect of same-sex marriages did not realistically arise in Canada until some time thereafter.

[42] The only federal statutes which directly touch on the question of same-sex marriage are s. 1.1 of the MBOA and s. 5 of the ***FCHA***. Section 1.1 of the ***MBOA*** provides:

> 1.1. For greater certainty, the amendments made by the Act do not affect the meaning of the word "marriage" that is, the lawful union of one man and one woman to the exclusion of all others.

[43] The MBOA was an omnibus bill amending 68 federal statutes to extend benefits and obligations already available to married and common-law opposite-sex couples, to common-law same-sex couples, and to extend other benefits only available to married couples to all common-law couples. It was a legislative response to the Supreme Court of Canada's decision in ***M. v. H.***, [1999] 2 S.C.R. 3. In brief, ***M. v. H.*** declared that the definition of "spouse" in s. 29 of the ***Family Law Act***, R.S.O. 1990, c. F.3, was of no force or effect as constituting an infringement of s. 15 of the Charter which was not saved by s. 1. Section 29 restricted the definition of "spouse" to married or common law opposite-sex couples, thereby excluding same-sex couples.

[44] It is not suggested by any of the parties that s. 1.1 of the ***MBOA*** does anything more than state Parliament's view as to what marriage is. It does not purport to be an exercise of Parliament's power to legislate in relation to marriage under s. 91(26) of the ***Constitution Act, 1867***.

[45] Section 5 of the ***FCHA*** provides:

> 5. Marriage requires the free and enlightened consent of a man and a woman to be the spouse of the other.

This Act came into effect on June 1, 2001. Its purpose was to harmonize the federal law with the civil law of the Province of Quebec.

[46] As earlier noted, both s. 1.1 of the ***MBOA*** and s. 5 of the ***FCHA*** were struck down by the court in ***Hendricks*** as unjustifiable violations of s. 15 of the Charter.

[47] There is no suggestion that the ***Marriage Act***, or any other provincial statute, contains a bar to same-sex marriage. In fact, subject to the resolution of the first ground of appeal, any attempt by the province to create such a legislative bar would be viewed as exceeding the provincial government's legislative powers by intruding on the federal government's power to legislate with respect to capacity to marry.

[48] The ***Marriage Act*** makes no express reference to any requirement that marriage can only take place between opposite-sex couples. Sections 6 and 7(1) of the ***Marriage Act*** provide:

> 6 Subject to this Act and any Act of Canada in force in British Columbia, the law of England as it existed on November 19, 1858 prevails in all matters relating to the following:
>
> (a) the mode of solemnizing marriages;
> (b) the validity of marriages;
> (c) the qualifications of parties about to marry;
> (d) the consent of guardians or parents, or any person whose consent is necessary to the validity of a marriage.
>
> 7 (1) A religious representative registered under this Act as authorized to solemnize marriage has and may exercise authority to solemnize marriage in accordance with this Act between any 2 persons neither of whom is under a legal disqualification to contract marriage.
>
> [Emphasis added.]

[49] It is the absence of any statutory prohibition of same-sex marriages which gives rise to the question of whether there is, nonetheless, a prohibition against same-sex marriage at common law.

[50] As earlier stated, the trial judge found that there was a common law bar to same-sex marriage; namely, the common law definition of marriage. In that regard, he relied on the oft-quoted passage from ***Hyde v. Hyde and Woodmansee*** (1866), L.R. 1 P. & D. 130 (H.L.), at p. 130. There, in deciding whether to recognize a polygamous marriage, the court described marriage as follows, at p. 133:

> Marriage has been well said to be something more than a contract, either religious or civil — to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of "husband" and "wife" is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have

> some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.
>
> [Emphasis added.]

[51] This definition of marriage was referred to and adopted in ***Corbett v. Corbett***, [1970] 2 All E.R. 33 (Probate, Divorce and Admiralty Div.), (where the court nullified a marriage involving a transgendered individual), and in ***Keddie v. Currie*** (1991), 60 B.C.L.R. (2d) 1 (C.A.), at p. 14 (where this Court expressly adopted the definition of marriage in ***Hyde***, albeit in relation to a discussion of common law marriages).

[52] After considering the appellants' arguments that the definition of marriage in ***Hyde*** should not be treated as either binding or persuasive, or as an expression of the common law, and that the adoption of that definition in later cases constituted no more than *obiter dicta*, the trial judge made the following comments (at paras. 82-83):

> I do not construe *Hyde* to create any new judicial characterization of the construct of marriage but to accurately state the law as it was before 1866 and, in the absence of any indication to the contrary, as it was at November 19, 1858.
>
> Section 6 of the *Marriage Act*, R.S.B.C. 1996, c. 282 provides that the law of British Columbia with respect to the validity of marriage is the common law of England at November 19, 1858 until that law is changed by statute. Because no legislative body has attempted to change the common law of England as it was at the relevant date, "marriage" in British Columbia in 2001 is a relationship that may only subsist between one man and one woman.

[53] The Ontario Divisional Court in ***Halpern*** also found that marriage at common law meant the marriage between a man and a woman, agreeing in that respect with the majority in ***Layland v. Ontario (Minister of Consumer & Commercial Relations)*** (1993), 14 O.R. (3d) 658 (Ont. Div. Ct), which, in turn, adopted the definition of marriage set forth in ***Hyde***, which was also adopted in ***North v. Matheson*** (1974), 52 D.L.R. (3d) 280 (Man. Co. Ct).

[54] In ***Hendricks***, Madam Justice Lemelin briefly discussed the issue of whether there was a common law bar to same-sex marriage, although she did so in the context of the

legislative provisions which were at issue before her. In the result, she concluded as follows (at para. 94):

> When the *Constitution Act, 1867* was enacted, marriage was the union of a man and a woman, whether under the common law or under the *Civil Code of Lower Canada.* In any event, how could the situation have been otherwise when our law made homosexuality a criminal offence until 1969?

[55] In my view, the appellants' submission that there was no common law bar to same-sex marriage cannot be sustained. As Professor Lahey acknowledged in her factum, the issue of same-sex marriage was unlikely to have arisen in the face of the criminal sanctions in place in both England and Canada. The adoption by Canadian courts of the definition of marriage in ***Hyde*** and ***Corbett*** did not arise in the context of same-sex marriages, but there is little doubt that the definition was in accord with the law in England and in Canada. The ***Keddie*** decision, in particular, discusses the history of marriage in England in some detail, and it is clear from that discussion that marriage was an opposite-sex institution and recognized by the courts as such.

[56] In the result, I am satisfied that the trial judge was correct in finding that there was a bar to same-sex marriage at common law by virtue of the common law definition of marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others."

D. A Plain Reading of the *Marriage Act*

[57] The appellants submitted that, on a plain reading of the ***Marriage Act***, and particularly s. 7 of that Act (quoted at para. 48, *supra*), it is apparent there is no prohibition to the issuance of marriage licences to same-sex couples. Section 7 refers to the solemnization of marriage "between any 2 persons neither of whom is under a legal disqualification to contract marriage."

[58] The full answer to that argument is that there is a common law bar to same-sex marriage which operates as a legal disqualification to contract marriage within the meaning of s. 7. In other words, by virtue of the common law definition of marriage, same-sex couples are "under a legal disqualification to contract marriage".

E. The Constitutional Issue

[59] Before addressing the appellants' arguments based on the Charter and Charter values, it is necessary to deal with the trial judge's critical finding that neither the provincial nor

federal governments has the power to alter the common law definition of marriage, but that a constitutional amendment would be required. This finding underlies much of the trial judge's reasoning, and impacts directly on his Charter analysis, particularly his s. 1 analysis.

[60] The appellants and both the AGC and the AGBC took the position before the trial judge that the issue of whether two individuals of the same sex could marry was an issue relating to the capacity to marry, and that issues relating to capacity fell within Parliament's jurisdiction to legislate concerning "Marriage and Divorce" under s. 91(26). It is apparent, however, that the trial judge did not see the issue that way, as evidenced by the following extract from his reasons for judgment (at paras. 100 and 101):

> In my opinion, a question that arises in the context of these petitions is whether same-sex relationships fall within the class of "Marriage and Divorce" so as to be subject to governance by Parliament, or within the class of Civil Rights so as to be subject to governance by the province. If such relationships are neither matters of marriage nor civil rights, they may be governed by Parliament for the peace, order and good government of Canada.
>
> This answer to the question is important because the petitioners seek remedies that presuppose the meaning of "marriage" can be changed by Parliament. As I see it, the assumption around which the debate before me has been framed is that Parliament is empowered to enact legislation **to define a head of power** as opposed to enacting legislation **under the authority of a head of power**. This distinction is important.
>
> [Emphasis added.]

[61] As earlier noted, the trial judge's resolution of the issue, as he reframed it, was summarized at paras. 10-11 of his reasons:

> Parliament may not enact legislation to change the legal meaning of marriage to include same-sex unions. Under s. 91(26) of the *Constitution Act, 1867*, Parliament was given exclusive legislative jurisdiction over marriage, a specific kind of legal relationship. By attempting to change the legal nature of marriage, Parliament would be self-defining a legislative power conferred upon it by the Constitution rather than enacting legislation pursuant to that power. Parliament would be attempting to amend the Constitution without

> recourse to the amendment process provided by the *Constitution Act, 1982*. Alternatively, Parliament would be attempting to enact legislation in respect of civil rights exclusively within the legislative authority of the province.
>
> "Marriage", as a federal head of power with legal meaning at confederation, is not amenable to *Charter* scrutiny. One part of the Constitution may not be used to amend another.

[62] In essence, what the trial judge found was that the meaning of "marriage" in s. 91(26), "Marriage and Divorce", was fixed for all time as of 1867, and that any attempt by Parliament to change the meaning of marriage to something other than what it meant in 1867 would constitute a unilateral amendment to the Constitution. Unlike its jurisdiction under other heads of power under s. 91, Parliament could not legislate to expand or otherwise change the definition of marriage, because to do so would render it something other than marriage in s. 91(26).

[63] The trial judge expressly rejected the submission of the parties that the question of whether same-sex couples can marry is a question dealing with capacity to marry. In so doing, he distinguished the decisions of ***North v. Matheson***, *supra,* and ***Layland***, *supra*, on the basis that the courts in those cases "assumed, without analysis, that the inability of persons of the same sex to marry was a question of capacity." The trial judge stated that those decisions were not binding on him and that he did not find them persuasive. He went on to state (at para. 119):

> In my opinion, the fact that persons of the same sex may not legally marry is not a question of capacity. Rather the inability of same-sex couples to marry results from the fact that, by its legal nature, marriage is a relationship which only persons of opposite sex may formalize. The requirement that parties to a legal marriage be of opposite sex goes to the core of the relationship and has nothing to do with capacity.

[64] He also stated that it was open to the provincial government to recognize and formalize same-sex "relationships" (as opposed to same-sex "marriages") as a matter of civil rights within British Columbia.

[65] Finally, the trial judge concluded that the Charter could not be used to override the essential meaning of marriage in s. 91(26). The trial judge found support for this view in

Reference Re Bill 30, An Act to Amend the Education Act (Ont.) [1987] 1 S.C.R. 1149, and ***Adler v. Ontario***, [1996] 3 S.C.R. 609. I will discuss these cases later in these reasons in relation to the Charter issues.

[66] The trial judge's views of the immutability of the meaning of the word "marriage" in s. 91(26) were expressly rejected by the courts in both ***Halpern*** and ***Hendricks***.

[67] In ***Halpern***, Mr. Justice LaForme framed the constitutional issue which formed the foundation of the trial judge's decision in this case as follows (at paras. 99-101 of his reasons):

> The submission of the Association [of Marriage and the Family] on this court's lack of jurisdiction is founded in the language of the Constitution Act, 1867. Specifically, it argues that sections 91(26) and 92(12) of the Constitution Act - when using the word "marriage" - contain within that word a clear, constitutionally enshrined meaning: "the union between a man and a woman". The argument then goes on to assert that, therefore any change to the meaning of the word "marriage" found in sections 91 and 92 requires a formal amendment to the Constitution Act.
>
> Simply put, the Association argues that the meaning of the word "marriage" contained in the Constitution Act, expressly limits Parliament to legislating under that head of power to unions between one man and one woman. It goes on to say that the power granted to Parliament under that head of legislative authority does not authorize it to legislate with respect to unions between members of the same sex. Similarly, under s. 92(12), a province can only solemnize marriages between a man and a woman; a province does not possess the constitutional power to solemnize "marriages" between members of the same sex.
>
> In sum, the Association submits that the impediment to the applicants' claim for the legal recognition of marriage between same-sex couples does not lie in federal or provincial legislation - or in the common law - but in the language of the constitution itself. Respectfully, I disagree.

[68] The Associations' submission, summarized in these paragraphs, was essentially the view adopted by the trial judge here. The only participants who support that position on

these appeals are the B.C. Coalition and the Interfaith Coalition.

[69] In ***Halpern,*** Mr. Justice LaForme observed that adopting the Association's view would freeze the meaning of the word "marriage" to the meaning it held for the framers of the Constitution in 1867. In rejecting this view, Mr. Justice LaForme stated, at para. 106 of his reasons:

> Given that "marriage" refers only to a topic or "class of subjects"[39] of potential legislation, it cannot contain an internal frozen in time meaning that reflects the presumed framers' intent as it may have been in 1867. It must — as the authorities have proclaimed — be interpreted "as describing a subject for legislation, not a definite object." Canadian courts have repeatedly declared that the language of the B.N.A. Act "must be given a large and liberal interpretation" recognizing "the magnitude of the subject with which it purports to deal in very few words".[40] [Footnotes omitted.]

[70] After providing examples to illustrate the extent of his disagreement with the views of the trial judge in this case, Mr. Justice LaForme concluded his analysis on this point at para. 123 of his reasons:

> In the end — and as a necessary preliminary matter — I find that the word "Marriage" used in the Constitution Act, 1982 does not of itself limit the ability of Parliament to legislate same-sex marriages under head s. 91(26). That is, it does not contain within it a definition that has the force of constitutional entrenchment, and thereby requires constitutional amendment to vary.

[71] I agree with Mr. Justice LaForme's analysis of this issue, which is consistent with, and elaborated upon, in the submissions of the appellants, the AGC and the AGBC. (I also note that Madam Justice Lemelin rejected the trial judge's views on this issue at paras. 109-122 of her reasons for judgment.)

[72] I will address the trial judge's related finding that the Charter cannot be used to "trump" or invalidate the constitutionalized meaning of the word "marriage" in s. 91(26) later in these reasons.

F. Charter Values

[73] Counsel for the appellants have urged this Court to analyze the common law bar to same-sex marriage based on Charter values. In so doing, they seek to avoid the full analysis required where legislation is under Charter scrutiny. They submit that where the common law (not legislation) is the subject of a Charter challenge, the court is entitled to base its analysis on Charter values, and to grant a remedy without engaging in a full s. 1 analysis. One of the authorities upon which the appellants rely in that regard is ***R. v. Swain***, [1991] 1 S.C.R. 933. There, in considering a common law rule which was found to violate s. 7 of the Charter, Chief Justice Lamer stated, at p. 978:

> Before turning to s. 1, however, I wish to point out that because this appeal involves a *Charter* challenge to a common law, judge-made rule, the *Charter* analysis involves somewhat different considerations than would apply to a challenge to a legislative provision. For example, having found that the existing common law rule limits an accused's rights under s. 7 of the *Charter*, it may not be strictly necessary to go on to consider the application of s. 1.... [I]t could, in my view, be appropriate to consider at this stage whether an alternative common law rule could be fashioned which would not be contrary to the principles of fundamental justice.
>
> If a new common law rule could be enunciated which would not interfere with an accused person's right to have control over the conduct of his or her defence, I can see no conceptual problem with the Court's simply enunciating such a rule to take the place of the old rule, without considering whether the old rule could nonetheless be upheld under s. 1 of the *Charter*. Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken.

[74] In the result, however, the court applied the formal s. 1 analysis set forth in ***R. v. Oakes***, [1986] 1 S.C.R. 103. (See also ***R. v. Robinson***, [1996] 1 S.C.R. 683, where the court also engaged in a full s. 1 analysis in relation to a common law rule which was found to have breached the Charter.)

[75] The AGC and AGBC submit that when state action is engaged, as here, by the refusal of a Ministry official to issue

marriage licences to same-sex couples, the court should engage in a full Charter analysis. They also submit that when state action is challenged, deference should be accorded to the state, both in the nature of the analysis undertaken, and, more particularly, in determining the appropriate remedy in the event of a breach of the Charter or Charter values. The respondents say this is so whether the state action is founded on legislation or, as here, on the common law.

[76] This issue was also raised in ***Halpern***, where the court was presented with similar arguments to those presented here. Mr. Justice LaForme agreed with the appellants that it was open to the court to consider the challenge to the common law bar to same-sex marriage by applying Charter values, rather than by a full Charter analysis, including the application of the s. 1 ***Oakes*** test. In the result, however, he adopted the more conservative route of engaging in a full Charter analysis. Even applying this more stringent test, he found that the common law bar to same-sex marriage breached s. 15 of the Charter and was not saved under s. 1. Mr. Justice Blair and Associate Chief Justice Smith (now Chief Justice Smith) agreed with his approach in that regard.

[77] I agree with the appellants and with the court in ***Halpern*** that this Court has a choice as to whether it will engage in a full Charter analysis where the challenge is to the common law rather than to a legislative provision. In my view, however, the more conservative approach chosen by the trial judge in this case and by the court in ***Halpern*** is the more appropriate approach. My conclusion in that regard turns on the fact that, like the trial judge, I do not view the appellants' request for relief in these appeals as a request for a "mere" incremental change in the law.

[78] I agree with Mr. Justice Blair in ***Halpern*** that the relief requested, if granted, would constitute a profound change to the meaning of marriage, and would be viewed as such by a significant portion of the Canadian public, whether or not it supported the change. It would certainly be viewed as a profound change by those who hold religious beliefs which are incompatible with an acceptance of same-sex marriages. While an informed member of the public would be aware of the significant changes that have taken place over the last several years in expanding the rights and obligations of same-sex couples, many members of the public have regarded those changes, in themselves, as highly controversial. On the other hand, many others have viewed them as simply a long-overdue recognition of the need to provide equality to those for whom equality has, in the past, been denied.

[79] Whatever one's point of view, the fact that previous legislative changes and changes to the common law have expanded the rights of same-sex couples does not make the

further expansion of those rights any less significant to those who, by reason of religious beliefs, or otherwise, view these changes as momentous. Applying the rigour of a full Charter analysis to a challenge to the law in these circumstances recognizes the importance of the rights at stake and the significance of those rights not only to the appellants, but to other members of society who have an interest in this issue.

[80] I will say more about the question of deference to Parliament when I address the issue of remedies later in these reasons.

G. Section 15 of the Charter

[81] Section 15 of the Charter provides:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[82] The trial judge dealt with the Charter issues in the alternative, in the event he was in error in finding that Parliament did not have the power to legislate with respect to same-sex marriages. In finding that the common law bar to same-sex marriage breached s. 15 of the Charter, he applied the analysis set forth in ***Law v. Canada (Minister of Employment and Immigration)***, [1999] 1 S.C.R. 497. He concluded, first, that the common law bar to same-sex marriage subjected the appellants to differential treatment, in that same-sex couples do not have the choice to marry which is available to opposite-sex couples. Secondly, he concluded that the differential treatment was based on an analogous ground; namely, sexual orientation. (That is not disputed by the respondents.) Thirdly, he concluded that the differential treatment discriminated against the appellants in a substantive sense. In arriving at that conclusion, the trial judge stated, in part (at paras. 174-78):

> In terms of the factors identified in *Law*, Canadian courts accept the fact that gays and

lesbians have been disadvantaged by stereotyping and prejudice. There is a need in the gay and lesbian community to have society acknowledge the value and reality of same-sex unions. The distinction between opposite-sex and same-sex relationships in the marriage context excludes the latter from a social and legal institution of considerable importance and tends to perpetuate the stereotypical and frequently critical community view of gays and lesbians.

The Attorney General of Canada says that across cultures, opposite-sex marriage is intended to "complement nature with culture for the sake of reproduction and the intergenerational cycle". She says "the universal norm of marriage has been a culturally approved opposite-sex relationship intended to encourage the birth (and rearing) of children". The Attorney General says legal marriage does not discriminate in a substantive sense because gays and lesbians cannot achieve the ends for which marriage exists.

As I appreciate their position, the petitioners say that marriage in Canadian society can no longer be said to exist for a purpose that is uniquely heterosexual. Rather it is a means of acknowledging a committed personal relationship and the sex of the partners is not material.

The legislative changes in British Columbia, many other provinces, and Parliament that have removed many of the historic legal, economic and social differences between married, unmarried opposite-sex, and same-sex couples while leaving the legal nature of marriage intact, have sharpened the focus on the fact that marriage is a relationship reserved for partners of opposite sex. Social changes have diminished the importance of marriage to some extent. Advances in alternative means of conception have decreased reliance upon marriage as an opposite-sex relationship required for the purpose of procreation. Children are conceived by, born to, and raised by opposite-sex, unmarried couples. They are also adopted and raised by same-sex couples.

Viewed in the context of legislative change and social and cultural evolution, and notwithstanding the material distinction between opposite-sex and same-sex couples with respect to reproductive capacity, the omission to provide some form of legal status for same-sex couples enhances, rather than

> diminishes, the stereotypical view that same-sex relationships are less important or valuable than opposite-sex relationships. There is now sufficient practical similarity between the economic and social consequences of opposite-sex and same-sex relationships that affording one but not the other the opportunity to acquire a legal and formal status discriminates in the substantive sense of the word.

[83] The respondents, supported by the B.C. Coalition and the Interfaith Coalition, submit that the trial judge erred in his s. 15 analysis.

[84] Like the trial judge in this case, the court in ***Halpern*** found that the common law definition of marriage breached s. 15 of the Charter. While I agree with the trial judge's summary of the s. 15 analysis just quoted, I prefer the more extensive analysis in ***Halpern***. Since ***Halpern*** addresses the s. 15 issues raised in this appeal, I will refer to it at some length.

[85] In his s. 15 analysis, Mr. Justice Blair provided an overview of the nature of marriage, both historically, and in its present-day civil context. His review was based, in part, on the affidavits filed in that case, most of which are also found in the materials filed in this case. I would adopt Mr. Justice Blair's historical review of marriage set out at paras. 39-84 of his reasons. In so doing, I recognize that his review cannot be comprehensive, given the breadth of the subject, and the limited materials available to the court. Rather than repeat Mr. Justice Blair's analysis, I will simply highlight certain aspects of it.

[86] In the course of his discussion, Mr. Justice Blair noted that the anthropological, sociological and historical materials filed revealed that "marriage" has almost universally been viewed as a monogamous union between a man and a woman in which procreation was emphasized. There were exceptions to this in some societies at certain points in time, but those exceptions never became the norm. Mr. Justice Blair also noted, however, that the evidence indicated that "marriage is not a static institution within any society" but "evolves as society changes" (para. 49). At para. 56 of his reasons, Mr. Justice Blair referred to the evidence of some of these changes, particularly in the twentieth century:

> That there has been a sea-change in laws and attitudes relating to marriage and the family in the past century is recognized by Professor Witte at the conclusion of his evidence regarding what he refers to as the Enlightenment Contractarian model of marriage. He states (at paras. 60-61):

> In the early part of the twentieth century, sweeping new laws were passed to govern marriage formalities, divorce, alimony, marital property, wife abuse, child custody, adoption, child support, child abuse, juvenile delinquency, education of minors, among other subjects. Such sweeping legal changes had several consequences. Marriages became easier to contract and easier to dissolve. Wives received greater independence in their relationships outside the family. Children received greater protection from the abuses, and neglect of their parents, and greater access to benefit rights. *And the state eclipsed the church as the principal external authority governing marriage and family life. The Catholic sacramental concept of the family governed principally by the church and the Protestant concepts of the family governed by the church and broader Christian community began to give way to a new privatist concept of the family whereby the wills of the marital parties became primary. Neither the church, nor the local community, nor the paterfamilias could override the reasonable expressions of will of the marital parties themselves.*
>
> In the past three decades, the Enlightenment call for the privatization of marriage and the family has come to greater institutional expression. Prenuptial contracts, determining in advance the respective rights and duties of the parties during and after marriage, have gained prominence. No-fault unilateral divorce statutes are in place in virtually every state. Legal requirements of parental consent and witnesses to marriage have become largely dead letters. *The functional distinction between the rights of the married and the unmarried has been narrowed by a growing constitutional law of sexual autonomy and privacy. Homosexual, bisexual, and other intimate associations have gained increasing acceptance at large, and at law.* [Emphasis of Blair R.S.J.]

[87] After briefly reviewing the historical basis of marriage, Mr. Justice Blair turned to a view of what marriage is today. He linked the relevance of that discussion to a s. 15 analysis at paras. 60-61 of his reasons:

> If the courts are to examine the common law definition of marriage through the prism of *Charter* rights and values, it seems to me they must recognize and appreciate the changes that have occurred over the centuries, and more rapidly in recent years, in the attitudes of society towards the family, marriage and relationships, as outlined above. To do otherwise is to abandon the purpose of s. 15 — which is to promote equality and prevent discrimination arising from such ills as stereotyping, prejudice and historical wrongs — and to fail to consider the common law principle under review in a contextual fashion. As noted already, the Courts are mandated to take a purposive and contextual approach to the analysis and interpretation of s. 15 equality rights: *Law v. Ontario (Minister of Employment and Immigration)*, *supra*.
>
> Given this background and dramatically shifting attitudes towards marriage and the family, I have a great deal of difficulty accepting that heterosexual procreation is such a compelling and central aspect of marriage in 21st century *post-Charter* Canadian society that it — and it alone — gives marriage its defining characteristic and justifies the exclusion of same-sex couples from that institution. It is, of course, the only characteristic with which such couples are unable to conform (and even that inability is changing).

[88] It is apparent from the trial judge's reasons in this case, that here, as in ***Halpern***, the AGC, B.C. Coalition and Interfaith Coalition emphasized their view that the most fundamental and essential defining characteristic of marriage is heterosexual procreation, and, to a lesser extent, heterosexual child-rearing. (Several of the experts' affidavits use the word "procreation" to include child-rearing.) As Professor Lahey noted in her submissions, there has been some "shift" in the position of these participants on appeal, but only to the extent of clarifying that they do not rely on heterosexual procreation as the only significant aspect of marriage. They recognize that marriage fulfills other societal needs, including mutual care and support, companionship, and economic interdependency.

[89] On this appeal, counsel for the B.C. Coalition (supported by the Interfaith Coalition) stated that his clients' position with respect to the applicability of s. 15 of the Charter was concisely stated by Mr. Justice Blair at para. 80 of his

reasons, and then erroneously rejected at paras. 81-84 inclusive. Paragraph 80 states:

> Whether one approaches "marriage" from the classical perspective based upon the narrow basis that heterosexual procreation is its fundamental underpinning and what makes it "unique in its essence, that is, its opposite sex nature", or whether one approaches it from a different perspective, is pivotal to the s. 15 analysis, however. If one accepts the former view as the starting premise, there is little debate, it seems to me. The institution of marriage is inherently and uniquely heterosexual in nature. Therefore, same-sex couples are not excluded from it on the basis of a personal characteristic giving rise to differential treatment founded upon a stereotypical difference. Same-sex couples are simply *incapable* of marriage because they cannot procreate through heterosexual intercourse. Thus it is a distinction created by the nature of the institution itself which precludes homosexuals from access to marriage, not a personal characteristic or stereotypic prejudice. The equality provisions of s. 15 are not violated, and even if they were, the same analysis would justify the law in preserving the institution for heterosexual couples and therefore save the classic definition of "marriage" on a s. 1 analysis.

[90] Paragraphs 81-84 contain Mr. Justice Blair's response to this argument:

> On the other hand, once it is accepted that same-sex unions can feature the same conjugal and other incidents of marriage, except for heterosexual intercourse, and if heterosexual procreation is no longer viewed as the central characteristic of marriage, giving it its inherently heterosexual uniqueness, the s. 15 argument must succeed. If heterosexual procreation is not essential to the nature of the institution, then the same-sex couples' sexual orientation is the only distinction differentiating heterosexual couples from homosexual couples in terms of access to the institution of marriage. For all of the reasons articulated by Mr. Justice LaForme, this differentiation is discriminatory of the same-sex couples' equality rights as set out in s. 15 of the *Charter* and cannot stand.
>
> First, the common law definition of marriage draws a formal distinction between the Applicant

> Couples and the couples "married" by the MCCT [Metropolitan Community Church of Toronto], on the one hand, and heterosexual couples, on the other hand, on the basis of their personal characteristics, i.e., their sexual orientation. Secondly, the claimants are subject to differential treatment on the basis of a ground of discrimination which has been held to be a ground analogous to those enumerated in s. 15, namely, sexual orientation. Finally, the differential treatment of the claimants discriminates against them in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping and historical disadvantage: see, *Law v. Canada (Minister of Employment and Immigration)*, *supra*, *per* Iacobucci J. at p. 524 [S.C.R.], adopted by Cory J. and Iacobucci J. in *M. v. H.*, *supra*, at pp. 46-47 [S.C.R.].
>
> The evidence supports a conclusion that "marriage" represents society's highest acceptance of the self-worth and the wholeness of a couple's relationship, and, thus, touches their sense of human dignity at its core.
>
> The equality provisions of s. 15(1) of the *Charter* are therefore violated.

[91] Mr. Justice Blair's analysis of s. 15, summarized in these passages, builds upon Mr. Justice LaForme's s. 15 analysis which, in turn, was accepted by Associate Chief Justice Smith in her concurring reasons. Their reasons with respect to the s. 15 analysis are also consistent with those of Madam Justice Lemelin, with necessary modifications arising from the fact that she was dealing with legislative barriers to marriage, rather than a barrier created by the common law definition of marriage. I do not find it useful to repeat their analyses in my reasons.

[92] As earlier stated, I prefer the more extensive and contextual analysis of the s. 15 issue engaged in by the courts in ***Halpern*** and ***Hendricks*** to the more limited analysis of the trial judge in this case. I agree with the trial judge's conclusion under s. 15, and with his overall application of the principles set forth in ***Law***, summarized at para. 82, *supra*. I note however, that while the trial judge's s. 15 analysis does not appear to accept the emphasis placed by the AGC, B.C. Coalition and Interfaith Coalition on the procreational significance of marriage, he relies almost entirely on the procreational function of marriage in his s. 1

Oakes analysis. As will become apparent, I do not find his s. 1 analysis persuasive.

[93] Before leaving the s. 15 issue, I will comment on one extract from the authorities upon which significant reliance was placed by AGC, the B.C. Coalition and the Interfaith Coalition. That reference is to the remarks of Mr. Justice La Forest in ***Egan v. Canada***, [1995] 2 S.C.R. 513 at paras. 21 and 25 of that decision:

> My colleague Gonthier J. in *Miron v. Trudel* [[1995] 2 S.C.R. 418] has been at pains to discuss the fundamental importance of marriage as a social institution, and I need not repeat his analysis at length or refer to the authorities he cites. Suffice it to say that marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate *raison d'être* transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.
>
> * * *
>
> It is the social unit that uniquely has the <u>capacity</u> to procreate children and generally care for their upbringing . . . .

[94] There were five sets of reasons in ***Egan***. In the passage quoted above, Mr. Justice La Forest spoke for a minority. The case concerned the claim of a same-sex partner for spousal benefits under the ***Old Age Security Act***, R.S.C. 1985, c. O-9. By a 5:4 majority, the court held that the limitation in the definition of "spouse" in that Act to a person of the opposite sex was constitutional. Mr. Justice Iacobucci, (speaking for himself and Mr. Justice Cory, in dissent), made a point of stating that the case was not to be taken as constituting a challenge to the traditional common law or statutory concept of marriage. Further, the passage from Mr. Justice La Forest's reasons, although emphasizing the aspects of procreation and child-rearing relied on by the AGC and two of the intervenors, does not purport to limit the ability of

Parliament to change the definition of what La Forest J. referred to as "the traditional marriage". It is not disputed that heterosexual marriages represent the tradition; the question is whether that tradition must be re-evaluated and altered in light of the Charter. For the reasons contained in this judgment, I have joined with other jurists in concluding that the answer to that question is "yes".

[95] In summary, I agree with the trial judge that the appellants have established that the common law definition of marriage (which operates as a common law bar to same-sex marriage) breaches their right to equality under s. 15 of the Charter.

[96] Before turning to a s. 1 analysis, I will refer briefly to the other Charter breaches upon which the appellants rely.

H. Other Alleged Charter Breaches

[97] The appellants allege that the common law bar to same-sex marriage also breaches their rights under s. 2 (freedom of conscience and religion, freedom of expression and freedom of association); s. 6 (mobility rights); s. 7 (right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice); and s. 28 (rights guaranteed equally to both sexes).

[98] The trial judge found that the appellants had not established a breach of their rights under any of these provisions.

[99] None of the parties addressed these alleged breaches of the Charter in their oral arguments. Rather, they were content to rely upon the submissions set forth in their factums. The trial judge spent little time on these issues.

[100] Since I have found a breach of the appellants' rights under s. 15 of the Charter and since, for the reasons I am about to give, I have concluded that this breach is not justifiable under s. 1 of the Charter, I do not find it necessary to deal with the other alleged breaches. My failure to comment on those issues should not be taken as either an acceptance or a rejection of the appellants' submissions in that regard.

I. Section 1 of the Charter

[101] Section 1 of the Charter provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by

law as can be demonstrably justified in a free and democratic society.

[102] The trial judge found that the breach of the appellants' s. 15 equality rights could be justified under s. 1 of the Charter. He approached his analysis of this issue from two perspectives. First, he referred back to his original constitutional analysis whereby he concluded that "marriage" in s. 91(26) could only mean a marriage between a man and a woman since that was its meaning both prior to and at the time of Confederation. He then relied on that analysis, supported by his interpretation of the ***Bill 30*** and ***Adler*** decisions, to justify his ultimate conclusion that the common law definition of marriage was a reasonable limit on the appellants' s. 15 Charter rights. His views with respect to this aspect of his s. 1 analysis are reflected in the following passages at paras. 199-200 of his decision:

> Quite apart from the kind of analysis approved by the Supreme Court of Canada in *Oakes* [*supra*] and *Thomson* [*infra*], the limitation [of the appellants' s. 15 equality rights] is justified by the Constitution itself. There is no doubt that its framers and the Parliament of England knew and comprehended the nature of marriage in 1867. As opposed to the general subject of family, it was marriage and divorce that were considered matters of such national importance that exclusive jurisdiction over them should be assigned to the federal Parliament. The Constitution, itself, expressed an intention that marriage was an issue of pressing and substantial national importance and differentiation and discrimination inherent in the fact that marriage was then, and still is, an opposite-sex relationship would be permitted.
>
> Section 52(1) of the *Constitution Act, 1867* provides that the Constitution is the supreme law of Canada. Under s. 91(26), Parliament was given plenary power in relation to marriage, a construct that is, by its nature, not inclusive of everyone. Failure to rely on s. 1 to save the core nature of legal marriage would result in one aspect of the Constitution being used to limit a plenary power in respect of which qualification was not intended. I do not understand the law to be that the *Charter* can be used to alter the head of power under s. 91(26) so as to make marriage something it was not when the various fields of legislative authority were divided between Parliament and the provinces.

[103] The trial judge noted that, in ***Bill 30***, the Supreme Court of Canada found that s. 15 of the Charter could not be applied to invalidate s. 93 of the ***Constitution Act, 1867***. The trial judge concluded (at para. 202) that:

> By analogy, the *Charter* cannot be used in an attempt to eliminate the differences or distinctions that must inevitably result as a consequence of Parliament relying on the "Marriage and Divorce" head of power under s. 91(26) to define some relationships, but not others, as marriage.

[104] The trial judge then went on to apply a more traditional ***Oakes*** analysis to reach the same conclusion. In that analysis, he emphasized: the opposite-sex nature of marriage as the norm within and across societies; the biological reality that opposite-sex couples may "as between themselves" propagate the species, whereas same-sex couples cannot; that marriage is the primary means by which humankind perpetuates itself in Canadian society; and the passage from Mr. Justice La Forest's reasons in ***Egan***, quoted in part at para. 93, *supra.*

[105] Ultimately, the trial judge concluded that the salutary effects of retaining the common law definition of marriage far outweighed the deleterious effects of changing that definition, particularly since, in his view, the effect of recent legislative change had narrowed or minimized the differences between same-sex and opposite-sex relationships.

[106] As earlier stated, I do not accept the trial judge's conclusion that the definition of marriage under s. 91(26) of the ***Constitution Act, 1867*** was fixed at that time, and for all time, to mean marriage between a man and a woman, subject only to constitutional amendment. For that reason, it may not be strictly necessary for me to deal with his finding that s. 15 of the Charter could not be used to invalidate what he found to be the one and only meaning of marriage under s. 91(26). Because the trial judge viewed the ***Bill 30*** and ***Adler*** cases as strong support for his analysis, however, I will deal with them here. In so doing, I note that the B.C. Coalition took the position at trial, and on appeal, that these two cases were a "full answer" to the claims of the appellants.

[107] ***Bill 30*** was a reference regarding the constitutionality of legislation in Ontario designed to extend provincial funding to senior grades of Roman Catholic High Schools. The Ontario government took the position that the Bill was immune from Charter scrutiny (and, in particular, immune from a s. 15 analysis) because it represented an exercise by the province of its legislative powers under s. 93(1) of the ***Constitution Act, 1867*** with respect to denominational schools and,

therefore, was protected by s. 29 of the Charter. Those provisions state:

> 93. In and for each Province the Legislature may exclusively make laws in relation to Education, subject and according to the following provisions:—
>
> (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:
>
> . . .
>
> (3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education.
>
> * * *
>
> 29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

[108] In the result, Madam Justice Wilson, speaking for the majority, accepted the government's position and held that s. 93(1) was immune from Charter scrutiny. She further found that s. 93(1) was protected from Charter scrutiny even without recourse to s. 29 of the Charter. The B.C. Coalition places particular emphasis on the following passage (at pp. 1197-99) of Madam Justice Wilson's reasons as applying, by analogy, to a Charter attack on what the trial judge found to be the inherent meaning of "marriage" in s. 91(26):

> I have indicated that the rights or privileges protected by s. 93(1) are immune from *Charter* review under s. 29 of the *Charter*. I think this is clear. What is less clear is whether s. 29 of the *Charter* was required in order to achieve that result. In my view, it was not. I believe it was put there simply to emphasize that the special treatment guaranteed by the constitution to denominational, separate or dissentient schools, even if it sits uncomfortably with the concept of equality embodied in the C*harter* because not available to other schools, is nevertheless not impaired by the *Charter*. It was

never intended, in my opinion, that the *Charter* could be used to invalidate other provisions of the Constitution, particularly a provision such as s. 93 which represented a fundamental part of the Confederation compromise. Section 29, in my view, is present in the *Charter* only for greater certainty, at least in so far as the Province of Ontario is concerned.

To put it another way, s. 29 is there to render immune from *Charter* review rights or privileges which would otherwise, i.e., but for s. 29 be subject to such review. The question then becomes: does s. 29 protect rights or privileges conferred by legislation passed under the province's plenary power in relation to education under the opening words of s. 93? In my view, it does, although again I do not believe it is required for this purpose. The Confederation compromise in relation to education is found in the whole of s. 93, not in its individual parts. The section 93(3) rights and privileges are not guaranteed in the sense that the s. 93(1) rights and privileges are guaranteed, i.e., in the sense that the legislature which gave them cannot later pass laws which prejudicially affect them. But they are insulated from *Charter* attack as legislation enacted pursuant to the plenary power in relation to education granted to the provincial legislatures as part of the Confederation compromise. Their protection from *Charter* review lies not in the guaranteed nature of the rights and privileges conferred by the legislation but in the guaranteed nature of the province's plenary power to enact that legislation. What the province gives pursuant to this plenary power the province can take away, subject only to the right of appeal to the Governor General in Council. But the province is master of its own house when it legislates under its plenary power in relation to denominational, separate or dissentient schools. This was the agreement at Confederation and, in my view, it was not displaced by the enactment of the *Constitution Act, 1982*. As the majority of the [Ontario] Court of Appeal concluded at pp. 575-76:

> These educational rights, granted specifically to the Protestants in Quebec and the Roman Catholics in Ontario, make it impossible to treat all Canadians equally. The country was founded upon the recognition of special or unequal educational rights for specific religious groups in Ontario and

> Quebec. The incorporation of the *Charter* into the *Constitution Act, 1982*, does not change the original Confederation bargain. A specific constitutional amendment would be required to accomplish that.
>
> I would conclude, therefore, that even if Bill 30 is supportable only under the province's plenary power and s. 93(3) it is insulated from *Charter* review.
>
> [Emphasis added.]

[109] What is apparent from these passages, and from the judgment of Wilson J. as a whole, is that the reason s. 93 was immune from Charter review was because of a pre-confederation compromise ("bargain") designed to protect the Roman Catholic minority in Ontario and the Protestant minority in Quebec. This compromise, which carried with it certain built-in rights (and inequalities), was entrenched in the ***Constitution Act, 1867***. Section 29 of the Charter did not grant the right to immunity from Charter review under s. 15 or otherwise; it simply recognized and preserved the rights conferred by s. 93 in their historical context.

[110] In my view, there is no valid analogy between s. 93 and s. 91(26) in that regard. It is true that there were constitutional bargains made in the division of powers between the federal and provincial governments which were eventually reflected in the power over "Marriage and Divorce" being given to the federal government under s. 91(26), and the power over "The Solemnization of Marriage in the Province" being given to the provinces under s. 92(12). However, these bargains had nothing to do with the meaning of marriage or the capacity to marry. They certainly did not have anything to do with guaranteeing the opposite-sex nature of marriage, remembering that same-sex conduct at that time constituted a criminal offence. It was accepted that the federal government would control capacity to marry. There was no suggestion that the capacity to marry in 1867 was then, and always would be, dictated by the *status quo* with respect to capacity to marry as it existed in 1867. By contrast, s. 93 expressly provided for a compromise which necessarily discriminated on the basis of religion, and effectively resulted in entrenched inequality insofar as that provision was concerned. Unlike s. 91(26), s. 93 did not simply confer the power to make laws in relation to the subject-matter of the section (education), it also conferred rights which were not subject to the Charter.

[111] I am not persuaded that the reasoning in ***Bill 30*** can be extended to apply to the definition of marriage in s. 91(26) as suggested by the B.C. Coalition and the Interfaith Coalition.

[112] In my view, the ***Adler*** decision, which also involved a Charter challenge to s. 93, and which explicitly applied the ***Bill 30*** analysis, adds nothing of significance to this discussion.

[113] In the result, therefore, I am satisfied that the ***Bill 30*** and ***Adler*** decisions do not support the trial judge's constitutional analysis or his s. 1 analysis. In particular, I find that these cases do not support the trial judge's conclusion that s. 15 of the Charter cannot apply to alter the meaning of marriage at common law, or that the effect of such a decision would be an illegitimate use of one provision of the Constitution (s. 15) to invalidate another provision of the Constitution (s. 91(26)).

[114] I turn, then, to an analysis of the trial judge's application of the ***Oakes*** test as his alternative basis for justifying the limitation of the appellants' rights under s. 15.

[115] It is common ground that in applying a s. 1 analysis, the onus is on the party seeking to uphold the limitation of a constitutional right. The burden of proof, on a preponderance of probability, must be applied rigorously. The party bearing the burden of proof must show that the limitation of the Charter right is "demonstrably justified". As Madam Justice McLachlin stated in ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1995] 3 S.C.R. 199 at para. 128: "The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration." Here, the onus and the burden of proof rested on the AGC.

[116] The nature of a s. 1 analysis has been set forth, with minor variations, in numerous authorities. In essence, the government must establish that the impugned provision (the common law definition of marriage which precludes marriage between same-sex couples) is a reasonable limit on the appellants' s. 15 equality rights which is justifiable in a free and democratic society. In order to do so, the government must show that the objective of the impugned provision is "pressing and substantial". The means chosen to achieve the objective must also pass a three-part proportionality test; namely that: (1) the means are rationally connected to the objective; (2) the impugned provision impairs the constitutionally protected right no more than is necessary to achieve the objective; and (3) the deleterious effects of the impugned provision are proportional both to their salutary effects and to the importance of the objective which has been identified as pressing and substantial. These criteria will be applied in a contextual manner and with varying degrees of rigour depending on the context of the appeal. (See, for example, the majority

decision of Mr. Justice Bastarache in ***Thomson Newspapers Co. v. Canada (Attorney General)***, [1998] 1 S.C.R. 877.)

[117] It is apparent in his analysis under s. 1, that the trial judge accepted the arguments of AGC, the B.C. Coalition and the Interfaith Coalition that the principal, albeit not the sole, purpose or objective of marriage is procreation and the perpetuation of mankind; that this objective is pressing and substantial; that retaining the opposite-sex definition of marriage is proportional and necessary to obtaining this objective; and that the salutary effects of retaining this definition more than offset the resultant denial of the appellants' equality rights under s. 15 of the Charter.

[118] After referring to evidence that opposite-sex marriage had been the norm in societies similar to Canada, and that marriage had been an historically important institution, the trial judge emphasized what he viewed as the biological and procreative core of marriage in the following passages from his s. 1 analysis (at paras. 205-207 and 210-211):

> While, in the recent past, same-sex couples have been accorded many of the rights and obligations previously reserved for married couples, the one factor in respect of which there cannot be similarity is the biological reality that opposite-sex couples may, as between themselves, propagate the species and thereby perpetuate humankind. Same-sex couples cannot.
>
> I accept the petitioners' submission that same-sex couples create family units and discharge child-rearing responsibilities much as opposite-sex couples do. Perhaps the best evidence of that is the fact that adoption laws in this and other provinces have been amended to recognize the needs and capabilities of same-sex couples. I also accept the fact that numerous alternatives to heterosexual intercourse have evolved and continue to evolve in Canadian society to facilitate procreation.
>
> At the same time, whatever views one holds of its other aspects, it cannot be denied that marriage remains the primary means by which humankind perpetuates itself in our society. I reject the petitioners' submissions that this is a recent rationalization of the origin and essential importance of marriage. The state has a demonstrably genuine justification in affording recognition, preference, and precedence to the nature and character of the core social and legal arrangement by which society endures.

* * *

> Other than the desire for public recognition and acceptance of gay and lesbian relationships, there is nothing that should compel the equation of a same-sex relationship to an opposite-sex relationship when the biological reality is that the two relationships can never be the same. That essential distinction will remain no matter how close the similarities are by virtue of social acceptance and legislative action.
>
> I concur in the submission of the Attorney General of Canada that the core distinction between same-sex and opposite-sex relationships is so material in the Canadian context that no means exist by which to equate same-sex relationships to marriage while at the same time preserving the fundamental importance of marriage to the community.
>
> [Emphasis added.]

[119] As earlier noted, the AGC acknowledged that there are other aspects of marriage which are important, beyond what the trial judge referred to as the "core" function of marriage; namely, procreation. The trial judge emphasized, however, that it is the procreative potential of the partners to an opposite-sex marriage which truly distinguishes their relationships from those of same-sex couples. For him, that was the crucial factor which justified the application of s. 1 to override the appellants' equality rights.

[120] The view that procreation is the over-riding pressing and substantial concern governing all stages of the s. 1 analysis was discussed, and rejected, by the courts in ***Hendricks*** and ***Halpern***.

[121] In ***Hendricks***, Madam Justice Lemelin found that the potential for procreation was not a precondition for the civil matrimonial bond. She noted that the definition of families had changed significantly over time; that some married couples opt not to have children; some couples cannot have children; proof of fertility is not a prerequisite to marriage; and that homosexual couples may now have children by means of medically-assisted procreation and through adoption. While these remarks were made in the context of her s. 15 analysis, they are also valid in relation to s. 1. At para. 149 of her decision, Lemelin J. stated:

> Marriage is no longer necessarily defined by the children born of the union. Marriage is an exclusive, intimate and lasting relationship of two

> persons who agree to live together and to support each other. Marriage is celebrated publicly and with a certain solemnity. More than a contract, it is an institution that one may not leave without observing certain specific conditions and without obtaining the judgment of a court. Changes in society and the general context of the family and technological developments may indicate a greater flexibility in the institution in better meeting the needs of homosexual couples.

[122] It is interesting to note that while the trial judge emphasized many of the same factors as Madam Justice Lemelin in his s. 15 analysis, he then significantly diminished the significance of those factors in his s. 1 analysis.

[123] In ***Halpern***, Mr. Justice LaForme found that the AGC had not met the onus upon it to demonstrate that procreation was the essential objective of marriage. In coming to that conclusion, he referred to earlier court decisions regarding the validity of marriage and capacity, and concluded that those decisions had not been founded on the view that procreation was the main purpose of marriage. Rather, he accepted the applicants' position that the emphasis on procreation as the justification for marriage arose once same-sex couples began asserting their claims for equal recognition of their relationships.

[124] I take a somewhat different approach to this part of the s. 1 analysis than did Mr. Justice LaForme. While it may be that the authorities referred to by counsel do not demonstrate that procreation has been the essential object of marriage, there is a body of evidence before the court which indicates that, historically and across cultures, procreation was viewed as such an essential objective. The evidence also shows, however, that the emphasis on procreation as being at the core of marriage has been displaced to a considerable degree by the evolving view of marriage and its role in society referred to by Mr. Justice Blair and Madam Justice Lemelin in their reasons for judgment. It is on that basis that I find that procreation (including the rearing of children) resulting from sexual intercourse between a husband and a wife, can no longer be regarded as a sufficiently pressing and substantial objective that it satisfies the first stage of the s. 1 analysis. Or, to view the first-stage issue from a somewhat different perspective, I am not satisfied that denying same-sex couples the right to marry because of their inability to procreate "as between themselves" is a sufficiently pressing and substantial objective to satisfy the first stage of the s. 1 analysis.

[125] Even if procreation is a sufficiently pressing and substantial objective of marriage to pass the first stage of the ***Oakes*** analysis, however, I agree with Mr. Justice LaForme that it is not sufficiently compelling to justify the breach of the appellants' s. 15 rights under the balance of the s. 1 analysis.

[126] LaForme J. found that there was no rational connection between the importance of procreation (and child-rearing) and the restriction of same-sex marriage. He stated (at para. 248 of his reasons) that:

> There simply is no evidentiary basis to support the proposition that granting same-sex couples the freedom to marry would either diminish the number of children conceived by heterosexual couples, or reduce the quality of care with which heterosexual couples raise their children.

[127] I agree. In this case, it is not clear on what basis the trial judge assumed that permitting same-sex couples to marry would diminish the procreative potential for marriage (unless he was responding to a perceived threat that if same-sex couples were permitted to marry, significant numbers of opposite-sex couples would no longer do so). It is also unclear why he downplayed the very real fact that same-sex couples can "have" and raise children, given technological developments and changes in the law permitting adoption. It is apparent, however, that the trial judge was of the view that permitting same-sex marriages represented a significant threat to the institution of marriage. In that regard, I agree with the comments of Mr. Justice Iacobucci at para. 211 of ***Egan****, supra,* (albeit in relation to the question of providing economic benefits to same-sex couples) where he said he failed to see "how according same-sex couples the benefits flowing to opposite-sex couples in any way inhibits, dissuades or impedes the formation of heterosexual unions."

[128] Mr. Justice LaForme also found (at para. 250 of his reasons) that the restriction on same-sex marriage failed the rational connection test because it was both:

- overinclusive in that it allows non-procreative heterosexuals to marry; and
- underinclusive because it denies same-sex parents and intended parents the legal right to marry.

[129] Mr. Justice LaForme further found that the common law bar to same-sex marriage did not constitute a minimal impairment of the equality rights of same-sex couples. Rather, he found that the law excluded them entirely from the institution of marriage based upon a protected personal characteristic.

[130] Finally, Mr. Justice LaForme rejected the AGC's submission, which was accepted by the trial judge in this case, that the salutary effects of retaining the opposite-sex requirement of marriage outweighed the deleterious effects to same-sex couples. He repeated his earlier statements that the appellants' quest for the right to marry was not "merely" a quest for social recognition or social status, but a quest for equality itself. He expanded on this view at paras. 261-264 of his reasons:

> The restriction against same-sex marriage is an offence to the dignity of lesbians and gays because it limits the range of relationship options available to them. The result is they are denied the autonomy to choose whether they wish to marry. This in turn conveys the ominous message that they are unworthy of marriage. For those same-sex couples who do wish to marry, the impugned restriction represents a rejection of their personal aspirations and the denial of their dreams.
>
> There is no meaningful evidence that points to any legitimate benefit to the rights denial. In this case, an absolute common law bar on the freedom of same-sex couples to marry does not constitute the "least intrusive" means by which the state could achieve the purported goal of providing institutional support to couples who have and raise children. On the contrary, this goal could easily be advanced without denying same-sex couples the freedom to marry.
>
> Further, I find that there is no merit to the argument that the rights and interests of heterosexuals would be affected by granting same-sex couples the freedom to marry. Contrary to the assertion of Interfaith Coalition — I cannot conclude that freedom of religion would be threatened or jeopardized by legally sanctioning same-sex marriage. No religious body would be compelled to solemnize a same-sex marriage against its wishes and all religious people — of any faith — would continue to enjoy the freedom to hold and espouse their beliefs. Thus, there is no need for any infringement of the equality rights of lesbians

> and gays that arises because of the restrictions against same-sex marriage.
>
> In this case, I am satisfied that, even if the exclusion of same-sex couples from marriage recognition were otherwise appropriate, the harms of exclusion are so severe that the violation of their rights and freedoms could not be justified. Given the serious violation of fundamental rights and freedoms, and the evidence of numerous and damaging effects on an already disadvantaged segment of society, I can find no benefit whatsoever to the exclusion.

[131] Subject to the further comments I will make with respect to deference to Parliament and my comments concerning the historical importance attributed to procreation in marriage, I am in substantial agreement with Mr. Justice LaForme's analysis under s. 1 to which I have just referred.

[132] In the context of her s. 1 analysis, Madam Justice Lemelin also dealt with the interest of various religious groups in the institution of marriage and their objections to same-sex marriage based on their religious beliefs. In that regard, Madam Justice Lemelin made the following comments, at paras. 164-166 of her reasons, with which I agree:

> No one would dispute that religions have played a major role in marriage since their beliefs and rites have governed the development of the institution's framework. The secularization of marriage has forced our legislatures to take into account the fact that the institution is civil and cannot be defined solely in religious terms. We are no longer living in the homogenous community of the last century. Multiculturalism, various religious beliefs, the secularization of several institutions testify to the openness of Canadian society. The State must ensure compliance by each individual but no single group can impose its values or define a civil institution.
>
> The Honourable Justice Dickson stated the following in *Big M Drug Mart* [[1985] 1 S.C.R. 295 at 337] in his analysis of the *Lord's Day Act:*
>
> > What may appear good and true to a majoritarian religious group, or to the state acting at its behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards

> religious minorities from the threat of "tyranny of the majority".
>
> The Court cannot conclude that this is the situation in the instant case although the Churches are firmly and sometimes tenaciously opposed to granting homosexual couples access to marriage, as the expert opinions of the Ligue and the Alliance explain. Despite this *caveat*, the statements of Justice Dickson can be transposed to any question where the courts are asked to consider a situation in which religious values come up against social concerns, since believers alone may not define marriage or require the maintenance of the *status quo*.

[133] It is interesting to note that in Quebec, Article 367 of the Civil Code provides that no minister of religion may be forced to celebrate a marriage that his or her religion and the rules of his or her religious society do not recognize. A concern was raised in this appeal by the Interfaith Coalition that, absent such a provision, religions whose beliefs preclude the recognition of same-sex marriage could find themselves required to participate in such marriages, or be discriminated against because of their beliefs. As noted by Lemelin J. in ***Hendricks***, there is no hierarchical list of rights in the Charter, and freedom of religion and conscience must live together with s. 15 equality rights. One cannot trump the other. In her view, shared by the court in ***Halpern***, the equality rights of same-sex couples do not displace the rights of religious groups to refuse to solemnize same-sex marriages which do not accord with their religious beliefs. Similarly, the rights of religious groups to freely practise their religion cannot oust the rights of same-sex couples seeking equality, by insisting on maintaining the barriers in the way of that equality. While it is always possible for an individual to attempt to challenge the practices of a religious group as being contrary to Charter values, the possibility of such a challenge cannot justify the maintenance of the common law barrier to same-sex marriage.

[134] As was stated by the intervenor, the Liberal Rabbis, in its factum:

> For a number of years there has been a growing debate in religious communities about same-sex marriage. Different religious groups have adopted various positions on this issue. There is obviously no uniform religious perspective on same-sex marriage. If the Court supports a continuation of the exclusion of same-sex marriage, it will be choosing sides in this religious debate. By

> allowing same-sex marriage, either through a civil ceremony generally available to all or a religious ceremony from a religious group [which] chooses to offer it, the courts still respect the freedom of conscience and religion of those religious groups who choose not to perform same-sex marriage. By not allowing same-sex marriage, the court forces some religious groups to accept the religious practices of others by forcing them to exclude same-sex couples from marriage.

[135] In the result, I agree with the courts in ***Halpern*** and ***Hendricks*** that the common law bar to same-sex marriage cannot be justified under s. 1 of the Charter.

J. Remedy

[136] In their factums, the relief sought by the appellants included:

> (a) a declaration pursuant to s. 52 of the ***Constitution Act, 1867*** that the common law bar against same-sex marriage is of no force or effect because it violates rights and freedoms guaranteed by s. 15 of the Charter and does not constitute a reasonable and demonstrably justifiable limit on those rights within the meaning of s. 1 of the Charter; and

Date: 20030610
File: C39172 and C39174

Synopsis of *Halpern et al v. Attorney General of Canada et al*

Overview:

From April 22 to 25, 2003, a panel of the Court of Appeal for Ontario, composed of Chief Justice McMurtry and Justices MacPherson and Gillese, heard a constitutional challenge to the definition of marriage. The definition of marriage, which is found only in the common law, requires that marriage be between "one man and one woman". This opposite-sex requirement was challenged by eight same-sex couples ("the Couples") as offending their right to equality as guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms* ("the *Charter*") on the basis of sexual orientation. The opposite-sex requirement was also challenged by the Metropolitan Community Church of Toronto ("MCCT") as violating its right to freedom of religion under s. 2(a) of the *Charter* and its equality rights under s. 15(1) of the *Charter* on the basis of religion.

On July 12, 2002, the Divisional Court (Associate Chief Justice Smith, Regional Senior Justice Blair and Justice LaForme) unanimously held that the opposite-sex requirement of marriage infringed the Couples' equality rights under s. 15(1) of the *Charter* and was not saved as a justifiable limit in a free and democratic society under s. 1 of the *Charter*. The Divisional Court was also unanimous in ruling that the rights of MCCT as a religious institution were not violated. The Court was divided on the issue of remedy. The formal judgment of the Court declared the common law definition to be inoperative. The declaration was suspended for two years to enable Parliament to fashion an appropriate remedy. If Parliament failed to act within two years, then the common law definition of marriage would be automatically reformulated by substituting the words "two persons" for "one man and one woman".

In a unanimous judgment, the Court of Appeal upholds the decision of the Divisional Court that the common law definition of marriage offends the Couples' equality rights under s. 15(1) of the *Charter* in a manner that cannot be justified in a free and democratic society. The Court further agrees that MCCT's rights as a religious institution are not violated. On remedy, the Court declares the current definition of marriage to be invalid, reformulates the definition of marriage to be "the voluntary union for life of two persons to the exclusion of all others", and orders the declaration of invalidity and the reformulated definition to have immediate effect.

Violation of Equality Rights under s. 15(1) of the *Charter*:

The Court holds that the dignity of persons in same-sex relationships is violated by the exclusion of same-sex couples from the institution of marriage.

The opposite-sex requirement in the definition of marriage creates a formal distinction between opposite-sex and same-sex couples on the basis of sexual orientation, an analogous ground of discrimination under s. 15(1) of the *Charter*.

A law that prohibits same-sex couples from marrying does not accord with the needs, capacities and circumstances of same-sex couples. Same-sex couples are capable of forming long, lasting, loving and intimate relationships. Denying same-sex couples the right to marry perpetuates the contrary view, namely, that same-sex couples are not capable of forming loving and lasting relationships, and thus same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships. Moreover, same-sex couples can choose to have children through adoption, surrogacy and donor insemination. Importantly, procreation and child-rearing are not the only purposes of marriage, or the only reason why couples choose to marry.

The Court does not accept that, given recent amendments to federal law extending benefits to same-sex couples, same-sex couples are afforded equal treatment under the law. In many instances, statutory rights and obligations do not attach until the same-sex couple has been cohabiting for a specified period of time. Married couples, on the other hand, have instant access to all attendant rights and obligations. Additionally, not all marital rights and obligations have been extended to cohabiting couples. Further, s. 15(1) of the *Charter* guarantees more than equal access to economic benefits; it requires a consideration of whether persons and groups have been excluded from fundamental societal institutions. Exclusion from marriage – a fundamental societal institution – perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.

Violation of s. 15(1) of the *Charter* is not justified under s. 1 of the *Charter*:

The Court holds that the Attorney General of Canada has failed to demonstrate that the violation of the equality rights of the Couples is justified in a free and democratic society under s. 1 of the *Charter*.

First, the Attorney General of Canada did not demonstrate any pressing and substantial objective for maintaining marriage as an exclusively heterosexual institution. A law whose purpose is uniting the two opposite sexes has the result of favouring one form of relationship over another, and suggests that uniting two persons of the same sex is of lesser importance. The encouragement of procreation and child-rearing does not require the exclusion of same-sex couples from marriage. Heterosexual couples will not stop having or raising children because same-sex couples are permitted to marry. An increasing percentage of children are born to and raised by same-sex couples. Although a union of two persons of the opposite sex is the only union that can “naturally” procreate, it is

not a sufficiently pressing and substantial objective to justify infringing the equality rights of same-sex couples.

Second, the Attorney General of Canada did not demonstrate that the means chosen to achieve its objectives are reasonable and justified in a free and democratic society. The opposite-sex requirement in marriage is not rationally connected to the encouragement of procreation and child-rearing. The law is overinclusive because the ability to naturally procreate and the willingness to raise children are not prerequisites of marriage for opposite-sex couples. The law is underinclusive because it excludes same-sex couples that have and raise children. Companionship also is not rationally connected to the exclusion of same-sex couples. Gay men and lesbians are as capable of providing companionship to their partners as persons in opposite-sex relationships. Additionally, the opposite-sex requirement in the definition of marriage does not minimally impair the rights of the Couples. Same-sex couples have been completely excluded from a fundamental societal institution. Complete exclusion cannot constitute minimal impairment.

Remedy:

The common law definition of marriage is inconsistent with the Charter to the extent that it excludes same-sex couples. The remedy that best corrects the inconsistency is to declare invalid the existing definition of marriage to the extent that it refers to “one man and one woman” and to reformulate the definition of marriage as “the voluntary union for life of two persons to the exclusion of all others”. This remedy achieves the equality required by s. 15(1) of the *Charter* but ensures that the legal state of marriage is not left in a state of uncertainty.

The Court does not accept that the only remedy that should be ordered is a declaration of invalidity and that the declaration should be suspended to permit Parliament to respond. A declaration of invalidity alone fails to meet the Court’s obligation to reformulate a common law rule that breaches a *Charter* right. A temporary suspension allows a state of affairs that has been found to violate standards embodied in the *Charter* to persist for a time despite the violation. A temporary suspension is warranted only in limited circumstances, such as where striking down the law poses a potential danger to the public, threatens the rule of law, or would have the effect of denying benefits under the law to deserving persons. There is no evidence that these limited circumstances exist here.

DATE: 20030610
DOCKET: C39172 and C39174

COURT OF APPEAL FOR ONTARIO

MCMURTRY C.J.O., MACPHERSON and GILLESE JJ.A.

B E T W E E N :	)	
	)	
HEDY HALPERN and COLLEEN ROGERS, MICHAEL LESHNER and MICHAEL STARK, ALOYSIUS PITTMAN and THOMAS ALLWORTH, DAWN ONISHENKO and JULIE ERBLAND, CAROLYN ROWE and CAROLYN MOFFATT, BARBARA MCDOWALL and GAIL DONNELLY, ALISON KEMPER and JOYCE BARNETT	)	***Roslyn J. Levine, Q.C.,*** ***Gail Sinclair*** **and** ***Michael H. Morris*** **for the Attorney General of Canada, appellant, respondent by way of cross-appeals**
	)	***Martha A. McCarthy*** **and** ***Joanna L. Radbord*** **for the applicant couples, respondents, appellants by way of cross-appeal**
Applicants (Respondents, Appellants by way of cross-appeal)	)	***R. Douglas Elliott, R. Trent Morris*** **and** ***Victoria Paris*** **for the Metropolitan Community Church of Toronto, respondent, appellant by way of cross-appeal**
- and -	)	
ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF ONTARIO, and NOVINA WONG, THE CLERK OF THE CITY OF TORONTO	)	***Lisa J. Solmon*** **for the Attorney General of Ontario, respondent**
	)	***Leslie Mendelson*** **and** ***Roberto E. Zuech*** **for the Clerk of the City of Toronto, respondent**
Respondents (Appellant, Respondent by way of cross-appeal)	)	

- and -	)	***Cynthia Petersen*** **and** ***Vanessa Payne***
	)	**for Egale Canada Inc.,**
	)	**intervenor**
	)	
EGALE CANADA INC., METROPOLITAN COMMUNITY CHURCH OF TORONTO, THE INTERFAITH COALITION ON MARRIAGE AND FAMILY, THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO, CANADIAN COALITION OF LIBERAL RABBIS FOR SAME-SEX MARRIAGE, and CANADIAN HUMAN RIGHTS COMMISSION	)	***Peter R. Jervis*** **and** ***Bradley W. Miller***
	)	**for The Interfaith Coalition on Marriage and Family,**
	)	**intervenor**
	)	
	)	***David M. Brown*** **and** ***Cindy Silver***
	)	**for The Association for Marriage and the Family in Ontario,**
	)	**intervenor**
	)	
	)	***Ed Morgan***
	)	**for the Canadian Coalition of Liberal**
Intervenors	)	**Rabbis for Same-Sex Marriage,**
	)	**intervenor**
	)	
	)	***Leslie A. Reaume, Andrea Wright***
A N D B E T W E E N :	)	**and** ***Elizabeth Kikuchi***
	)	**for the Canadian Human Rights Commission,**
METROPOLITAN COMMUNITY CHURCH OF TORONTO	)	**intervenor**
	)	
	)	
Applicant (Respondent, Appellant by way of cross-appeal)	)	
	)	
- and -	)	
	)	
ATTORNEY GENERAL OF CANADA and THE ATTORNEY GENERAL OF ONTARIO	)	
	)	
	)	
Respondents (Appellant, Respondent by way of cross-appeal)	)	
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- and -	)	
	)	
HEDY HALPERN and COLLEEN ROGERS, MICHAEL LESHNER and MICHAEL STARK, ALOYSIUS PITTMAN and THOMAS ALLWORTH, DAWN ONISHENKO and JULIE ERBLAND, CAROLYN ROWE and CAROLYN MOFFATT, BARBARA MCDOWALL and GAIL DONNELLY, ALISON KEMPER and JOYCE BARNETT, EGALE CANADA INC., THE INTERFAITH COALITION ON MARRIAGE AND FAMILY,THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO, CANADIAN COALITION OF LIBERAL RABBIS FOR SAME-SEX MARRIAGE, and CANADIAN HUMAN RIGHTS COMMISSION	)	
	)	
	)	
Intervenors	)	
	)	
	)	**Heard: April 22 to April 25, 2003**

On appeal from a judgment of the Divisional Court (Heather F. Smith, A.C.J.S.C., Robert A. Blair R.S.J., and Harry LaForme J.) dated July 12, 2002, reported at 60 O.R. (3d) 321.

BY THE COURT:

A. INTRODUCTION

[1] The definition of marriage in Canada, for all of the nation's 136 years, has been based on the classic formulation of Lord Penzance in *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P.&D. 130 at 133: "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others." The central question in this appeal is whether the exclusion of same-sex couples from this common law definition of marriage breaches ss. 2(a) or 15(1) of the *Canadian Charter of Rights and Freedoms* ("the

Charter") in a manner that is not justified in a free and democratic society under s. 1 of the *Charter*.

[2] This appeal raises significant constitutional issues that require serious legal analysis. That said, this case is ultimately about the recognition and protection of human dignity and equality in the context of the social structures available to conjugal couples in Canada.

[3] In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at 530, Iacobucci J., writing for a unanimous court, described the importance of human dignity:

> 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 by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. 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.

[4] The Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, also recognizes the importance of protecting the dignity of all persons. The preamble affirms that "the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". It states:

> [I]t is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province;

[5] Marriage is, without dispute, one of the most significant forms of personal relationships. For centuries, marriage has been a basic element of social organization in

societies around the world. Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual's sense of self-worth and dignity.

[6] The ability to marry, and to thereby participate in this fundamental societal institution, is something that most Canadians take for granted. Same-sex couples do not; they are denied access to this institution simply on the basis of their sexual orientation.

[7] Sexual orientation is an analogous ground that comes under the umbrella of protection in s. 15(1) of the *Charter*: see *Egan v. Canada*, [1995] 2 S.C.R. 513, and *M. v. H.*, [1999] 2 S.C.R. 3. As explained by Cory J. in *M. v. H.* at 52-53:

> In *Egan*...this Court unanimously affirmed that sexual orientation is an analogous ground to those enumerated in s. 15(1). Sexual orientation is "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs" (para. 5). In addition, a majority of this Court explicitly recognized that gays, lesbians and bisexuals, "whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage" (para. 175, *per* Cory J.; see also para. 89, *per* L'Heureux-Dubé J.).

[8] Historically, same-sex equality litigation has focused on achieving equality in some of the most basic elements of civic life, such as bereavement leave, health care benefits, pensions benefits, spousal support, name changes and adoption. The question at the heart of this appeal is whether excluding same-sex couples from another of the most basic elements of civic life - marriage - infringes human dignity and violates the Canadian Constitution.

B. FACTS

(1) The parties and the events

[9] Seven[1] gay and lesbian couples ("the Couples") want to celebrate their love and commitment to each other by getting married in civil ceremonies. In this respect, they share the same goal as countless other Canadian couples. Their reasons for wanting to engage in a formal civil ceremony of marriage are the same as the reasons of heterosexual couples. By way of illustration, we cite the affidavits of three of the persons who seek to be married:

> *Aloysius Edmund Pittman*
>
> I ask only to be allowed the right to be joined together by marriage the same as my parents and my heterosexual friends.
>
> *Julie Erbland*
>
> I understand marriage as a defining moment for people choosing to make a life commitment to each other. I want the family that Dawn and I have created to be understood by all of the people in our lives and by society. If we had the freedom to marry, society would grow to understand our commitment and love for each other. We are interested in raising children. We want community recognition and support. I doubt that society will support us and our children, if our own government does not afford us the right to marry.
>
> *Carolyn Rowe*
>
> We would like the public recognition of our union as a "valid" relationship and would like to be known officially as more than just roommates. Married spouse is a title that one chooses to enter into while common-law spouse is something that a couple happens into if they live together long enough. We want our families, relatives, friends, and larger society to know and understand our relationship for what it is, a loving committed relationship between two people. A traditional

[1] Eight gay and lesbian couples originally challenged the decision of the Clerk of the City of Toronto not to grant them marriage licences. One of the couples separated after the decision of the Divisional Court but before the hearing of this appeal. The persons involved indicated that they did not wish to continue to participate in the proceedings.

> marriage would allow us the opportunity to enter into such a commitment. The marriage ceremony itself provides a time for family and friends to gather around a couple in order to recognise the love and commitment they have for each other.

[10] The Couples applied for civil marriage licences from the Clerk of the City of Toronto. The Clerk did not deny the licences but, instead, indicated that she would apply to the court for directions, and hold the licences in abeyance in the interim. The Couples commenced their own application. By order dated August 22, 2000, Lang J. transferred the Couples' application to the Divisional Court. The Clerk's application was stayed on consent.

[11] In roughly the same time frame, the Metropolitan Community Church of Toronto ("MCCT"), a Christian church that solemnizes marriages for its heterosexual congregants, decided to conduct marriages for its homosexual members. Previously, MCCT had felt constrained from performing marriages for same-sex couples because it understood that the municipal authorities in Toronto would not issue a marriage licence to same-sex couples. However, MCCT learned that the ancient Christian tradition of publishing the banns of marriage was a lawful alternative under the laws of Ontario to a marriage licence issued by municipal authorities: see *Marriage Act*, R.S.O. 1990, c. M.3, s. 5(1).

[12] Two couples, Kevin Bourassa and Joe Varnell and Elaine and Anne Vautour, decided to be married in a religious ceremony at MCCT. In an affidavit, Elaine and Anne Vautour explained their decision:

> We love one another and are happy to be married. We highly value the love and commitment to our relationship that marriage implies. Our parents were married for over 40 and 50 years respectively, and we value the tradition of marriage as seriously as did our parents.

[13] The pastor at MCCT, Rev. Brent Hawkes, published the banns of marriage for the two couples during services on December 10, 17 and 24, 2000. On January 14, 2001, Rev. Hawkes presided at the weddings at MCCT. He registered the marriages in the Church Register and issued marriage certificates to the couples.

[14] In compliance with the laws of Ontario, MCCT submitted the requisite documentation for the two marriages to the Office of the Registrar General: see *Vital Statistics Act*, R.S.O. 1990, c. V.4, s. 19(1) and the Regulations under the *Marriage Act*, R.R.O. 1990, Reg. 738, s. 2(3). The Registrar refused to accept the documents for

registration, citing an alleged federal prohibition against same-sex marriages. As a result, MCCT launched its application to the Divisional Court.

[15] By order dated January 25, 2001, Lang J. consolidated the Couples' and MCCT's applications.

(2) The litigation

[16] The Couples' application and MCCT's application were heard by a panel of the Divisional Court consisting of Smith A.C.J.S.C., Blair R.S.J. and LaForme J. In reasons released on July 12, 2002, the court unanimously held that the common law definition of marriage as the "lawful and voluntary union of one man and one woman to the exclusion of all others" infringed the Couples' equality rights under s. 15(1) of the *Charter* in a manner that was not justified under s. 1 of the *Charter*. The court also held that the remaining *Charter* rights claimed by the applicants were either not applicable or not infringed. In particular, the court did not accept MCCT's arguments anchored in s. 2(a), freedom of religion.

[17] The panel's ruling on remedy was not unanimous. Smith A.C.J.S.C. was of the view that Parliament should legislate the appropriate remedy and that it should be given two years to do so, failing which the parties could return to the court to seek an appropriate remedy. LaForme J. favoured immediate amendment, by the court, of the common law definition of marriage by substituting the words "two persons" for "one man and one woman". Blair R.S.J. adopted a middle position; he would have allowed Parliament two years to amend the common law rule, failing which the reformulation remedy proposed by LaForme J. would be automatically triggered. It is Blair R.S.J.'s position that is reflected in the formal judgment of the court.

[18] The appellant Attorney General of Canada ("AGC") appeals from the judgment of the Divisional Court on the equality issue.

[19] The Couples cross-appeal on the question of remedy alone. They seek a declaration of unconstitutionality and a reformulation of the definition of marriage, both to take place immediately, and related personal remedies in the nature of *mandamus*.

[20] MCCT also cross-appeals on the question of remedy. In addition, it cross-appeals from the Divisional Court's dismissal of its claim that the current definition of marriage infringes its ss. 2(a) and 15(1) rights as a religious institution.

[21] Because of the public importance of the issues, several parties were given permission to intervene in the appeal.

[22] The Association for Marriage and the Family in Ontario and the Interfaith Coalition on Marriage and Family support the position of the AGC.

[23] The Canadian Human Rights Commission, Egale Canada Inc. and the Canadian Coalition of Liberal Rabbis for Same-Sex Marriage support the position of the Couples and MCCT.

[24] The Attorney General of Ontario and the Clerk of the City of Toronto take no position with respect to the issues raised by the appeal and the cross-appeal. Both state that they will abide by any order made by this court.

C. ISSUES

[25] We frame the issues as follows:

(1) What is the common law definition of marriage? Does it prohibit same-sex marriages?

(2) Is a constitutional amendment required to change the common law definition of marriage, or can a reformulation be accomplished by Parliament or the courts?

(3) Does the common law definition of marriage infringe MCCT's rights under ss. 2(a) and 15(1) of the *Charter*?

(4) Does the common law definition of marriage infringe the Couples' equality rights under s. 15(1) of the *Charter*?

(5) If the answer to question 3 or 4 is 'Yes', is the infringement saved by s. 1 of the *Charter*?

(6) If the common law definition of marriage is unconstitutional, what is the appropriate remedy and should it be suspended for any period of time?

D. ANALYSIS

[26] Before turning to the issues raised by the appeal, we make four preliminary observations.

[27] First, the definition of marriage is found at common law. The only statutory reference to a definition of marriage is found in s. 1.1 of the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, which provides:

> For greater certainty, the amendments made by this Act do not affect the meaning of the word "marriage", that is, the lawful union of one man and one woman to the exclusion of all others.

[28] The *Modernization of Benefits and Obligations Act* is the federal government's response to the Supreme Court of Canada's decision in *M. v. H.* The Act extends federal benefits and obligations to all unmarried couples that have cohabited in a conjugal relationship for at least one year, regardless of sexual orientation. As recognized by the parties, s. 1.1 does not purport to be a federal statutory definition of marriage. Rather, s. 1.1 simply affirms that the Act does not change the common law definition of marriage.

[29] Second, it is clear and all parties accept that, the common law is subject to *Charter* scrutiny where government action or inaction is based on a common law rule: see *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *R. v. Swain*, [1991] 1 S.C.R. 933; *R. v. Salituro*, [1991] 3 S.C.R. 654; and *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130. Accordingly, there is no dispute that the AGC was the proper respondent in the applications brought by the Couples and MCCT, and that the common law definition of marriage is subject to *Charter* scrutiny.

[30] Third, the issues raised in this appeal are questions of law. Accordingly, the standard of review applicable to the decision of the Divisional Court is that of correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8. As explained by Iacobucci and Major JJ. at para. 9: "[T]he primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill [these] functions, appellate courts require a broad scope of review with respect to matters of law."

[31] Fourth, this court is not the first court to deal with the issues relating to the constitutionality of the definition of same-sex marriage. In addition to the judgments prepared by the three judges of the Divisional Court, courts in two other provinces have addressed the same issues we must face.

[32] In *Hendricks v. Quebec (Attorney General)*, [2002] J.Q. No. 3816 (S.C.), Lemelin J. declared invalid the prohibition against same-sex marriages in Quebec caused by the intersection of two federal statutes and the *Civil Code of Quebec* on the basis that it contravened s. 15(1) of the *Charter* and could not be saved under s. 1. She stayed the declaration of invalidity for two years.

[33] In *EGALE Canada Inc. v. Canada (Attorney General)*, [2003] B.C.J. No. 994, released on May 1, 2003, the British Columbia Court of Appeal declared the common law definition of marriage unconstitutional, substituted the words "two persons" for "one

man and one woman" and suspended the declaration of unconstitutionality until July 12, 2004, the expiration of the two-year suspension ordered by the Divisional Court in this case.

[34] We want to record our admiration for the high quality of the reasons prepared by all of the judges in these cases. As will become clear, we agree with a great deal of their reasoning and conclusions on the equality issue. Our reasons can be shortened, given the clarity and eloquence of our judicial colleagues.

(1) The common law rule regarding marriage

[35] The preliminary argument on this appeal advanced by the Couples is that there is no common law bar to same-sex marriages. The intervenor Egale Canada Inc. ("Egale") supported this argument and expanded on the Couples' submissions.

[36] As previously mentioned, the classic formulation of marriage is found in the English decision of *Hyde v. Hyde and Woodmansee*, "the voluntary union for life of one man and one woman, to the exclusion of all others." Egale argues that *Hyde* and *Corbett v. Corbett*, [1970] 2 All E.R. 33 (P.D.A.), the other English case cited as authority for the common law restriction against same-sex marriage, have a weak jurisprudential foundation and ought not to be followed. Egale points out that *Hyde* dealt with the validity of a potentially polygamous marriage, and argues that the comments in *Hyde* about marriage being between opposite-sex persons are *obiter*. With respect to *Corbett*, Egale argues that it is based on outdated, narrow notions of sexual relationships between women and men. The Couples adopt Egale's submissions, and further argue that *M. v. H.* overruled, by implication, any common law restriction against same-sex marriages.

[37] In our view, the Divisional Court was correct in concluding that there is a common law rule that excludes same-sex marriages. This court in *Iantsis v. Papatheodorou*, [1971] 1 O.R. 245 at 248, adopted the *Hyde* formulation of marriage as the union between a man and a woman. This understanding of the common law definition of marriage is reflected in s. 1.1 of the *Modernization of Benefits and Obligations Act*, which refers to the definition of marriage as "the lawful union of one man and one woman to the exclusion of all others." Further, there is no merit to the submission that *M. v. H.* overruled, by implication, the common law definition of marriage. In *M. v. H.*, Iacobucci J. stated, at p. 83:

> This appeal does not challenge traditional conceptions of marriage, as s. 29 of the [*Family Law Act*, R.S.O. 1990, c. F.3] expressly applies to unmarried opposite-sex couples. *That being said, I do not wish to be understood as making any comment on marriage or indeed on related issues.*
>
> [Emphasis added.]

(2) Constitutional amendment

[38] The *Constitution Act, 1867* divides legislative powers relating to marriage between the federal and provincial governments. The federal government has exclusive jurisdiction over "Marriage and Divorce": s. 91(26). The provinces have exclusive jurisdiction over the solemnization of marriage: s. 92(12).

[39] The intervenor, The Association for Marriage and the Family in Ontario ("the Association"), takes the position that the word "marriage", as used in the *Constitution Act, 1867*, is a constitutionally entrenched term that refers to the legal definition of marriage that existed at Confederation. The Association argues that the legal definition of marriage at Confederation was the "union of one man and one woman". As a constitutionally entrenched term, this definition of marriage can be amended only through the formal constitutional amendment procedures. As a consequence, neither the courts nor Parliament have jurisdiction to reformulate the meaning of marriage.

[40] In the Divisional Court, LaForme J. rejected this argument. His analysis was adopted by Smith A.C.J.S.C. and Blair R.S.J., as well as by the British Columbia Court of Appeal in *EGALE Canada Inc.* None of the parties or other intervenors supports the Association on this issue.

[41] In our view, the Association's constitutional amendment argument is without merit for two reasons. First, whether same-sex couples can marry is a matter of capacity. There can be no issue, nor was the contrary argued before us, that Parliament has authority to make laws regarding the capacity to marry. Such authority is found in s. 91(26) of the *Constitution Act, 1867*.

[42] Second, to freeze the definition of marriage to whatever meaning it had in 1867 is contrary to this country's jurisprudence of progressive constitutional interpretation. This jurisprudence is rooted in Lord Sankey's words in *Edwards v. A.G. Canada*, [1930] A.C. 124 at 136 (P.C.): "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits." Dickson J. reiterated the correctness of this approach to constitutional interpretation in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155:

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its

> provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.

[43] In *Constitutional Law of Canada*, looseleaf (Scarborough: Carswell, 1997) at 15-43 to 15-44, Professor Peter W. Hogg explained that Canada has changed a great deal since Confederation, and "[t]he doctrine of progressive interpretation is one of the means by which the Constitution Act, 1867 has been able to adapt to the changes in Canadian society."

[44] Under the doctrine of progressive interpretation, activities have been included under ss. 91 and 92 of the *Constitution Act, 1867* that had not previously been included. For example, s. 91(15) of the *Constitution Act, 1867* gives the federal government exclusive jurisdiction over "Banking, Incorporation of Banks, and the Issue of Paper Money". In *A.G. Alberta v. A.G. Canada*, [1947] A.C. 503 (P.C.), the province argued that certain credit activities did not fall within the scope of s. 91(15) because "banking" at the time of Confederation did not include these activities. The Privy Council, in rejecting this argument, held that the term "banking" in s. 91(15) is not confined to the extent and kind of business actually carried on by banks in Canada in 1867.

[45] Similarly, in regard to the federal government's authority over "The Criminal Law" under s. 91(27), the Privy Council in *P.A.T.A. v. A.G. Canada,* [1931] A.C. 310, considered the constitutionality of federal legislative provisions intended to protect against restraint of trade. Notwithstanding that the impugned provisions criminalized activity that was not the subject of criminal legislation in 1867, the Privy Council concluded that the legislation was *intra vires* the federal government under its criminal law power. Lord Atkin, writing the unanimous judgment, said at p. 324:

> "Criminal law" means "the criminal law in its widest sense"....It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes.

[46] In our view, "marriage" does not have a constitutionally fixed meaning. Rather, like the term "banking" in s. 91(15) and the phrase "criminal law" in s. 91(27), the term "marriage" as used in s. 91(26) of the *Constitution Act, 1867* has the constitutional flexibility necessary to meet changing realities of Canadian society without the need for recourse to constitutional amendment procedures.

[47] The Association also argues that the *Charter* cannot be used to alter provisions of the *Constitution Act, 1867* and, accordingly, cannot be the basis for amending the definition of marriage in s. 91(26). The Association points to *Reference Re Bill 30, an Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R 1148 at 1197-98, where Wilson J. said: "It was never intended, in my opinion, that the *Charter* could be used to invalidate other provisions of the Constitution". The Association also relies on *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 373, where McLachlin J. stated: "It is a basic rule...that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution".

[48] We do not agree with the Association's argument on this point. *Reference Re Bill 30* dealt with the constitutional recognition accorded to minority religious groups in regard to education. This express constitutional recognition finds its root in the religious compromises achieved at Confederation. We are of the view that, whatever compromises were negotiated to achieve the legislative distribution of power relating to marriage, such compromises were not related to constitutionally entrenching differential treatment between opposite-sex and same-sex couples.

[49] The *Nova Scotia Speaker* case dealt with the decision of the legislature of Nova Scotia to prohibit the televising of its proceedings. The Supreme Court of Canada recognized that parliamentary privilege is necessary to ensure the orderly operation of the legislature, and that this privilege includes the power to exclude strangers from legislative chambers. A majority of the court held that parliamentary privilege is part of the constitution of Canada, and therefore not subject to *Charter* review. In our view, the exercise of a constitutionally recognized parliamentary privilege to exclude strangers from the legislature is not analogous to a law excluding persons from marriage.

[50] Accordingly, we do not accept the Association's submissions on this issue.

(3) Cross-appeal by MCCT: religious rights under sections 2(a) and 15(1) of the *Charter*

[51] In its cross-appeal, MCCT takes the position that the common law definition of marriage breaches its freedom of religion under s. 2(a) of the *Charter* and its right to be free from religious discrimination under s. 15(1). MCCT argues that the common law definition of marriage is rooted in Christian values, as propounded by the Anglican Church of England, which has never recognized same-sex marriages. MCCT contends that this definition, therefore, has the unconstitutional purpose of enforcing a particular religious view of marriage and excluding other religious views of marriage. MCCT also contends that the common law definition of marriage, which provides legal recognition and legitimacy to marriage ceremonies that accord with one religious view of marriage, has the effect of diminishing the status of other religious marriages.

[52] MCCT framed its argument this way in its factum:

> There is no obligation on the law to recognize religious marriage as a legal institution. However, once it decides to do so (as it has done), it cannot withhold recognition to any religious marriage except in a constitutionally lawful manner.

[53] In our view, this case does not engage religious rights and freedoms. Marriage is a legal institution, as well as a religious and a social institution. This case is solely about the legal institution of marriage. It is not about the religious validity or invalidity of various forms of marriage. We do not view this case as, in any way, dealing or interfering with the religious institution of marriage.

[54] Even if we were to see this case as engaging freedom of religion, it is our view that MCCT has failed to establish a breach of s. 2(a) of the *Charter*. In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 336, Dickson J. described freedom of religion in these terms:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.

[55] Dickson J. then identified, at p. 337, the dual nature of the protection encompassed by s. 2(a) as the absence of coercion and constraint, and the right to manifest religious beliefs and practices.

[56] MCCT frames its submissions regarding s. 2(a) in terms of state coercion and constraint. We disagree with MCCT's argument that, because the same-sex religious marriage ceremonies it performs are not recognized for civil purposes, it is constrained from performing these religious ceremonies or coerced into performing opposite-sex marriage ceremonies only.

[57] In *Big M Drug Mart*, the impugned legislation prohibited all persons from working on Sunday, a day when they would otherwise have been able to work. Thus, the law required all persons to observe the Christian Sabbath. In sharp contrast to the situation in *Big M Drug Mart*, the common law definition of marriage does not oblige MCCT to abstain from doing anything. Nor does it prevent the manifestation of any religious beliefs or practices. There is nothing in the common law definition of marriage that obliges MCCT, directly or indirectly, to stop performing marriage ceremonies that conform with its own religious teachings, including same-sex marriages. Similarly, there

is nothing in the common law definition of marriage that obliges MCCT to perform only heterosexual marriages.

[58] MCCT also argues that the common law's failure to recognize the legal validity of the same-sex marriages it performs constitutes a breach of its right to be free from religious discrimination under s. 15(1) of the *Charter*. We consider the impact of s. 15(1) on the common law definition of marriage in greater detail in the next part of these reasons. For now, it appears clear to us that any potential discrimination arising out of the differential treatment of same-sex marriages performed by MCCT is based on sexual orientation. This differential treatment is not based on the religious beliefs held by the same-sex couples or by the institution performing the religious ceremony. For this reason, we conclude that MCCT has failed to establish religious discrimination under s. 15(1).

(4) Section 15(1) of the *Charter*

(a) Approach to section 15(1)

[59] Section 15(1) of the *Charter* provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[60] In *Law*, Iacobucci J., writing for a unanimous court, described the purpose of s. 15(1) in the following terms, at p. 529:

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

[61] Iacobucci J. emphasized that a s. 15(1) violation will be found to exist only where the impugned law conflicts with the purpose of s. 15(1). The determination of whether such a conflict exists must be approached in a purposive and contextual manner: *Law* at 525. To that end, Iacobucci J. articulated a three-stage inquiry, at pp. 548-49:

> (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position

> within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
>
> and
>
> (C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

The claimant has the burden of establishing each of these factors on a balance of probabilities.

(b) The existence of differential treatment

[62] The first stage of the s. 15(1) inquiry requires the court to determine whether the impugned law: (a) draws a formal distinction between the claimant and others on the basis of one or more personal characteristics; or (b) fails to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics.

[63] This stage of the inquiry recognizes that the equality guarantee in s. 15(1) of the *Charter* is a comparative concept. As explained by Iacobucci J. in *Law* at 531:

> The object of a s. 15(1) analysis is not to determine equality in the abstract; it is to determine whether the impugned legislation creates differential treatment between the claimant and others on the basis of enumerated or analogous grounds, which results in discrimination.

[64] Accordingly, it is necessary to identify the relevant comparator group in order to determine whether the claimants are the subject of differential treatment. Generally speaking, the claimants choose the group with whom they wish to be compared for the purpose of the discrimination inquiry: *Law* at 532.

[65] In this case, the Couples submit that the common law definition of marriage draws a formal distinction between opposite-sex couples and same-sex couples on the basis of their sexual orientation. Opposite-sex couples have the legal capacity to marry; same-sex couples do not.

[66] The AGC submits that marriage, as an institution, does not produce a distinction between opposite-sex and same-sex couples. The word "marriage" is a descriptor of a unique opposite-sex bond that is common across different times, cultures and religions as a virtually universal norm. Marriage is not a common law concept; rather, it is a historical and worldwide institution that pre-dates our legal framework. The Canadian common law captured the definition of marriage by attaching benefits and obligations to the marriage relationship. Accordingly, it is not the definition of marriage itself that is the source of the differential treatment. Rather, the individual pieces of legislation that provide the authority for the distribution of government benefits and obligations are the source of the differential treatment. Moreover, since the enactment of the *Modernization of Benefits and Obligations Act*, same-sex couples receive substantive equal benefit and protection of the federal law.

[67] In our view, the AGC's argument must be rejected for several reasons.

[68] First, the only issue to be decided at this stage of the s. 15(1) analysis is whether a distinction is made. The fact that the common law adopted, rather than invented, the opposite-sex feature of marriage is irrelevant. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 543-44, Cory J. stated:

> [T]he respondents' contention that the distinction is not created by law, but rather exists independently of [Alberta's *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2] in society, cannot be accepted….It is not necessary to find that the legislation creates the discrimination existing in society in order to determine that it creates a potentially discriminatory distinction.

[69] Second, Canadian governments chose to give legal recognition to marriage. Parliament and the provincial legislatures have built a myriad of rights and obligations around the institution of marriage. The provincial legislatures provide licensing and registration regimes so that the marriages of opposite-sex couples can be formally

recognized by law. Same-sex couples are denied access to those licensing and registration regimes. That denial constitutes a formal distinction between opposite-sex and same-sex couples. The words of La Forest J. in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at 678 are instructive:

> This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner….In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons [citations omitted].

[70] Third, whether a formal distinction is part of the definition itself or derives from some other source does not change the fact that a distinction has been made. If marriage were defined as "a union between one man and one woman of the Protestant faith", surely the definition would be drawing a formal distinction between Protestants and all other persons. Persons of other religions and persons with no religious affiliation would be excluded. Similarly, if marriage were defined as "a union between two white persons", there would be a distinction between white persons and all other racial groups. In this respect, an analogy can be made to the anti-miscegenation laws that were declared unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967) because they distinguished on racial grounds.

[71] Fourth, an argument that marriage is heterosexual because it "just is" amounts to circular reasoning. It sidesteps the entire s. 15(1) analysis. It is the opposite-sex component of marriage that is under scrutiny. The proper approach is to examine the impact of the opposite-sex requirement on same-sex couples to determine whether defining marriage as an opposite-sex institution is discriminatory: see *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 488-93 *per* McLachlin J.

[72] Accordingly, in our view, there is no doubt that the common law definition of marriage creates a formal distinction between opposite-sex couples and same-sex couples on the basis of their sexual orientation. The first stage of the s. 15(1) inquiry has been satisfied.

(c) Differential treatment on an enumerated or analogous ground

[73] The second stage of the s. 15(1) inquiry asks whether the differential treatment identified under stage one of the inquiry is based on an enumerated or analogous ground.

[74] In *Egan* at 528, the Supreme Court of Canada recognized sexual orientation as an analogous ground, observing that sexual orientation is a "deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs".

[75] In this case, the AGC properly conceded that, if this court determined that marriage imposes differential treatment, then sexual orientation, as an analogous ground, is the basis for such differential treatment.[2]

[76] Accordingly, stage two of the s. 15(1) inquiry has been met.

(d) The existence of discrimination

[77] The third stage of the s. 15(1) inquiry requires the court to determine whether the differential treatment imposes a burden upon, or withholds a benefit from, the claimants in a manner that reflects the stereotypical application of presumed group or personal characteristics, or that otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.

[78] This stage of the inquiry in the s. 15(1) analysis is concerned with substantive equality, not formal equality: *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 at para. 22. The emphasis is on human dignity. In *Law* at 530, Iacobucci J. elaborated on the meaning and importance of respecting human dignity, particularly within the framework of equality rights:

> 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 by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. 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

[2] The Couples also submit that the common law definition of marriage violates s. 15(1) of the *Charter* on the basis of sex. In our view, sexual orientation is the most applicable ground of discrimination under s. 15(1) of the *Charter*. Accordingly, we find it unnecessary to decide whether there is a *Charter* violation on the basis of sex.

> circumstances regarding the individuals affected and excluded by the law?

[79] The assessment of whether a law has the effect of demeaning a claimant's dignity should be undertaken from a subjective-objective perspective. The relevant point of view is not solely that of a "reasonable person", but that of a "reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the group of which the rights claimant is a member": *Egan* at 553; *Law* at 533-34. This requires a court to consider the individual's or group's traits, history, and circumstances in order to evaluate whether a reasonable person, in circumstances similar to the claimant, would find that the impugned law differentiates in a manner that demeans his or her dignity: *Law* at 533.

[80] The court is required to examine both the purpose and effects of the law in question. It is clear that a law that has a discriminatory purpose cannot survive s. 15(1) scrutiny. However, a discriminatory purpose is not a requirement for a successful s. 15(1) challenge; it is enough for the claimant to demonstrate a discriminatory effect. As stated in *Law* at 535:

> [A]ny demonstration by a claimant that a legislative provision or other state action has *the effect* of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society…will suffice to establish an infringement of s. 15(1). [Emphasis added.]

[81] In *Law* at 550-52, Iacobucci J. identified four contextual factors that a claimant may reference in order to demonstrate that the impugned law demeans his or her dignity in purpose or effect. The list of factors is not closed and not all of the factors will be relevant in every case. The four factors identified by Iacobucci J. are examined below.

(i) Pre-existing disadvantage, stereotyping or vulnerability of the claimants

[82] The first contextual factor to be examined is the existence of a pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or group at issue. While this contextual factor is not determinative, it is "probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory": *Law* at 534. As explained by Iacobucci J., at pp. 534-35:

> These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect, and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable.

[83] The disadvantages and vulnerability experienced by gay men, lesbians and same-sex couples were described by Cory J. in *Egan* at 600-602:

> The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse of homosexual individuals is not uncommon. Homosexual women and men have been the victims of crimes of violence directed at them specifically because of their sexual orientation….They have been discriminated against in their employment and their access to services. They have been excluded from some aspects of public life solely because of their sexual orientation….The stigmatization of homosexual persons and the hatred which some members of the public have expressed towards them has forced many homosexuals to conceal their orientation. This imposes its own associated costs in the work place, the community and in private life.
>
> …
>
> Homosexual couples as well as homosexual individuals have suffered greatly as a result of discrimination. 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….[S]tudies serve to confirm overwhelmingly that homosexuals, whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage.

See also *Vriend* at 543; *M v. H.* at 52-55.

[84] The AGC acknowledges that gay men and lesbians have been recognized as a disadvantaged group in Canada. It emphasizes, however, that historical disadvantage is not presumed to embody discrimination. It points to the Supreme Court of Canada's recent decision in *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, where, despite the fact that cohabiting common law couples have been recognized as a historically disadvantaged group, the court found that the impugned law was not discriminatory.

[85] We agree that the existence of historical disadvantage is not presumptive of discrimination. In *Law* at 536, Iacobucci J. stated:

> At the same time, I also do not wish to suggest that the claimant's association with a group which has historically been more disadvantaged will be conclusive of a violation under s. 15(1), where differential treatment has been established. This may be the result, but whether or not it is the result will depend upon the circumstances of the case and, in particular, upon whether or not the distinction truly affects the dignity of the claimant. There is no principle or evidentiary presumption that differential treatment for historically disadvantaged persons is discriminatory.

[86] However, as previously stated, Iacobucci J. also made it clear that historical disadvantage is a strong indicator of discrimination: see *Law* at 534-35. Therefore, the historical disadvantage suffered by same-sex couples favours a finding of discrimination in this case.

[87] Furthermore, we note that in *Walsh* the court determined that the impugned legislation was not discriminatory because the distinction the legislation created between married couples and common law couples respected the liberty interest of individuals to make fundamental choices regarding their lives. Bastarache J. stated, at para. 63:

> Finally, it is important to note that the discriminatory aspect of the legislative distinction must be determined in light of *Charter* values. One of those essential values is liberty, basically defined as the absence of coercion and the ability to make fundamental choices with regard to one's life….Limitations imposed by this Court that serve to restrict this freedom of choice among persons in conjugal relationships would be contrary to our notions of liberty.

In this case, the common law requirement that persons who marry be of the opposite sex denies persons in same-sex relationships a fundamental choice – whether or not to marry their partner.

(ii) Correspondence between the grounds and the claimant's actual needs, capacities or circumstances

[88] The second contextual factor is the correspondence, or lack thereof, between the grounds on which the claim is based and the actual needs, capacities or circumstances of the claimant or others with similar traits: *Law* at 537, 551. As illustrated in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, legislation that accommodates the actual needs, capacities and circumstances of the claimants is less likely to demean dignity.

[89] The AGC submits that marriage relates to the capacities, needs and circumstances of opposite-sex couples. The concept of marriage - across time, societies and legal cultures - is that of an institution to facilitate, shelter and nurture the unique union of a man and woman who, together, have the possibility to bear children from their relationship and shelter them within it.

[90] We cannot accept the AGC's argument for several reasons.

[91] First, it is important to remember that the purpose and effects of the impugned law must at all times be viewed from the perspective of the claimant. The question to be asked is whether the law takes into account the actual needs, capacities and circumstances of same-sex couples, not whether the law takes into account the needs, capacities and circumstances of opposite-sex couples. In *Law* at 538, Iacobucci J. cautioned that "[t]he fact that the impugned legislation may achieve a valid social purpose for one group of individuals cannot function to deny an equality claim where the effects of the legislation upon another person or group conflict with the purpose of the s. 15(1) guarantee."

[92] Second, the AGC's argument on this point is more appropriately considered in the context of a s. 1 justification analysis. We find the comments of Bastarache J. in *Lavoie v. Canada*, [2002] 1 S.C.R. 769 at 809-10 to be apposite:

> In measuring the appellants' subjective experience of discrimination against an objective standard, it is crucial not to elide the distinction between the claimant's onus to establish a *prima facie* s. 15(1) violation and the state's onus to justify such a violation under s. 1. Section 15(1) requires the claimant to show that her human dignity and/or freedom is adversely affected. The concepts of dignity and freedom

> are not amorphous and, in my view, do not invite the kind of balancing of individual against state interest that is required under s. 1 of the *Charter*. On the contrary, the subjective inquiry into human dignity requires the claimant to provide a rational foundation for her experience of discrimination in the sense that a reasonable person similarly situated would share that experience. …
>
> By contrast, the government's burden under s. 1 is to justify a breach of human dignity, not to explain it or deny its existence. This justification may be established by the practical, moral, economic, or social underpinnings of the legislation in question, or by the need to protect other rights and values embodied in the *Charter*. It may further be established based on the requirements of proportionality, that is, whether the interest pursued by the legislation outweighs its impact on human dignity and freedom. However, the exigencies of public policy do not undermine the *prima facie* legitimacy of an equality claim. *A law is not "non-discriminatory" simply because it pursues a pressing objective or impairs equality rights as little as possible. Much less is it "non-discriminatory" because it reflects an international consensus as to the appropriate limits on equality rights. While these are highly relevant considerations at the s. 1 stage, the suggestion that governments should be encouraged if not required to counter the claimant's s. 15(1) argument with public policy arguments is highly misplaced. Section 15(1) requires us to define the scope of the individual right to equality, not to balance that right against societal values and interests or other Charter rights.* [Emphasis added.]

[93] Third, a law that prohibits same-sex couples from marrying does not accord with the needs, capacities and circumstances of same-sex couples. While it is true that, due to biological realities, only opposite-sex couples can "naturally" procreate, same-sex couples can choose to have children by other means, such as adoption, surrogacy and donor insemination. An increasing percentage of children are being conceived and raised by same-sex couples: *M. v. H.* at 75.

[94] Importantly, no one, including the AGC, is suggesting that procreation and childrearing are the only purposes of marriage, or the only reasons why couples choose to

marry. Intimacy, companionship, societal recognition, economic benefits, the blending of two families, to name a few, are other reasons that couples choose to marry. As recognized in *M. v. H.* at 50, same-sex couples are capable of forming "long, lasting, loving and intimate relationships." Denying same-sex couples the right to marry perpetuates the contrary view, namely, that same-sex couples are not capable of forming loving and lasting relationships, and thus same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships.

[95] Accordingly, in our view, the common law requirement that marriage be between persons of the opposite sex does not accord with the needs, capacities and circumstances of same-sex couples. This factor weighs in favour of a finding of discrimination.

(iii) Ameliorative purpose or effects on more disadvantaged individuals or groups in society

[96] The third contextual factor to be considered is whether the impugned law has an ameliorative purpose or effect upon a more disadvantaged person or group in society. The question to be asked is whether the group that has been excluded from the scope of the ameliorative law is in a more advantaged position than the person coming within the scope of the law. In *Law* at 539, Iacobucci J. emphasized that "[u]nderinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination".

[97] The AGC cites La Forest J. in *Egan* at 539 for the proposition that, since opposite-sex couples raise the vast majority of children, supporting opposite-sex relationships "does not exacerbate an historic disadvantage; rather it ameliorates an historic economic disadvantage".

[98] We do not accept the AGC's submission. The critical question to be asked in relation to this contextual factor is whether opposite-sex couples are in a more disadvantaged position than same-sex couples. As previously stated, same-sex couples are a group who have experienced historical discrimination and disadvantages. There is no question that opposite-sex couples are the more advantaged group.

[99] In our view, any economic disadvantage that may arise from raising children is only one of many factors to be considered in the context of marriage. Persons do not marry solely for the purpose of raising children. Furthermore, since same-sex couples also raise children, it cannot be assumed that they do not share that economic disadvantage. Accordingly, if alleviating economic disadvantages for opposite-sex couples due to childrearing were to be considered an ameliorative purpose for the opposite-sex requirement in marriage, we would find the law to be underinclusive. The principle from *Law* that "[u]nderinclusive ameliorative legislation that excludes from its

scope the members of a historically disadvantaged group will rarely escape the charge of discrimination" would be applicable.

(iv) Nature of the interest affected

[100] The fourth contextual factor to be examined is the nature of the interest affected by the impugned law. The more severe and localized the effect of the law on the affected group, the greater the likelihood that the law is discriminatory: *Egan* at 556; *Law* at 540.

[101] In *Law* at 540, the court adopted L'Heureux-Dubé J.'s description of this factor in *Egan*, where she emphasized that s. 15(1) of the *Charter* protects more than "economic rights". She stated, at p.556:

> Although a search for economic prejudice may be a convenient means to begin a s. 15 inquiry, a conscientious inquiry must not stop here. The discriminatory calibre of a particular distinction cannot be fully appreciated without also evaluating the constitutional and societal significance of the interest(s) adversely affected. *Other important considerations involve determining whether the distinction somehow restricts access to a fundamental social institution*, or affects a basic aspect of full membership in Canadian society (e.g. voting, mobility). Finally, *does the distinction constitute a complete non-recognition of a particular group?* It stands to reason that a group's interests will be more adversely affected in cases involving complete exclusion or non-recognition than in cases where the legislative distinction <u>does</u> recognize or accommodate the group, but does so in a manner that is simply more restrictive than some would like.
>
> [Emphasis added.]

[102] The AGC submits that the existence of the *Modernization of Benefits and Obligations Act* precludes a finding of discrimination. With this Act, Parliament amended 68 federal statutes in order to give same-sex couples the same benefits and obligations as opposite-sex couples. The AGC also points to recent amendments to provincial legislation that similarly extended benefits to same-sex couples. As a result, same-sex couples are afforded equal treatment under the law.

[103] In our view, the AGC's submission must be rejected.

[104] First, we do not agree that same-sex couples are afforded equal treatment under the law with respect to benefits and obligations. In many instances, benefits and

obligations do not attach until the same-sex couple has been cohabiting for a specified period of time. Conversely, married couples have instant access to all benefits and obligations.

[105] Additionally, not all benefits and obligations have been extended to cohabiting couples. For example, in *Walsh* the Supreme Court of Canada upheld Nova Scotia's legislation that provides only married persons with equalization of net family property upon breakdown of the relationship. Ontario's *Family Law Act*, R.S.O. 1990, c. F.3, similarly excludes cohabiting opposite-sex and same-sex couples from equalization of net family property. Opposite-sex couples are able to gain access to this legislation as they can choose to marry. Same-sex couples are denied access because they are prohibited from marrying.

[106] Second, the AGC's submission takes too narrow a view of the s. 15(1) equality guarantee. As the passage cited from *Egan* indicates, s. 15(1) guarantees more than equal access to economic benefits. One must also consider whether persons and groups have been excluded from fundamental societal institutions. A similar view was expressed by Cory J. in *M. v. H.* at 53:

> The respondent H. has argued that the differential treatment imposed by s. 29 of the [*Family Law Act*, R.S.O. 1990, c. F.3] does not deny the respondent M. the equal benefit of the law since same-sex spouses are not being denied an economic benefit, but simply the opportunity to gain access to a court-enforced process. Such an analysis takes too narrow a view of "benefit" under the law. It is a view this Court should not adopt. The type of benefit salient to the s. 15(1) analysis cannot encompass only the conferral of an economic benefit. It must also include access to a process that could confer an economic or other benefit. . . .

[107] In this case, same-sex couples are excluded from a fundamental societal institution – marriage. The societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked. Indeed, all parties are in agreement that marriage is an important and fundamental institution in Canadian society. It is for that reason that the claimants wish to have access to the institution. Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.

(v) Conclusion

[108] Based on the foregoing analysis, it is our view that the dignity of persons in same-sex relationships is violated by the exclusion of same-sex couples from the institution of marriage. Accordingly, we conclude that the common-law definition of marriage as "the voluntary union for life of one man and one woman to the exclusion of all others" violates s. 15(1) of the *Charter*. The next step is to determine whether this violation can be justified under s. 1 of the *Charter*.

(5) Reasonable limits under section 1 of the *Charter*

(a) The necessity of a s. 1 analysis

[109] Section 1 of the *Charter* provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[110] In this case, the parties agree that the common law requirement that marriage be between two persons of the opposite sex is "prescribed by law": see *Swain* at 979. However, the Couples submit that a s. 1 analysis is not required because this case concerns a challenge to a common law or "judge-made" rule rather than a legislative provision. Relying on *Swain* at 978, the Couples submit that the court may proceed to cure the *Charter* infringement by fashioning a new rule that complies with constitutional requirements.

[111] While it may not be strictly necessary to consider the application of s. 1 of the *Charter*, we find the words of Lamer C.J.C. in *Swain* at 979-80 to be compelling:

> The *Oakes* test provides a familiar structure through which the objectives of the common law rule can be kept in focus and alternative means of attaining these objectives can be considered. Furthermore, the constitutional questions were stated with s. 1 in mind. While this is not, in and of itself, determinative, the Court has had the benefit of considered argument under s. 1 both from the immediate parties and from a number of interveners. In my view, it would be both appropriate and helpful for the Court to take advantage of these submissions in considering the objective of the existing

> rule and in considering whether an alternative common law rule could be fashioned….

[112] Further, since marriage is the foundation for a myriad of government benefits, and since Parliament "confirmed" the opposite-sex definition of marriage in s. 1.1 of the *Modernization of Benefits and Obligations Act*, we consider a s. 1 justification analysis to be appropriate. We also note that, during oral argument, counsel for the Couples conceded that it would be suitable for this court to conduct the s. 1 inquiry.

(b) Approach to section 1

[113] In *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138-39, Dickson C.J.C. formulated the test for determining whether a law is a reasonable limit on a *Charter* right or freedom in a free and democratic society. The party seeking to uphold the impugned law has the burden of proving on a balance of probabilities that:

(1) The objective of the law is pressing and substantial; and

(2) The means chosen to achieve the objective are reasonable and demonstrably justifiable in a free and democratic society. This requires:

(A) The rights violation to be rationally connected to the objective of the law;

(B) The impugned law to minimally impair the *Charter* guarantee; and

(C) Proportionality between the effect of the law and its objective so that the attainment of the objective is not outweighed by the abridgement of the right.

See *Eldridge* at 684; *Vriend* at 554.

(c) Pressing and substantial objective

[114] The first stage of the *Oakes* test involves a two-step process: (i) the objective(s) of the impugned law must be determined; and (ii) the objective(s) of the impugned law must be evaluated to see if they are capable of justifying limitations on *Charter* rights: *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 at para. 20.

[115] When a law has been found to violate the *Charter* due to underinclusion, both the objective of the law as a whole and the objective of the exclusion must be considered: *Vriend* at 554-55; *M. v. H.* at 62.

[116] The AGC submits that marriage, as a core foundational unit, benefits society at large in that it has proven itself to be one of the most durable institutions for the organization of society. Marriage has always been understood as a special kind of monogamous opposite-sex union, with spiritual, social, economic and contractual dimensions, for the purposes of uniting the opposite sexes, encouraging the birth and raising of children of the marriage, and companionship.

[117] No one is disputing that marriage is a fundamental societal institution. Similarly, it is accepted that, with limited exceptions, marriage has been understood to be a monogamous opposite-sex union. What needs to be determined, however, is whether there is a valid objective to maintaining marriage as an exclusively heterosexual institution. 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.

[118] We now turn to the more specific purposes of marriage advanced by the AGC: (i) uniting the opposite sexes; (ii) encouraging the birth and raising of children of the marriage; and (iii) companionship.

[119] The first purpose, which results in favouring one form of relationship over another, suggests that uniting two persons of the same sex is of lesser importance. The words of Dickson C.J.C. in *Oakes* at 136 are instructive in this regard:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

Accordingly, a purpose that demeans the dignity of same-sex couples is contrary to the values of a free and democratic society and cannot be considered to be pressing and substantial. A law cannot be justified on the very basis upon which it is being attacked: *Big M Drug Mart* at 352.

[120] The second purpose of marriage, as advanced by the AGC, is encouraging the birth and raising of children. Clearly, encouraging procreation and childrearing is a laudable goal that is properly regarded as pressing and substantial. However, the AGC must demonstrate that the objective of maintaining marriage as an exclusively heterosexual institution is pressing and substantial: see *Vriend* at 554-57.

[121] We fail to see how the encouragement of procreation and childrearing is a pressing and substantial objective of maintaining marriage as an exclusively heterosexual institution. Heterosexual married couples will not stop having or raising children because same-sex couples are permitted to marry. Moreover, an increasing percentage of children are being born to and raised by same-sex couples.

[122] The AGC submits that the union of two persons of the opposite sex is the only union that can "naturally" procreate. In terms of that biological reality, same-sex couples are different from opposite-sex couples. In our view, however, "natural" procreation is not a sufficiently pressing and substantial objective to justify infringing the equality rights of same-sex couples. As previously stated, same-sex couples can have children by other means, such as adoption, surrogacy and donor insemination. A law that aims to encourage only "natural" procreation ignores the fact that same-sex couples are capable of having children.

[123] Similarly, a law that restricts marriage to opposite-sex couples, on the basis that a fundamental purpose of marriage is the raising of children, suggests that same-sex couples are not equally capable of childrearing. The AGC has put forward no evidence to support such a proposition. Neither is the AGC advocating such a view; rather, it takes the position that social science research is not capable of establishing the proposition one way or another. In the absence of cogent evidence, it is our view that the objective is based on a stereotypical assumption that is not acceptable in a free and democratic society that prides itself on promoting equality and respect for all persons.

[124] The third purpose of marriage advanced by the AGC is companionship. We consider companionship to be a laudable goal of marriage. However, encouraging companionship cannot be considered a pressing and substantial objective of the *omission* of the impugned law. Encouraging companionship between only persons of the opposite sex perpetuates the view that persons in same-sex relationships are not equally capable of providing companionship and forming lasting and loving relationships.

[125] Accordingly, it is our view that the AGC has not demonstrated any pressing and substantial objective for excluding same-sex couples from the institution of marriage. For that reason, we conclude that the violation of the Couples' rights under s. 15(1) of the *Charter* cannot be saved under s. 1 of the *Charter*.

(d) Proportionality analysis

[126] Our conclusion under the first stage of the *Oakes* test makes it unnecessary to consider the second stage of the test. However, as has become the norm, we will go on to briefly consider the remainder of the test.

(i) Rational Connection

[127] Under the rational connection component of the proportionality analysis, the party seeking to uphold the impugned law must demonstrate that the rights violation is rationally connected to the objective, in the sense that the exclusion of same-sex couples from marriage is required to encourage procreation, childrearing and companionship.

[128] The AGC submits that the rational connection for the opposite-sex nature of marriage is "self-evident", considering its universality and its effectiveness in bringing the two sexes together, in sheltering children, and in providing a stable institution for society.

[129] The difficulty with the AGC's submission is its focus. It is not disputed that marriage has been a stabilizing and effective societal institution. The Couples are not seeking to abolish the institution of marriage; they are seeking access to it. Thus, the task of the AGC is not to show how marriage has benefited society as a whole, which we agree is self-evident, but to demonstrate that maintaining marriage as an exclusively heterosexual institution is rationally connected to the objectives of marriage, which in our view is *not* self-evident.

[130] First, the AGC has not shown that the opposite-sex requirement in marriage is rationally connected to the encouragement of procreation and childrearing. 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.

[131] Second, the AGC has not demonstrated that companionship is rationally connected to the exclusion of same-sex couples. Gay men and lesbians are as capable of providing companionship to their same-sex partners as persons in opposite-sex relationships.

[132] Accordingly, if we were of the view that the objectives advanced by the AGC were pressing and substantial, we would conclude that the objectives are not rationally connected to the opposite-sex requirement in the common law definition of marriage.

(ii) Minimal Impairment

[133] With respect to minimal impairment, the AGC submits that there is no other way to achieve Parliament's objectives than to maintain marriage as an opposite-sex institution. Changing the definition of marriage to incorporate same-sex couples would profoundly change the very essence of a fundamental societal institution. The AGC points to no-fault divorce as an example of how changing one of the essential features of marriage, its permanence, had the unintended result of destabilizing the institution with unexpectedly high divorce rates. This, it is said, has had a destabilizing effect on the family, with adverse effects on men, women and children. Tampering with another of the core features, its opposite-sex nature, may also have unexpected and unintended results. Therefore, a cautious approach is warranted.

[134] We reject the AGC's submission as speculative. The justification of a *Charter* infringement requires cogent evidence. In our view, same-sex couples and their children should be able to benefit from the same stabilizing institution as their opposite-sex counterparts.

[135] The AGC further submits that the means chosen by Parliament to achieve its objectives impair the rights of same-sex couples as minimally as possible. Although same-sex relationships are not granted legal recognition, gay men and lesbians have the right to choose their partners and to celebrate their relationships through commitment ceremonies. Additionally, same-sex couples have achieved virtually all of the federal benefits that flow from marriage with the passing of the *Modernization of Benefits and Obligations Act*.

[136] We do not accept these submissions. As explained in our s. 15(1) analysis, it is our view that same-sex couples have not achieved equal access to government benefits. There are significant waiting periods involved before cohabiting couples can access these benefits. Some benefits and obligations are available only to married couples. Importantly, the benefits of marriage cannot be viewed in purely economic terms. The societal significance surrounding the institution of marriage cannot be overemphasized: see *M. v. H.* at 57.

[137] Allowing same-sex couples to choose their partners and to celebrate their unions is not an adequate substitute for legal recognition. This is not a case of the government balancing the interests of competing groups. Allowing same-sex couples to marry does not result in a corresponding deprivation to opposite-sex couples.

[138] Nor is this a case of balancing the rights of same-sex couples against the rights of religious groups who oppose same-sex marriage. Freedom of religion under s. 2(a) of the *Charter* ensures that religious groups have the option of refusing to solemnize same-sex

marriages. The equality guarantee, however, ensures that the beliefs and practices of various religious groups are not imposed on persons who do not share those views.

[139] In our view, the opposite-sex requirement in the definition of marriage does not minimally impair the rights of the claimants. Same-sex couples have been completely excluded from a fundamental societal institution. Complete exclusion cannot constitute minimal impairment.

(iii) Proportionality between the effect of the law and its objective

[140] The final branch of the proportionality test requires an examination of whether the deleterious effects caused by excluding same-sex couples from marriage are so severe that they outweigh its purposes.

[141] Since we have already concluded that the objectives are not rationally connected to the opposite-sex requirement of marriage, and the means chosen to achieve the objectives do not impair the Couples' rights as minimally as possible, it is axiomatic that the deleterious effects of the exclusion of same-sex couples from marriage outweigh its objectives.

(e) Conclusion

[142] Accordingly, we conclude that the violation of the Couples' equality rights under s. 15(1) of the *Charter* is not justified under s. 1 of the *Charter*. The AGC has not demonstrated that the objectives of excluding same-sex couples from marriage are pressing and substantial. The AGC has also failed to show that the means chosen to achieve its objectives are reasonable and justified in a free and democratic society.

(6) Remedy

[143] Having found that the common law definition of marriage violates the Couples' equality rights under s. 15(1) of the *Charter* in a manner that is not justified under s. 1 of the *Charter*, we turn to consider the appropriate remedy.

[144] The Couples and MCCT seek an immediate declaration that the common law definition of marriage is invalid, and an order reformulating the definition to refer to the union of "two persons" to the exclusion of all others. Additionally, the Couples seek an order directing the Clerk of the City of Toronto to issue a marriage licence to each of them, and an order directing the Registrar General of the Province of Ontario to register same-sex marriages. MCCT also seeks an order that the Registrar General register the marriages of Kevin Bourassa and Joe Varnell and of Elaine and Anne Vautour. The AGC takes the position, in the event that we dismiss its appeal, that the appropriate

remedy is to declare the common law definition of marriage unconstitutional, but to suspend the declaration of invalidity for two years.

[145] *Schachter v. Canada*, [1992] 2 S.C.R. 679, remains the seminal authority regarding constitutional remedies. Lamer C.J.C. identified the court's obligation to fashion a remedy for a constitutional breach and the scope of such remedies, at p. 695:

> Section 52 of the *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in.

[146] Lamer C.J.C. set out three steps to be followed in determining the appropriate remedy for a *Charter* breach. First, the court is to define the extent of the impugned law's inconsistency with the *Charter*. Second, it should select the remedy that best corrects the inconsistency. Third, the court should assess whether the remedy ought to be temporarily suspended.

[147] Turning to the first step, we hold that the common law definition of marriage is inconsistent with the *Charter* to the extent that it excludes same-sex couples.

[148] With respect to the second step, in our view the remedy that best corrects the inconsistency is to declare invalid the existing definition of marriage to the extent that it refers to "one man and one woman", and to reformulate the definition of marriage as "the voluntary union for life of two persons to the exclusion of all others". This remedy achieves the equality required by s. 15(1) of the *Charter* but ensures that the legal status of marriage is not left in a state of uncertainty.

[149] We reject the AGC's submission that the only remedy we should order is a declaration of invalidity, and that this remedy should be suspended to permit Parliament to respond. A declaration of invalidity alone fails to meet the court's obligation to reformulate a common law rule that breaches a *Charter* right. Lamer C.J.C. highlighted this obligation in *Swain* at 978:

> [B]ecause this appeal involves a *Charter* challenge to a common law, judge-made rule, the *Charter* analysis involves somewhat different considerations than would apply to a challenge to a legislative provision. …

> Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken.

No argument was presented to us that the reformulated common law definition of marriage would conflict with the principles of fundamental justice. Nor is there any issue that the reformulated definition would violate the *Charter*.

[150] In addition to failing to fulfil the court's obligation, a declaration of invalidity, by itself, would not achieve the goals of s. 15(1). It would result in an absence of any legal definition of marriage. This would deny to all persons the benefits of the legal institution of marriage, thereby putting all persons in an equally disadvantaged position, rather than in an equally advantaged position. Moreover, a declaration of invalidity alone leaves same-sex couples open to blame for the blanket denial of the benefits of the legal institution of marriage, a result that does nothing to advance the goal of s. 15(1) of promoting concern, respect and consideration for all persons.

[151] We are also of the view that the argument made by the AGC and several of the intervenors that we should defer to Parliament once we issue a declaration of invalidity is not apposite in these circumstances. *Schachter* provides that the role of the legislature and legislative objectives is to be considered at the second step of the remedy analysis when a court is deciding whether severance or reading in is an appropriate remedy to cure a legislative provision that breaches the *Charter*. These considerations do not arise where the genesis of the *Charter* breach is found in the common law and there is no legislation to be altered. Any lacunae created by a declaration of invalidity of a common law rule are common law lacunae that should be remedied by the courts, unless to do so would conflict with the principles of fundamental justice.

[152] The third step remains to be considered, that is, whether to temporarily suspend the declaration of invalidity. As previously noted, the AGC argues for a suspension in order to permit Parliament an opportunity to respond to the legal gap that such a declaration would create. Again, *Schachter* provides guidance on the resolution of this issue. Lamer C.J.C. emphasized, at p. 716, that "[a] delayed declaration allows a state of affairs which has been found to violate standards embodied in the *Charter* to persist for a time despite the violation." He stated, at pp. 715-16 and 719, that temporarily suspending a declaration of invalidity is warranted only in limited circumstances, such as where striking down the law poses a potential danger to the public, threatens the rule of law, or would have the effect of denying deserving persons of benefits under the impugned law.

Further, Lamer C.J.C. pointed out, at p. 717, that respect for the role of the legislature is not a consideration at the third step of the analysis:

> The question whether to delay the application of a declaration of nullity should therefore turn not on considerations of the role of the court and the legislature, but rather on considerations listed earlier relating to the effect of an immediate declaration on the public [*i.e.* potential public danger, threat to the rule of law, or denial of benefit to deserving persons].

[153] There is no evidence before this court that a declaration of invalidity without a period of suspension will pose any harm to the public, threaten the rule of law, or deny anyone the benefit of legal recognition of their marriage. We observe that there was no evidence before us that the reformulated definition of marriage will require the volume of legislative reform that followed the release of the Supreme Court of Canada's decision in *M. v. H.* In our view, an immediate declaration will simply ensure that opposite-sex couples and same-sex couples immediately receive equal treatment in law in accordance with s. 15(1) of the *Charter*.

[154] Accordingly, we would allow the cross-appeal by the Couples on remedy. We would reformulate the common law definition of marriage as "the voluntary union for life of two persons to the exclusion of all others". We decline to order a suspension of the declaration of invalidity or of the reformulated common law definition of marriage. We would also make orders, in the nature of *mandamus*, requiring the Clerk of the City of Toronto to issue marriage licences to the Couples, and requiring the Registrar General of the Province of Ontario to accept for registration the marriage certificates of Kevin Bourassa and Joe Varnell and of Elaine and Anne Vautour.[3]

E. DISPOSITION

[155] In summary, we have concluded the following:

(1) the existing common law definition of marriage is "the voluntary union for life of one man and one woman to the exclusion of all others";

(2) the courts have jurisdiction to alter the common law definition of marriage; resort to constitutional amendment procedures is not required;

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[3] We recognize that an order requiring the Registrar General of the Province of Ontario to accept for registration the marriage certificates of Kevin Bourassa and Joe Varnell and of Elaine and Anne Vautour does not flow from our rejection of MCCT's legal arguments. However, given our conclusion on the equality issue, and bearing in mind the consolidation of the two applications, we are of the view that a remedy for the two couples involved in the MCCT application is also appropriate.

(3) the existing common law definition of marriage does not infringe MCCT's freedom of religion rights under s. 2(a) of the *Charter* or its equality rights on the basis of religion under s. 15(1) of the *Charter*;

(4) the existing common law definition of marriage violates the Couples' equality rights on the basis of sexual orientation under s. 15(1) of the *Charter*; and

(5) the violation of the Couples' equality rights under s. 15(1) of the *Charter* cannot be justified in a free and democratic society under s. 1 of the *Charter*.

[156] To remedy the infringement of these constitutional rights, we:

(1) declare the existing common law definition of marriage to be invalid to the extent that it refers to "one man and one woman";

(2) reformulate the common law definition of marriage as "the voluntary union for life of two persons to the exclusion of all others";

(3) order the declaration of invalidity in (1) and the reformulated definition in (2) to have immediate effect;

(4) order the Clerk of the City of Toronto to issue marriage licenses to the Couples; and

(5) order the Registrar General of the Province of Ontario to accept for registration the marriage certificates of Kevin Bourassa and Joe Varnell and of Elaine and Anne Vautour.

[157] In the result, the AGC's appeals are dismissed. MCCT's cross-appeal relating to s. 2(a) of the *Charter* and s. 15(1) of the *Charter* on the basis of religion is dismissed. The Couples' cross-appeal and MCCT's cross-appeal on remedy are allowed.

[158] If the AGC, the Couples and MCCT are unable to agree on costs, they may speak to the matter by filing brief written submissions within two weeks of the release of these reasons. There will be no costs awarded to or against the Clerk of the City of Toronto, the Attorney General of Ontario, or any of the intervenors.

RELEASED: June 10, 2003 ("RRM")

"R. Roy McMurtry C.J.O."
"J. C. MacPherson J.A."
"E. E. Gillese J.A."

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 40/01

SUZANNE DU TOIT	First Applicant
ANNA-MARIÉ DE VOS	Second Applicant
versus	
THE MINISTER FOR WELFARE AND POPULATION DEVELOPMENT	First Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
THE COMMISSIONER OF CHILD WELFARE, PRETORIA	Third Respondent
THE LESBIAN AND GAY EQUALITY PROJECT	Amicus Curiae
ADVOCATE P STAIS	Curator ad Litem

Heard on : 9 May 2002

Decided on : 10 September 2002

JUDGMENT

SKWEYIYA AJ:

Introduction

[1] The applicants, partners in a longstanding lesbian relationship, wanted to adopt two

children. They could not do so jointly because current legislation confines the right to adopt children jointly to married couples. Consequently, the second applicant alone became the adoptive parent.

[2] Some years later, the applicants brought an application in the Pretoria High Court challenging the constitutional validity of sections 17(a), 17(c) and 20(1) of the Child Care Act[1] and section 1(2) of the Guardianship Act[2] which provide for the joint adoption and guardianship of children by married persons only. In the High Court, the relevant provisions of the Child Care Act were challenged on the grounds that they violate the applicants' rights to equality[3] and dignity[4] and do not give paramountcy to the best interests of the child as required by section 28(2) of the Constitution. Kgomo J found that these provisions of the Child Care Act and the Guardianship Act violated the Constitution and ordered the reading in of certain words into the impugned provisions so as to allow for joint adoption and guardianship of children by same-sex life partners.[5] The applicants now seek confirmation by this Court of the High Court order in terms of section 172(2)(a)

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1 Act 74 of 1983.

2 Act 192 of 1993.

3 Section 9 of the Constitution, n 22 below.

4 Section 10 of the Constitution, n 28 below.

5 The High Court judgment is reported as *Du Toit and Another v Minister of Welfare and Population Development and Others* 2001 (12) BCLR 1225 (T).

of the Constitution.[6]

[3] The respondents did not oppose the application but the applicants were supported by the Lesbian and Gay Equality Project, which was admitted as an amicus curiae. They also enjoyed the support of Advocate Stais of the Johannesburg Bar, who was appointed by this Court to act as curator ad litem to represent the interests of the children who are the subject of this application and also other children born and unborn who may be affected by this Court's order. In matters where the interests of children are at stake, it is important that their interests are fully aired before the Court so as to avoid substantial injustice to them and possibly others. Where there is a risk of injustice, a court is obliged to appoint a curator to represent the interests of children. This obligation flows from the provisions of section 28(1)(h) of the Constitution which provides that:

> "Every child has the right –
>
> . . . .
>
> (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result"[7]

Advocate Stais filed a thorough report concerning the welfare of the adoptive children of

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6 Section 172(2)(a) provides that: "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

7 See also the comments of this Court in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) at para 53.

the second applicant and children generally. He also made submissions at the hearing of the matter. We are indebted to him for his assistance.

Factual background

[4] The applicants have lived together as life partners since 1989. They formalised their relationship with a commitment ceremony, performed by a lay preacher in September 1990. To all intents and purposes they live as a couple married in community of property; immovable property is registered jointly in both their names; they pool their financial resources; they have a joint will in terms of which the surviving partner of the relationship will inherit the other's share in the joint community; they are beneficiaries of each other's insurance policies; and they take all major life decisions jointly and on a consensual basis.

[5] In 1994, the applicants approached the authorities of Cotlands Baby Centre, Johannesburg (Cotlands) to be screened as prospective adoptive parents. They went through a standard three-month process which involved their being screened and counselled together by social workers as required by the Child Care Act which sets out the legal framework for adoptions in South Africa.[8] The screening of the applicants included psychological testing, home circumstance visits, extended family

[8] See section 18(1)(b) of the Child Care Act which states that before granting an adoption order, the children's court must consider a prescribed report by a social worker. See also *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) at para 30.

recommendations and a panel discussion. It was at all times made clear during the screening process that the adopted children would be moving into a family structured around a permanent lesbian life partnership. The suitability of both applicants to be parents of the adoptive children was considered in the light of these circumstances.

[6] Within two months of the commencement of the screening and counselling process, the applicants were accepted as adoptive parents by the Cotlands authorities. A sister and brother, born on 10 November 1988 and 20 April 1992 respectively, were chosen for possible adoption by the applicants. On 3 December 1994, the siblings were placed temporarily in the care of the applicants by the Cotlands authorities. Since then, the siblings have remained with the applicants and they consider the applicants to be their parents.

[7] In 1995, the applicants applied to the children's court in Pretoria[9] to adopt the siblings jointly. The children's court, constrained by current adoption legislation, awarded custody and guardianship to the second applicant alone despite both applicants having been recommended as suitable parents. The applicants now challenge the constitutionality of the impugned provisions in the Pretoria High Court.

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9 In terms of section 18(1)(a) of the Child Care Act, the children's court of the district in which the adopted child resides shall effect an adoption order.

Current adoption and guardianship legislation

[8] Under current law there is no provision for couples, other than married couples, jointly to adopt a child. Section 17 of the Child Care Act provides that a child can be adopted:

> "(a) by a husband and his wife jointly;
> (b) by a widower or widow or unmarried or divorced person;
> (c) by a married person whose spouse is the parent of the child;
> (d) by the natural father of a child born out of wedlock."

Furthermore, section 20(1) of the Child Care Act provides that:

> "An order of adoption shall terminate all the rights and obligations existing between the child and any person who was his parent (other than a spouse contemplated in section 17(c)) immediately prior to such adoption, and that parent's relatives."

[9] Section 17 of the Child Care Act lists the categories of persons entitled to adopt children. Section 17(a) specifically allows for the joint adoption of children by married couples. It does not provide for the joint adoption of children by partners in a permanent same-sex life partnership. The reference to "husband" and "wife" in section 17(a) refers only to marriages ordinarily recognised by the common law and legislation between heterosexual spouses.[10]

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[10] Section 1 of the Child Care Act defines "marriage" as ". . . any marriage which is recognised in terms of South African law or customary law, or which was concluded in accordance with a system of religious law subject to specified procedures, and any reference to a husband, wife, widower, widow, divorced person, married person or spouse shall be construed accordingly". See in this regard section 2 of the Recognition of Customary Marriages Act 120 of 1998 which provides that for all purposes a duly contracted customary marriage will be recognised as a marriage. See also *National Coalition for Gay and Lesbian Equality and*

[10] Section 17(c) of the Child Care Act caters for so-called second-parent adoptions which envisage adoption by the spouse of the biological or adoptive parent of a child. The effect of such an adoption order is to confer equal parenting rights in respect of the child on the "second parent", giving both spouses the same legal relationship to the child as would have existed if the child had been born to the couple in marriage. Similarly, it vests in the child the same legal rights within the family as a child born to a married couple.

[11] While the above provisions require prospective adoptive parents to be married in order to adopt children jointly, the fact that same-sex life partners are excluded from this regime does not mean that they cannot adopt children at all. Section 17(b) of the Child Care Act permits adoption by a single applicant. Thus, a person living with a same-sex life partner may apply to adopt children in his or her own right, intending to raise the child with his or her partner, but the partner will have no legally recognised right in relation to the children.

[12] Under section 1(2) of the Guardianship Act, the parents of a child born in wedlock

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Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 25-6 where this Court held that the term "spouse" and the use of the word "marriage" in the context of the Aliens Control Act 96 of 1991 referred only to marriages ordinarily recognised by South African law. See also *Satchwell v The President of the Republic of South Africa and Another,* CCT 45/01, an as yet unreported decision of this Court, dated 25 July 2002 at para 9.

have joint guardianship of the child, allowing them to exercise their rights and powers and carry out their duties arising from guardianship independently of each other.[11] This joint guardianship is subject to the requirement that the consent of both parents is obtained for certain important and specified acts relating to the child. This provision applies to the joint guardianship of adopted children by married spouses as well.[12]

[13] The effect of these provisions for the purposes of this matter is that married persons who jointly adopt a child are joint guardians of that child. The difficulty in respect of same-sex life partners is that (not surprisingly in the light of section 17 of the Child Care Act) section 1(2) of the Guardianship Act does not contemplate that same-sex life partners will be joint guardians of children. If sections 17(a) and (c) are in conflict with the Constitution because they do not permit adoption by same-sex life partners, as the applicants argue, then to the same extent and for the same reason, section 1(2) of the Guardianship Act must conflict with the Constitution.

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11 Section 1(2) of the Guardianship Act reads –

> "Whenever both a father and mother have guardianship of a minor child of their marriage, each one of them is competent, subject to any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or power or to carry out any duty arising from such guardianship: Provided that, unless a competent court orders otherwise, the consent of both parents shall be necessary in respect of –
>
> (a) the contracting of a marriage by the minor child;
> (b) the adoption of the child;
> (c) the removal of the child from the Republic by one of the parents or by a person other than a parent of the child;
> (d) the application for a passport by or on behalf of a person under the age of 18 years;
> (e) the alienation or encumbrance of immovable property or any right to immovable property belonging to the minor child."

12 See section 20(2) of the Child Care Act.

[14] As a result of the current law the applicants cannot jointly adopt the siblings. Although first applicant is not the legally recognised adoptive parent, she is the primary care-giver. She provides the children with their principal source of emotional support within the family and, because of the constraints of the second applicant's professional life, she spends more time with them during week days than does the second applicant. 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 proceedings in the High Court

[15] To remove the legal bar to the first applicant becoming a joint adoptive parent of the children, the applicants launched application proceedings in the Transvaal High Court challenging the constitutionality of the impugned provisions which prevent them from jointly adopting the siblings. The Minister for Welfare and Population Development, the Minister of Justice and Constitutional Development and the Commissioner of Child Welfare, Pretoria were joined as respondents. They initially opposed the application but subsequently withdrew their opposition and gave notice that they would abide the decision of the High Court. They also abide the decision of this Court.

[16] In the High Court, as in this Court, the applicants argued that the impugned provisions of the Child Care Act violate, first, their rights protected in section 9(3) of the Constitution[13] by unfairly discriminating against gay and lesbian parents on the grounds of sexual orientation and marital status; second, the first applicant's rights in terms of section 10 of the Constitution[14] in that they deny the first applicant due recognition and status as a parent of her children; and third, section 28(2) of the Constitution[15] because an absolute prohibition of joint adoptions by same-sex parents cannot be in the best interests of adoptive children who are placed in the families of adoptive parents involved in permanent same-sex life partnerships. Similarly, they argued that section 1(2) of the Guardianship Act was in conflict with the Constitution on the grounds that it infringes sections 9(3) and 28(2) of the Constitution.

[17] The High Court upheld the application and declared the impugned provisions unconstitutional and invalid. It read into the relevant sections of the two statutes wording which would permit same-sex life partners jointly to adopt and be joint guardians of children. The full terms of the High Court order are as follows:

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13 Section 9 of the Constitution, n 22 below.

14 Section 10 of the Constitution, n 28 below.

15 Section 28(2) of the Constitution provides that "A child's best interests are of paramount importance in every matter concerning the child."

"1. It is declared that:

1.1. the omission from section 17(a) of the Child Care Act 74 of 1983 after the word 'jointly' of the words 'or by the two members of a permanent same-sex life partnership jointly' is inconsistent with the Constitution and invalid; and

1.2. section 17(a) of the Child Care Act 74 of 1983 is to be read as though the following words appear therein immediately after the word 'jointly':

'or by the two members of a permanent same-sex life partnership jointly.'

2. It is declared that:

2.1. the omission from section 17(c) of the Child Care Act 74 of 1983 after the word 'child' of the words 'or by a person whose permanent same-sex life partner is the parent of the child' is inconsistent with the Constitution and invalid; and

2.2. section 17(c) of the Child Care Act 74 of 1983 is to be read as though the following words appear therein immediately after the word 'child':

'or by a person whose permanent same-sex life partner is the parent of the child.'

3. It is declared that:

3.1. the omission from section 20(1) of the Child Care Act 74 of 1983 after the word 'spouse' of the words 'or permanent same-sex life partner' is inconsistent with the Constitution and invalid; and

3.2. section 20(1) of the Child Care Act 74 of 1983 is to be read as though the following words appear therein immediately after the word 'spouse':

'or permanent same-sex life partner.'

4. It is declared that:

4.1. the omission from section 1(2) of the Guardianship Act 192 of 1993 after the word 'marriage' of the words 'or both members of a

permanent same-sex life partnership are joint adoptive parents of a minor child' is unconstitutional and invalid; and

4.2. section 1(2) of the Guardianship Act 192 of 1993 is to be read as though the following words appear therein immediately after the word 'marriage':

'or both members of a permanent same-sex life partnership are joint adoptive parents of a minor child'."

The constitutional context

[18] Recognition of the fact that many children are not brought up by their biological parents is embodied in section 28(1)(b) of our Constitution which guarantees a child's right to "family or parental care". Family care includes care by the extended family of a child, which is an important feature of South African family life. It is clear from section 28(1)(b) that the Constitution recognises that family life is important to the well-being of all children. Adoption is a valuable way of affording children the benefits of family life which might not otherwise be available to them.

[19] The institutions of marriage and family are important social pillars that provide for security, support and companionship between members of our society and play a pivotal role in the rearing of children. However, we must approach the issues in the present matter on the basis that family life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life

should change as social practices and traditions change.[16] I turn now to consider the constitutionality of the impugned provisions.

Paramountcy of the child's best interests

[20] The applicants submitted that the impugned provisions violate the "best interests" principle protected by section 28(2) of the Constitution. Section 28(2) of the Constitution states that:

> "A child's best interests are of paramount importance in every matter concerning the child."

In *Minister of Welfare and Population Development v Fitzpatrick and Others*,[17] Goldstone J observed that:

> "Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights enumerated in s 28(1) and s 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in s 28(1). This interpretation is consistent with the manner in which s 28(2) was applied by this Court in *Fraser v Naude and Others*.[18]"

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16 See *Dawood and Another; Shalabi and Another; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 31; *National Coalition v Minister of Home Affairs*, above note 10 at para 47-8; and *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 99.

17 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) at para 17.

18 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 9.

Both international law and the domestic law of many countries have affirmed the paramountcy of "the best interests of the child".[19] Similarly, section 18(4)(c) of the Child Care Act, which sets the best interests standard for the adoption of a child, provides that:

> "A children's court to which application for an order of adoption is made . . . shall not grant the application unless it is satisfied –
>
> . . . .
>
> (c) that the proposed adoption will serve the interests and conduce to the welfare of the child . . ."

[21] In their current form the impugned provisions exclude from their ambit potential joint adoptive parents who are unmarried, but who are partners in permanent same-sex life partnerships and who would otherwise meet the criteria set out in section 18 of the Child Care Act.[20] Their exclusion surely defeats the very essence and social purpose of

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19 Examples of African countries which incorporate children's clauses in their constitutions include Namibia (art 15 of the Constitution of the Republic of Namibia); and Uganda (section 34 of the Constitution of the Republic of Uganda). The paramountcy of the best interests of children is confirmed in many international conventions. See, for example, art 3 of the United Nations Convention on the Rights of the Child, 1989. The convention was adopted by the United Nations General Assembly on 20 November 1989 and entered into force on 2 September 1990. See also, art 4 of the African Charter on the Rights and Welfare of the Child, 1990.

20 Section 18(4) of the Child Care Act provides that:

> "A children's court to which application for an order of adoption is made in terms of subsection (2), shall not grant the application unless it is satisfied –
>
> (a) that the applicant is or that both applicants are qualified to adopt the child in terms of section 17 and possessed of adequate means to maintain and educate the child; and
>
> (b) that the applicant is or that both applicants are of good repute and a person or persons fit and proper to be entrusted with the custody of the child; and
>
> (c) that the proposed adoption will serve the interests and conduce to the welfare of the child; and
>
> (d) that consent to the adoption has been given by both parents of the child, or, if the child is born out of wedlock, by both the mother and the natural father of the child, whether or not such mother or natural father is a minor or married person and whether or not he or she is assisted by his or her parent, guardian or in the case of a married person, spouse, as the case may be: Provided that

adoption which is to provide the stability, commitment, affection and support important to a child's development, which can be offered by suitably qualified persons.[21]

[22] Excluding partners in same sex life partnerships from adopting children jointly where they would otherwise be suitable to do so is in conflict with the principle enshrined in section 28(2) of the Constitution. It is clear from the evidence in this case that even though persons such as the applicants are suitable to adopt children jointly and provide them with family care, they cannot do so. The impugned provisions of the Child Care Act thus deprive children of the possibility of a loving and stable family life as required by section 28(1)(b) of the Constitution. This is a matter of particular concern given the social reality of the vast number of parentless children in our country. The provisions of the Child Care Act thus fail to accord paramountcy to the best interests of the children and I conclude that, in this regard, sections 17(a) and (c) of the Act are in conflict with section 28(2) of the Constitution.

Equality

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such natural father has acknowledged himself in writing to be the father of the child and has made his identity and whereabouts known as contemplated in section 19A; and

(e) that the child, if over the age of ten years, consents to the adoption and understands the nature and import of such consent".

See also section 40 of the Act (as read with section 18(3)) which provides that: ". . . regard shall be had to the religious and cultural background of the child concerned and of his parents as against that of the person in or to whose custody he is to be placed or transferred."

21 These values are also reflected in the Preamble to the United Nations Convention on the Rights of the Child which states that, ". . . the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding".

[23] The argument advanced by the applicants in the High Court and in this Court was that the impugned provisions, in effect, differentiate on the grounds of sexual orientation and marital status, both of which are listed grounds in section 9(3) of the Constitution.[22]

[24] The High Court referred to the judgment of this Court in *Harksen v Lane*[23] which comprehensively describes the three stage test which is undertaken to determine whether a right has been infringed under the equality clause of the Constitution.[24]

[25] In applying this test, the judge found that the impugned provisions unfairly differentiate between married persons and the applicants as same-sex life partners.[25] He

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22 Section 9 of the Constitution provides –

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

23 *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 53; 1997 (11) BCLR 1489 (CC) at para 52.

24 This approach to the stages of equality analysis has been confirmed in a number of subsequent cases such as *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (the Sodomy case) at para 17; *National Coalition v Minister of Home Affairs,* above n 10 at para 32; *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council and Others* 1998 (2) SA 61 (CC); 1998 (1) BCLR 1 (CC) at para 22; and *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 27.

25 Above note 5 at para 11.

was satisfied that the omission of the words complained of in the Child Care Act was inconsistent with the Constitution and invalid to the extent of such inconsistency.

[26] I agree. The unfair effect of the discrimination is squarely founded on an intersection of the grounds upon which the applicants' complaint is based:[26] the applicants' status as unmarried persons which currently precludes them from joint adoption of the siblings is inextricably linked to their sexual orientation. But for their sexual orientation which precludes them from entering into a marriage, they fulfil the criteria that would otherwise make them eligible jointly to adopt children in terms of the impugned legislation.[27] In this respect, then, the provisions of section 17(a) and (c) are in conflict with section 9(3) of the Constitution.

Dignity

[27] The applicants further argued that their inability to adopt the siblings jointly amounts to a limitation of the first applicant's right to human dignity[28] in that the challenged provisions of the Child Care Act deny her due recognition and status as a parent of the siblings even though she has played a significant role in their upbringing.

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26 See *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR (CC) at para 44; *National Coalition v Minister of Home Affairs*, above n 10 at para 40; and *National Coalition v Minister of Justice*, above n 24 at para 113.

27 Those criteria are set out in section 18(4) of the Child Care Act, above n 20.

28 Section 10 of the Constitution provides that "Everyone has inherent dignity and the right to have their dignity respected and protected."

More significantly, the first applicant is said to be denied recognition as a parent even though she and the second applicant have lived together as a family and made a consensual and deliberate decision jointly to adopt the siblings and to support and rear them equally as co-parents.

[28] They submitted further that the non-recognition of the first applicant as a parent, in the context of her relationship with the second applicant and their relationship with the siblings, perpetuates the fiction or myth of family homogeneity based on the one mother/one father model. It ignores developments that have taken place in the country, including the adoption of the Constitution.

[29] On the evidence presented in this case, the applicants constitute a stable, loving and happy family. Yet the first applicant's status as a parent of the siblings cannot be recognised. This failure by the law to recognise the value and worth of the first applicant as a parent to the siblings is demeaning.[29] I accordingly hold that the impugned provisions limit the right of the first applicant to dignity.

The Guardianship Act

[30] As the applicants have succeeded in establishing that the provisions of the Child

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[29] See *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 84; *Dawood*, above n 16 at para 35; *S v Mamabolo* 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 41; *Hoffmann*, above n 24 at para 27; and *National Coalition v Minister of Justice*, above n 24 at para 28.

Care Act constitute an infringement of the rights protected by sections 28(2), 9(3) and 10 of the Constitution, so for the same reasons have they established that section 1(2) of the Guardianship Act constitutes an infringement of the Constitution. The provisions of the Guardianship Act are premised on the assumption that same-sex life partners cannot be joint guardians of children. That assumption arises, in particular, from the provisions of section 17 of the Child Care Act. For the same reasons that section 17 is in conflict with the Constitution, then, section 1(2) of the Guardianship Act is.

Limitations Inquiry

[31] The respondents have not suggested that the impugned provisions are justifiable in terms of section 36 of the Constitution.[30] This is not, however, decisive of the matter.[31] The validity of these provisions is a matter of public importance which is properly before the Court and which must be decided. The Court must therefore consider whether the limitations occasioned by the impugned provisions are indeed justifiable in terms of section 36 of the Constitution.

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30 Section 36(1) of the Constitution provides –

> "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, taking into account all relevant factors, including –
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

31 See *National Coalition v Minister of Justice*, above n 24 at para 5 and 35; and *Dawood*, above n 16 at para 15.

[32] The impugned provisions do not prevent lesbian or gay people from adopting children at all. They make no provision however for gay and lesbian couples to adopt children jointly. In this regard, they are not the only legislative provisions which do not acknowledge the legitimacy and value of same-sex permanent life partnerships. It is a matter of our history (and that of many countries) that these relationships have been the subject of unfair discrimination in the past. However, our Constitution requires that unfairly discriminatory treatment of such relationships cease. It is significant that there have been a number of recent cases,[32] statutes[33] and government consultation documents[34] in South Africa which broaden the scope of concepts such as "family", "spouse" and "domestic relationship", to include same-sex life partners. These legislative and jurisprudential developments indicate the growing recognition afforded to same-sex relationships.

[33] One of the considerations that could have been raised by the respondents to justify

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32 See *National Coalition v Minister of Home Affairs*, above n 10; *Satchwell*, above n 10; and *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T).

33 See section 27(2)(c)(i) of the Basic Conditions of Employment Act 75 of 1997 providing for family responsibility leave in the event of death of a "spouse or life partner"; section 1(vii)(b) of the Domestic Violence Act 116 of 1998 referring to the definition of "domestic relationship"; and the definition of "spouse" in section 1 of the Estate Duty Act 45 of 1955 has been amended by section 3(a) of the Taxation Laws Amendment Act 5 of 2001 which now provides that ". . . 'spouse', in relation to any deceased person includes a person who at the time of death of such deceased person was the partner of such person . . . in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent . . .".

34 See, for example, Section 1 Chapter 8 Draft White Paper for Social Welfare, Ministry for Welfare and Population Development (November 1995), GN 16943 (2 February 1996).

the constitutional limitations in issue, relates to the procedures available for regulating and safeguarding the interests of children in the event of the termination or breakdown of the relationship between same-sex couples who may be joint adoptive parents. Same-sex couples are not immune to the breakdown of their relationships and at present the law does not make comprehensive or express provision either for the recognition or the dissolution of same-sex life partnerships, or the safeguarding of the interests of children in the event of such a breakdown.

[34] Important as a consideration like this is, I am satisfied that there are adequate mechanisms available for determining and protecting the best interests of minor children upon termination of a same-sex partnership in which the participants are joint adoptive parents.

[35] The curator ad litem, who supported the joint adoption by the applicants, argued in this Court that the lacuna in the law regarding the protection of children upon termination of the same-sex partnerships could be cured by invoking some of the provisions meant for the protection of children upon divorce or separation of the child's parents. In his report, the curator observed that an aggrieved parent could approach a High Court in terms of the provisions of section 5(1) of the Matrimonial Affairs Act 37

of 1953,[35] which allows applications for sole custody and/or guardianship in the event of a termination of the same-sex partnership. I am not persuaded that the Matrimonial Affairs Act can be read so as to achieve this result. It refers to an application by a "parent of a minor whose parents are divorced or are living apart", and speaks of an order lapsing in circumstances where "the parents become reconciled and live together again as husband and wife".[36]

[36] There can be no doubt, however, that the aid of the High Courts could always be sought in their capacity as upper guardian of all minor children.[37] Although it clearly would be preferable to have statutory guidelines and procedures governing the situation, there is no reason why existing procedures could not be used in appropriately adapted form.

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35 Section 5(1) of the Matrimonial Affairs Act (as substituted by section 16(a) of the Divorce Act 70 of 1979) states that "Any provincial or local division of the Supreme Court or any judge thereof may, on the application of either parent of a minor whose parents are divorced or are living apart, in regard to the custody or guardianship of, or access to, the minor, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent."

36 Sections 5(1) and (2).

37 "As upper guardian of all dependent and minor children this Court has an inalienable right and authority to establish what is in the best interests of children and to make corresponding orders to ensure that such interests are effectively served and safeguarded. No agreement between the parties can encroach on this authority." *Girdwood v Girdwood* 1995 (4) SA 698 (C) at 708J - 709A. The status of the High Courts as upper guardians of all minors has a long and established historical pedigree. See the discussion in Van Heerden et al *Boberg's Law of Persons and the Family* 2nd ed (Juta, Kenwyn 1999) at 500-1, n 7.

[37] The absence of statutory regulation concerning the protection of children in cases where same-sex adoptive parents break up, is not sufficient to render the limitations of the constitutional rights identified in this case justifiable. In the circumstances, then, I conclude that the limitations of the rights to equality, dignity and the paramountcy of the best interests of children in cases concerning them are not justifiable.

Remedy

[38] In concluding that the impugned provisions are inconsistent with the Constitution and to that extent invalid, I am now required to consider a remedy that is not only appropriate[38] but also just and equitable.[39] Applicants submit that in the present case, appropriate relief demands not merely a declaration that the impugned provisions are inconsistent with the Constitution and therefore invalid, but also the reading into the impugned provisions of words that will cure the constitutional defect.[40] Such an order would provide the first applicant with the legal basis upon which to adopt the siblings, effectively conferring on both the applicants equal parenting rights.

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38 See section 38 of the Constitution which provides that a court "may grant appropriate relief" to anyone alleging that a right in the Bill of Rights has been infringed or threatened. See also *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at para 95; and *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at paras 18, 19, and 69. (These cases dealt with the comparable provision in the interim Constitution, namely, section 7(4).)

39 Section 172(1)(b) states that –

> "(1) When deciding a constitutional matter within its power, a court-
>
> . . . .
>
> (b) may make any order that is just and equitable. . ."

40 The wording to be read into the impugned provisions as prayed for by the applicants appears in the order handed down by the High Court, see para 17.

[39] This Court has recognised the remedy of reading into legislation wording that cures the constitutional defect as an appropriate form of relief. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, Ackermann J held that reading in is "an appropriate form of relief under s 38 of the Constitution".[41]

[40] During the hearing of this matter, the amicus curiae handed into Court a draft order, the terms of which proposed a variation of the relief granted by the High Court. The amicus proposed that the Court suspend a declaration of invalidity for a period of twenty-four months from the date of the order to enable Parliament to address the matter. In particular, the amicus argued that it was desirable that Parliament should provide a system of regulation of same-sex life partnerships which would ensure that the best interests of the children would be preserved in the event of the termination of such partnerships, in circumstances where the partners were joint adoptive parents of children.

[41] I have no doubt that the provision of effective protection for children upon termination of a same-sex partnership can best be cured by the passing of legislation by Parliament. However, in the interim, I am of the view that the interests of the siblings and prospective adoptive children in general can adequately be addressed by the high courts

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41 Above n 10 at para 70. This form of relief has been used by the Constitutional Court subsequently on several occasions. See, for example, *Satchwell*, above n 10.

as the upper guardian of all minor children. In exercising that role, the high courts will seek to develop the constitutional standard of the best interests of the child. The flexibility of that standard will ensure that the welfare and best interests of children are protected.

[42] Accordingly, I shall grant the relief sought by the applicants in this case and confirm the order made by the High Court. I am of the view that such a remedy serves to protect not only the applicants' equal parenting rights in respect of the siblings, but all permanent same-sex life partners wanting to adopt children jointly or to undertake joint guardianship.

[43] I should, however, emphasise that in each decision concerning adoption, prospective adoptive parents should be evaluated on a case-by-case basis as provided for in the Child Care Act. In so doing, care will be taken to ensure that only suitable couples will be entitled to adopt children jointly.

[44] In conclusion, the following order is made:

1. The order made by Kgomo J in the High Court is confirmed.

2. It is accordingly declared that:

2.1. the omission from section 17(a) of the Child Care Act 74 of 1983 after the word “jointly” of the words “or by the two members of a permanent same-sex life partnership jointly” is inconsistent with the Constitution and invalid; and

2.2. section 17(a) of the Child Care Act 74 of 1983 is to be read as though the following words appear therein immediately after the word “jointly”: “or by the two members of a permanent same-sex life partnership jointly”; and

2.3. the omission from section 17(c) of the Child Care Act 74 of 1983 after the word “child” of the words “or by a person whose permanent same-sex life partner is the parent of the child” is inconsistent with the Constitution and invalid; and

2.4 section 17(c) of the Child Care Act 74 of 1983 is to be read as though the following words appear therein immediately after the word “child”: “or by a person whose permanent same-sex life partner is the parent of the child”; and

2.5. the omission from section 20(1) of the Child Care Act 74 of 1983 after the word “spouse” of the words “or permanent same-sex life partner” is inconsistent with the Constitution and invalid; and

2.6 section 20(1) of the Child Care Act 74 of 1983 is to be read as though the following words appear therein immediately after the word “spouse”: “or permanent same-sex life partner”; and

2.7 the omission from section 1(2) of the Guardianship Act 192 of 1993 after the word "marriage" of the words "or both members of a permanent same-sex life partnership are joint adoptive parents of a minor child" is inconsistent with the Constitution and invalid; and

2.8 section 1(2) of the Guardianship Act 192 of 1993 is to be read as though the following words appear therein immediately after the word "marriage": "or both members of a permanent same-sex life partnership are joint adoptive parents of a minor child".

Chaskalson CJ, Langa DCJ, Ackermann J, Du Plessis AJ, Goldstone J, Kriegler J, Madala J, Ngcobo J, O'Regan J and Sachs J concur in the judgment of Skweyiya AJ.

For the applicants:	P Ginsburg SC and M Chaskalson instructed by the Wits Law Clinic, Johannesburg.
For the amicus curiae:	PR Jammy and K Pillay instructed by Nicholls, Cambanis and Associates, Johannesburg.
Curator ad Litem:	P Stais.

IN THE HIGH COURT OF SOUTH AFRICA
(Transvaal Provincial Division)

Case number: 23704/2001
Heard: 7/08/2001
Date delivered: /09/2001
In the matter between:

SUZANNE DU TOIT 1st Applicant
ANNA-MARIé DE VOS 2nd Applicant

and

THE MINISTER OF WELFARE AND
POPULATION DEVELOPMENT
1st Respondent
MINISTER OF JUSTICE
2nd Respondent
COMMISSIONER FOR CHILD WELFARE,
PRETORIA 3rd Respondent

JUDGMENT

KGOMO J:

1. This is an application by the applicants for orders declaring Sections 17 (a), 17 (c) and 20 (1) of the Child Care Act of 1983 and Section 1 (2) of the Guardianship Act 192 of 1992 to be unconstitutional and therefore invalid and seeking orders reading into the aforementioned challenged provisions certain specific wording, fully adverted to later, which will cure the constitutional complaints of the applicants. The application is unopposed.

2. I digress to point out that I deferred making any decision on this application until I have heard argument and written the judgment in the opposed application of K M Satchwell v The President of the Republic of South Africa and Another, Case No: 26289/2000 (TPD) to be delivered simultaneously with this matter to avoid inconsistencies. It suffices to say that substantial portions in the two judgments overlap as regards the approach, the principles involved and the authorities cited therein. Separate judgments have been written for convenience and easy reference.

3. The First Applicant, Du Toit, is an artist and the Second Applicant, De Vos, a High Court judge. They are partners in a same-sex (or lesbian) life partnership. They have lived together as such since September 1989. A year later, in September 1990, the founding statement states, they "held a commitment ceremony cementing our relationship with each other and indicating to friends and family our intention to stay together permanently. The ceremony was performed by a friend who is a lay preacher in our church." They have pooled their financial resources. They have a joint will in which the first dying has instituted the surviving partner as beneficiary. They have also nominated each other as beneficiary in their respective insurance policies. In short, for all intends and purposes they are a couple and a family and are regarded as such by their relatives, friends and acquaintances. If they could marry each other, they certainly would. See:

Langemaat v Minister of Safety and Security and Others 1998 (3) SA 312 (T) at 316G.

4. In June 1994 the applicants approached a recognized children's home in Johannesburg and were screened as possible joint adoptive parents. They also went through months of counselling. They were both approved as suitable prospective adoptive parents. They chose siblings, a boy and a girl, who must for obvious reasons (not related to the sexual orientations of the applicants) remain anonymous. The children were released into their custody in December 1994. In September 1995 the adoption was finalised but with De Vos as the sole adoptive parent. No blame is apportioned to the Third Respondent, the Commissioner for Child Welfare, Pretoria, but it was certain provisions in the Child Care Act 74 of 1983 and the Guardianship Act 192 of 1993 which frustrated the applicants' wish to become joint adoptive parents of the siblings. They now challenge the constitutionality of these provisions, soon to be specified. (I once heard a chieftainess of a village against whose woman-folk certain customary laws discriminated remark that she has armed herself with the Constitutional axe to chop down the obnoxious discriminatory tree or trim the offending branches to size.) This is precisely what the applicants intend doing.

5. The applicants consequently approach the Court for the following remedies:
"1. It is declared that:
1.1 the omission from section 17(1) of the Child Care Act, 74 of 1983 after the word "jointly" of the words "or by the two members of a permanent same-sex life partnership jointly" is inconsistent with the Constitution and invalid; and
1.2 section 17(a) of the Child Care Act 74 of 1983 is to be read as though the following words appear therein immediately after the word "jointly":
"or by the two members of a permanent same-sex life partnership jointly."
2. It is declared that:
2.1 the omission from section 17(c) of the Child Care Act, 74 of 1983 after the word "child" of the words "or by a person whose permanent same-sex life partner is the parent of the child" is inconsistent with the Constitution and invalid; and
2.2 section 17(c) of the Child Care Act, 74 of 1983 is to be read as though the following words appear therein immediately after the word "child":
"or by a person whose permanent same-sex life partner is the parent of the child".
3. It is declared that:
3.1 the omission from section 20(1) of the Child Care Act, 74 of 1983 after the word "spouse" of the words "or permanent same-sex life partner" is inconsistent with the Constitution and invalid; and
3.2 section 20(1) of the Child Care Act, 74 of 1983 is to be read as though the following words appear therein immediately after the word "spouse"
"or permanent same-sex life partner"
4. It is declared that:
4.1 the omission from section 1(2) of the Guardianship Act, 192 of 1993 after the word "marriage" of the words "or both members of a permanent same-sex life partnership are joint adoptive parents of a minor child" is unconstitutional and invalid; and
4.2 section 1(2) of the Guardianship Act, 192 of 1993 is to be read as though the following words appear therein immediately after the word "marriage":
"or both members of a permanent same-sex life partnership are joint adoptive parents of a minor child".

6. Section 17 of the Child Care Act which is being challenged provides that:
"17 Qualifications for adoption of children
A child may be adopted-
(a) by a husband and his wife jointly;
(b) by a widower or widow or unmarried or divorced person;

(c) by a married person whose spouse is the parent of the child;
(d) by the natural father of a child born out of wedlock."

Section 20 (1) which must be read in conjunction with Section 17 (above) stipulates that:
"20 Effect of adoption
Cases
(1) An order of adoption shall terminate all the rights and obligations existing between the child and any person who was his parent (other than a spouse contemplated in section 17 (c)) immediately prior to such adoption, and that parent's relatives."

The crisp submission that Mr Ginsburg, on behalf of the applicants, made on the effect of the aforegoing impugned provisions is that same-sex life partners cannot jointly adopt a child or children. I share that view.

7. The other provisions to be placed under the microscope relate to Section 1(2) of the Guardianship Act No 192 of 1993. It reads:
"(2) Whenever both a father and mother have guardianship of a minor child of their marriage, each one of them is competent, subject to any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or power or to carry out any duty arising from such guardianship: Provided that, unless a competent court orders otherwise, the consent of both parents shall be necessary in respect of-
(a) the contracting of a marriage by the minor child;
(b) the adoption of the child;
(c) the removal of the child from the Republic by one of the parents or by a person other than a parent of the child;
(d) the application for a passport by or on behalf of a person under the age of 18 years;
(e) the alienation or encumbrance of immovable property or any right to immovable property belonging to the minor child."

This section conspicuously fails to regulate the position of same-sex life partners who are joint guardians of their adoptive children.

8. Ms du Toit, the first applicant, states that since the children moved in with her and her partner they have developed a good parent/child relationship with her. She has played a significant role in the upbringing of the children in as much as De Vos, the second applicant, has done. The children regard her (Du Toit) as their mother. She provides them with their principal source of emotional support within their family structure. This is so because of the constraints that De Vos's professional life places on her time during the week. The overwhelming indications are that under the joint parenthood of both applicants the children have developed well, are happy and well adjusted. The children are aware of the applicants' lesbian life partnership and understand the situation well. They are also aware that they have a natural mother who was incapable of caring properly for them which led to them being given up for adoption. The children are attending school and are performing well both academically and in their extra-curricular activities. The children and Du Toit's sister's three children regard each other as cousins and are on reciprocal visiting terms.

9. The applicants further aver that:
9.1 It is in the best interests of the children that their experience of family life is reflected in the law;
9.2 It is a source of embarrassment and humiliation to Du Toit and a cause of some confusion to the children that only De Vos can sign their documents and school reports;
9.3 Whilst Du Toit is in fact contributing towards the maintenance and upbringing of the children she is not legally obliged to do so;
9.4 Should Du Toit die intestate the children would not inherit from her;
9.5 Should circumstances change Du Toit's access to the children could in

later years be severely limited, to the detriment of the children as she cannot have access to them as of right;
9.6 If made an adoptive parent Du Toit would also acquire custodianship of and guardianship over the children;
9.7 Du Toit states further in her affidavit:
"The refusal of the law to allow me to adopt the children jointly with second applicant is also demeaning of our relationship. It suggests to me while the law is willing to countenance our de facto role as joint parents of the children it is not willing to give our relationship the same recognition that it gives to heterosexual married couples."

10. Mr Ginsberg has submitted that the facts outlined in the applicant's papers demonstrate that:
10.1 There has been differentiation on grounds of sexual orientation and marital status, both of which are listed grounds in section 9(3) of the Constitution.
10.2 In view thereof that the differentiation is on specified grounds such differentiation amounts to discrimination.
10.3 In terms of section 9 (5) of the Constitution the discrimination is presumed to be unfair unless the contrary is shown.

11. The Constitutional Court has tabulated the stages of enquiry which become necessary whenever an attack is made on a provision in reliance to section 9 of the Constitution (previously Section 8 of the Interim Constitution).
11.1 The first enquiry is whether the provisions differentiate between people or categories of people. If so, it has to be established whether such differentiation bear a rational connection to a legitimate government purpose.
11.2 The next stage is to enquire whether the differentiation amounts to unfair discrimination. If the differentiation is found to be unfair then there will be a violation of section 9 of the Constitution.
11.3 If the discrimination is found to be unfair then a determination must be made as to whether the impugned provision can be justified under the limitation clause, Section 36 of the Constitution. See: Harksen v Lane N.O. & Others 1998 (1) SA 300 (CC) para 53 (pp324H-325E); National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC) at para 17; National Coalition / Home Affairs (supra) at para 32.

12. The term "spouse" is not defined in the Child Care Act, No 74 of 1983. It is trite that where the term "spouse" has not been defined it has been given its ordinary every day meaning. The Oxford English Dictionary describes it as: "A married woman in relation to her husband; a wife or a married man in relation to his wife; a husband". The term "spouse" was propounded upon by the Constitutional Court in National Coalition for Gay & Lesbian Equality v Min of Home Affairs & Others 2000 (2) SA 1CC ("National Coalition / Home Affairs"). In that case the applicants had brought an application in the Cape High Court seeking an order declaring Section 25 of the Aliens Control Act 96 of 1991 to be inconsistent with the Constitution on the grounds that it discriminated against partners in permanent same-sex life partnerships, in that Section 25(5) of this particular Act provided for an exemption from the provisions of Section 25(4) for the spouse of a person permanently and lawfully resident in South Africa. This, by implication, did not extend the exemption to partners in permanent same-sex life partnerships. At p20 D-G (par 25) the Court held:
"(25) The High Court correctly concluded that 'spouse' as used in s 25(5) was not reasonably capable of the construction contended for by the respondents. The word 'spouse' is not defined in the Act, but its ordinary meaning connotes '[a] married person; a wife, a husband'. The context in which 'spouse' is used in s 25(5) does not suggest a wider meaning. The use of the expression 'marriage' in s 25(6) and the special provisions relating to a person applying for an immigration permit and 'who has entered into a

marriage with a person who is permanently and lawfully resident in the Republic less than two years prior to the date of his or her application' is a further indication that 'spouse', as used in s 25(5), is used for a partner in a marriage. There is also no indication that the word 'marriage' as used in the Act extends any further than those marriages that are ordinarily recognised by our law. In this regard reference may be made to the recent House of Lords decision in Fitzpatrick (AP) v Sterling Housing Association Ltd (delivered 28/10/99 - unreported) where 'spouse' likewise could not be given such an extensive meaning and Quilter v Attorney-General ((1998) NZLR 523 (CA)) where the statute at issue did not define 'marriage' but the New Zealand Court of Appeal unanimously held that textual indications prevented the term from being construed to include same-sex unions."

13. In Seedat's Executors v The Master, Natal, 1917 AD 302 at 309 Innes CJ defined the Common Law marriage as "the union of one man with one woman, to the exclusion while it lasts, of all others". In terms of this definition same-sex life partnerships are excluded. Du Toit is accordingly not regarded as a De Vos's spouse and cannot enjoy the benefits accorded to married judges and their spouses by the challenged provisions.

14. The applicants decry the fact that they have been denied their inherent dignity because they belong to a vulnerable marginalised and stigmatized group. In National Media Ltd and Others v Bogoshi 1998 (4) SA 1196 (SCA) at 1207E-H and Argus Printing and Publishing Co Ltd v Essenlen's Estate 1994 (2) SA 1 at 23D-H the Court quoted with approval the following passage in Melius de Villiers's The Roman and Roman-Dutch Law of Injuries (1899):
"The specific interests that are detrimentally affected by the acts of aggression that are comprised under the name of injuries are those which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation. By a person's reputation is here meant that character or moral or social worth to which he is entitled amongst his fellow-men; by dignity that valued and serene condition in his social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt.
The rights here referred to are absolute or primordial rights; they are not created by, nor dependent for their being upon, any contract; every person is bound to respect them; and they are capable of being enforced by external compulsion. Every person has an inborn right to the tranquil enjoyment of his peace of mind, secure against aggression upon his person, against the impairment of that character or moral and social worth to which he may rightly lay claim and of that respect and esteem of his fellow-men of which he is deserving, and against degrading and humiliating treatment; and there is a corresponding obligation incumbent on all others to refrain from assailing that to which he has such right."

15. The aforegoing classical statement of the law more than a century ago accords with the provisions of Section 10 of the Constitution which stipulates: "10. Human Dignity: Everyone has inherent dignity and the right to have their dignity respected and protected". In Law v Canada (Minister of Employment and Immigration) (1999) 170 DLR (4th) 1 at Paragraph 53 Lacobucci, J, expressed himself in this manner on the fundamental right to human dignity:
"Human dignity means that an individual or group feels self-respected and self-worth. It is concerned with physical and psychological integrity and empowernment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlining their differences."

In Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC) at par 35 O'Regan

J stated:
"[35] The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past .. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected." (Foot notes omitted)

16. Mr Ginsburg has in addition submitted that the challenged provisions violate the "best interest" rights of the children protected by Section 28 (2) of the Constitution. Section 18 (4) (C) of the Child Care Act provides that no adoption application may be granted by a Commissioner for Child Welfare unless the Children's Court is satisfied that the proposed adoption will serve the best interests and conduce to the welfare of the child. In the premises, Mr Ginsburg argued, the challenged provisions are wholly unnecessary to protect the best interests and welfare of adoptive children and merely operate to frustrate adoptions which conduce to the best interests and welfare of the child.

17. The other aspect of the applicants' case is that section 1 (2) of the Guardianship Act limits their fundamental rights protected by Section 9 (3) and 28 (2) of the Constitution because by failing to regulate the guardianship of children "jointly adopted" by same-sex life partners it creates a lacuna in the statutes in question. Mr Ginsburg submitted that this casus omissus creates a situation of uncertainty that is manifestly not in the best interests of the children whose rights are sought to be enforced and protected. There is merit in this argument. This is discriminatory against same-sex life partners in view thereof that heterosexual married couples who adopt children need not incur such costs or go to such lengths to exercise their rights in this connection.

18. The respondents have not opposed this application. They have accordingly not endeavoured to justify the limitations placed by the impugned provisions on the joint adoption by and the guardianship in respect of same-sex life partners. The provisions of the limitation clause (section 36 of the Constitution) therefore do not fall to be considered. See: Minister of Welfare and Population Development v Fitzpatrick 2000 (3) SA 422 (CC) at 429 D-E ("the Fitzpatrick-case"). There is no evidence before me that generally same-sex life partners are less capable of jointly adopting children or in particular that the applicants are not worthy joint adoptive parent candidates. On the contrary the full and frank disclosure by the applicants before me by way of affidavits and social welfare reports point to their eminent suitability.

19. My intimation as regards the applicants' ostensible suitability must not be construed as giving them the seal of approval as suitable joint adoptive parents. That task falls to be decided by the children's court. I advert to this issue only, in the words of Goldstone J in Fitzpartrick (supra) at 425, "as illustrative of why the (children's) best interest may be prejudiced by the current formulation" of the impugned provisions of the Children's Act. At 432B-F Goldstone J (in a different context which is apposite to this matter) went on to state:
"A children's court may not grant an adoption unless it is satisfied, inter alia, that:
(a) the applicants are possessed of adequate means to maintain and educate

the child;
(b) the applicant or applicants are of good repute and a person or persons fit and proper to be entrusted with the custody of the child;
(c) that the proposed adoption will serve the interests and conduce to the welfare of the child;
(d) subject to the exceptions contained in s 19 and in s 18(4)(d), that the consent to the adoption has been given by the parents of the child.
According to the Act, it is the children's courts that are charged with overseeing the well-being of children, examining the qualifications of applicants for adoption and granting adoption orders. The provisions of the Act creating children's courts and establishing overall guidelines advancing the welfare of the child offer a coherent policy of child and family welfare."

20. I am satisfied that the omission of the words complained of in the Child Care Act and the Guardianship Act, set out in the Court Order formulated at the end of this judgment, is inconsist with the Constitution and invalid to the extent of such inconsistency.

21. It has occurred to me after this applicant was argued that no curator ad litem was appointed for the children whose rights and interests were in issue. Section 28 (1) (h) enjoins that every child has the right to have a legal practitioner assigned to it by the State, at State expense, in civil proceedings affecting the child, if substantial injustice would otherwise result. I considered directing counsel to file supplementary written heads pertaining to this narrow aspect when I was busy writing this judgment but decided against it because I can conceive of no "substantial injustice" that would result from this application or my order. I have already remarked that all indications before me are that it would be in the best interest of the children that they be adopted jointly by the applicants and that they share guardianship over the children. I am not unmindful of the fact that the Children'' Court or the Constitutional Court may see matters differently or that a curator ad litem may motivate that it is not in the best interests of the children to be jointly adopted by the applicants.

I accordingly suggest that serious consideration be given to the necessity or otherwise of appointing a curator ad litem for the children when the matter comes before the Constitutional Court and/or the Children's Court.

22. What remains to be determined is what the appropriate relief in terms of Section 38 and 172 (1) (b) of the Constitution has to be. In Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) the Constitutional Court commented as follows on the identical predecessor of Section 38 (which was Section 98 (5) of the Interim Constitution):
"[19] Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights."
"[69] . Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this

regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."

23. More pertinently in National Coalition / Home Affairs (supra) these pronouncements were made by the Constitutional Court concerning the courts' obligation to provide appropriate relief:
"[82] An appropriate remedy in the present case must vindicate the rights of permanent same-sex life partners to establish a family unit that, while retaining the characteristic features derived from its same-sex nature, receives the same protection and enjoys the same concern from the law and from society generally as do marriages recognised by law. But it must vindicate at more than an abstract level. It must operate to eradicate these stereotypes. Our constitutional commitment to non-discrimination and equal protection demands this. There is a wider public dimension. The bell tolls for everyone, because
'(t)he social cost of discrimination is insupportably high and these insidious practices are damaging not only to the individuals who suffer the discrimination, but also to the very fabric of our society'.
The most effective way of achieving this in the present case is by a suitable reading-in order, if this is reasonably possible."

At para 86 the following:
"[86] Against the background of what has been said above I am satisfied that the constitutional defect in s 25(5) can be cured with sufficient precision by reading in after the word 'spouse' the following words: 'or partner, in a permanent same-sex life partnership' and that it should indeed be cured in this manner. Permanent in this context means an established intention of the parties to cohabit with one another permanently."

24. As can be seen from the (amended) Notice of Motion set out in paragraph 5 (above) the Court is not been asked to strike down the offending provisions. The applicants are alive to the fact that people who are currently entitled to adopt children jointly or exercise joint guardianship over children could be prevented from doing so until Parliament stepped in to regularise the situation. I am of the view that had Parliament considered the most appropriate way for it to remedy the unconstitutionality of the challenged provisions it would have chosen a remedy that accords with the reading in of the words that would give effect to the relief prayed for by the applicants or Parliament would have fashioned legislation that would give more accurate effect to its policy, provided the same is not inconsistent with the constitution. The application succeeds.

24. In the result the following order is made:
1. It is declared that:
1.1 the omission from section 17(1) of the Child Care Act, 74 of 1983 after the word "jointly" of the words "or by the two members of a permanent same-sex life partnership jointly" is inconsistent with the Constitution and invalid; and
1.2 section 17(a) of the Child Care Act 74 of 1983 is to be read as though the following words appear therein immediately after the word "jointly":
"or by the two members of a permanent same-sex life partnership jointly."
2. It is declared that:
2.1 the omission from section 17(c) of the Child Care Act, 74 of 1983 after the word "child" of the words "or by a person whose permanent same-sex life partner is the parent of the child" is inconsistent with the Constitution and invalid; and
2.2 section 17(c) of the Child Care Act, 74 of 1983 is to be read as though the following words appear therein immediately after the word "child":
"or by a person whose permanent same-sex life partner is the parent of the child".
3. It is declared that:
3.1 the omission from section 20(1) of the Child Care Act, 74 of 1983 after the word "spouse" of the words "or permanent same-sex life partner" is

inconsistent with the Constitution and invalid; and
3.2 section 20(1) of the Child Care Act, 74 of 1983 is to be read as though the following words appear therein immediately after the word "spouse"
"or permanent same-sex life partner"
4. It is declared that:
4.1 the omission from section 1(2) of the Guardianship Act, 192 of 1993 after the word "marriage" of the words "or both members of a permanent same-sex life partnership are joint adoptive parents of a minor child" is unconstitutional and invalid; and
4.2 section 1(2) of the Guardianship Act, 192 of 1993 is to be read as though the following words appear therein immediately after the word "marriage":
"or both members of a permanent same-sex life partnership are joint adoptive parents of a minor child".

_____
F D KGOMO
JUDGE
TRANSVAAL PROVINCIAL DIVISION

For the Applicant: Adv P Ginsburg, SC, with him Adv M Chaskalson.

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case no: 232/2003
REPORTABLE

MARIÉ ADRIAANA FOURIE First appellant
CECELIA JOHANNA BONTHUYS Second appellant

and

MINISTER OF HOME AFFAIRS First Respondent
DIRECTOR-GENERAL OF HOME AFFAIRS
Second Respondent

and

LESBIAN AND GAY EQUALITY PROJECT Amicus Curiae

Before: Farlam JA, Cameron JA, Mthiyane JA, van Heerden JA and Ponnan AJA
Appeal: Monday 23 August 2004
Judgment: Tuesday 30 November 2004

Constitution – Bill of Rights – Right to equality – Sexual orientation – Right to marry – Development of common law – Definition of marriage developed to include same-sex partners – Order developing common law not to be suspended – ORDER IN PARA 49

JUDGMENT

CAMERON JA:

[1] I am indebted to my colleague Farlam JA for the benefit of reading his judgment. On the main question, the development of the common law, we agree. We differ in our approach to one aspect of the Marriage Act 25 of 1961, and on whether the order should be suspended. In view of this and other differences I propose briefly to set out my reasons for allowing the appeal, without the order of suspension Farlam JA proposes.

[2] The appellants are two adult persons who on the undisputed evidence love each other. They feel and have deliberately expressed an exclusive commitment to each other for life. The question is whether the common law of this country allows them to marry. That question is controversial because they are of the same sex. Until now, marriage as a social and legal institution has been understood to be reserved for couples of opposite sexes. Joined by the Lesbian and Gay Equality Project as amicus, the appellants – two women who more than ten years ago dedicated themselves to a life together – ask the court to issue a declaration that this is not so. They wish to be married, they testify, 'for the very reason that the bond between

us is so genuine and serious',[1] and because not being able to marry presents a host of practical and legal impediments to their shared life.

[3] They raise no statutory challenge. Instead, their founding affidavit asks the court to grant them relief by invoking its jurisdiction to develop the common law in accordance with the Constitution. In the Pretoria High Court Roux J dismissed their application on the ground that the relief they sought was incompatible with the Marriage Act 25 of 1961. He ordered them and the amicus to pay the costs of the respondents (the Minister and Director-General of Home Affairs). (The respondents later abandoned the costs order against the amicus.)

[4] The Constitution grants inherent power to the Constitutional Court, the Supreme Court of Appeal and the High Courts 'to develop the common law, taking into account the interests of justice' (s 173). The Bill of Rights (s 8(3)) provides that when applying a provision of the Bill of Rights to a natural or juristic person a court, in order to give effect to a right in the Bill, 'must apply, or if necessary develop, the common law to the extent

[1] Founding affidavit para 16: 'Juis ook omdat die verbintenis tussen ons so eg en ernstig is, voel ons om in die eg verbind te word.'

that legislation does not give effect to that right' (though it may develop the rules of the common law to limit the right in accordance with the limitations provision in s 36(1)). It also provides that when developing the common law, a court 'must promote the spirit, purport and objects of the Bill of Rights' (s 39(2)).

[5] Taken together, these provisions create an imperative normative setting that obliges courts to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. Doing so is not a choice. Where the common law is deficient, the courts are under a general obligation to develop it appropriately.[2]

[6] This provides the background to our task in the appeal. At its centre is the fact that our Constitution expressly enshrines equality on the ground of sexual orientation.[3] When this took effect at the birth of our democracy on 27 April 1994,[4] it was

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[2] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC) paras 34 and 39, per Ackermann and Goldstone JJ on behalf of the Court.

[3] Bill of Rights s 9(3): 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.' Section 9(4): 'No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.' Section 9(5): 'Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

[4] Interim Constitution, Act 200 of 1993, s 8(2): 'No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin,

unique: at the time no other country's founding document outlawed unfair discrimination on the express ground of sexual orientation. Its inclusion in the list of conditions specially protected against unfair discrimination was both novel and bold.[5] This is important to emphasise, not because our decision requires boldness, but because the reasons for including sexual orientation in the Constitution illuminate our path.

[7] Through more than 300 years, the primary criterion for civic and social subordination in South Africa was race. On the basis of their skin colour, black women and men were subjected to a host of systematic indignities and exclusions. These included denial of voting rights and citizenship. What was unique about apartheid was not that it involved racial humiliation and disadvantage – for recent European history has afforded more obliterating realisations of racism – but the fact that its iniquities were enshrined in law. More than anywhere else, apartheid enacted racism through minute elaboration in systematised legal regulation. As a consequence, the dogma

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colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.'

[5] The inclusion of sexual orientation in our Constitution is recounted in LM du Plessis and HM Corder *Understanding South Africa's Transitional Bill of Rights* (Juta, 1994) ch 5 pages 139-144; Carl F Stychin *A Nation by Rights* (Temple University Press, 1998) ch 3 pages 52-88; Richard Spitz and Matthew Chaskalson *The Politics of Transition – a hidden history of South Africa's negotiated settlement* (Witwatersrand University Press, 2000) ch 15 pages 301-312.

of race infected not only our national life but the practice of law and our courts' jurisprudence at every level.

[8] Yet despite this rank history, the negotiating founders determined that our aspirations as a nation and the structures for their realisation should be embodied in a constitution that would regulate contesting claims through law. This decision embodied a paradox. Though apartheid used legal means to exclude the majority of this country's people from civic and material justice, the law – embodied in a detailed founding document – would now form the basis for our national aspirations. This paradox lies at the core of our national project – that we came from oppression by law, but resolved to seek our future, free from oppression, in regulation by law. Our constitutional history thus involves –

> 'a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance'.[6]

[9] In expressing this vision of our future, the founders committed themselves to a conception of our nationhood that was both very wide and very inclusive. In this lay a further paradox: for the very extent of past legal exclusion and denigration now

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[6] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) para 21, per Langa DP.

determined the generosity of the protection that the Constitution offered. It was because the majority of South Africans had experienced the humiliating legal effect of repressive colonial conceptions of race and gender that they determined that henceforth the role of the law would be different for all South Africans. Having themselves experienced the indignity and pain of legally regulated subordination, and the injustice of exclusion and humiliation through law, the majority committed this country to particularly generous constitutional protections for all South Africans.

[10] These paradoxes illuminate the significance of the Constitution's promise of freedom from unfair discrimination on the ground of sexual orientation. For though oppression on the ground of sexual orientation was not paramount in the scheme of historical injustice, it formed part of it, and the negotiating founders deliberately committed our nation to a course that disavowed all forms of legalised oppression and injustice.[7] Instead of selective remediation of the badges of repression and dishonour, all criteria of unfair discrimination were

[7] Compare the position regarding gender discrimination as set out in *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 44, per O'Regan J for the Court: 'Although in our society discrimination on grounds of sex has not been as visible, nor as widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute in the case of black women, as race and gender discrimination overlap. That all such discrimination needs to be eradicated from our society is a key message of the Constitution.'

renounced in favour of an ample commitment to equality under law. The national project of liberation would not be mean-spirited and narrow but would encompass all bases of unjust denigration. Non-discrimination on the ground of sexual orientation was to be a part – perhaps a relatively small part, but an integral part – of the greater project of racial reconciliation and gender and social justice through law to which the Constitution committed us.

[11] The fact that homosexuality was in 1994 and still is a controversial issue in Africa, as elsewhere in the world, did not deflect from this commitment. The equality clause went further than elsewhere in Africa: but this was because the legal subordination imposed by colonialism and apartheid went further than anywhere else in Africa. It lasted longer, was more calculated, more intrusive, more pervasive and more injurious. In response the negotiating founders offered the humane vision of nationhood on the basis of expansive legal protections.

[12] This setting explains the 'strides' [8] that our equality jurisprudence has taken in respect of gays and lesbians in the last ten years. Consensual sexual conduct between adults in private has been freed from criminal restriction, not only

[8] *Daniels v Campbell NO* 2004 (5) SA 331 (CC) para 103, per Moseneke J.

because sexual orientation is specifically listed in the Bill of Rights, but on wider grounds of dignity and privacy.[9] Same-sex partners have been held to be entitled to access to statutory health insurance schemes.[10] The right of permanent same-sex partners to equal spousal benefits provided in legislation has been asserted.[11] The protection and nurturance same-sex partners can jointly offer children in need of adoption has been put on equal footing with heterosexual couples.[12] The right of a same-sex partner not giving birth to a child conceived by artificial insemination to become the legitimate parent of the child has been confirmed.[13] The equal right of same-sex partners to beneficial immigrant status has been established.[14] And this Court has developed the common law by extending the spouse's action for loss of support to partners in permanent same-sex life relationships.[15]

[13] The importance of these cases lies not merely in what they decided, but in the far-reaching doctrines of dignity, equality

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[9] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) paras 28-32, per Ackermann J for the Court; paras 108-129, per Sachs J (with whose sentiments Ackermann J associated himself – para 78).
[10] *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T), per Roux J.
[11] *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC), per Madala J for the Court.
[12] *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC), per Skweyiya AJ for the Court.
[13] *J v Director General: Department of Home Affairs* 2003 (5) SA 621 (CC), per Goldstone J for the Court.
[14] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), per Ackermann J for the Court.
[15] *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA), per Cloete JA for the Court.

and inclusive moral citizenship[16] they articulate. They establish the following:

(a) Gays and lesbians are a permanent minority in society who in the past have suffered from patterns of disadvantage. Because they are a minority unable on their own to use political power to secure legislative advantages, they are exclusively reliant on the Bill of Rights for their protection.[17]

(b) The impact of discrimination on them has been severe, affecting their dignity, personhood and identity at many levels.[18]

(c) 'The sting of past and continuing discrimination against both gays and lesbians' lies in the message it conveys, namely that, viewed as individuals or in their same-sex relationships, they 'do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships'. This 'denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity',

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[16] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) paras 107 and 127, per Sachs J.
[17] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 25.
[18] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 26(a).

namely that 'all persons have the same inherent worth and dignity', whatever their other differences may be.[19]

(d) Continuing discrimination against gays and lesbians must be assessed on the basis that marriage and the family are vital social institutions. The legal obligations arising from them perform important social functions.[20] They provide for security, support and companionship between members of our society and play a pivotal role in the rearing of children.[21]

(e) Family life as contemplated by the Constitution can be constituted in different ways and legal conceptions of the family and what constitutes family life should change as social practices and traditions change.[22]

(f) Permanent same-sex life partners are entitled to found their relationships in a manner that accords with their sexual orientation: such relationships should not be subject to unfair discrimination.[23]

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[19] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 42, per Ackermann J.
[20] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 31, per O'Regan J for the Court, applied in *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) para 13.
[21] *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) para 19.
[22] *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) para 19.
[23] *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) para 15. See too *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 82.

(g) Gays and lesbians in same-sex life partnerships are 'as capable as heterosexual spouses of expressing and sharing love in its manifold forms'. They are likewise 'as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household'. They 'are individually able to adopt children and in the case of lesbians to bear them'. They have in short 'the same ability to establish a *consortium omnis vitae*'. Finally, they are 'capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life' in a way that is 'not distinguishable in any significant respect from that of heterosexual spouses'.[24]

(h) The decisions of the courts regarding gays and lesbians should be seen as part of the growing acceptance of difference in an increasingly open and pluralistic South Africa that is vital to the society the Constitution contemplates.[25]

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[24] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 53(iv)-(viii), per Ackermann J.
[25] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC)

(i) Same-sex marriage is not unknown to certain African traditional societies.[26]

[14] These propositions point our way. At issue is access to an institution that all agree is vital to society and central to social life and human relationships. More than this, marriage and the capacity to get married remain central to our self-definition as humans. As Madala J has pointed out, not everyone may choose to get married: but heterosexual couples have the choice.[27] The capacity to choose to get married enhances the liberty, the autonomy and the dignity of a couple committed for life to each other. It offers them the option of entering an honourable and profound estate that is adorned with legal and social recognition, rewarded with many privileges and secured by many automatic obligations.[28] It offers a social and legal shrine for love and for commitment and for a future shared with another human being to the exclusion of all others.

[15] The current common law definition of marriage deprives committed same-sex couples of this choice. In this our

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para 138 and para 107, per Sachs J.

[26] *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) para 12, per Madala J.

[27] *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) para 16.

[28] See *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 93, per O'Regan J (Madala and Mokgoro JJ concurring) ('marital status is a matter of significant importance to all individuals, closely related to human dignity and liberty') and compare *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 30, per O'Regan J for the Court ('such relationships have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others').

common law denies gays and lesbians who wish to solemnise their union a host of benefits, protections and duties. Legislation has ameliorated,[29] but not eliminated,[30] the disadvantage same-sex couples suffer.[31] More deeply, the exclusionary definition of marriage injures gays and lesbians because it implies a judgment on them. It suggests not only that their relationships and commitments and loving bonds are inferior, but that they themselves can never be fully part of the community of moral equals that the Constitution promises to create for all.

[16] The vivid message of the decisions of the last ten years is that this exclusion cannot accord with the meaning of the Constitution, and that it 'undermines the values which underlie an open and democratic society based on freedom and equality'.[32] In the absence of justification, it cannot but constitute unfair discrimination that violates the equality and other guarantees in the Bill of Rights.

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[29] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 37 ('A notable and significant development in our statute law in recent years has been the extent of express and implied recognition the Legislature has accorded same-sex partnerships').
[30] *J v Director General: Department of Home Affairs* 2003 (5) SA 621 (CC) para 23 ('Comprehensive legislation regularising relationships between gay and lesbian persons is necessary').
[31] Compare *Halpern v Attorney-General of Canada* 225 DLR 529 (Ontario Court of Appeal) para 104 (piecemeal legislation extending benefits to same-sex couples may impose pre-conditions while 'married couples have instant access to all benefits and obligations').
[32] Tshepo L Mosikatsana 'The Definitional Exclusion of Gays and Lesbians from Family Status' (1996) 12 *SAJHR* 549 566.

[17] The justification respondents' counsel suggested in this case was in essence that the procreative purpose that is usually and rightly associated with marriage requires that the institution be restricted to heterosexual couples only. But this does not pass. The suggestion that gays and lesbians cannot procreate has already been authoritatively rejected as a mistaken stereotype.[33] In any event the Constitutional Court has held that 'from a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal relationships'.[34]

[18] The appellants moreover do not seek to limit procreative heterosexual marriage in any way. They wish to be admitted to its advantages, notwithstanding the same-sex nature of their relationship. Their wish is not to deprive others of any rights. It is to gain access for themselves without limiting that enjoyed by others. Denying them this, to quote Marshall CJ in the Massachusetts Supreme Court of Judicature, 'works a deep and scarring hardship on a very real segment of the community for no rational reason.'[35] Marshall CJ elaborated thus:

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[33] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 50.
[34] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 51, per Ackermann J for the Court.
[35] *Goodridge v Department of Public Health* 440 Mass 309, 798 NE 2d 941 para 63; and see *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC)

> 'Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.' (para 57)

[19] It is for this reason that the question of extending marriage to same-sex couples involves such intense and pure questions of principle. As Sachs J has observed in a different setting, 'because neither power nor specific resource allocation are at issue, sexual orientation becomes a moral focus in our constitutional order'.[36] The focus in this case falls on the intrinsic nature of marriage, and the question is whether any aspect of same-sex relationships justifies excluding gays and lesbians from it. What the Constitution asks in such a case is that we look beyond the unavoidable specificities of our condition – such as race, gender and sexual orientation – and consider our intrinsic human capacities and what they render possible for all of us. In this case, the question is whether the

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para 56 ('there is no rational connection between the exclusion of same-sex life partners … and the government interest sought to be achieved thereby, namely the protection of families and the family life of heterosexual spouses').

[36] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 128.

capacity for commitment, and the ability to love and nurture and honour and sustain, transcends the incidental fact of sexual orientation. The answer suggested by the Constitution itself and by ten years of development under it is Yes.

[20] The remaining justification sought to be advanced – impliedly if not expressly – invokes the acknowledged fact that most South Africans still think of marriage as a heterosexual institution, and that many may view its extension to gays and lesbians with apprehension and disfavour. Six years ago, the Constitutional Court acknowledged that revoking the criminal prohibitions on private consensual homosexual acts touched 'deep convictions' and evoked 'strong emotions', and that contrary views were not confined to 'crude bigots only'.[37] We must do the same. Our task is to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. In this our sole duty lies to the Constitution: but those we engage with most deeply in explaining what that duty entails is the nation, whose understanding of and commitment to constitutional values is essential if the larger project of securing justice and equality under law for all is to succeed.

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[37] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 38.

[21] In interpreting and applying the Constitution we therefore move with care and respect, and with appreciation that a diverse and plural society is diverse and plural precisely because not everyone agrees on what the Constitution entails. Respect for difference requires respect also for divergent views about constitutional values and outcomes.

[22] It is also necessary to be mindful, as the Constitutional Court reminds us, 'of the fact that the major engine for law reform should be the Legislature and not the Judiciary'.[38] In the same breath in which it issued this cautionary, however, the Court drew attention to the imperative need for the common law to be consonant with 'a completely new and different set of legal norms'. It therefore urged that courts 'remain vigilant' and not 'hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights'.[39]

[23] In moving forward we also bear in mind that the meaning of our constitutional promises and guarantees did not transpire instantaneously. Establishing their import involves a process of evolving insight and application.[40] Developing the common law

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[38] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC) para 36.
[39] *Carmichele* para 36.
[40] See *Van Rooyen and others v The State and others (General Council of the Bar of South Africa intervening)* 2002 (5) SA 246 (CC) para 75 (judicial independence is 'an evolving concept') and para 249 (practical reasons 'at this stage of the evolving process of judicial

involves a simultaneously creative and declaratory function in which the court puts the final touch on a process of incremental legal development that the Constitution has already ordained. This requires a deepening understanding of ourselves and our commitment to each other as South Africans across the lines of race, gender, religion and sexual orientation. As Ngcobo J has stated:

> 'Our Constitution contemplates that there will be a coherent system of law built on the foundations of the Bill of Rights, in which common law and indigenous law should be developed and legislation should be interpreted so as to be consistent with the Bill of Rights and with our obligations under international law. In this sense the Constitution demands a change in the legal norms and the values of our society.' [41]

[24] This process also requires faith in the capacity of all to adapt and to accept new entrants to the moral parity and equal dignity of constitutionalism. Judges are thus entitled to put faith in the sound choices the founding negotiators made on behalf of all South Africans in writing the Constitution. And they are entitled also to trust that South Africans are prepared to accept the evolving implications that those choices entail.

[25] The task of applying the values in the Bill of Rights to the common law thus requires us to put faith in both the values themselves and in the people whose duly elected

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independence' may justify constitutionally undesirable temporary appointments).

[41] *Daniels v Campbell NO* 2004 (5) SA 331 (CC) para 56.

representatives created a visionary and inclusive constitutional structure that offered acceptance and justice across diversity to all. The South African public and their elected representatives have for the greater part accepted the sometimes far-reaching decisions taken in regard to sexual orientation and other constitutional rights over the past ten years. It is not presumptuous to believe that they will accept also the further incremental development of the common law that the Constitution requires in this case.

Relief the appellants seek: the Marriage Act 25 of 1961

[26] In their founding affidavit the appellants ask the Court to develop the common law to recognise same-sex marriages. Their notice of motion seeks to cast this relief by way of a declarator that their (proposed) marriage be recognised as a valid marriage in terms of the Marriage Act 25 of 1961, and that the Minister and Director-General of Home Affairs be directed to register their marriage in terms of the Marriage Act and the Identification Act 68 of 1997. In the High Court, Roux J concluded that the provisions of the Marriage Act were 'peremptory' and that they constituted an obstacle to granting the appellants any relief. This is not correct.

[27] The Marriage Act contains no definition of marriage. It was enacted on the assumption – unquestioned at the time – that the common law definition of marriage applied only to opposite-sex marriages. That definition underlies the statute. This Court has now developed it to encompass same-sex marriages. The impediment the statute presents to the broader relief the appellants seek is only partial. This lies in the fact that s 30(1) prescribes a default – but not exclusive – marriage formula. That formula must be used by (a) marriage officers who are not ministers of religion or persons holding a 'responsible position' in a religious denomination or organisation; and (b) marriage officers who are ministers of religion or who do hold such a position, but whose marriage formulae have not received ministerial approval.[42] The statute requires that such marriage officers 'shall put' the default formula to the couple, and it requires each to answer the question whether they accept the other 'as your lawful wife (or

[42] Marriage Act 25 of 1961, s 30(1): 'In solemnizing any marriage any marriage officer designated under section 3 may follow the marriage formula usually observed by his religious denomination or organisation if such marriage formula has been approved by the Minister [of Home Affairs], but if such marriage formula has not been approved by the Minister, or in the case of any other marriage officer, the marriage officer concerned shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative:

> "Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?",

and thereupon the parties shall each give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words:

> "I declare that A.B. and C.D. here present have been lawfully married.".'

husband)'. The statute empowers the Minister however to approve religious formulae that differ from the default formula.

[28] Farlam JA suggests that we can change even the default formula by a process of innovative and 'updating' statutory interpretation by reading 'wife (or husband)' in this provision as 'spouse'. I cannot agree. There are two principal reasons. The first is that I think this would go radically further than the process of statutory interpretation can appropriately countenance. The second is that in my view the particular words, because of their nature and the role the statute assigns to them, are not susceptible to the suggested interpretative process.

[29] First, as Ackermann J explained in the *Home Affairs* case, there is 'a clear distinction' between *interpreting* legislation in conformity with the Constitution and its values, and granting the *constitutional remedies* of reading in or severance. The two processes are 'fundamentally different':

> 'The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid.'[43]

[43] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 24.

[30] That it is not always easy to determine 'what the text is reasonably capable of meaning' emerges from *Daniels v Campbell*.[44] In a split decision, the Constitutional Court held that the word 'spouse' in the Intestate Succession Act 81 of 1987 can be read to include the surviving partner to a monogamous Muslim marriage. The majority came to this conclusion after distinguishing the position of same-sex partners, who, that Court had previously held,[45] could not be read as being included in statutory references to 'spouse'. The majority held, per Sachs J, that central to the Court's previous decisions to this effect 'was a legal finding that it would place an unacceptable degree of strain on the word "spouse" to include within its ambit parties to a same-sex life partnership'.[46] The majority also concluded, per Ngcobo J, that the previous decisions 'must be understood to hold that the word "spouse" cannot be construed to include persons who are not married.'[47] Moseneke J agreed with the result but considered that the

[44] 2004 (5) SA 331 (CC).
[45] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 25; *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) para 9.
[46] *Daniels v Campbell NO* 2004 (5) SA 331 (CC) para 33.
[47] *Daniels* para 62.

provision should be declared unconstitutionally narrow and the remedial process of 'reading in' adopted.[48]

[31] The majority in *Daniels* assigned a broad meaning to a word whose purport was not certain. It applied the constitutionally interpretative approach. This involved attributing a wide meaning to a word, without changing the word. The approach suggested by Farlam JA goes radically further. It does not assign a broad meaning to a contested word or phrase, but substitutes a phrase with an entirely different word. In the circumstances of this case I do not consider that this is permissible. Radically innovative statutory interpretations of this kind were devised, as the authority Farlam JA quotes shows, for jurisdictions which do not, or at the time did not, have the ample remedies of constitutionalism. Under our Constitution, the proper interpretative approach is plain.[49] If statutory wording cannot reasonably bear the meaning that constitutional validity requires, then it must be declared invalid and the 'reading in' remedy adopted.

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[48] *Daniels* paras 64-111.
[49] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 24; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) paras 21-26.

[32] Second. Most statutory provisions create norms that guide state officials and others who exercise power. When their interpretation is at issue, the question is how broadly or narrowly they apply. Section 30(1) does not create a norm for the application of state power. It describes an action. It prescribes a verbal formula that must be uttered if the legal consequences of lawful marriage are to follow. What it requires is action that must be performed if the parties' personal status is to be changed in relation to each other and the world. The action consists in the utterance of specified words. But it is action no less. The statutory formula in other words encodes a 'performative utterance'[50] which the statute requires as a precondition to the happening of the marriage and its legal consequences.

[33] In my view where the legislature prescribes a formula of this kind its words can not be substituted by 'updating' interpretation. If the Court, and not the legislature, is to make a

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[50] John L Austin, *How to Do Things with Words*, ed. J. O. Urmson and Marina Sbisá (Harvard University Press, 1962) pages 5-5, accessed at http://www.stanford.edu/class/ihum54/Austin_on_speech_acts.htm:
'Utterances can be found… such that:
A. They do not 'describe' or 'report' or constate anything at all, are not 'true or false,' and
B. The uttering of the sentence is, or is a part of, the doing of an action, which again would not normally be described as, or as 'just,' saying something.'
Austin's classic example is the marriage formula. He also instances 'I hereby name this ship …' and 'I give you sixpence'. 'In these examples it seems clear that to utter the sentence (in, of course, the appropriate circumstances) is not to describe my doing of what I should be said in so uttering to be doing or to state that I am doing it: it is to do it.'

constitutionally necessary change to such a formula, that must be done not by interpretation but by the constitutional remedy of 'reading in'. That remedy is appropriate because it changes in a permissible manner the nature of the action the statute requires, without purporting merely to interpret its words.

[34] The appellants' legal advisors apparently overlooked the question of the marriage formula entirely. As Moseneke J pointed out in refusing leave to appeal directly to the Constitutional Court, their papers do not seek 'a declaration that any of the provisions of the legislation dealing with the solemnising or recording of marriages is inconsistent with the Constitution'.[51]

[35] This does not however in my view constitute an obstacle to granting the appellants some portion of the relief they seek, as Roux J considered. As Farlam JA points out (para 91), the Act permits the Minister to approve variant marriage formulae for ministers of religion and others holding a 'responsible position' within religious denominations. There are many religious societies that currently approve gay and lesbian marriage, including places of worship specifically dedicated to gay and lesbian congregations. Even without amendment to the

[51] *Fourie v Minister of Home Affairs* 2003 (5) SA 301 (CC) para 11.

statute, the Minister is now at liberty to approve religious formulae that encompass same-sex marriages.

[36] It is important to emphasise that neither our decision, nor the ministerial grant of such a formula, in any way impinges on religious freedom. The extension of the common law definition of marriage does not compel any religious denomination or minister of religion to approve or perform same-sex marriages. The Marriage Act specifically provides that:

> '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 organisation to solemnize a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organisation' (s 31).

[37] When the Minister approves appropriate religious formulae (though subject to the possibility of further appeal proceedings), the development of the common law in this appeal will take practical effect. Religious orders for whose use such formulae are approved will at their option be able to perform gay and lesbian marriages. But gay and lesbian couples seeking to have a purely secular marriage will have to await the outcome of proceedings which, we were informed from the Bar, were launched in the Johannesburg High Court in July 2004, designed to secure comprehensive relief by

challenging the provisions of the Marriage Act and other statutes.

Should our order be suspended?

[38] Having concluded that the common law should be developed, Farlam JA proposes to suspend the order for two years. I cannot agree. The suggested suspension is in my respectful view neither appropriate nor in keeping with principle, the justice of this case, or the role the Constitution assigns to courts in developing the common law. It is in my view also not logical to hold that developing the common law does not stray into the legislative domain, as Farlam JA rightly holds, but then to suspend the order as though it did.

[39] First the Constitution. As suggested earlier, development of the common law entails a simultaneously creative and declaratory function in which the court perfects a process of incremental legal development that the Constitution has already ordained. Once the court concludes that the Bill of Rights requires that the common law be developed, it is not engaging in a legislative process. Nor in fulfilling that function does the court intrude on the legislative domain.

[40] It is precisely this role that the Bill of Rights envisages must be fulfilled, and which it entrusts to the judiciary. As set out earlier (para 3 above), s 8(3) of provides that in order to give effect to a right in the Bill of Rights a court must – subject to limitation – 'apply, or if necessary develop, the common law *to the extent that legislation does not give effect to that right*'. Section 8(3) envisages just the situation this appeal presents – that legislation to give effect to a fundamental right is absent. In this circumstance, the Constitution deliberately assigns an imperative role to the court. Subject to limitation, it is obliged to develop the common law appropriately. And this role is particularly suited to the judiciary, since the common law and the need for its incremental development are matters with which lawyers and judges are concerned daily.

[41] In this case the equality and dignity provisions of the Bill of Rights require us to develop the common law. This is because legislation 'does not give effect' to the rights of same-sex couples discussed above. In such a situation the incremental development that the Bill of Rights envisages is entrusted to the courts. It will be rarely, if ever, that an order pursuant to such incremental development can or should be subjected to suspension.

[42] This approach is borne out by the Constitutional Court's approach in *J v Director General, Department of Home Affairs*.[52] There the Court declared a statutory provision to be inconsistent with the Constitution and afforded a remedy that 'read in' appropriate expansionary words. The Home Affairs department – also a respondent in this appeal – asked the Court to suspend the declaration of invalidity, as it asks us to suspend the order developing the common law here. The basis on which it sought suspension there was identical to that it advances here, namely the prospect of legislation following a pending South African Law Reform Commission investigation.[53]

[43] In that case the Constitutional Court refused to suspend. It held that 'Where the appropriate remedy is reading in words in order to cure the constitutional invalidity of a statutory provision, it is difficult to think of an occasion when it would be appropriate to suspend such an order':

> 'This is so because the effect of reading in is to cure a constitutional deficiency in the impugned legislation. If reading in words does not cure the unconstitutionality, it will ordinarily not be an appropriate remedy. Where the unconstitutionality is cured, there would usually be no reason to deprive the applicants or any other persons of the benefit of such an order by suspending it.'[54]

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[52] 2003 (5) SA 621 (CC) paras 21 and 22.
[53] South African Law Reform Commission Discussion Paper 104, Project 118.
[54] 2003 (5) SA 621 (CC) para 22.

The reasoning in *J* seems to me to apply with even greater force where the court's order does not touch on legislation at all, but develops the common law. Legislation is the province of Parliament. If granting the remedy of 'reading in' does not intrude on the legislative domain, then development of the common law in accordance with the Constitution – the particular responsibility of the judiciary – does so even less.

[44] The reference in the judgment of Farlam JA to the recent decision of the Constitutional Court in *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* (15 October 2004) does not, with respect, take the matter any further. *Zondi* re-emphasises three clear strands of the remedial jurisprudence of the Constitutional Court. The first is that the court 'should be slow to make those choices which are primarily choices suitable for the Legislature'.[55] The second is that, for this reason, the court frequently suspends an order of statutory invalidity – as it did in *Zondi* – in order to give the legislature the opportunity to fulfil its particular function of matching legislation with constitutional obligation.

[45] What my colleague's allusion to *Zondi* leaves out of account is that the case itself illustrates a third, equally vital, strand of

[55] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 64; *Zondi* para 123.

Constitutional Court remedial jurisprudence. This is the 'important principle of constitutional adjudication that successful litigants should be awarded relief'.[56] In *Dawood*, that had the consequence that (a) the provisions of the statute at issue were declared invalid; (b) the order of invalidity was suspended to enable Parliament to do what was constitutionally necessary; but (c) an extensive order was also granted, requiring Home Affairs officials in the interim to act in accordance with the principles of the judgment, pending the legislative modifications.[57] In *Zondi*, too, an order of invalidity was issued and suspended, but extensive remedial assistance was granted.[58]

[46] In my respectful view the appellants in this case are entitled to no less. Our order developing the common law trenches on no statutory provision. Deference to the particular functions and responsibilities of the legislature does not therefore require that we suspend it. Instead, the appellants are entitled to appropriate relief. They should be awarded the benefit of a declaration regarding the common law of marriage that takes effect immediately.

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[56] *S v Bhulwana, S v Gwadiso* 1996 (1) SA 388 (CC) para 32; *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 66, *Zondi* paras 124-135.
[57] See 2000 (3) SA 936 (CC) para 70.
[58] See *Zondi* para 135.

[47] In conclusion I would add that the Constitutional Court called in *J* for 'comprehensive legislation' regularising same-sex partnerships.[59] That has not been forthcoming. This may be for many reasons, doubtless including the imperative requirements of other legislative priorities. It is not inconceivable, however, that the legislature may be content, or even prefer, that this process of fulfilling the sexual orientation guarantee in the Constitution should proceed incrementally by leaving development of the common law to the courts.[60] If this is not so, our unsuspended decision will not preclude later constitutionally sound legislation.[61]

[48] In all these circumstances I conclude that the appellants are entitled to immediate declaratory relief regarding the development of the common law, and to a declaration that their intended marriage is capable of recognition as lawfully valid subject to compliance with statutory formalities.

ORDER

[49] The following order is made:

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[59] 2003 (5) SA 621 (CC) para 23.
[60] Compare the analogous (though not identical) situation regarding the death penalty: *S v Makwanyane* 1995 (3) SA 391 (CC) para 25, per Chaskalson P.
[61] As Ngcobo J points out in *Xolisile Zondi v Member of the Executive Council for Traditional and Local Government Affairs* (Constitutional Court, 15 October 2004): '… it must be borne in mind that whatever remedy a court chooses, it is always open to the legislature, without constitutional limits, to amend the remedy granted by the court'.

1. The appeal succeeds with costs.

2. The order of the court below is set aside. In its place is substituted:

> ‘(1) It is declared that:
>
> (a) In terms of sections 8(3), 39(2) and 173 of the Constitution, the common law concept of marriage is developed to embrace same-sex partners as follows:
> ‘Marriage is the union of two persons to the exclusion of all others for life.’
>
> (b) The intended marriage between the appellants is capable of lawful recognition as a legally valid marriage, provided the formalities in the Marriage Act 25 of 1961 are complied with.
>
> (2) The respondents are ordered to pay the applicants’ costs.’

E CAMERON
JUDGE OF APPEAL

<u>CONCUR</u>:

MTHIYANE JA
VAN HEERDEN JA
PONNAN AJA

FARLAM JA:

INTRODUCTION

[50] This is an appeal against a judgment of Roux J, sitting in the Pretoria High Court, who dismissed with costs an application brought by the appellants against the respondents, the Minister of Home Affairs and the Director General: Home Affairs, for orders (a) declaring that the marriage between them be recognized as a legally valid marriage in terms of the Marriage Act 25 of 1961, provided that it complied with the formalities set out in the Act; and (b) directing the respondents to register their marriage in terms of the provisions of the Marriage Act and the Identification Act 68 of 1997.

EVIDENCE FOR APPELLANTS

[51] The appellants are two adult females who have been living together in a permanent same-sex relationship since June 1994. The first appellant stated in her founding affidavit, which was confirmed in a supporting affidavit by the second appellant, that the purpose of the application was to obtain a declaratory order that the *intended* marriage between the appellants be recognised as legally valid. She stated further that she and the second appellant had approached a magistrate at one stage and asked

her if she would be prepared to solemnize a marriage between them. The magistrate's reply was that she was prepared to perform such a marriage ceremony for them but that it would not be legally valid and that she would not be able to record it in the marriage register. The first appellant also stated that she and the second appellant had learnt that the Department of Home Affairs would not be prepared to register their intended marriage in terms of the provisions of the Marriage Act.

[52] According to the first appellant, no bank was prepared to allow her and the second appellant to open a joint bank account and that they also could not obtain a joint mortgage bond. Moreover, it would be much easier for them to become members of a medical aid fund, to adopt a child or to have a child placed in their care as foster parents if they were married to each other.

[53] The first appellant stated that she had been advised that it was what she called a 'common law impediment' that persons of the same sex could not marry each other. She submitted, however, that the common law had in the meanwhile so developed that a marriage between herself and the second appellant could now be recognised as legally valid.

[54] She had been advised further that, in terms of the Constitution, she and the second appellant could not be

discriminated against on the ground of their sexual preferences and that their human dignity could not be infringed. She contended that the failure by the law to recognise a marriage between her and the second appellant discriminated against them and infringed their dignity. In the concluding paragraph of this part of her affidavit the first appellant stated that she had been advised that in terms of the Constitution the common law had to be developed to promote the spirit, purport and objects of the Bill of Rights. She submitted that the common law (by which she clearly meant the common law of marriage in terms of which it was not possible for two persons of the same sex to marry one another) had now to be so developed.

RULE 16A NOTICE

[55] Before the respondents' opposing affidavits were filed the appellants caused a notice to be given to the registrar of the Pretoria High Court in terms of Rule 16A in which they indicated that they would raise in their application a constitutional point, which they formulated as follows:

'Whether the common law has so developed that it can be amended so as to recognise marriages of persons of the same sex as legally valid marriages in terms of the Marriage Act, provided that such marriages comply with the formality requisites set out in the Act.'

The purpose of the Rule is to enable parties interested in a constitutional issue to seek to be admitted as *amici curiae* in the case in which the issue is raised so that they can advance submissions in regard thereto. As a result of the appellants' notice to the registrar in terms of Rule 16A a voluntary association known as The Lesbian and Gay Equality Project was allowed to intervene as *amicus curiae* in the case and submissions were made on its behalf at the hearing in the court *a quo.* Being of the opinion that the conduct of the *amicus* went well beyond what was regarded as proper in the Constitutional Court decision *In re certain amicus curiae applications: Minister of Health and Others v The Treatment Action Campaign and Others,*[62] Roux J ordered the *amicus* to pay the respondents' costs jointly and severally with the appellants. The respondents subsequently abandoned this part of the order of the court *a quo.*

[56] After the matter had been set down for hearing in this Court the Lesbian and Gay Equality Project once again sought to be admitted as *amicus curiae* in the matter. Neither the appellants nor the respondents opposed the application and it was granted. The *amicus* submitted written arguments before the case was argued

[62] 2002 (5) SA 713 (CC).

and Mr *Berger* and Ms *Kathree* appeared at the hearing and made oral submissions.

EVIDENCE FOR RESPONDENTS

[57] The respondents caused an affidavit to be filed on their behalf in which they asked that the application be dismissed with costs. In this affidavit it was averred that the magistrate who told the appellants that a 'marriage' between them would not be legally valid was correctly stating the law as it stands. It was also conceded that the Department of Home Affairs is not prepared to register the proposed marriage between the appellants. (It is clear that the Department's attitude in this regard is based on its contention regarding the validity of the intended marriage between the appellants. There is no reason to think that this attitude will be persisted in if the Department's contention on this point is not upheld.) The respondents did not deny the first appellant's statements regarding the practical difficulties the appellants experience in consequence of the fact that they are not married but contented themselves with putting the appellants to the proof thereof.

[58] The respondents 'admitted' that the common law prohibits members of the same sex from entering into a valid marriage relationship. They denied that the common law has developed to

the extent that permanent same-sex life partnerships can be recognised as marriages and submitted that the appellants had not laid any factual basis for this contention. After admitting that under the Constitution the appellants may not be discriminated against on the basis of their sexual orientation and that their human dignity may not be infringed and that they are, as it was put, 'living in some sort of consortium with each other', the respondents denied that the appellants are being discriminated against or that they are, as it was put, 'suffering indignity because their intended marriage will not be recognised'. The respondents also contended that the appellants had not provided any factual basis for the allegation that they were being discriminated against. In this regard it was said that it was 'revealing' that the appellants had 'not as yet approached the Department of Home Affairs for the registration of their relationship'.

JUDGMENT OF COURT *A QUO*

[59] In his judgment dismissing the application Roux J, after pointing out that the appellants commenced living together in June 1994 and that their relationship appeared to be a 'sincere and abiding' one, said that they claimed to be married. He emphasized that no attempt had been made to amend the prayers and added:

'This despite airing my view on how appropriate this relief could be in the light of the facts and the Statute to which I will refer later.'

He held that the appellants were seeking a declaratory order. Such an order, he said, is catered for by s 19 (1) *(a)* (iii) of the Supreme Court Act 59 of 1959, which vests the court with a discretion, at the instance of any interested person, 'to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination'.

[60] He continued:

'The "right" in question must be the [appellants'] assumption that they are married …. In Roman law marriage is the full legal union of man and woman for the purpose of lifelong mutual companionship. I refer for example to Sohm *Institutes of Roman Law,* 3rd edition at p 452. Nothing I am aware of has changed since. Indeed the Marriage Act 25 of 1961 mirrors the age old concept of what a marriage is. I refer to the peremptory provisions of section 30(1) of the Act:

"1. In solemnising any marriage any marriage officer designated under section 3 may follow the marriage formula usually observed by his religious denomination or organization if such marriage formula has been approved by the Minister, but if such marriage formula has not been approved by the Minister, or in the case of any other marriage officer, the marriage officer concerned shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative:

> "Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?"

This section …, as I have already pointed out, is peremptory. It contemplates a marriage between a male and a female and no other.

Section 11(1) of the same Act provides as follows:

"11(1) A marriage may be solemnised by a marriage officer only."

It must follow that the Applicants are not married as required by the law. I am not prepared to exercise the discretion vested in me by section 19 of Act 59 of 1959 to enquire into a non-existing right.

Prayer 3 of the notice of motion [the prayer asking for an order directing the respondents to register the marriage in terms of the Marriage Act and the Identification Act] requires me to compel the Respondents to do what is unlawful. Obviously I will not make such an order.

There is no attack on the provisions of Act 25 of 1961 on the basis that they offend the Constitution. No more need therefore be said. This application is obviously still-born.'

LEAVE TO APPEAL

[61] The applicants applied to the Pretoria High Court for leave to appeal against this judgment. As Roux J had in the interim retired, the application came before Mynhardt J, who refused to grant the appellants a positive certificate in terms of Rule 18 of the

Constitutional Court Rules but did grant them leave to appeal to this Court.

APPLICATION TO CONSTITUTIONAL COURT

[62] The appellants then approached the Constitutional Court for leave to appeal directly to it against the judgment and order of Roux J. This application was refused on the ground that the interests of justice required that the appeal be heard first by this Court. The judgment of the Constitutional Court, which was delivered by Moseneke J, has been reported: see *Fourie and Another v Minister of Home Affairs and Another*[63].

RELEVANT STATUTORY PROVISIONS

[63] Before the issues arising for decision in this case and the contentions of the parties in regard thereto are considered it will be appropriate to set out the relevant provisions of the Constitution as well as ss 3, 29A, 30 and 31 of the Marriage Act (as far as they are relevant) and ss 3, 5(1) and 8(e) of the Identification Act 68 of 1997.

(a) THE CONSTITUTION

[64] The following provisions of the Constitution are relevant in this matter: s 7, s 8 (1), (2) and (3), s 9 (1), (2), (3) and (5), s 10, s

[63] 2003 (5) SA 301 (CC).

31(1)*(a)* and (2), s 36, s 38 (the general part of the section and paragraph *(a)*), s 39(1) and (2) and s 172(1).

They provide as follows:

‘7. (1) This Bill is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfill the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.’

‘8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).’

‘9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

'10. Everyone has inherent dignity and the right to have their dignity respected and protected.'

'31. (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-

(a) to enjoy their culture, practise their religion and use their language; and

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.'

'36. (1) 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, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

'38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

(a) anyone acting in their own interest;

…'

'39. (1) When interpreting the Bill of Rights, a court, tribunal or forum-

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

'172. (1) When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

(b) THE MARRIAGE ACT

[65] As far as they are relevant ss 2, 3, 11(2) and 3, 29A, 30(2) and (3) and 31 of the Marriage Act read as follows:

'2. (1) Every magistrate, every special justice of the peace and every Commissioner shall by virtue of his office and so long as he holds such office, be a marriage officer for the district or other area in respect of which he holds office.

(2) The Minister and any officer in the public service authorized thereto by him may designate any officer or employee in the public service or the diplomatic or consular service of the Republic to be, by virtue of his office and so long as he holds such office, a marriage officer, either generally or for any specified class of persons or country or area.'

'3. (1) The Minister and any officer in the public service authorized thereto by him may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organization to be, so long as he is such a minister or occupies such position, a marriage officer for

the purpose of solemnizing marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion.'

'11. (2) Any marriage officer who purports to solemnize a marriage which he is not authorized under this Act to solemnize or which to his knowledge is legally prohibited, and any person not being a marriage officer who purports to solemnize a marriage, shall be guilty of an offence and liable on conviction to a fine not exceeding four hundred rand or, in default of payment, to imprisonment for a period not exceeding twelve months, or to both such fine and such imprisonment.

(3) Nothing in subsection (2) contained shall apply to any marriage ceremony solemnized in accordance with the rites or formularies of any religion, if such ceremony does not purport to effect a valid marriage.'

'29A. (1) The marriage officer solemnizing any marriage, the parties thereto and two competent witnesses shall sign the marriage register concerned immediately after such marriage has been solemnized.

(2) The marriage officer shall forthwith transmit the marriage register and records concerned, as the case may be, to a regional or district representative designated as such under section 21(1) of the Identification Act, 1986 (Act 72 of 1986).'

'30. (2) Subject to the provisions of subsection (1), a marriage officer, if he is a minister of religion or a person holding a responsible position in a religious denomination or organization, may in solemnizing a marriage follow the rites usually observed by his religious denomination or organization.

(3) If the provisions of this section or any former law relating to the questions to be put to each of the parties separately or to the declaration

whereby the marriage shall be declared to be solemnized or to the requirement that the parties shall give each other the right hand, have not been strictly complied with owing to-

(a) an error, omission or oversight committed in good faith by the marriage officer; or

(b) an error, omission or oversight committed in good faith by the parties or owing to the physical disability of one or both of the parties,

but such marriage has in every other respect been solemnized in accordance with the provisions of this Act or, as the case may be, a former law, that marriage shall, provided there was no other lawful impediment thereto and provided further that such marriage, if it was solemnized before the commencement of the Marriage Amendment Act, 1970 (Act 51 of 1970), has not been dissolved or declared invalid by a competent court and neither of the parties to such marriage has after such marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with.'

'31. 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 solemnize a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organization.'

(The text of ss 11(1) and 30(1), which are also relevant, were quoted by Roux J in the extracts from his judgment set out in para [60].)

(c) THE IDENTIFICATION ACT

[66] Sections 3, 8(e) and 13 of the Identification Act 68 of 1997 read as follows:

'3. This Act shall apply to all persons who are South African citizens and persons who are lawfully and permanently resident in the Republic.'

'8. There shall in respect of any person referred to in section 3, be included in

the population register the following relevant particulars available to the Director-General, namely-

…

(e) the particulars of his or her marriage contained in the relevant marriage register or other documents relating to the contracting of his or her marriage, and such other particulars concerning his or her marital status as may be furnished to the Director-General …'

'13 (1) The Director-General shall as soon as practicable after the receipt by him or her of an application, issue a birth, marriage or death certificate in the prescribed form after the particulars of such birth, marriage or death were included in the register in terms of section 8 of this Act.

(2) Any certificate issued in terms of subsection (1), shall in all courts of law be prima facie evidence of the particulars set forth therein.'

ISSUES ARISING FOR DECISION

[67] In the course of the argument it became clear that the following issues arise for decision in this case:

(1) Does the common law definition of marriage which precludes two persons of the same sex from marrying one another discriminate against the appellants?

(2) If so, is such discrimination unfair?

(3) Does it infringe their human dignity?

(4) If there is unfair discrimination, and/or an infringement of human dignity, should this court give the appellants the remedy they seek, namely a development of the common law definition of marriag e so as to allow same sex marriages?

To answer that question it will be necessary to consider:

(5) whether such development would constitute an incremental change required to promote the spirit, purport and objects of the Bill of Rights or would it, on the other hand, require a fundamental change to the common law, of such a nature that it should rather be undertaken by Parliament?

(6) That in turn will necessitate consideration of the question:

what is the essence of the concept of marriage as it has developed down the centuries and especially since 1994 in this country?

If all these questions are answered in favour of the appellants it will be necessary to ask:

(7) Can the appellants be granted the relief they seek in the absence of a prayer for declarations that the Marriage Act and the Identification Act are inconsistent with the Constitution? And

(8) Can and should any order the Court may make be suspended to enable Parliament to consider the matter?

HISTORY OF INSTITUTION OF MARRIAGE IN OUR LAW

[68] Before I proceed to consider these issues it is in my view desirable to say something about the history of the institution of marriage in our law.

[69] It is convenient for our purposes to begin with the marriage law of the Romans during the period of the classical Roman law (the first two and a half centuries of the Christian era).

As Professor Max Kaser says:[64]

'[T]he Roman marriage *(matrimonium)* was not a legal relationship at all, but a social fact, the legal effects of which were merely a reflection of that fact …. Marriage was a "realised union for life" … between man and woman, supported by *affectio maritalis,* the spouses' consciousness of their union being marriage.'

The act which brought the marriage into existence was a purely private one. No State official was involved. The marriage did not have to be registered: indeed no public record of any kind was required. No religious or ecclesiastical rite was essential, even

[64] *Roman Private Law* 3 ed (1980) translated by Professor Rolf Dannenbring, p 284.

after Christianity became the official religion of the Roman Empire in 313 AD. In fact no prescribed form was required. All that was necessary was the reciprocally expressed consent of the parties, even cohabitation was not required. Ulpian expressed the rule as follows (D 35.1.15; D 50.17.30):

'Nuptias non concubitus, sed consensus facit.' (Consent not cohabitation makes a marriage.)

[70] Even when marriage began to be controlled by the Church after the disintegration of the Roman Empire in the West, what Bryce calls 'the fundamental conception of marriage as a tie formed solely by consent, and needing the intervention neither of State nor of Church'[65] remained the legal position until the middle of the sixteenth century. The Church's control over marriage was manifested in the fact that, from the tenth century, the Church's tribunals had exclusive jurisdiction in regard to questions relating to marriage. As a result there was a uniform law of marriage applied in Western Europe. Marriage, which the Church regarded as a sacrament, was indissoluble, except by decree of the Pope. The Church encouraged the parties to declare their consent before a priest and to receive a blessing; what was referred to as the *benedictio ecclesiae* (the blessing of the church). In some areas

[65] James Bryce, 'Marriage and Divorce under Roman and English Law' in *Studies in History and Jurisprudence* Volume II 782 at 811.

the publication of banns before the church ceremony was insisted on and this was made the general law of the Church by the Fourth Lateran Council of 1215. Only marriages which took place ‘in the face of the Church’ were regarded as ‘regular’ marriages.

[71] But marriages resting on the consent of the parties alone, so-called ‘irregular’ marriages, were nevertheless valid although the parties thereto were subject to ecclesiastical and secular penalties. Secret or clandestine marriages, which often gave rise to great scandal, were thus valid. Eventually the need for reform became irresistible and at its Twenty Fourth Session in 1563 the Council of Trent passed a decree, the famous *Decretum Tametsi,* which, after reciting that clandestine marriages had been held valid, though blameworthy, declared that for the future all should be deemed invalid unless banns were published and the parties declared their consent before a priest and at least two witnesses. The decrees of the Council of Trent did not become law in the Northern Netherlands but the principles of the *Decretum Tametsi* were adopted in the various provinces thereof. The Political Ordinance of 1 April 1580, which was enacted by the States of Holland, provided in section 3 for banns to be published, on three successive Sundays or market-days, in church or in the council chamber of the city or town where the intending spouses resided,

and for their marriage to be solemnised by the magistrate or minister of religion 'according to the forms in use in the churches or which shall have been prescribed to the magistrates for that purpose by the States'.[66] 'Marriages' not solemnised in accordance with section 3 were invalid. Similar legislation was enacted in the other provinces of the Northern Netherlands.[67]

[72] The provisions of the Political Ordinance on the point were received as law at the Cape when it was colonised by the Dutch East India Company.[68] Despite the reception of the Political Ordinance at the Cape it appears that from 1665, when the first resident clergyman was appointed, marriages were solemnised by a minister of the Church. Before that date they were solemnised by the Secretary of the Council of Policy.[69]

[73] As far as I have been able to discover, Holland was the first European jurisdiction to permit civil marriages. In practice persons who chose to be married by magistrates were those who were not

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[66] Maasdorp's translation *Institutes of Cape Law* Book 1 2 ed p 289.
[67] For details see J Voorda *Dictata ad Ius Hodiernum* Ad D 23.2, transcribed, edited and translated by Professor M Hewett, as yet unpublished. I am grateful to Professor Hewett for making available to me the relevant extract from this work.
[68] See Visagie, *Regspleging en Reg aan die Kaap van 1652 tot 1806* p 38 and De Wet and Swanepoel, *Strafreg* 4 ed (1985) p 42, fn 101.
[69] HR Hahlo *The South African Law of Husband and Wife* 5 ed (1985) p 15.

of the Reformed religion[70] or, 'who, being estranged from the orthodox church, hated ecclesiastical benediction'.[71]

[74] Marriage law was secularised at the advent of the Reformation as the Protestant reformers did not regard marriage as a sacrament. Brissaud refers to what he calls 'this remarkable evolution' by which marriage was completely secularized.[72] The point of departure for this, he says, 'was in a theological, legal theory of which Saint Thomas Aquinas was perhaps the first to give the formula. According to that writer, marriage could be regarded at one and the same time: 1st. As a contract of natural law (a borrowing from the Roman writings, which understood by this the law which is given to man and to animals). 2d. The civil contract, that is to say, one governed by the Roman law as it was organized, so long as the Church did not have the monopoly concerning questions relating to marriage. 3d. A sacrament, of which the contract was the element and which could not exist without the latter. The civil marriage and the religious marriage are separated in this analysis, whereas in former times they were not distinguished. These speculations, which had no very great bearing so long as they remained shut up within the Schools, were

[70] See S van Leeuwen *Censura Forensis* 1.1.14.1.
[71] Voorda *loc cit.*
[72] Jean Brissand *A History of French Private Law,* translated by R Howell, p 90 et seq.

propagated during the sixteenth century by virtue of the favour shown them by the Renaissance and the Reformation; they were presented before the Council of Trent by more than twenty prelates and theologians, and, a more serious thing, the jurists took possession of them in order to make of them a weapon against the Church. From this they came to the conclusion that marriage ought to be subjected to the Church in so far as it was a sacrament, to the State in so far as it was a civil contract.'

This development culminated, as far as France was concerned, in the adoption in the constitution of 1791 of the principle that 'the law only considered marriage as a civil contract; the Church was free to set up the sacrament in establishing the forms and conditions which might please it, the faithful were at liberty to respect its doctrines, but the State had no power to bind itself to impose them upon all citizens without affecting their liberty of conscience. The decree of September 20, 1792, organized the certificates of civil status and marriage; the latter must thenceforth be executed before a municipal official in order to be recognized by the State.'[73]

[75] The principle that marriages had to be solemnised by a civil official was adopted in some of the provinces of the Northern Netherlands after 1795 and became the legal position in the whole

[73] Brissaud *op cit* pp 109 – 110.

of what was now called the Kingdom of Holland in 1809 when the Code Napoleon, with adaptations, was given the force of law by King Louis Napoleon.

[76] During the period between the two British occupations of the Cape, when the Cape was under the control of the Batavian Republic, Commissioner General De Mist introduced the secular marriage before landdrost and heemraden in the country districts and before the Court for Matrimonial and Civil Affairs in Cape Town. This change was, however, repealed at the beginning of the Second British Occupation by a proclamation issued on 26 April 1806 by Sir David Baird prohibiting civil marriages and providing that all marriages were 'to be performed … by an ordained clergyman or minister of the Gospel, belonging to the settlement'.[74]

[77] The law relating to the solemnisation of marriages in the Cape was altered by Order in Council dated 7 September 1838. This order made detailed provision for the publication of banns, the issuing of special licences, the establishment of a marriage register and the appointment of civil marriage officers where there was 'not a sufficient number of … ministers [of the Christian religion] to afford convenient facilities for marriage'. By the

[74] Sir David Baird's Proclamation is printed in Harding (ed) *The Cape of Good Hope Government Proclamations from 1806 to 1825 … and the Ordinances Passed in Council from 1825 to 1838* Vol 1 p 13. It gives references to De Mist's shortlived legislation.

Marriage Act 16 of 1860 the resident magistrates were made marriage officers and the Governor was empowered to appoint marriage officers for Jews and Muslims. Similar legislation was passed in the other colonies which eventually made up the Union of South Africa.

[78] The Marriage Act 25 of 1961 consolidated the laws governing the formalities of marriage and the appointment of marriage officers and repealed some 47 Union and pre-Union statutes from the Marriage Order in Council of 7 September 1838 onwards. It is clear from a study of the provisions of the Marriage Act that it builds on the foundations laid by the Council of Trent in 1563 and by the States of Holland in 1580. It is solely concerned with marriage as a secular institution. Although it does not go as far as the French did in 1791 and 1792 and the Dutch legislature thereafter in requiring all marriages to be solemnized by a civil official and not allowing clerics to solemnize them, it clearly constitutes clerics who are marriage officers State officials for the purpose of bringing into being a marriage relationship between the intending spouses which is recognised by the State.

[79] Indeed it is instructive to note that this way of seeing the matter is set forth by Henricus Brouwer (1625 – 1683), a leading Roman Dutch writer, in his work *De Jure Connubiorium,* which was

first published in 1665. In book 2, chapter 27, paragraph 20 we find the following:

‘It is possible for someone indeed to call one marriage a political marriage and the other a church marriage inasmuch as one is contracted in the face of the church and the other before a court. But if this distinction were to be approved it proceeds from the incidentals of the marriage and is of no force if one has regard to the bond of the marriage itself, honourableness, the legitimate status of the children who are born therefrom and all the rights which the spouses obtain. Because the same legal position applies in both cases, the same dignity, the same honourableness, the same bond. Indeed a marriage contracted in church can be called a political marriage in so far as it is solemnized in the church by the authority of a magistrate through a delegated person, namely a minister of God.’

This analysis is clearly correct and as applicable today as it was in 1665 when it was first published.

[80] I have dealt in some detail with the history of the law of marriage because it throws light on a point of cardinal importance in the present case, namely that the law is only concerned with marriage as a secular institution. It is true that it is seen by many to have a religious dimension also but that is something with which the law is not concerned. Even though clerics are appointed marriage officers, when they solemnise marriages they do so in a twofold capacity: first as clerics, giving the *benedictio ecclesiae* to

the couple and affording them the opportunity to take their vows at a religious service; and secondly as State marriage officers, bringing into existence a secular legal bond recognised by the State.

[81] But as s 31 of the Marriage Act makes clear, clerics who are marriage officers are not obliged to marry couples if to do so would be against the tenets of their religion. Thus, to take an obvious example, a Roman Catholic priest who is a marriage officer is not obliged to marry a couple one of whom is divorced and whose former spouse is still alive. The Marriage Act contains a provision (s 28) which renders it lawful for a person to marry certain relatives of his of her deceased or divorced spouse. This provision repeals the common law rules which dealt with prohibited degrees of relationship in so far as collaterals by affinity are concerned. These rules were based on the canon law and, to the extent that they are still upheld by certain denominations, clerics belonging to such denominations would be unwilling to solemnise marriages between such persons. Section 31 makes it clear that they are free to refuse to do so. These examples also help to make clear the distinction between the secular institution of marriage which the law regulates and the religious institution of marriage which is recognised in the Act.

[82] As I have said, we are concerned in this case only with the secular institution. Nothing that we say is intended to deal with the religious institution. Indeed it would be inappropriate and improper for judges in a secular state to do otherwise.

DOES THE COMMON LAW DEFINITION DISCRIMINATE AGAINST HOMOSEXUAL PERSONS?

[83]Against that background I turn to the question whether the common law definition of marriage discriminates unfairly against homosexual persons.

What may be called the common law definition of marriage was stated as follows by Innes CJ in *Mashia Ebrahim v Mahomed Essop:*[75]

'With us marriage is a union of one man with one woman, to the exclusion, while it lasts, of all others'.

He approved this statement in *Seedat's Executors v The Master (Natal).*[76]

[84] As to what is meant by 'a union' in that definition it is necessary to have regard to the definition of marriage attributed to the Roman jurist Modestinus, who flourished in the first half of the

[75]1905 TS 59 at 61.
[76] 1917 AD 302 at 309. See further the authorities collected in Sinclair *The Law of Marriage* Vol 1 p 305, fn 1.

third century, and the definition given in Justinian's *Institutes.* Modestinus's definition reads as follows (D 23.2.1):

'*nuptiae sunt coniunctio maris et feminae et consortium omnis vitae divini et humani iuris communicatio'* (marriage is a joining of man and woman, a partnership in the whole of life, a sharing of rights both sacred and secular'.[77]

Justinian's definition reads as follows (Inst. 1.9.1):

'Nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuam vitae consuetudinem continens' ('wedlock or marriage is a union of male and female involving an undivided habit of life').[78]

These definitions have been quoted over and over again down the centuries. Indeed O'Regan J, in *Dawood, Shalabi and Thomas v Minister of Home Affairs*[79] used the expression *consortium omnis vitae* in referring to the 'physical, moral and spiritual community of life' created by marriage.

A useful expanded paraphrase of the concept was given by the great Scots jurist Viscount Stair in his *Institutions,* published in 1681. He said that the consent to marriage is :[80]

'the consent whereby ariseth that conjugal society, which may have the conjunction of bodies as well as of minds, as the general end of the institution

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[77] Translation based on that given by Bryce *op cit* p 798.
[78] RW Lee's translation *The Elements of Roman Law* 4 ed (1956) p 80.
[79] 2000 (3) SA 936 (CC) in fn 44 to para 33. See also per Ackermann J in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others,* 2000 (2) SA 1 (CC) at para 46.
[80] Book 1, tit 4, para 6.

of marriage is the solace and satisfaction of man [by which I take it he meant humankind].'

[85] Mr *Oosthuizen,* who appeared for the appellants, submitted that our law and societal practice grants many rights and privileges to married persons because they are married. Mr *Sithole,* for the respondents, did not dispute this. It is clear therefore that our law, in terms of the common law definition to which I have referred, permits heterosexual persons to enter a conjugal society as described by Viscount Stair, by Modestinus and Justinian, it recognises and protects that relationship in many ways, and grants the parties thereto many legally enforceable rights and privileges.

[86] It will be recalled that s 9(1) of the Constitution provides that everyone has the right to equal protection and benefit of the law, while s 9(3) lists among the proscribed grounds of discrimination sexual orientation. Homosexual persons are not permitted in terms of the common law definition to marry each other, however strong their yearning to establish a conjugal society of the kind described. As a result they are debarred from enjoying the protection and benefit of the law on the ground of their sexual orientation. This clearly constitutes discrimination within the meaning of s 9 of the Constitution.

[87] Mr *Sithole* contended that this conclusion is not correct. He argued that the common law definition does not discriminate against homosexuals because it does not prevent them from marrying. Reliance was placed on a *dictum* by Southey J, with whom Sirois J concurred, in *Re Layland and Minister of Consumer and Commercial Relations; Attorney-General of Canada et al., Interveners.*[81]

The *dictum* relied on reads as follows:

'The law does not prohibit marriage by homosexuals, provided it takes place between persons of the opposite sex. Some homosexuals do marry. The fact that many homosexuals do not choose to marry, because they do not want unions with persons of the opposite sex, is the result of their own preferences, not a requirement of the law.'

[88] This approach to the matter was expressly rejected by Ackermann J in the *Home Affairs* case[82] at para 38 where he said:

'The respondents' submission that gays and lesbians are free to marry in the sense that nothing prohibits them from marrying persons of the opposite sex, is true only as a meaningless abstraction. This submission ignores the constitutional injunction that gays and lesbians cannot be discriminated against on the grounds of their own sexual orientation and the constitutional right to *express their orientation in a relationship of their own choosing.*' (The italics are mine.)

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[81](1993) 104 DLR (4th) 214 (Ont. Div. Ct) at 223.
[82] *Home Affairs* case, supra at para 38.

IS SUCH DISCRIMINATION FAIR?

[89] Section 9(5) provides that discrimination on a ground listed in s 9(3) is unfair unless it is established that the discrimination is fair. No attempt was made by the respondents to establish the fairness of the discrimination. Instead they contended that there was *differentiation* in this case but not *discrimination,* a submission which for the reasons given above I cannot accept.

[90] In my opinion there can be no doubt that the discrimination flowing from the application of the common law definition of marriage is unfair. In the *Home Affairs* case the Constitutional Court considered the provisions of s 25(5) of the Aliens Control Act 96 of 1991, which empowered a regional committee of the immigrants selection board to dispense with certain pre-conditions in authorising the issue of an immigration permit to the foreign spouse of a person permanently and legally resident in South Africa upon the application of such spouse, and held that the omission from the subsection after the word ‘spouse’ of the words ‘or partner in a permanent same-sex relationship’ was inconsistent with the Constitution. It held further that the subsection should be read as though the words omitted appeared therein after the word ‘spouse’.

[91] In reaching that conclusion the Constitutional Court held that the total exclusion of homosexual persons from the provisions of the subsection constituted unfair discrimination. It also held that, for substantially the same reasons as those set out in its judgment in relation to unfair discrimination, s 25 (5) 'simultaneously constitutes a severe limitation on the s 10 right to dignity enjoyed by … gays and lesbians' who are permanently resident in the Republic and who are in permanent same-sex life partnerships with foreign nationals.

[492] The reasoning leading up to that conclusion is conveniently set out in paras 53 to 57 of the judgment in the *Home Affairs* case, which read as follows:

'[53] The message that the total exclusion of gays and lesbians from the provisions of the subsection conveys to gays and lesbians and the consequent impact on them can, in my view, be conveniently expressed by comparing (a) the facts concerning gays and lesbians and their same-sex partnerships which must be accepted, with (b) what the subsection in effect states:

(a) (i) Gays and lesbians have a constitutionally entrenched right to dignity and equality;

(ii) sexual orientation is a ground expressly listed in s 9(3) of the Constitution and under s 9(5) discrimination on it is unfair unless the contrary is established;

(iii) prior criminal proscription of private and consensual sexual expression between gays, arising from their sexual orientation and which had been directed at gay men, has been struck down as unconstitutional;

(iv) gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms, including affection, friendship, eros and charity;

(v) they are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household;

(vi) they are individually able to adopt children and in the case of lesbians to bear them;

(vii) in short, they have the same ability to establish a *consortium omnis vitae;*

(viii) finally, and of particular importance for purposes of this case, they are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses.

(b) The subsection, in this context, in effect states that all gay and lesbian permanent residents of the Republic who are in same-sex relationships with foreign nationals are not entitled to the benefit

> extended by the subsection to spouses married to foreign nationals in order to protect their family and family life. This is so stated, notwithstanding 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.

[54] The message and impact are clear. Section 10 of the Constitution recognises and guarantees that everyone has inherent dignity and the right to have their dignity respected and protected. The message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity. The discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians.

[55] We were pressed with an argument, on behalf of the Minister, that it was of considerable public importance to protect the traditional and conventional institution of marriage and that the government accordingly has a strong and legitimate interest to protect the family life of such marriages and was entitled to do so by means of s 25(5). Even if this proposition were to be accepted it would be subject to two major reservations. In the first place, protecting the traditional institution of marriage as recognised by law may not be done in a

way which unjustifiably limits the constitutional rights of partners in a permanent same-sex life partnership.

[56] In the second place there is no rational connection between the exclusion of same-sex life partners from the benefits under s 25(5) and the government interest sought to be achieved thereby, namely the protection of families and the family life of heterosexual spouses. No conceivable way was suggested, nor can I think of any, whereby the appropriate extension of the s 25(5) benefits to same-sex life partners could negatively effect such protection. A similar argument has been roundly rejected by the Canadian Supreme Court, which Court has also stressed, correctly in my view, that concern for the protection of same-sex partnerships in no way implies a disparagement of the traditional institution of marriage.

[57] There is nothing in the scales to counteract such conclusion. I accordingly hold that s 25(5) constitutes unfair discrimination and a serious limitation of the s 9(3) equality right of gays and lesbians who are permanent residents in the Republic and who are in permanent same-sex life partnerships with foreign nationals. I also hold, for the reasons appearing throughout this judgment and culminating in the conclusion reached at the beginning of this paragraph, that s 25(5) simultaneously constitutes a severe limitation of the s 10 right to dignity enjoyed by such gays and lesbians.' (Footnotes omitted.)

[93] That reasoning clearly applies here. The effect of the common law prohibition of same-sex marriages is clearly unfair because it prevents parties to same-sex permanent relationships, who are as capable as heterosexual spouses of establishing a *consortium omnis vitae,* of constituting a family and of establishing,

enjoying and benefiting from family life, from entering into a legally protected relationship from which substantial benefits conferred and recognized by the law flow.

IS THE RIGHT TO HUMAN DIGNITY INFRINGED?

[94] It is clear from the reasons given in the passage cited from the *House Affairs* case that the common law definition of marriage not only gives rise to an infringement of the appellants' constitutional right not to be the victims of unfair discrimination in terms of s 9 of the Constitution but also to their right to human dignity in terms of s 10.

JUSTIFIABLE LIMITATION UNDER S 36

[95] It is not suggested by the respondents that the common law definition of marriage in so far as it prevents homosexual persons from entering into same sex marriages constitutes a justifiable limitation on the appellants' rights under ss 9 and 10 of the Constitution. In my view, there would be no merit in any such suggestion.

REMEDY

[9] It is now necessary to consider what remedy, if any, should be given to the appellants. The respondents contended that the court *a quo* correctly dismissed the application for the reasons given in the judgment which I have summarized in paras [59] and

[60] above. They laid great stress on the point, which had found favour with the court *a quo,* that, as the appellants had not attacked the validity of those provisions of the Marriage Act which appeared to place a legislative imprimatur on the common law definition, the application could not succeed.

[97] The respondents did not suggest that the appellants should in addition have sought a declaration that the Identification Act 68 of 1997 is inconsistent with the Constitution (as Moseneke J suggested may be the position[83]). The attitude adopted by the respondents in this regard was, in my view, entirely correct because the provision in the Identification Act which deals with the registration of marriages (s 8(e)) does not depend in any way on an acceptance of the common law definition.

[98] Later in this judgment I shall state my reasons for being of the opinion that the statutory marriage formula set forth in s 30(1) of the Marriage Act does not constitute a basis for denying the appellants relief in this matter. This renders it unnecessary for me to decide whether the absence of a challenge to the constitutional validity of s 30(1) precludes the appellants from receiving any relief at all in their application.

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[83] Constitutional Court judgment in this matter, *supra,* at para 9.

[99] It will be recalled that the court *a quo* approached the application on the basis that the appellants claimed to be married. After referring to their 'assumption' that they were married, Roux J held that they were not married as required by the law. It is clear that the learned judge was misled by the notice of motion, which spoke of the marriage of the parties. It is clear however, from the founding affidavit, which I have summarised above, that the appellants' true case is that they intend to enter into a marriage with each other and they seek a declaration that such marriage, when entered into in accordance with the formalities in the Marriage Act, will be valid and registrable under the Marriage Act and the Identification Act. The respondents' contention that the prayers in the notice of motion indicate that the appellants regarded themselves as married and considered that all they needed from the court was a declaration to legalise their marriage is accordingly not correct.

[100] In constitutional litigation, where infringements of rights entrenched in the Bill of Rights are at issue, it is in any event inappropriate to adopt an overly technical attitude to the relief sought by an applicant. Holding, as I do, that the application of the common law definition of marriage subjects the appellants to infringements of their rights under ss 9 and 10 of the Constitution, I

must conclude that this is an instance where the common law deviates from the spirit, purport and objects of the Bill of Rights and it should accordingly be developed, if this is possible and appropriate, so as to remove the deviation.

[101] As the Constitutional Court held in *Carmichele v Minister of Safety and Security,*[84] where the common law is deficient as regards the spirit, purport and objects of the Bill of Rights in terms of s 39(2) of the Constitution, the Courts are under a general obligation to develop the common law appropriately. The Constitutional Court pointed out[85] that 'in exercising their powers to develop the common law, Judges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary'. It proceeded to cite with approval a *dictum* by Iacobucci J in a decision of the Canadian Supreme Court, *R v Salituro,*[86] which contained the following:

'In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform …. The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.'

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[84] 2001 (4) SA 938 (CC) at 39.
[85] At para 36.
[86] (1991) 3 SCR 654; (1992) 8 CRR (2d) 173 (SCC).

[102] In *Du Plessis v Road Accident Fund*[87] that this Court extended the action for loss of support to partners in a same-sex permanent life relationship similar in other respects to marriage, who had a contractual duty to support one another. Cloete JA said[88] that this extension would be 'an incremental step to ensure that the common law accords with the dynamic and evolving fabric of our society as reflected in the Constitution, recent legislation and judicial pronouncements.'

WOULD THE EXTENSION OF THE COMMON LAW DEFINITION OF MARRIAGE TO ALLOW PERSONS OF THE SAME SEX TO MARRY CONSTITUTE AN INCREMENTAL STEP OR IS THE PROBLEM ONE MORE APPROPRIATELY TO BE SOLVED BY THE LEGISLATURE?

[103] Counsel for the respondents contended that the step which the appellants ask the Court to take is not merely an incremental one but one which would require a fundamental rewriting of important aspects of what can be described as the essence of marriage. He incorporated in his argument portion of the submissions advanced by Counsel for the Attorney General of

[87] 2004 (1) SA 359 (SCA).
[88] At para 37.

Canada in a matter heard in November 2001 in the Ontario Superior Court of Justice, Divisional Court,[89] in which the divisional court declared the common law definition of marriage recognised in Canada (which is the same as ours) to be constitutionally invalid and inoperative but suspended the effect of the declaration for 24 months to permit the Canadian Parliament to act. (On appeal to the Ontario Court of Appeal, the Court, in a judgment delivered on 10 June 2003, upheld the declaration of invalidity but set aside the suspension and ordered the declaration to have immediate effect.[90])

[104] The submission incorporated into counsel for the respondents' argument before this Court reads as follows:

'This case is about our humanity … There are different aspects, but at its core is our femaleness and maleness. The issue before this court is a legal one. It is whether government action, embodied in common law, and statutes, meets the charter rights that the applicants possess. … It is a unique institution, and the court has to decide whether to change marriage forever. … The purpose of marriage has nothing to do with excluding the applicants. That is an effect, but the purpose of marriage, outside the law, at its roots, was to define an institution that would bring together the two core aspects of our humanity; our maleness and our femaleness, because at its essence this is the basis for

[89] *Halpern et al v Attorney General of Canada et al* 215 DLR (4th) 223
[90] See (2003) 225 DLR (4th) 529

humanity. If you take that purpose away, we have something else; the institution has changed.'

[105] Counsel for the respondents contended further that the essence of marriage in our law is a combination of factors: the characteristics going together to make up marriage, so he contended, were procreation, the *consortium omnis vitae* and what counsel for the Attorney General of Canada in the *Halpern* case in the divisional court called 'the complementarity of the two human sexes', 'our femaleness and our maleness'.

[106] Counsel pointed out further that, with the exception of two states of the United States of America (Massachusetts[91] and Washington[92]), three provinces and a territory in Canada (Ontario,[93] Quebec,[94] British Columbia[95] and the Yukon[96]) and the Netherlands and Belgium, no jurisdiction of which he was aware has extended the definition of marriage to cover same-sex unions, although some countries recognise what may be called a

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[91] See the decision of the Supreme Court of Massachusetts, *Goodridge and Others v Department of Public Health and Another* 440 Mass 309; 798 NE 2nd 941 (2003), in which it was held, by a majority of three judges to two, that barring an individual from the protections, benefits and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachussetts Constitution. Entry of judgment was stayed for 180 days to permit the Legislature to take such action as it might deem appropriate in the light of the Court's opinion.

[92] *Anderson and Another v King County and Others* Superior Court of the State of Washington for King County, Memorandum Opinion No 04 – 2 – 4964 4 SEA, 4 August 2004 and *Celia Castle et al v State of Washington,* Superior Court of Washington, Thurston County, Memorandum Opinion on Constitutionality of RCW 26.02.010 and RCW 26.02.020, 7 September 2004.

[93] The *Halpern* case, *supra.*

[94] *Hendricks v Quebec Procureur Général* [2002] RJQ 2506 (Superior Court of Quebec).

[95] *Barbeau v British Columbia (Attorney-General)* (2003) 225 DLR (4th) 472 (BCCA).

[96] *Dunbar & Edge v Yukon (Government of) & Canada (A.G.)* 2004 YKSC 54, 14 July 2004.

parallel legal institution, which gives a separate status, although the parties thereto enjoy virtually all the rights available to married couples. He contended that we would be out of kilter with the rest of the world if we were to recognise same-sex marriages.

[107] He submitted that an extension of the common law definition to apply to same-sex unions would not be an incremental step but what he called 'a quantum leap across a chasm', the consequences of which would be 'a crisis of the reality of the law'. By this he meant, he said, a situation where what the population is practising is the opposite of what is in the law books. He referred in this regard to a lecture given in 1998 by the Hon David K Malcolm, the Chief Justice of Western Australia, addressing the issue of the independence of the judiciary[97].

[108] At one point in his lecture Chief Justice Malcolm said:

'In reality, a strong, independent judiciary forms the foundation of representative democracy and observance of the Rule of Law and human rights. [However] it is primarily the confidence of the community in the legal system which encourages observance of the law … [The practice of judicial independence] also relies on a community perception that in resolving disputes between parties, the judiciary reflects and acts upon the basic and enduring values to which the community subscribes ….'

[97] Quoted in *Advocate,* Vol 17, No2, August 2004, p41.

‘If one accepts that the courts work through the voluntary acceptance of their authority by the community, the relationship between the courts and public must be reciprocal. This does not mean that the courts will decide cases by reference to every shift in public opinion. The courts and the judiciary must have the confidence of the community in order to maintain their authority. Apart from acting in accordance with their ethical obligations, the judiciary must also keep a “weather eye” on community values in order to retain the relevance of their decisions to that community.’

[109] Counsel for the respondent submitted that, if this Court were to be of the opinion that the definition of marriage should be extended to cover same-sex unions, it should suspend whatever relief it was minded to grant to the appellants for 24 months so as to give the legislature time to consider the matter and pass such legislation as it considered necessary to deal with the problem.

[110] Counsel for the appellants attached to his heads of argument Discussion Paper 104 published by the South African Law Reform Commission in connection with its Project 118, which is devoted to the topic of Domestic Partnerships. Discussion Paper 104 contains proposals prepared by the Commission aimed at harmonizing family law with the provisions of the Bill of Rights and the constitutional values of equality and dignity. The Commission considers ‘as unconstitutional the fact that there is currently no legal recognition of same-sex relationships’. It proposes that same-

sex relationships should be acknowledged by the law and identifies three alternative ways of effecting legal recognition to such relationships, *viz* (a) 'opening up the common-law definition of marriage to same-sex couples by inserting a definition to that effect in the Marriage Act'; (b) separating the civil and religious elements of marriage, by amending the Marriage Act to the extent that it will only regulate the civil aspect of marriage, namely the requirements and consequences prescribed by law, and by providing in it for the civil marriage of both same- and opposite-sex couples; and (c) providing what is called a 'marriage-like alternative', according same-sex couples (and possibly also opposite-sex couples) the opportunity of concluding civil unions with the same legal consequences as marriage.

[111] As appears from what I have said above, I share the Commission's view that the fact that there is no legal recognition of same-sex relationships is contrary to the Constitution. It is clear, however, that this Court is not able, in the exercise of its jurisdiction to develop the common law so as to promote the spirit, purport and objects of the Bill of Rights, to grant relief based on the incorporation into our law of either the second or the third options mentioned by the Law Reform Commission. Only the first option is

available to us and then only if it can be regarded as an incremental step.

[112] In *Bellinger v Bellinger* [2003] 2 AC 467 (HL(E)) the House of Lords upheld a decision dismissing a petition under s 55 of the Family Law Act 1986 for a declaration that a marriage celebrated between a person registered at birth as a male who later underwent gender re-assignment surgery and a male partner was valid but it granted a declaration under s 4 of the Human Rights Act 1998 that s 11(c) of the Matrimonial Causes Act 1973 (which provides that a marriage is void unless the parties are 'respectively male and female') is incompatible with the appellant's right to respect for her private life under art 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and her right to marry under art 12 of the Convention. One of the points considered was whether the problem confronting Mrs Bellinger could not be resolved by recognising same-sex marriages. Lord Nicholls of Birkenhead said (at para 48):

'[i]t hardly needs saying that this approach would involve a fundamental change in the traditional concept of marriage'.

Lord Hope of Craighead was of the same opinion. At para 69 of his opinion he said:

'… problems of great complexity would be involved if recognition were to be given to same-sex marriages. They must be left to Parliament.'

[113] These statements do not apply with the same force in this country. With us the concepts of marriage and the family have to be seen against the background of the numerous strands making up the variegated tapestry of life in South Africa. In addition the influence of the Constitution and its express recognition of the importance of the democratic values of human dignity and equality have played a major role in transforming attitudes in this as in many other areas of the law. The point is well put by Professor Joan Church in her valuable and scholarly article 'Same-sex unions – Different Voices'.[98] Professor Church says:[99]

'In South Africa until recently, however, the traditional notion of marriage was that it was a legally recognized voluntary union for life in common of one man and one woman, to the exclusion of all others while it lasts. In terms of this definition the constitutive elements of the marriage is that it is a legal institution, the coming into being and termination of which is legally determined, it is based on the consent of the parties to it, and it is only possible between two persons of the opposite sex. In the present multicultural South African society and in the light of the new constitutional dispensation, this definition no longer holds good. In the first place, in the light of the Constitution and the Recognition of Customary Marriages Act that came into

[98] (2003) 9 *Fundamina* 44. In writing this judgment I have derived considerable assistance from this article.
[99] *Op cit* 45.

operation on 15 November 2000, polygamous or potentially polygamous marriage is legally recognized. In the second place, and perhaps more importantly, discrimination on the grounds of sexual orientation is contrary to the Bill of Rights. As Edwin Cameron points out, the fact that sexual orientation is specifically mentioned with regard to equality and protected conditions, is a milestone not only in the South African context but in world constitutional history. A greater sensitivity towards and acceptance of cultural differences as well as the libertarian jurisprudence that has emerged in the new constitutional dispensation has shaped, and doubtless will still shape, changing policy. This will be discussed later. Although same-sex marriage has as yet not been legally recognised, it is clear that in less than a decade there have been major policy changes in South Africa regarding homosexuals and homosexual conduct. It is suggested that despite some previously dissenting voices, the cases of *S v H* [1995 (1) SA 120 (C)] and [*S v Kampher* 1997 (4) SA 460 (C)] that decriminalized sodomy, were at the vanguard of changing attitudes.' (Footnotes omitted.)

Later in the article, under the heading 'Same-sex marriage and cultural patterns',[100] she refers to various same-sex relationships in non-western societies which serve cultural or economic functions, and gives two examples from indigenous African culture. The first concerns the traditional woman-to-woman marriages which are reported from all over Africa. What she calls a 'notable example' of these involves the Rain Queen of the Lovedu, the last of whom

[100] *Op cit* 50.

had four wives. Further details of such marriages are given by Oomen in her note 'Traditional woman-to-woman marriages and the Recognition of Customary Marriages Act.'[101]

[114] Since the coming into operation of the Interim Constitution on 27 April 1994 the courts have given a series of decisions based on the equality and human dignity provisions of the Interim Constitution and the present Constitution affording to same-sex couples benefits that were previously enjoyed only by married couples.[102]

[115] In the *Home Affairs* case,[103] Ackermann J emphasised that 'over the past decades an accelerating process of transformation has taken place in family relationships, as well as in societal and legal concepts regarding the family and what it comprises.' The judgments which I list in fn 102 above do not recognise same-sex marriages as such but rather a parallel, equivalent institution. It may accordingly be argued that they do not afford a basis for adopting by judicial decision the first option suggested by the Law Commission, *viz* the opening up of the institution of marriage to

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[101] 2000 (63) THR-HR 274.

[102] See *Langemaat v Minister of Safety and Security and Others* 1998 (3) SA 312 (T); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC); *J and Another v Director General Department of Home Affairs and Others* 2003 (5) SA 621 (CC) and *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA).

[103] *Supra,* at para 47.

same-sex couples, but rather as paving the way for the adoption by the legislature of the second or third options. Such a point is clearly not without substance but it does not detract from the fact that these decisions indicate a recognition of the process of transformation to which Ackermann J referred in the *Home Affairs* decision.

[116] Parliament has also over the years since 1994 enacted numerous provisions giving recognition, in some cases expressly in others impliedly, to same-sex partnerships.[104] These enactments evidence an awareness on the part of Parliament of the changing nature of the concept of the family in our society.

[117] I am satisfied in the circumstances that the extension of the common law definition of marriage to same-sex couples cannot be regarded in South Africa in 2004 as involving a fundamental change in the traditional concept of marriage.

[118] It seems to me that the best way of ascertaining whether the proposed extension would for us be merely an incremental step or would involve problems of great complexity, as Lord Hope of Craighead suggested would be the case in the United Kingdom, is

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[104] Details are to be found in footnote 41 to the judgment of the Constitutional Court in the *Home Affairs* case, *supra,* and in footnote 33 to the judgment of the Constitutional Court in the *Du Toit* case, *supra.*
To these may be added the Immigration Act 13 of 2002, s 1 of which includes in the definition of 'spouse' a person who is a party to 'a permanent homosexual or heterosexual relationship which calls for cohabitation and mutual financial and emotional support, and is proven by a prescribed affidavit substantiated by a notarial contract.'

to consider the main rules comprising that part of the law traditionally regarded as part of the law of marriage or matrimonial relations.

[119] But before doing so it is appropriate to refer to the reason given by the Roman Dutch writers who dealt with the topic for the rule restricting the marriage relationship to heterosexual couples. In his commentary on the Institutes[105] Arnoldus Vinnius says in discussing Justinian's definition of marriage, which is set out in Inst 1.9.1 and which is quoted in para [37] above:

'*of a male* and a *female.*

For the union of two persons of the same sex is to be detested and is condemned by the law of God, the law of nature and the laws of all nations.'

Brouwer, after quoting the definitions of Justinian and Modestinus, says:[106]

'We say *"of a male and a female"* in the singular to exclude polygamy: we express both sexes to condemn lechery contrary to nature towards the same sex.'

Similar views were expressed by Hendrik Jan Arntzenius:[107] 'We say "a man and a woman" which indicates that polygamy and the unspeakable practice of homosexualism are repugnant to the nature of marriage.'

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[105] *In Quatuor Libros Institutionum Imperialium Commentarius Academicus et Forensis.*
[106] Op cit 2.28.3.
[107] *Institutiones Juris Belgici de Conditione Hominum,* 1.2.3.2 (Van den Heever's translation, p 52).

[120] We no longer condemn sodomy.[108] It follows that a major reason given by jurists from the Roman Dutch era for the heterosexual requirement in the definition has now fallen away.

[121] Until comparatively recently there were other reasons precluding the recognition in our law of same-sex marriages. Because the principle of legal equality between the spouses was not enshrined in our law there were many rules forming part of our law of matrimonial relations which put the husband in a superior position and the wife in an inferior one. The law could thus not easily accommodate same-sex unions because, unless the partners thereto agreed as to who was to be the 'husband' and who the 'wife', these rules could not readily be applied to their union.

[122] Thus it was a consequence of a marriage in our law that the husband had (a) power as head of the family, which meant that he had the decisive say in all matters concerning the common life of the parties, with the result, amongst other things that the wife automatically acquired her husband's domicile; (b) marital power over the person of his wife, by which was meant in modern times

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[108] See *S v Kampher, supra,* approved by the Constitutional Court in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) in which it was held that the criminal offence of sodomy was unconstitutional.

representing her in civil legal proceedings;[109] and (c) marital power over his wife's property. Powers (b) and (c) could be excluded by antenuptial contract either completely or in part. Power (a) was an invariable consequence of the marriage and could not be excluded.[110]

[123] The Matrimonial Property Act 88 of 1984 abolished the husband's marital power over his wife's person and property in respect of marriages entered into after the commencement of the Act and not governed by the Black Administration Act 38 of 1927. The Marriage and Matrimonial Property Law Amendment Act 3 of 1988 extended the provisions of the Matrimonial Property Act to the civil marriages of Blacks (which were previously governed by the Black Administration Act). Sections 29 and 30 of the General Law Fourth Amendment Act 132 of 1993 abolished the marital power that a husband had over the person and property of his wife in respect of all marriages to which it still applied and also his power flowing from his position as head of the family. This Act contained a number of other provisions repealing or amending statutory provisions which differentiated between men and women and, in particular between husbands and wives. A year before this

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[109] See Hahlo *The South African Law of Husband and Wife* 4 ed (1975) p 154.
[110] For full particulars of the old law as it stood at the end of 1974 see Hahlo op cit pp 106 et seq.

Act was passed Parliament passed the Domicile Act 3 of 1992, which conferred on all persons over the age of eighteen years the capacity to acquire a domicile of choice and thereby abolished the common law rule that a wife automatically acquired and followed her husband's domicile. The Guardianship Act 192 of 1993 repealed the common law rule that a father is the natural guardian of his legitimate children and replaced it by the rule that parents share guardianship in respect of their legitimate children.

[124] As far as I am aware the only common law rule for the application of which it is necessary to be able to identify the husband which still forms part of our matrimonial law is the rule which provides that the proprietary consequences of a marriage are determined, where the prospective spouses have different domiciles, by the law of the domicile of the husband at the time of the marriage. (This rule was established by the decision of this Court in *Frankel's Estate v The Master*[111]). All other rules apply equally to both spouses. Thus spouses owe each other a reciprocal duty of support and either spouse can be ordered to support the other or, where a redistribution order is competent, to transfer assets to the other on divorce.

[111] 1950 (1) SA 220 (A).

[125] With the exception of the rule in *Frankel's* case no problems will be encountered in applying the rules governing the relations between husbands and wives to partners in a same-sex union. I do not believe that the impossibility of applying the rule in *Frankel's* case to same-sex unions would give rise to insoluble problems.[112] The existence of this problem would not constitute a reason for refusing to extend the definition in the way we have been asked to do.

[126] Although counsel for the respondent did not contend that an inability on the part of parties to a same-sex union to procreate with each other was a basis for refusing to grant the extension of the definition sought, he did say, as I indicated earlier, that procreation is one of the characteristics going together to make up marriage. In one of the minority judgments in the *Massachusetts* decision to which I referred above,[113] Cordy J, with whom Spina and Sosman JJ concurred, said:

'The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to

[112] For a possible solution to the problem see the article by Elsabe Schoeman entitled 'The South African conflict rule for proprietary consequences of marriage: learning from the German experience' 2004 *TSAR* 115.
[113] *Goodridge and Others v Department of Public Health and Another, supra.*

engage in exclusive sexual relations, with children the probable result and paternity presumed.'

The learned judge went on to say that 'a family defined by heterosexual marriage continues to be the most prevalent social structure into which the vast majority of children are born, nurtured and prepared for productive participation in civil society' and continued:

'It is difficult to imagine a State purpose more important and legitimate than ensuring, promoting and supporting an optimal social structure within which to bear and raise children. At the very least, the marriage statute continues to serve this important state purpose.'

He then considered whether the Massachusetts statute, construed (as he held it had to be) as limiting marriages to couples of the opposite sex, remains a rational way to further that purpose. He concluded that it did. In reaching that conclusion he said, amongst other things:

'As long as marriage is limited to opposite sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavour; that if they are to procreate, their society has endorsed the institution of marriage as the environment for it and for the subsequent rearing of their children; and that benefits are available explicitly to create a supportive and conducive atmosphere for those purposes.

If society proceeds similarly to recognize marriages between same-sex couples who cannot procreate, it could be perceived as an abandonment of this claim, and might result in the mistaken view that civil marriage has little to do with procreation: just as the potential of procreation would not be necessary for a marriage to be valid, marriage would not be necessary for optimal procreation and child rearing to occur.'

[127] In my view it is appropriate to consider what importance or relevance is to be attached in the present context to the fact that the parties to a same-sex union are incapable of procreating 'naturally' with each other.

[128] As was pointed out in the *Halpern* case when it was before the Ontario Court of Appeal:[114]

'While it is true that, due to biological realities only opposite-sex couples can "naturally" procreate, same-sex couples can choose to have children by other means, such as adoption, surrogacy and donor insemination.'

This fact in itself may well constitute sufficient refutation of the arguments set out in Cordy J's judgment in the *Goodridge* case which I have quoted above.

[129] It is a controversial question in our law whether sterility (an inability to procreate) not accompanied by impotence (an inability to have intercourse) is a sufficient ground for the annulment of a

[114] *Supra,* at para 93.

marriage. *Venter v Venter*[115] is authority for the proposition that it is not, except where the inability was deliberately concealed by the affected spouse. *Van Niekerk v Van Niekerk*[116] on the other hand, is authority for the contrary proposition, namely that inability to procreate, even where it was not fraudulently concealed, is a ground of annulment. This is subject, however, to the important proviso that this is not the case where the parties knew that procreation was not possible.[117] In a same-sex union the parties would be aware at the time of the marriage that what the Ontario Court of Appeal called 'natural' procreation is not possible. It follows that their union, if it is to be regarded as a marriage, would not be subject to annulment and the factor under consideration is not relevant.

[130] Further authority for this view is to be found in the judgment of Ackermann J in the *Home Affairs* case.[118] Having referred[119] to the reinforcement of 'harmful and hurtful stereotypes of gays and lesbians', Ackermann J said:

'[50] A second stereotype, often used to bolster the prejudice against gay and lesbian sexuality, is constructed on the fact that a same-sex couple cannot procreate in the same way as a heterosexual couple. Gays and

[115] 1949 (4) SA 123 (W).
[116] 1959 (4) SA 658 (GW).
[117] See the judgment of Wessels J at 667F and the judgment of De Vos Hugo J at 675H.
[118] *Supra,* at paras 50 to 52.
[119] *Supra,* at para 49.

lesbians are certainly individually permitted to adopt children under the provisions of s 17(b) of the Child Care Act 74 of 1983 and nothing prevents a gay couple or a lesbian couple, one of whom has so adopted a child, from treating such child in all ways, other that strictly legally, as their child. They can certainly love, care and provide for the child as though it was their joint child.

[51] From a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal relationships. Such a view would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. I would even hold it to be demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy.

[52] I find support for this view in the following conclusions of L'Heureux-Dubé J (with whom Cory J and McLachlin J concurred) in *Mossop* [*Canada (Attorney-General) v Mossop* (1993) 100 DLR (4^{th}) 658]:

"The argument is that procreation is somehow necessary to the concept of family and that same-sex couples cannot be families as they are incapable of procreation. Though there is undeniable value in procreation, the tribunal could not have accepted that the capacity to procreate limits the boundaries of

family. It this were so, childless couples and single parents would not constitute families. Further, this logic suggests that adoptive families are not as desirable as natural families. The flaws in this position must have been self-evident. Though procreation is an element in many families, placing the ability to procreate as the inalterable basis of family could result in an impoverished rather than an enriched version."' (Footnotes omitted.)

[131] I have already referred to the fact that Parliament has in the years since 1994 passed a number of statutes recognising same-sex partnerships. As appears from the judgment given by Moseneke J when this case was before the Constitutional Court there are at least 44 Acts of Parliament in which reference is made to 'husband' and/or 'wife' either in the body of the Act or in regulations to the Act.[120] The extension of the definition of marriage would not appear materially to affect the operation of these statutory provisions and I am satisfied that the existence of these provisions on the statute book would not prevent the development of the common law under discussion from being considered to be no more than an incremental step. In fact it may well be that Parliament would consider it appropriate to pass an Act, possibly by way of an amendment to the Interpretation Act 33 of 1957, to provide that a reference in a statue to a 'husband' or a 'wife' in terms of a marriage under the Marriage Act would include

[120] Details may be found in fn 19 of the judgment.

a reference to a 'spouse' married in terms of that Act. This is, however, for Parliament to decide and as I am of the view, for the reasons that I shall give later in this judgment, that the order to be given in this case should be suspended for two years to allow Parliament to consider the matter, Parliament will have the full opportunity to consider the advisability of enacting such a provision when it considers other aspects of the matter.

ARE THE APPELLANTS DEBARRED FROM SEEKING RELIEF BECAUSE THEY DID NOT CHALLENGE THE CONSTITUTIONAL VALIDITY OF s 30(1) OF THE MARRIAGE ACT?

[132] I proceed to consider whether, as the court *a quo* held, this Court is precluded from granting relief to the appellants because they did not challenge the constitutional validity of s 30(1) of the Marriage Act, which sets out the marriage formula. This formula, which has been quoted above, is clearly based on the declaration prescribed by the Order in Council of 7 September 1838.[121] Section 7, as amended by an Order in Council of 3 April 1840, provided that in the case of marriages other than those using the form and ceremony or ritual of the Anglican or Dutch Reformed

[121] See para [77] above.

Churches, each of the parties had to make the following declaration: 'I do solemnly declare that I know not of any lawful impediment why I, A.B., may not be joined in matrimony to C.D., here present.' Thereafter each of the parties had to say to the other: 'I call upon these persons here present to witness that I, A.B., do take C.D to be my lawful wedded wife (or husband).'[122]

[133] There is no section of the Act that expressly approves the common law definition of marriage and I do not think that s 30(1) can be regarded as placing what may be called a legislative imprimatur on that definition. Clearly what has happened is that the marriage formula contained in the Act was framed on the assumption that the common law definition was the correct one, which it was in 1838 and in 1961.

[134] The question to be considered is whether if the common law definition were to change (as I believe it will have to if Parliament does not take other action to ensure that the appellant's rights to equality and human dignity are not infringed) the Court would be able to modify the language of the formula so as to bring it in line with an extended definition.

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[122] See also s 12 of the Huwelijkswet, Law 3 of 1871 (Transvaal) and s 13 of the Huwelijkswet, Hoofdstuk LXXXVIII of the Orange Free State Lawbook.

[135] It is well settled that 'it is within the powers of a court to modify the language of a statutory provision where this is necessary to give effect to what was clearly the legislature's intention'.[123] Here Parliament's intention was to provide a formula for the use of those capable of marrying each other and wishing to do so, unless in the case of a marriage solemnized by a marriage officer who was a minister of religion the formula observed by the denomination to which the minister in question belonged had been approved by the Minister of Home Affairs. It is important to note that no limitations are placed on the Minister's power to approve a religious marriage formula. In other words, there is nothing to prevent the Minister from, for example, approving such a formula which uses the word 'spouse' instead of 'wife' or 'husband' in the statutory formula. This indicates clearly that Parliament is not to be taken as having intended to approve the common law definition and, as it were, to prohibit same-sex marriages by failing (or refusing) to provide a formula for use thereat. That is why I say that Parliament's intention was to provide a formula for the use of those capable of marrying each other and wishing to do so.

[123]Per Schreiner JA in *Durban City Council v Gray* 1951 (3) SA 568 (A) at 580 (B).

[136] Francis Bennion,[124] refers to a presumption that an updating construction is to be given to statutes except those comparatively rare statutes intended to be of unchanging effect, which he calls 'fixed-time Acts.' All other Acts he calls 'ongoing Acts'.

He explains the law as follows:

'It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as *always speaking.* This means that in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law.'

This, he says,

'states the principle, enunciated by the Victorian draftsman Lord Thring, that an ongoing Act is taken to be always speaking. While it remains in force, the Act is necessarily to be treated as current law. It speaks from day to day, though always (unless textually amended) in the words of its original drafter. As Lord Woolf MR said of the National Assistance Act 1948 –

"That Act had replaced 350 years of the Poor Law and was a prime example of an Act which was "always speaking". Accordingly it should be construed by continuously updating its wording to allow for changes since the Act was written."'

[124] *Statutory Interpretation* 3 ed (1997) p 686.

Later on Bennion says:[125]

‘Each generation lives under the law it inherits. Constant formal updating is not practicable, so an Act takes on a life of its own. What the original framers intended sinks gradually into history. While their language may endure as law, its current subjects are likely to find that law more and more ill-fitting. The intention of the originators, collected from an Act’s legislative history, necessarily becomes less relevant as time rolls by. Yet their words remain law. Viewed like this, the ongoing Act resembles a vessel launched on some one-way voyage from the old world to the new. The vessel is not going to return; nor are its passengers. Having only what they set out with, they cope as best they can. On arrival in the present, they deploy their native endowments under conditions originally unguessed at.

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly the interpreter is to make allowances for any relevant changes that have occurred, since the Act’s passing, in law, social conditions, technology, the meaning of words, and other matters. Just as the US Constitution is regarded as “a living Constitution”, so an ongoing British Act is regarded as “a living Act”. That today’s construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will try to foresee the future, and allow for it in the wording.’

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[125] O*p cit* p 687.

[137] Among the examples he gives of the application of the working of the presumption are the following:[126]

'Changes in the practices of mankind may necessitate a strained construction if the legislator's object is to be achieved.

Example 288.16 The Carriage by Air Act 1961 gives legislative force to the Warsaw Convention as amended at The Hague in 1955, which is set out in Sch 1. The Convention limits liability for loss of or damage to "registered baggage", but does not explain what "registered" means or what "registration" entails. Lord Denning MR explained that originally airlines kept register books in which all baggage was entered, but that this had been discontinued. He added: "What then are we to do? The only solution that I can see is to strike out the words 'registered' and 'registration' wherever they occur in the articles. By doing this, you will find that all the articles work perfectly, except that you have to find out what a 'baggage check' is."

Example 288.16A A reference in an enactment originating in 1927 to a business which a company "was formed to acquire" was held to cover an off the shelf company, even though such companies were unknown in 1927.

…

Developments in technology The nature of an ongoing Act requires the court to take account of changes in technology, and treat the statutory language as modified accordingly when this is needed to implement the legislative intention.

Example 288.19 Section 4 of the Foreign Enlistment Act 1870 makes it an offence for a British subject to accept any engagement in "the military or naval

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[126] O*p cit* pp 695-7.

service" of a foreign state which is at war with a friendly state. The mischief at which s 4 is aimed requires this phrase to be taken as now including air force service. Textual updating of the 1870 Act was recommended in the Report of the Committee of Privy Councillors appointed to inquire into the recruitment of mercenaries, but has not been done. Even so it seems that a modern court should treat "military or naval service" in s 4 as including any service in the armed forces of the state in question.' (Footnotes omitted.)

[138] If one applies this presumption to the marriage formula in s 30(1) of the Marriage Act, it is clear that, in order to give effect to Parliament's intention, it would not only be permissible but appropriate to regard the words 'lawful wife (or husband)' as capable of including the words 'lawful spouse' if the common law definition were to be extended so as to cover same-sex marriages. It follows that s 30(1) of the Marriage Act does not afford a basis for denying the appellants relief in this matter.

SHOULD THE COURT'S ORDER BE SUSPENDED TO ENABLE PARLIAMENT TO DEAL WITH THE MATTER?

[139] I am satisfied for the reasons I have given that the appellants have established that the continued application of the common law definition of marriage infringes their constitutional rights to equality and human dignity and that it is possible for this Court to give them an effective remedy because the extension of that definition to

cover same-sex unions would be an incremental step in the development of the law and would not involve the court in trespassing on the domain of the legislature by effecting extensive amendments to the law involving problems of great complexity.

On the other hand it is also relevant to bear in mind that the Law Reform Commission in its Discussion Paper to which I have referred[127] has drawn attention to two other possible remedies to the problem raised by the appellants which this Court could not consider for the reasons I mentioned.

[140] It is desirable that all three options be carefully considered by Parliament before a final decision is taken as to which remedy should be adopted in this country. I am deeply conscious of the fact that this Court, consisting as it does of unelected judges, should not do anything which prejudices or even possibly pre-empts the decision Parliament takes on the matter. Important and wide ranging policy issues have to be considered. Our conclusion, limited as it is to a consideration of but one of the available options, is based solely on juridical considerations. The policy issues are for Parliament, not for us. This is a result of the application of the doctrine of the separation of powers, which, as the Constitutional Court has recently reminded us, must be

[127] See para [62] above.

respected by the courts. See *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others,* an as yet unreported decision of the Constitutional Court, delivered on 15 October 2004, in which Ngcobo J, discussing what the appropriate remedy would be in a case where certain provisions in the Pound Ordinance (KwaZulu-Natal), 1947, were found to be inconsistent with the Constitution, pointed out (at para 122) that, in deciding whether words should be severed from a provision or read into one, 'there are two primary considerations to be kept in mind: The need to afford appropriate relief to successful litigants, on the one hand, and the need to respect separation of powers and, in particular, the role of the legislature as the institution that is entrusted with the task of enacting legislation, on the other.' Later (in para 123) he said that 'when curing a defect in [a] provision would require policy decisions to be made, reading-in or severance may not be appropriate. So too where there are a range of options open to the legislature to cure a defect. This Court should be slow to make choices that are primarily to be made by the legislature.' In the present case Parliament may decide, after a full consideration of all the relevant factors, that one of the other options suggested by the Law Reform Commission should be adopted and if that decision survives such constitutional scrutiny

as that to which it may be subjected, that will be the answer our country gives to the problem.

[141] I am accordingly satisfied that the appropriate way forward is for this Court to make an order within its powers to grant the appellants relief but to suspend such order for two years to enable Parliament to deal with the matter.

[142] Counsel for the appellants argued that such suspension would not be either competent or appropriate. I do not agree.

[143] As far as this Court's powers are concerned, the matter, being a constitutional one, is governed by s 172(1)*(b)* of the Constitution, which, it will be recalled, empowers the Court to

'make any order that is just and equitable, including –

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

Even if one assumes that a decision to develop the common law - because without the development it is not in accord with the spirit, purport and objects of the Bill of Rights - does not amount to a declaration of invalidity (a matter on which it is not necessary for me to express an opinion), it is clear that the Court's powers to grant 'any order that is just and equitable' must include the power

to suspend an order developing the common law, when the problem under consideration can also be solved by other methods which only Parliament can employ and where the ultimate decision as to which method should be employed depends to a substantial degree on policy considerations.

[144] If this Court were to plump for the only remedy open to it, it is likely, if this Court's order is not suspended, that many same-sex couples will get married. This factor will clearly make it difficult, if not impossible, for Parliament to decide to adopt one of the other options set out in the Law Reform Commission's report.

[145] There is no case of which I am aware where an order developing the common law has been suspended, but in a number of cases where statutory provisions were declared invalid the Constitutional Court has ordered that a statutory provision declared invalid was to remain in force for a specified period to enable Parliament to correct the defect in the provision. Under the Interim Constitution such orders were made under s 98(5) thereof which provided that the Constitutional Court might 'in the interests of justice and good government' require Parliament or any other competent authority, within a period specified by the Court, to correct the defect in a provision declared to be invalid, which provision was to remain in force pending correction or the expiry of

the specified period. One of the cases where this power was exercised was *Fraser v Children's Court, Pretoria North, and Others,*[128] in which it was said[129] that regard being had, *inter alia,* to the nuanced legislative responses which might be available in meeting the issues raised by the case, it was a proper case to require Parliament to correct the defects identified in the relevant statutory provision by an appropriate statutory provision. Section 98(5) of the Interim Constitution has been replaced by section 172(1)*(b)* (ii) of the Constitution, which is set out above and which does not repeat the phrase 'in the interests of justice and good government' although this is the test still applied by the Constitutional Court.[130]

[146] In the present case the matter has since April 1998 enjoyed the attention of the Law Reform Commission. In its report to which I referred earlier the Commission requested respondents to submit written comments and representations by 1 December 2003. It is clearly envisaged that after the comments and representations it has received have been evaluated and it has finally deliberated on the matter, a report will be submitted to the Minister of Justice and Constitutional Development for tabling in Parliament. For the

[128] 1997 (2) SA 261 (CC).
[129] In para 50 at 283 I-284 B).
[130] See *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) at 434G – H.

reasons I have given earlier I think it important that Parliament be given a free hand to consider the matter and all the policy factors that arise without being subject to pressure of any kind flowing from the fact that one of the options to be considered by it has already been implemented by judicial decision, (without the policy implications of that option, or the other options, being evaluated).

[147] I am of course aware of the fact that the Ontario Court of Appeal, overruling the majority in the Divisional Court of Justice, ordered that its declaration that the common law definition was invalid and its reformulation thereof was to have immediate effect. I do not think that the approach set out in that judgment should be applied here. In Canada there is, as far as I am aware, no statutory equivalent to s 172(1)*(b)* of our Constitution. The Canadian courts have assumed a power to give 'temporary force and effect' to unconstitutional laws to allow the Legislature time to pass correcting legislation.[131] The leading case on the point is *Schachter v Canada,*[132] in which Lamer CJC said:[133]

'Temporarily suspending the declaration of invalidity to give Parliament or the provincial Legislature in question an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations will

[131] See Hogg *Constitutional Law of Canada* 4 ed (looseleaf) para 37.1 (d), pp 37-4.
[132] (1992) 10 CRR (2d) 1 (SCC).
[133] At 27.

be warranted even where striking down has been deemed the most appropriate option on the basis of one of the above criteria if:

A. striking down the legislation without enacting something in its place would pose a danger to the public;

B. striking down the legislation without enacting something in its place would threaten the rule of law; or,

C. the legislation was deemed unconstitutional because of under-inclusiveness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefiting the individual whose rights have been violated.

I should emphasize before I move on that the above propositions are intended as guidelines to assist courts in determining what action under s. 52 is most appropriate in a given case, not as hard and fast rules to be applied regardless of factual context.'

Professor Hogg[134] points out that these 'guidelines' were not referred to in and do not accommodate five subsequent decisions of the Supreme Court of Canada in which temporary validity was given to certain laws to enable the legislature to redraft them and in one case[135] to allow for consultation with Aboriginal people before a new law was drafted.

The Ontario Court of Appeal in *Halpern* applied the 'guidelines' very strictly, without referring to Lamer CJC's statement that they

[134] *Op cit* at pp 37-8 to 37-9 (fn38).
[135] *Corbiere v Canada* [1999] 2 SCR 203.

were not hard and fast rules or to the subsequent Supreme Court of Canada decisions to which Professor Hogg refers. Other Canadian courts confronted with the problem have suspended the coming into effect of their orders. Thus in Quebec Lamelin J suspended for two years the order she made in *Hendricks v Quebec Procureur General,*[136] as did the majority of the Divisional Court in the *Halpern* case.[137] The British Columbia Court of Appeal suspended its order in *EGALE Canada Inc v Canada (Attorney General)*[138] until the expiry of the two year period imposed in the *Halpern* case in the Divisional Court. After the Attorney General of Canada indicated that he did not intend proceeding with his appeal against the Court of Appeal decision in the *Halpern* case, the Quebec and British Columbia suspensions were uplifted.[139] The Supreme Court of Massachusetts stayed entry of its judgment in the *Goodridge* case for 180 days to permit the legislature to take such action as it might deem appropriate in the light of the Court's opinion.

[148] The power of a South African court to suspend the coming into effect of an order in a constitutional case to enable the

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[136] [2002] RJQ 2506 (Superior Court of Quebec).
[137] *Supra.*
[138] (2003) 225 DLR (4th) (BCCA)
[139] See *Catholic Civil Rights League v Hendricks* [2004] QJ No 2593 and *EGALE Canada Inc v Canada (Attorney-General)* 228 DLR (4th) 416 (BCCA).

legislature to deal with the matter is not subject to the strict application of 'guidelines' such as those set forth in the *Schachter* case, with the result that this part of the Court of Appeal decision in the *Halpern* case is not applicable in this country.

[149] In the circumstances I am satisfied that this court should suspend the order it makes for a period to allow Parliament to deal with the matter in such a way as to bring an end to the unjustifiable breach of the appellants' rights to equality and human dignity. This would have the result that the appellants would be successful in putting a stop to the breach of those rights, either because Parliament will enact appropriate legislation to deal with the matter or, if it fails to do so (either because it enacts no legislation or because it enacts legislation which does not survive constitutional scrutiny[140]), because this Court's order would then come into operation.

[150] I would make an order allowing the appeal with costs and replacing it with an order declaring that the intended marriage between the appellants, provided the formalities set out in the Marriage Act 25 of 1961 are complied with, would be capable of being recognised as a legally valid marriage, but suspending this

[140] The constitutionality of the other options suggested by the Law Reform Commission was not argued before us and we are not in a position to pronounce thereon, even if it were appropriate for us to do so, which in my opinion it is not.

declarator to enable Parliament to enact legislation to ensure that the appellants' rights to equality and human dignity are not unjustifiably infringed and providing that if such legislation is enacted, the declarator would fall away.

I would also order the respondents to pay the applicants' costs in the court below.'

……..
IG FARLAM
JUDGE OF APPEAL

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 60/04

MINISTER OF HOME AFFAIRS	First Applicant
DIRECTOR-GENERAL OF HOME AFFAIRS	Second Applicant
versus	
MARIÉ ADRIAANA FOURIE	First Respondent
CECELIA JOHANNA BONTHUYS	Second Respondent
with	
DOCTORS FOR LIFE INTERNATIONAL	First amicus curiae
JOHN JACKSON SMYTH	Second amicus curiae
THE MARRIAGE ALLIANCE OF SOUTH AFRICA	Third amicus curiae

Case CCT 10/05

LESBIAN AND GAY EQUALITY PROJECT AND EIGHTEEN OTHERS	Applicants
versus	
MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL OF HOME AFFAIRS	Second Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent

Heard on : 17 May 2005

Decided on : 1 December 2005

JUDGMENT

SACHS J:

INTRODUCTION

[1] Finding themselves strongly attracted to each other, two people went out regularly and eventually decided to set up home together. After being acknowledged by their friends as a couple for more than a decade, they decided that the time had come to get public recognition and registration of their relationship, and formally to embrace the rights and responsibilities they felt should flow from and attach to it. Like many persons in their situation, they wanted to get married. There was one impediment. They are both women.

[2] Ms Marié Adriaana Fourie and Ms Cecelia Johanna Bonthuys are the applicants in the first of two cases[1] that were set down for hearing on the same day in this Court. Their complaint has been that the law excludes them from publicly celebrating their love and commitment to each other in marriage. Far from enabling them to regularise their union, it shuts them out, unfairly and unconstitutionally, they claim.

[1] *Minister of Home Affairs and Another v Fourie and Another, with Doctors For Life International (first amicus curiae), John Jackson Smyth (second amicus curiae) and Marriage Alliance of South Africa (third amicus curiae)* CCT 60/04.

[3] They contend that the exclusion comes from the common law definition which states that marriage in South Africa is "a union of one man with one woman, to the exclusion, while it lasts, of all others."[2] The common law is not self-enforcing, and in order for such a union to be formalised and have legal effect, the provisions of the Marriage Act[3] have to be invoked. This, as contended for in the second case,[4] is where the further level of exclusion operates. The Marriage Act provides that a minister of religion who is designated as a marriage officer may follow the marriage formula usually observed by the religion concerned.[5] In terms of section 30(1) other marriage officers must put to each of the parties the following question:

> "'Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful *wife* (*or husband*)?', and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words: 'I declare that A.B. and C.D. here present have been lawfully married.'" (My emphasis.)

The reference to wife (or husband) is said to exclude same-sex couples. It was not disputed by any of the parties that neither the common law nor statute provide for any

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[2] As articulated by Innes CJ in *Mashia Ebrahim v Mahomed Essop* 1905 TS 59 at 61. In other cases the exclusion is said to be "for life". See for example *Hyde v Hyde and Woodmansee* 1866 LR 1 P and D 130 at 133; *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 309 and *Ismail v Ismail* 1983 (1) SA 1006 (A) at 1019. Given the high degree of divorce this would seem to be a misnomer.

[3] Act 25 of 1961.

[4] *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs and Others* CCT 10/05.

[5] Section 30(1) states in this regard:

> "[A]ny marriage officer designated under section 3 may follow the marriage formula usually observed by his religious denomination or organization if such marriage formula has been approved by the Minister . . . ."

legal mechanism in terms of which Ms Fourie and Ms Bonthuys and other same-sex couples could marry.

[4] In the pre-democratic era same-sex unions were not only denied any form of legal protection, they were regarded as immoral and their consummation by men could attract imprisonment.[6] Since the interim Constitution came into force in 1994, however, the Bill of Rights has dramatically altered the situation. Section 9(1) of the Constitution now reads:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

Section 9(3) of the Constitution expressly prohibits unfair discrimination on the grounds of sexual orientation. It reads:

> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, *sexual orientation*, age, disability, religion, conscience, belief, culture, language and birth." (My emphasis.)

[5] The matter before us accordingly raises the question: does the fact that no provision is made for the applicants, and all those in like situation, to marry each other, amount to denial of equal protection of the law and unfair discrimination by the

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[6] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC). (The *Sodomy* case.)

state against them because of their sexual orientation? And if it does, what is the appropriate remedy that this Court should order?

I. HISTORY OF THE LITIGATION

The first challenge: the common law definition of marriage (the Fourie case)

[6] Pursuant to their desire to marry and thereby acquire the status, benefits and responsibilities which traditionally flow from marriage between heterosexual couples, the applicants went to the Pretoria High Court. They asked for an order declaring that the law recognises their right to marry, and a mandamus ordering the Minister of Home Affairs and the Director-General to register their marriage in terms of the Marriage Act.[7] It will be noted that they did not mount a challenge either to the common law definition of marriage or to the constitutionality of section 30(1) of the Marriage Act.

[7] Roux J in the High Court[8] attempted to 'wring out' of the parties a clear description of the constitutional issue in the matter. The applicants articulated the issue as follows:

> "Whether the common law has so developed that it can be amended so as to recognise marriages of persons of the same sex as legally valid marriages in terms of the Marriage Act, 25 of 1961 provided that such marriages comply with the formality requisites set out in the Act."

[7] They also sought to have their marriage registered in terms of the Identification Act 97 of 1968.

[8] *Fourie and Another v Minister of Home Affairs and Another (The Lesbian and Gay Equality Project intervening as amicus curiae)*, Case No 17280/02, handed down on 18 October 2002. Unreported.

Roux J concluded that the marriage formula in section 30(1) of the Marriage Act, which contemplates marriage between a male and a female and no other, is peremptory. Consequently the applicants could not be married as required by the law. To compel the Minister of Home Affairs to register the "marriage" between the applicants, he added, would constitute a request to do what is unlawful. An omission to challenge the constitutionality of the provisions of the Marriage Act accordingly constituted an obstacle to granting the relief sought. On this basis he dismissed the application.

[8] The applicants then applied to the Pretoria High Court for leave to appeal to this Court, alternatively, to the Supreme Court of Appeal (SCA) against his judgment. Roux J having in the interim retired, the application was heard by Mynhardt J, who refused to grant a positive certificate, but[9] did grant them leave to appeal to the SCA. The applicants then approached the Constitutional Court for leave to appeal directly to it against the judgment and order of the High Court.

[9] This Court refused the application on the ground that the interests of justice required that the appeal first be heard by the SCA. Moseneke J[10] said that in their papers the applicants did not seek a declaration that any of the provisions of the legislation dealing with solemnising or recording of marriages was inconsistent with the Constitution, or if any was, what the appropriate relief would be in that regard.

[9] In terms of Rule 18 of the Constitutional Court Rules as they then were, which provided that the Court hearing the matter had to state whether it thought the application should be heard by this Court.

[10] *Fourie and Another v Minister of Home Affairs and Another* 2003 (5) SA 301 (CC); 2003 (10) BCLR 1092 (CC). [*Fourie* (CC).]

The applicants also omitted to address all the consequences that would flow from the recognition of such a union or how it should be dissolved. The appeal was likely to raise complex and important questions of the legal conformity of our common law and statutory rules of marriage in the light of our Constitution and its resultant jurisprudence. Moseneke J pointed out that

> "[m]arriage and its legal consequences sit at the heart of the common law of persons, family and succession and of the statutory scheme of the Marriage Act. Moreover marriage touches on many other aspects of law, including labour law, insurance and tax. These issues are of importance not only to the applicants and the gay and lesbian community but also to society at large."[11]

[10] Although considerations of saving costs and of an early and definitive decision of the disputed issues were in themselves weighty, they should not oust the important need for the common law, read in the light of the applicable statutes, to develop coherently and harmoniously within our constitutional context. The judgment emphasised that the views of the SCA on the matters that arose were of considerable importance. The nature of the dispute raised by the appeal was, as the High Court had correctly held in issuing a negative rule 18(2) certificate, pre-eminently suited to be considered first by the SCA. The application for leave to appeal directly to this Court was accordingly refused.

[11] Id at para 12.

[11] The result was that the applicants pursued their appeal in the SCA.[12] They did so on the same basis on which they had litigated in the Pretoria High Court, namely, that the common law needed to be developed, without linking this to a challenge to the Marriage Act.

[12] The SCA upheld the appeal in part. Two separate judgments were delivered. All five judges held that the exclusion of same-sex couples from the common law definition of marriage constituted unfair discrimination against them. The reasons for coming to this conclusion diverged in certain significant respects, however, resulting in different approaches being taken as to the order to be made.

[13] Writing for the majority, Cameron JA[13] held that the Constitution grants powers to the Constitutional Court, the SCA and the High Courts to develop the common law, taking into account the interests of justice.[14] The Bill of Rights provides[15] that when applying a provision of the Bill of Rights to a natural or juristic person a court, in order to give effect to a right in the Bill, "must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right" though it may develop the rules of the common law to limit the right in accordance with the limitations provision in section 36(1). It also provides that when developing the

[12] *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA); 2005 (3) BCLR 241 (SCA). [*Fourie* (SCA).]

[13] His judgment was concurred in by Mthiyane and Van Heerden JJA and Ponnan AJA.

[14] Section 173 of the Constitution.

[15] Section 8(3).

common law the Court must promote the spirit, purport and objects of the Bill of Rights.[16] Taken together, these provisions create an imperative normative setting that obliges courts to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. Doing so is not a choice. Where the common law is deficient, the courts are under a general obligation to develop it appropriately. This provided the background to the task in the appeal.

[14] Cameron JA went on to state that developing the common law involves a creative and declaratory function in which the court puts the final touch on the process of incremental legal development that the Constitution has already ordained. The task of applying the values in the Bill of Rights to the common law thus requires the courts to put its faith in both the values themselves, as well as in the people whose duly elected representatives created a visionary and inclusive constitutional structure that offered acceptance and justice across diversity to all. He said that South Africans and their elected representatives have for the greater part accepted the sometimes far-reaching decisions in regard to sexual orientation and other constitutional rights over the past ten years. It is not presumptuous to believe that they will accept also the further incremental development of the common law that the Constitution requires in this case.

[15] Cameron JA pointed out that our equality jurisprudence had taken great strides in respect of gays and lesbians in the last decade. The cases articulate far-reaching

[16] Section 39(2).

doctrines of dignity, equality and inclusive moral citizenship. They establish that: gays and lesbians are a permanent minority in society who have suffered patterns of disadvantage and are consequently exclusively reliant on the Bill of Rights for their protection; the impact of discrimination on them has been severe, affecting their dignity, personhood and identity at many levels; family as contemplated by the Constitution can be constituted in different ways and legal conceptions of the family and what constitutes family life should change as social practices and traditions change; permanent same-sex partners are entitled to found their relationships in a manner that accords with their sexual orientation and such relationships should not be subject to unfair discrimination; and same-sex life partners are "as capable as heterosexual spouses of expressing and sharing love in its manifold form." Cameron JA continued:

> "'The sting of the past and continuing discrimination against both gays and lesbians' lies in the message it conveys, namely, that viewed as individuals or in their same-sex relationships, they 'do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships.' This 'denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity' namely that 'all persons have the same inherent worth and dignity', whatever their other differences may be."[17]

[16] He added that the capacity to choose to get married enhances the liberty, the autonomy and the dignity of a couple committed for life to each other. It offers them the option of entering an honourable and profound estate that is adorned with legal and social recognition, rewarded with many privileges and secured by many automatic

[17] *Fourie* (SCA) above n 12 at para 13.

obligations. It offers a social and legal shrine for love and commitment and for a future shared with another human being to the exclusion of all others.

[17] Legislative developments, he continued, have ameliorated but not eliminated the disadvantages same-sex couples suffer. More deeply, the exclusionary definition of marriage injures gays and lesbians because it implies a judgment on them. It suggests not only that their relationships and commitments and loving bonds are inferior, but that they themselves can never be fully part of the community of moral equals that the Constitution promises to create for all. The applicants' wish was not to deprive others of any rights. It was to gain access for themselves, without limiting that enjoyed by others.[18]

[18] The majority judgment went on to state that the Marriage Act prescribes a verbal formula that must be uttered if the legal consequences of the lawful marriage are to follow. The legislature prescribed this formula, and its words cannot be substituted by 'updating' interpretation.[19] If the Court, and not Parliament, is to make a constitutionally necessary change to such a formula, that must be done not by interpretation but by the constitutional remedy of 'reading-in'. The applicants' legal advisors, however, had overlooked the question of the Marriage Act.

[18] Quoting Marshall CJ in the Massachusetts Supreme Judicial Court, he held that to deny them access to marriage, "works a deep and scarring hardship on a very real segment of the community for no rational reason". Id at para 18.

[19] See para 32 below.

[19] This did not, however, constitute a complete obstacle to granting them some portion of the relief they sought. The Marriage Act permits the Minister to approve variant marriage formulae for ministers of religion and others holding a 'responsible position' within religious denominations. Cameron JA noted that there are currently many religious societies that approve same-sex marriages. Even without amendment to the statute, the Minister is now at liberty to approve religious formulae that encompass same-sex marriages.

[20] Cameron JA stated that it is important to emphasise that neither the Court's decision, nor the ministerial grant of such a formula, in any way impinges on religious freedom. The extension of the common law definition of marriage does not compel any religious denomination or minister of religion to approve or perform same-sex marriages.

[21] Turning to the appropriate remedy, he stated that once the court concludes that the Bill of Rights requires the development of the common law, it is not engaging in a legislative process. Nor in fulfilling that function is the court intruding on the legislative domain. In his view, successful litigants should be awarded relief; the order of the SCA developing the common law trenched on no statutory provision, and deference to Parliament did not require that the order be suspended; and the applicants should be awarded the benefit of an order regarding the common law of marriage that would take effect immediately. Cameron JA indicated that when the Minister approved appropriate religious formulae, the development of the common law would

take practical effect. Religious orders whose use of such formulae are approved, will at their option be able to perform gay and lesbian marriages. But, he concluded, gay and lesbian couples seeking to have a purely secular marriage would have to await the outcome of proceedings which were launched in the Johannesburg High Court in July 2004, designed to secure comprehensive relief challenging the provisions of the Marriage Act and other statutes.

[22] Cameron JA accordingly limited his order to declaring that in terms of sections 8(3), 39(2) and 173 of the Constitution, the common law concept of marriage is developed to embrace same-sex partners as follows: "Marriage is the union between two persons to the exclusion of all others for life."

[23] In his minority judgment, Farlam JA dealt broadly with the history of the institution of marriage in our law. He emphasised that during the classical Roman law period marriage was a purely private institution which did not involve the state. No religious or ecclesiastical rite was essential, even after Christianity became the official religion of the Roman Empire in 313 AD. All that was required for the existence of a marriage was reciprocally expressed consent of parties. After the disintegration of the Roman Empire in the West, when the Church began to control marriage, parties were encouraged to declare their consent before a priest and to receive a blessing. Such marriages were regarded as "regular" marriages. There were also so-called "irregular" marriages which were based on the consent of the parties alone. Parties to "irregular"

marriages were often subjected to ecclesiastical and secular penalties, but their marriages were nonetheless as valid as the "regular" ones.

[24] The present Marriage Act consolidated the laws governing the formalities of marriage and the appointment of marriage officers, and repealed some 47 Union and pre-Union statutes from the Marriage Order in Council of 7 September 1838 onwards. A study of the provisions of the Marriage Act makes it clear that it builds on the foundations laid by the Council of Trent in 1563 and by the States of Holland in 1580. It is solely concerned with marriage as a secular institution. Many may see a religious dimension to marriage, but this is not something that the law is concerned with.

[25] Farlam JA then went on to hold that

> "[i]t will be recalled that s 9(1) of the Constitution provides that everyone has the right to equal protection and benefit of the law, while s 9(3) lists among the proscribed grounds of discrimination sexual orientation. Homosexual persons are not permitted in terms of the common-law definition to marry each other, however strong their yearning to establish a conjugal society of the kind described. As a result they are debarred from enjoying the protection and benefit of the law on the ground of their sexual orientation. This clearly constitutes discrimination within the meaning of s 9 of the Constitution."[20]

[26] He added that the effect of the common law prohibition of same-sex marriages was clearly unfair because it prevented parties to same-sex permanent relationships, who are as capable as heterosexual spouses of establishing a consortium omnis vitae,

[20] *Fourie* (SCA) above n 12 at para 86.

of constituting a family and of establishing, enjoying and benefiting from family life, from entering into a legally protected relationship from which substantial benefits conferred and recognised by the law flowed.[21] He went on to say that the common law definition of marriage not only gave rise to an infringement of the appellants' constitutional right not to be the victims of unfair discrimination in terms of section 9 of the Constitution but also to their right to human dignity in terms of section 10.[22]

[27] Farlam JA was of the view that the omission to challenge the marriage formula in the Marriage Act did not constitute a basis for denying the applicants relief. The finding by Roux J that the parties cannot be married as required by the law was wrong. The applicants' true case was that they intended to enter into a marriage with each other and that they sought a declaration that such marriage, when entered into in accordance with the formalities in the Marriage Act, would be valid and registerable under the Marriage Act and the Identification Act.

[28] The judgment observes that counsel for the applicants had referred to the Discussion Paper 104 published by the South African Law Reform Commission (SALRC), which is devoted to the topic of Domestic Partnerships. The Paper contains proposals prepared by the SALRC aimed at harmonising family law with the provisions of the Bill of Rights and the constitutional values of equality and dignity. The SALRC considers as unconstitutional the fact that there is currently no legal

[21] Id at para 93.

[22] Id at para 94.

recognition of same-sex relationships. It proposes that same-sex relationships should be acknowledged by the law and identifies three alternative ways of effecting legal recognition to such relationships, viz (a) opening up the common law definition of marriage to same-sex couples by inserting a definition to that effect in the Marriage Act; (b) separating the civil and religious elements of marriage, by amending the Marriage Act to the extent that it will only regulate the civil aspect of marriage, namely the requirements and the consequences prescribed by law and by providing in it for civil marriage of both same- and opposite-sex couples; and (c) providing what is called a 'marriage-like alternative' according same-sex couples (and possibly opposite sex couples) the opportunity of concluding civil unions with the same legal consequences as marriage.[23]

[29] Farlam JA stated that only the first option is available to the courts, but only if it can be regarded as an incremental step. In the year 2004, and in the present circumstances the development of the common law cannot be regarded as a fundamental change. He said that Parliament has over the years since 1994 enacted numerous provisions giving recognition, in some cases expressly and in others impliedly, to same-sex partnerships. These enactments evidence an awareness on the part of Parliament of the changing nature of the concept of the family in our society. He added that until recently the principle of legal equality between the spouses had not been enshrined in our law. The rules forming part of our matrimonial relations

[23] *Fourie* (SCA) above n 12 at para 110.

which put the husband in a superior position and the wife in an inferior one are no longer part of our law.[24]

[30] In respect of the contention that applicants are debarred from seeking relief because they did not challenge the constitutional validity of section 30(1) of the Marriage Act, he held that there is no section in the Marriage Act that expressly approves the common law definition of marriage. Section 30(1), according to Farlam JA, cannot be regarded as placing what may be called a 'legislative imprimatur' on that definition. What has happened is that the marriage formula contained in the Act was framed on the assumption that the common law definition of marriage was correct, which it was in 1838[25] and in 1961. He found that the formula can be changed by a process of innovative and 'updating' statutory interpretation by reading "wife (or husband)" in this provision as "spouse".

[31] Farlam JA therefore supported an order declaring that the intended marriage between the applicants, provided that it complies with the formalities set out in the Marriage Act, would be capable of being recognised as a legally valid marriage. He

[24] He pointed out that the law could thus not easily accommodate same-sex unions because, unless the partners thereto agreed as to who was to be the "husband" and who the "wife", these rules could not readily be applied to their union. Sections 29 and 30 of the General Law Fourth Amendment Act 132 of 1993, however, abolished the husband's marital power over his wife's person and property in respect of all marriages to which it applied, and also his power flowing from his position as head of the family. The only common law rule which makes it necessary to be able to identify the husband and which still forms part of our law of matrimonial law, is the rule which provides that the proprietary consequences of a marriage are determined, where prospective spouses have different domiciles, by the law of the domicile of the husband at the time of the marriage. All other rules apply equally to spouses. Farlam JA stated that he does not believe that the impossibility of applying this rule to same-sex unions would give rise to insoluble problems. The existence of this problem, he held, would not constitute a reason for refusing to extend the definition in the way that the SCA had been asked to do.

[25] The Marriage Order in Council. See para 24 above.

would suspend the declaration of invalidity of the common law for two years, however, to enable Parliament to enact legislation to ensure the applicants' rights to equality and human dignity are not unjustifiably infringed. Furthermore, the declaration would fall away only if such legislation was timeously enacted.

[32] To summarise: both judgments were in agreement that the SCA could and should rule that the common law definition discriminated unfairly against same-sex couples. The majority judgment by Cameron JA held, however, that although the common law definition should be developed so as to embrace same-sex couples, the Marriage Act could not be read in such a way as to include them. In the result, the only way the parties could marry would be under the auspices of a religious body that recognised same-sex marriages, and whose marriage formula was approved by the Minister of Home Affairs. The right of same-sex couples to celebrate a secular marriage would have to await a challenge to the Marriage Act. The minority judgment of Farlam JA, on the other hand, held both that the common law should be developed and that the Marriage Act could and should be read there and then in updated form so as to permit same-sex couples to pronounce the vows. In his view, however, the development of the common law to bring it into line with the Constitution should be suspended to enable Parliament to enact appropriate legislation. In support of an order of suspension he pointed out that the SALRC had indicated that there were three possible legislative responses to the unconstitutionality, and, in his view, it should be Parliament and not the judiciary that should choose.[26]

[26] Above n 12 at para 142.

Appeal and cross-appeal

[33] None of the parties to the litigation were satisfied with the outcome. The state noted an appeal on several grounds, revolving mainly around the proposition that it was not appropriate for the judiciary to bring about what it regarded as a momentous change to the institution of marriage, something, it contended, that should be left to Parliament. The applicants for their part were unhappy because although the newly developed definition of the common law included them in its terms, they were still prevented from getting married by the phrasing of the marriage vows in the Marriage Act. The only possible route enabling them to marry under the Act was a tenuous one, namely, to find a sympathetic religious denomination with an inclusive marriage vow that was approved by the Minister of Home Affairs. In their application to cross-appeal they accordingly supported the reasoning of Farlam JA regarding updating the Marriage Act, while objecting to his suspension of the development of the common law. At the same time they supported Cameron JA's finding that immediate relief should be granted to them, but objected to his decision that the Marriage Act barred them from taking the vows except in the limited circumstances to which he referred. The overall result was that the state has sought leave to appeal against the SCA's decision on the basis that it went too far, while the applicants have sought leave to cross-appeal on the grounds that it did not go far enough. It was common cause that the application in the *Fourie* matter by the state for leave to appeal and by the applicants for leave to cross-appeal, raise questions of considerable constitutional

significance and social importance. It is in the interests of justice that they both be granted.

The second challenge: section 30(1) of the Marriage Act as well as the common law definition (the Equality Project case)

[34] In the meantime, accepting the need to challenge the Marriage Act as well as the common law, the Lesbian and Gay Equality Project (the Equality Project) and eighteen others had launched an application in the Johannesburg High Court[27] for the following relief:

> "1. Declaring that the common law definition of marriage and the prescribed marriage formula in section 30(1) of the Marriage Act 25 of 1961 ('the Marriage Act') are unconstitutional in that they violate the rights of lesbian and gay people to:
>
> 1.1. equality in terms of section 9 of the Constitution of the Republic of South Africa, 1996 ('the Constitution');
>
> 1.2. dignity in terms of section 10 of the Constitution; and
>
> 1.3. privacy in terms of section 14 of the Constitution;
>
> 2. Declaring that the common law definition of marriage is henceforth to be read as follows:
>
> *'Marriage is the lawful and voluntary union of two persons to the exclusion of all others while it lasts'*;
>
> 3. Declaring that the words *'or spouse'* are to be read into the prescribed marriage formula in section 30(1) of the Marriage Act immediately after the words *'or husband'*;
>
> 4. Ordering those of the respondents who oppose this application to pay the applicants' costs of suit; and
>
> 5. Granting the applicants such further and/or alternative relief as this Court deems appropriate in the circumstances."

[27] On 8 July 2004.

The case was originally due to be heard in the High Court in October this year, but was eventually set down for January next year. The Equality Project then applied for direct access to this Court to enable their challenge to the statute as well as to the common law definition of marriage to be heard together with the appeal and the cross-appeal relating to the SCA judgment in the *Fourie* case.

[35] The Minister of Home Affairs, the Director-General of Home Affairs and the Minister of Justice and Constitutional Development (I refer to them collectively as the state), opposed the application on the ground that direct access was not in the interests of justice.[28] The state agreed with the SCA that the primary issue was whether same-sex partners should be granted access to the existing common law institution of marriage, but disputed the finding that same-sex couples were entitled to such access. The state submitted that the SCA had misdirected itself in concluding that the common law definition of marriage violates the constitutional rights of lesbian and gay people to equality. Instead, it contended that it was the lack of legal recognition of their same-sex family relationships and the absence of legal consequences, which violated their rights, and not the exclusion from the institution of marriage.

[36] The state accordingly acknowledged that partners to same-sex relationships suffer discriminatory effects and violations of dignity and privacy and that such violations should be removed. It contended, however, that granting same-sex couples

[28] As contemplated by section 167(6) of the Constitution, which reads:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court−
> (a) to bring a matter directly to the Constitutional Court; or
> (b) to appeal directly to the Constitutional Court from any other court."

access to common law marriage is not the answer, constitutionally or otherwise. Appropriate relief from the discriminatory consequences, invasions of privacy and dignity involves

> "an exercise of coherent, all embracing law making, which may have to overtake and undo existing Constitutional Court decisions. It may therefore be counterproductive for the [Constitutional Court] to make far-reaching revision of the common law by redefining marriage in this case."

It followed, the state contended, that the Equality Project was incorrect in seeking an order from this Court declaring the common law definition of marriage and the prescribed marriage formula in section 30(1) of the Marriage Act to be unconstitutional. Any previous concession on behalf of government that the exclusion of same-sex couples from marriage was unconstitutional, was retracted. Should the Court find, however, that the exclusion was unconstitutional, the state argued in the alternative that any order of invalidity should be suspended to enable Parliament, after extensive public debate, to deal with the matter through appropriate legislation. The relief sought, the state contended, went beyond the powers of the Court.

Amici curiae

[37] Prior to the hearing, applications were made by Doctors For Life International and its legal representative Mr John Smyth, to be admitted as amici curiae. They sought to lead further evidence and to make written submissions, while Mr Smyth in addition requested leave to make oral submissions. Their application to adduce

further evidence was refused, but they were granted leave to make written submissions and Mr Smyth was authorised to address the Court orally.

[38] Application to be admitted as amicus curiae was also made by the Marriage Alliance of South Africa, supported on affidavit by Cardinal Wilfred Napier. The application, which included a request for the right to make both written and oral representations, was granted.

The application for direct access in the Equality Project matter

[39] The application by the Equality Project for direct access to this Court was resisted by the state, and requires special consideration. This Court has frequently stated that as a general rule it should not act as a court of first and final instance in relation to constitutional matters that may be heard in other courts.[29] In *Mkontwana*[30] Yacoob J emphasised that the importance and complexities of the issues raised in an application for direct access would weigh heavily against this Court being a court of first and final instance.[31] Not only is the jurisprudence of this Court greatly enriched by being able to draw on the considered opinion of another court. Proper evidential foundations, where appropriate, can be laid. Issues, both in relation to substantive law

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[29] Section 167(4) of the Constitution sets out the circumstances where this Court alone may hear certain matters. Other constitutional matters may first be heard in a high court [section 169(a)(i)] and on appeal in the SCA [section 168(3)].

[30] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu Natal Law Society and Msunduzi Municipality as amici curiae)* 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC).

[31] Id at para 11.

and appropriate orders to be made, are crystallised out for focused research and attention. There is no doubt, therefore, that a judgment by the High Court on the application made to it by the Equality Project would be of great assistance.

[40] At the same time it has to be borne in mind that the hearing in the High Court would only take place next year. The broad question of the right of same-sex couples to marry is already before us in the *Fourie* matter. It was first considered in the High Court and then in a comprehensive judgment of the SCA. Although the challenge to section 30(1) of the Marriage Act as such was not before the SCA, the SCA devoted considerable attention to interpreting its terms and evaluating its significance in relation to the common law. Furthermore, there has been no suggestion that evidence of significance to the outcome would or could have been led in the High Court in the *Equality Project* matter. The issues are matters of law which fall to be determined in a social context that has already frequently been dealt with by this Court.

[41] In *Bhe*[32] this Court was confronted with a not dissimilar situation. When considering separate applications for orders of constitutional invalidity made by the Cape High Court and the Pretoria High Court respectively,[33] it was asked also to consider an application by the South African Human Rights Commission and the

[32] *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as amicus curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC).

[33] Both courts found certain sections of the Black Administration Act 38 of 1927, and the Intestate Succession Act 81 of 1987, as well as a regulation of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks (R200) published in Government Gazette No. 10601, to be unconstitutional.

Women's Legal Centre Trust[34] for direct access seeking relief that was wider than that granted in the Cape and Pretoria High Courts. In granting direct access Langa DCJ said:

> "The submissions sought to be made by the applicants relate to substantive issues that were already before the Court. The direct access application, however, quite helpfully broadens the scope of the constitutional investigation, given the need to deal effectively with the unwelcome consequences of the Act in the shortest possible time. The application further adds fresh insights on difficult issues, including the question of the appropriate remedy.
>
> From the description of the two applicants, it is clear that they are both eminently qualified to be part of the debate on the issues before the Court. By reason of the above considerations, this Court concluded that it was in the interests of justice that the application for direct access should be granted."[35]

[42] In the present matter, the appeal from the SCA decision in the *Fourie* matter is already before us. The direct access application fills a gap in the *Fourie* case referred to by the High Court, this Court and the SCA. The common law in relation to marriage has been overtaken by statute in a great number of respects. To deal with it as if the Marriage Act did not exist would be highly artificial and abstract. The overlap between the issues raised and their strong interconnectedness requires them to be dealt with in an integrated and comprehensive fashion. There would be grave disadvantages to all concerned if the issues raised were to be decided in a piecemeal way.

[34] Acting in their own interest as well as in the public interest.

[35] Above n 32 at paras 33-4.

[43] In opposing direct access the state did not contend that the High Court should first pronounce on the matter, but rather fired the first salvos of its new approach to the substantive issues raised. Its contentions will be dealt with in the course of this judgment, and it will suffer no prejudice from having the two matters consolidated. On the contrary, like all the parties it will gain from having the pieces of the puzzle placed together as would happen if the application for direct access is granted.

[44] In essence the enquiry into the common law definition of marriage and the constitutional validity of section 30(1) of the Marriage Act is the same. Are gay and lesbian people unfairly discriminated against because they are prevented from achieving the status and benefits coupled with responsibilities which heterosexual couples acquire from marriage? If they are, both the common law definition as well as section 30(1) must have the effect of limiting the rights contained in section 9 of the Constitution. If not, both will be good. It must be emphasised that it is not possible for one of the two provisions concerning marriage that are under attack in this case to be consistent with the Constitution, and for the other to be constitutionally invalid. In the circumstances, a refusal to consider both together would amount to no more than technical nicety. In the circumstances of this case, therefore, it is clearly in the interests of justice that the application for direct access be granted and that the *Fourie* and the *Equality Project* matters be heard together.[36]

[36] At the hearing counsel for the Minister of Home Affairs raised a preliminary challenge to the competence on the papers before it of the SCA to develop the common law. He pointed to the fact that in their notice of motion the applicants had merely asked for a declarator that stated that they had a right to marry, and that went on to require the responsible officials to marry them. In their founding affidavits, however, the applicants clearly referred to the need to develop the common law so as to enable same-sex couples to marry. The case brought by the applicants concerning the common law, and the one launched by the Equality Project challenging the statute as well, are being dealt with together in this Court. The state suffered no prejudice as a result of the way the

II. THE ISSUES

[45] At the hearing two broad and interrelated questions were raised: The first was whether or not the failure by the common law and the Marriage Act to provide the means whereby same-sex couples can marry, constitutes unfair discrimination against them. If the answer was that it does, the second question arose, namely, what the appropriate remedy for the unconstitutionality should be. These are the central issues in this matter, and I will start with the first.

Does the law deny equal protection to and discriminate unfairly against same-sex couples by not including them in the provisions of the Marriage Act?

[46] Counsel for the Minister of Justice argued that the Constitution did not protect the right to marry. It merely guaranteed to same-sex couples the right to establish their own forms of family life without interference from the state. This was a negative liberty, not to be equated with a right to be assimilated into the institution of marriage, which in terms of its historic genesis and evolution, was heterosexual by nature. International law recognised and protected marriage as so understood. Same-sex couples accordingly had no constitutional right to enter into or manipulate that institution. If their form of family life suffered from particular disadvantages, then these should be dealt with by appropriate legal remedies in response to each of the identified problems, not by entry into the global set of rights and entitlements

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issues were formally presented at the outset of the *Fourie* application. Its preliminary objection cannot be sustained.

established by marriage. Marriage law appropriately confined itself to marriage, it was contended, and not to all forms of family relationship.

[47] The initial proposition of the state's argument is undoubtedly correct inasmuch as the Bill of Rights does not expressly include a right to marry. It does not follow, however, that the Constitution does nothing to protect that right, and with it, the concomitant right to be treated equally and with dignity in the exercise of that right. Explaining why the right to marry had not been expressly included in the text of the Constitution as produced by the Constitutional Assembly, this Court in the *First Certification* case[37] pointed out that families are constituted, function and are dissolved in such a variety of ways, and the possible outcomes of constitutionalising family rights are so uncertain, that Constitution-makers appear frequently to prefer not to regard the right to marry or to pursue family life as a fundamental right that is appropriate for definition in constitutionalised terms.[38] This avoids questions that relate to the history, culture and special circumstances of each society.[39] At the same time, the provisions of the constitutional text would clearly prohibit any arbitrary state interference with the right to marry or to establish and raise a family.[40] The text enshrined the values of human dignity, equality and freedom.[41] However these words might come to be interpreted in the future, the judgment said, it was evident that laws

[37] *Certification of the Constitution of the Republic of South Africa, 1996, In Re: Ex parte Chairperson of the Constitutional Assembly 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

[38] Id at para 99.

[39] Id

[40] Id at para 100.

[41] Id

or executive action resulting in enforced marriages, or oppressive prohibitions on marriage or the choice of spouses, would not survive constitutional challenge.[42]

[48] The way the words dignity, equality and privacy later came to be interpreted by this Court showed that they in fact turned out to be central to the way in which the exclusion of same-sex couples from marriage came to be evaluated. In a long line of cases, most of which were concerned with persons unable to get married because of their sexual orientation, this Court highlighted the significance for our equality jurisprudence of the concepts and values of human dignity, equality and freedom. It is these cases that must serve as the compass that guides analysis in the present matter, rather than the references made in argument to North American polemical literature or to religious texts.

[49] Although the *Sodomy* case, which was the first in the series, did not deal with access to marriage as such, it highlighted the seriously negative impact that societal discrimination on the ground of sexual orientation has had, and continues to have, on gays and same-sex partnerships. It concluded that gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage.[43]

[42] Id

[43] The *Sodomy* case above n 6 at paras 20-7.

[50] This Court stated later in the *Home Affairs* case[44] dealing with same-sex immigrant partners that although the main focus of the *Sodomy* judgment was on the criminalisation of sodomy and on other proscriptions of erotic expression between men, the conclusions regarding the minority status of gays and the patterns of discrimination to which they had been and continued to be subjected were also applicable to lesbians. The sting of past and continuing discrimination against both gays and lesbians was the clear message that it conveyed, namely, that they, whether viewed as individuals or in their same-sex relationships, did not have the inherent dignity and were not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This discrimination occurred at a deeply intimate level of human existence and relationality. It denied to gays and lesbians that which was foundational to our Constitution and the concepts of equality and dignity, which at that point were closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerated into a denial of humanity and led to inhuman treatment by the rest of society in many other ways. This was deeply demeaning and frequently had the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays. The Court went on to hold that it had recognised that the more vulnerable the group adversely affected by the discrimination, the more likely the discrimination would be

[44] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC). (The *Home Affairs* case.) At para 42.

held to be unfair.[45] Vulnerability in turn depended to a very significant extent on past patterns of disadvantage, stereotyping and the like.[46]

[51] The issue in the *Home Affairs* case was the discriminatory impact of a provision of immigration law that gave special protection to foreigners married to South Africans, while ignoring same-sex life partners. The case accordingly has very direct relevance to the present one. The pertinent question was the impact on same-sex life partners of being excluded from the relevant provisions. The judgment pointed out that under South African common law a marriage creates a physical, moral and spiritual community of life, a consortium omnis vitae described as

> ". . . an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage. . . . These embrace intangibles, such as loyalty and sympathetic care and affection, concern . . . as well as the more material needs of life, such as physical care, financial support, the rendering of services in the running of the common household or in a support-generating business. . . ."[47]

[52] It was important to emphasise, the Court continued, that over the past decades an accelerating process of transformation had taken place in family relationships, as well as in societal and legal concepts regarding the family and what it comprises. The Court cited Sinclair and Heaton for the proposition that

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[45] Id at para 44.

[46] Id

[47] Id at para 46, where Ackermann J quoted Erasmus J in *Peter v Minister of Law and Order* 1990 (4) SA 6 (E) at 9G.

> ". . . the current period of rapid change seems to 'strike at the most basic assumptions' underlying marriage and the family.
>
> . . .
>
> Itself a country where considerable political and socio-economic movement has been and is taking place, South Africa occupies a distinctive position in the context of developments in the legal relationship between family members and between the State and the family. Its heterogeneous society is 'fissured by differences of language, religion, race, cultural habit, historical experience and self-definition' and, consequently, reflects widely varying expectations about marriage, family life and the position of women in society."[48] (Footnotes omitted.)

The impact of the exclusion of lesbians and gays by the provision in question was to reinforce harmful and hurtful stereotypes.[49] Underlying these stereotypes, the Court continued, lay misconceptions derived from the fact that the sexual orientation of lesbians and gays was such that they had an erotic and emotional affinity for persons of the same sex.[50] This resulted in classifying lesbians and gays as exclusively sexual beings, reduced to one-dimensional creatures "defined by their sex and sexuality."[51]

[53] The judgment sums up what it calls the facts concerning gays and lesbians as follows:

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[48] *Home Affairs* above n 44 at para 47.

[49] Id at para 49.

[50] Id

[51] The judgment cites Timothy E Lin "Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases":

> "[T]here is the story of lesbians and gays that centres on their sexuality. Whether because of disgust, confusion, or ignorance about homosexuality, lesbian and gay sexuality dominates the discourse of not only same-sex adoption, but all lesbian and gay issues. The classification of lesbians and gays as 'exclusively sexual beings' stands in stark contrast to the perception of heterosexual parents as 'people who, along with many other activities in their lives, occasionally engage in sex.' Through this narrative, lesbians and gays are reduced to one-dimensional creatures, defined by their sex and sexuality." (Footnote omitted.) *Home Affairs* above n 44 at para 49.

> "(i) Gays and lesbians have a constitutionally entrenched right to dignity and equality;
> (ii) sexual orientation is a ground expressly listed in s 9(3) of the Constitution and under s 9(5) discrimination on it is unfair unless the contrary is established;
> (iii) prior criminal proscription of private and consensual sexual expression between gays, arising from their sexual orientation and which had been directed at gay men, has been struck down as unconstitutional;
> (iv) gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms, including affection, friendship, eros and charity;
> (v) they are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household;
> (vi) they are individually able to adopt children and in the case of lesbians to bear them;
> (vii) in short, they have the same ability to establish a *consortium omnis vitae*;
> (viii) finally, . . . they are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses."[52]

[54] The provision in question stated in effect that persons in same-sex relationships were not entitled to the benefit extended to married spouses in order to protect their family and family life. This was so notwithstanding that the family and family life were in all significant respects indistinguishable from those of spouses and in human terms as important to gay and lesbian same-sex partners as they were to spouses.

> "The message and impact are clear. Section 10 of the Constitution recognises and guarantees that everyone has inherent dignity and the right to have their dignity respected and protected. The message is that gays and lesbians lack the inherent

[52] *Home Affairs* above n 44 at para 53.

> humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity. The discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians."[53]

The judgment adds that protecting the traditional institution of marriage as recognised by law may not be done in a way which unjustifiably limits the constitutional rights of partners in a permanent same-sex life partnership.[54]

[55] Having pronounced unambiguously on the issues before it, the judgment goes on to say that it expressly leaves open two questions, the first relating to the position of unmarried partners in permanent heterosexual relationships, and the second "whether, or to what extent, the law ought to give formal institutional recognition to same-sex partnerships".[55] In other words, it stopped short of considering whether some form of global or umbrella institutional recognition should be given to same-sex partnerships, an issue which had not been raised in that matter and was not before it, but which is before us.

[56] In *Satchwell*,[56] the issue was whether the non-inclusion of same-sex partners in a statute providing pension rights to the surviving spouses of Judges was

[53] Id at para 54.

[54] Id at para 55.

[55] Id at para 60.

[56] *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC).

discriminatory. Madala J pointed out that marriage was a matter of profound importance to the parties, and indeed to their families, and was of great social value and significance.[57] Historically, however, our law had only recognised marriages between heterosexual spouses, and this narrowness of focus had excluded many relationships which created similar obligations and had a similar social value.[58] Inasmuch as the provisions in question afforded benefits to spouses but not to same-sex partners who had established a permanent life relationship similar in other respects to marriage, including accepting the duty to support one another, such provisions, he held, constituted unfair discrimination.[59]

[57] In *Du Toit*,[60] the issue flowed from a provision in child care legislation which confined the right to adopt children jointly to married couples. Holding that the exclusion of same-sex life partners conflicted both with the best interests of the child and the right to dignity of same-sex couples, Skweyiya AJ emphasised that family life as contemplated by the Constitution could be provided in different ways, and that legal conceptions of the family and what constituted family life should change as social practices and traditions changed.[61] He pointed out further that it was a matter of our history, and that of many countries, that same-sex relationships had been the

[57] Id at para 22.

[58] Id

[59] Id at para 23.

[60] *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as amicus curiae)* 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC).

[61] Id at para 19.

subject of unfair discrimination in the past.[62] The Constitution required that unfairly discriminatory treatment cease. It was significant that there had been a number of recent cases, statutes and government consultation documents in South Africa which broadened the scopes of 'family', 'spouse' and 'domestic relationship' to include same-sex life partners.[63] These legislative and jurisprudential developments indicated the growing recognition afforded to same-sex relationships.[64]

[58] Similar reasoning was followed in *J*,[65] which concerned the parental rights of permanent same-sex life partners in cases where one of the partners was artificially inseminated. Confirming an order to read in the words "permanent same-sex life partner" after the word "husband" wherever it appeared in the relevant section, Goldstone J made the following observation which is relevant to the present matter:

> "Comprehensive legislation regularising 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."[66]

The right to be different

[62] Id at para 32.

[63] Id

[64] Id

[65] *J and Another v Director General, Department of Home Affairs, and Others* 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC).

[66] Id at para 23.

[59] This Court has thus in five consecutive decisions highlighted at least four unambiguous features of the context in which the prohibition against unfair discrimination on grounds of sexual orientation must be analysed. The first is that South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one.[67] The second is the existence of an imperative constitutional need to acknowledge the long history in our country and abroad of marginalisation and persecution of gays and lesbians, that is, of persons who had the same general characteristics as the rest of the population, save for the fact that their sexual orientation was such that they expressed erotic desire and affinity for individuals of their own sex, and were socially defined as homosexual. The third is that although a number of breakthroughs have been made in particular areas, there is no comprehensive legal regulation of the family law rights of gays and lesbians. Finally, our Constitution represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all. Small gestures in favour of

[67] See further the Introduction by myself to Eekelaar and Nhlapo (eds) *The Changing Family: Family Forms and Family Law* (Juta, Cape Town, 1998) at xi:

> "[A]s far as family law is concerned, we in South Africa have it all. We have every kind of family: extended families, nuclear families, one-parent families, same-sex families, and in relation to each one of these there are [controversies, difficulties] and cases coming before the courts or due to come before the courts. This is the result of ancient history and recent history. I am not proposing to go through the few hundred thousand years ever since Lucy [the African common ancestor of all humanity], but one can say that family law in South Africa or the problems of family law are the product of the way our subcontinent was peopled, the way we were colonised, the way the colonists were subsequently colonised, the way we were separated and the way we came together again. Our families are suffused with history, as family law is suffused with history, culture, belief and personality. For researchers it's a paradise, for judges a purgatory."

equality, however meaningful, are not enough. In the memorable words of Mahomed J:

> "In some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic."[68]

[60] A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality.[69] Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference

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[68] *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 262.

[69] *Sodomy* case above n 6 at para 129.

brings to any society.[70] The issue goes well beyond assumptions of heterosexual exclusivity, a source of contention in the present case. The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are.[71] The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.[72] Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.

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[70] Id

[71] Minow argues that equality for those deemed different is precluded by five unstated and unacceptable assumptions namely that: difference is intrinsic not a comparison; the norm need not be stated; the observer can see without a perspective; other perspectives are irrelevant; and the status quo is natural, uncoerced and good. Her focus was principally on disability rights, but the critique would seem to apply to the manner in which gay and lesbian conduct has been characterised. Minow *Making all the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press, Ithaca and London, 1990) at 53-74.

[72] See the *Sodomy* case above n 6 at para 135.

[61] As was said by this Court in *Christian Education*[73] there are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the "right to be different".[74] In each case, space has been found for members of communities to depart from a majoritarian norm. The point was made in *Christian Education* that these provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern. For present purposes it needs to be added that acknowledgement of the diversity that flows from different forms of sexual orientation will provide an extra and distinctive thread to the national tapestry. The strength of the nation envisaged by the Constitution comes from its capacity to embrace all its members with dignity and respect. In the words of the Preamble, South Africa belongs to all who live in it, united in diversity. What is at stake in this case, then, is how to respond to legal arrangements of great social significance under which same-sex couples are made to feel like outsiders who do not fully belong in the universe of equals.

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[73] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) 1051 (CC) at para 24.

[74] Id at para 24. See too *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 146-7, and the *Sodomy* case above n 6 at paras 107 and 134-5.

[62] These may seem purely abstract statements. Yet the 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. Such scrutiny establishes that the consequences of the total exclusion of same-sex couples from the solemnities and consequences of marriage are far from academic, as the following section shows.

The significance of marriage and the impact of exclusion from it

[63] It is true that marriage, as presently constructed under common law, constitutes a highly personal and private contract between a man and a woman in which the parties undertake to live together, and to support one another. Yet the words 'I do' bring the most intense private and voluntary commitment into the most public, law-governed and state-regulated domain.[75]

[64] Though freely entered into by the parties, marriage must be undertaken in a public and formal way and once concluded it must be registered. Formalities for the celebration of a marriage are strictly set out in the Marriage Act. A marriage must be conducted by a marriage officer, to whom objections may be directed. If objections to the marriage are lodged, the marriage officer must satisfy herself or himself that there are no legal obstacles to the marriage. Those wishing to get married must produce copies of their identity documents, or alternatively make affidavits in the prescribed

[75] The summary that follows below is reproduced (without footnotes) from the judgment of Mokgoro and O'Regan JJ in *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) at paras 112-8.

form. Marriages must take place in a church or other religious building, or in a public office or home, and the doors must be open. Both parties must be present as well as at least two competent witnesses. A particular formula for the ceremony is provided in the Marriage Act, but other formulae, such as religious rites, may be approved by the Minister. Once the marriage has been solemnised, both spouses, at least two competent witnesses, and the marriage officer must sign the marriage register. A copy of the register must then be transmitted to the Department of Home Affairs to be officially recorded. These formalities make certain that it is known to the broader community precisely who gets married and when they get married. Certainty is important for the broader community in the light of the wide range of legal implications that marriage creates. Marriage is thus taken seriously not only by the parties, their families and society, but by the state.

[65] One of the most important invariable consequences of marriage is the reciprocal duty of support. It is an integral part of the marriage contract and has immense value not only to the partners themselves but to their families and also to the broader community. The duty of support gives rise to the special rule that spouses, even those married out of community of property, can bind one another to third parties in relation to the provision of household necessaries which include food, clothing, and medical services. The law sees the spouses as life partners and jointly and severally responsible for the maintenance of their common home. This obligation may not be excluded by antenuptial contract. Another invariable legal consequence of the marriage is the right of both parties to occupy the joint matrimonial home. This

obligation is clearly based on the premise that spouses will live together. The party who owns the home may not exclude or evict the other party from the home. Limited exceptions to this rule have been created under the Domestic Violence Act.[76]

[66] The way in which the marriage affects the property regime of the parties to the marriage is variable at common law. The ordinary common law regime is one of community of property including profit and loss in terms of which the parties to a marriage share one joint estate which they manage jointly. Historically, of course, our common law provided that the power to manage the estate ('the marital power') vested in the husband. This rule was altered by statutory intervention in 1984. Major transactions affecting the joint estate must now be carried out with the concurrence of both parties.[77]

[67] Marriage also produces certain invariable consequences in relation to children. Children born during a marriage are presumed to be children of the husband. Both parents have an ineluctable duty to support their children (and children have a reciprocal duty to support their parents). The duty to support children arises whether the children are born of parents who are married or not.

[68] The law also attaches a range of other consequences to marriage – for example, insolvency law provides that where one spouse is sequestrated, the estate of the other

[76] Act 116 of 1998. Interestingly, the Act is unusual in modern statutes in that it not only extends its provisions to life partners generally, but expressly includes same-sex partnerships within its ambit. See section 1(b).

[77] Section 15 of the Matrimonial Property Act 88 of 1984.

spouse also vests in the Master in certain circumstances, the law of evidence creates certain rules relating to evidence by spouses against or for one another,[78] and the law of delict recognises damages claims based on the duty of support.

[69] It should be added that formalisation of marriages provides for valuable public documentation. The parties are identified, the dates of celebration and dissolution are stipulated, and all the multifarious and socially important steps which the public administration is required to make in connection with children and forward planning, are facilitated. Furthermore, the commitment of the parties to fulfil their responsibilities is solemnly and publicly undertaken. This is particularly important in imposing clear legal duties on the party who is in the stronger position economically. Marriage stabilises relationships by protecting the vulnerable partner and introducing equity and security into the relationship.

[70] Marriage law thus goes well beyond its earlier purpose in the common law of legitimising sexual relations and securing succession of legitimate heirs to family property. And it is much more than a mere piece of paper.[79] As the SALRC Paper comments, the rights and obligations associated with marriage are vast. Besides other important purposes served by marriage, as an institution it was (at the time the SALRC Paper was produced) the only source of socio-economic benefits such as the

[78] *Volks* above n 75 at para 117.

[79] Id, see judgment of Skweyiya J at paras 53 and 59, and judgment of Ngcobo J at para 93.

right to inheritance, medical insurance coverage, adoption, access to wrongful death claims, spousal benefits, bereavement leave, tax advantages and post-divorce rights.[80]

[71] The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents 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.

[72] It should be noted that the intangible damage to same-sex couples is as severe as the material deprivation. To begin with, they are not entitled to celebrate their commitment to each other in a joyous public event recognised by the law. They are obliged to live in a state of legal blankness in which their unions remain unmarked by the showering of presents and the commemoration of anniversaries so celebrated in

[80] In this respect it should be borne in mind that since the abolition of the patriarchal powers once vested by the common law in the husband, spouses enjoy equality in marriage. Same-sex marriages therefore would not be required to replicate between the partners the formerly unequal or divergently stereotyped roles of husband and wife in marriage. The achievement of heterosexual equality thus removed a potentially serious barrier to homosexual equality. In all material respects, then, sexual orientation survives as a neutral factor as far as the conjugal family law interests are concerned. See also the judgment of Farlam JA, *Fourie* (SCA) above n 12 at para 122.

our culture. It may be that, as the literature suggests,[81] many same-sex couples would abjure mimicking or subordinating themselves to heterosexual norms. Others might wish to avoid what they consider the routinisation and commercialisation of their most intimate and personal relationships, and accordingly not seek marriage or its equivalence.[82] Yet what is in issue is not the decision to be taken, but the choice that is available. If 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

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[81] For example De Vos "Gay and Lesbian Legal Theory" in *Jurisprudence* Roederer and Moellendorf (eds) (Juta, Cape Town, 2004) at 349-50, raises the question of why the state should provide special legal recognition to only those relationships which conform to a heterosexual stereotype, thereby further marginalising and oppressing those whose relationships are less traditional in form. See also Cheshire Calhoun *Feminism, the Family, and the Politics of the Closet: Lesbian and Gay Displacement* (Oxford University Press, Cape Town, 2000) at 113, who points out that the argument that same-sex marriage rights depend on the view that the state ought to promote one normative ideal for intimacies, plays directly into queer theorists' and lesbian feminists' worst fears:

> "Queer theorists worry that pursuing marriage rights is assimilationist, because it rests on the view that it would be better for gay and lesbian relationships to be as much like traditional heterosexual intimate relationships as possible. To pursue marriage rights is to reject the value of pursuing possibly more liberating, if less conventional, sexual, affectional, care-taking, and economic intimate arrangements. Feminists worry that pursuing marriage rights will have the effect of endorsing gender-structured heterosexual marriage . . . ."

[82] The literature suggests, however, that most gay people in South Africa dream of getting married. See Gevisser "Mandela's stepchildren: homosexual identity in post-apartheid South Africa" in *Different Rainbows* Peter Drucker (ed) (Gay Men's Press, London, 2000) at 135. For many the dream is attenuated by present reality. See Ruth Morgan and Saskia Wieringa *Tommy Boys, Lesbian Men and Ancestral Wives: Female same-sex practices in Africa* (Jacana, Johannesburg, 2005) at 321. Writing about gay identity in a black township on the outskirts of Ermelo, Reid "'A man is a man completely and a wife is a wife completely': Gender classification and performance amongst 'ladies' and 'gents' in Ermelo, Mpumalanga" in *Men Behaving Differently* Graeme Reid and Liz Walker (eds) (Double Storey, Cape Town, 2005) write that

> "[s]ame-sex engagement and marriage ceremonies which take place in the region are events where traditions are both evoked and reinvented. They constitute significant social occasions where the performance of gender is enacted in a particular, ritualised way. These events are also topics for seemingly endless speculation, rumour, gossip and fantasy." (At 221.)

He goes on to write that that while Bhuti (one of his informants) may have fantasised about a white wedding and honeymoon, Zakhi aspired towards a more traditionally African engagement and wedding ceremony, which includes lobola negotiations between the families and an umhlambiso engagement followed by a white wedding.

> "Marriage signals a pinnacle of social acceptance and equality before the law. The fact that individuals are getting married in spite of the law suggests that social acceptance and the quest for respectability is a primary motivating factor."

One organiser complained that in gay weddings there was far too much emphasis placed on superficial things such as rings, food and especially clothing at the expense of more substantial issues such as the quality of the relationship. (At 223.)

and a set of entitlements and responsibilities on a par with those enjoyed by heterosexual couples. It follows that, given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way.[83]

[73] Equally important as far as family law is concerned, is the right of same-sex couples to fall back upon state regulation when things go wrong in their relationship. Bipolar by its very nature, the law of marriage is invoked both at moments of blissful creation and at times of sad cessation. There is nothing to suggest that same-sex couples are any less affected than are heterosexual ones by the emotional and material consequences of a rupture of their union. The need for comprehensive judicial regulation of their separation or divorce, or of devolution of property, or rights to maintenance or continuation of tenancy after death, is no different. Again, what requires legal attention concerns both status and practical regulation.

[74] The law should not turn its back on any persons requiring legal support in times of family breakdown. It should certainly not do so on a discriminatory basis; the antiquity of a prejudice is no reason for its survival. Slavery lasted for a century and a

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[83] The literature also indicates that the gay and lesbian experience in South Africa is extremely varied. Thus in the Introduction to *Sex and Politics in South Africa* Hoad, Martin and Reid (ed) (Double Storey, Cape Town, 2005), Hoad writes:

> "Letties, moffies, stabanes, skesanas, injongas . . . make their own history but under conditions that are not of their making. Our list of identifying terms is far from comprehensive and each item on that list indicates a different configuration of identity, desire, practice, possibility, held together by the phrase 'sexual orientation' in the South African Constitution – the meaning of which is continually being revised by the South African courts."

He adds that significant legislative victories have been won, also affecting the meaning of the phrase. (At 19.)

half in this country, colonialism for twice as long, the prohibition of interracial marriages for even longer, and overt male domination for millennia. All were based on apparently self-evident biological and social facts; all were once sanctioned by religion and imposed by law; the first two are today regarded with total disdain, and the third with varying degrees of denial, shame or embarrassment. Similarly, the fact that the law today embodies conventional majoritarian views in no way mitigates its discriminatory impact. It is precisely those groups that cannot count on popular support and strong representation in the legislature that have a claim to vindicate their fundamental rights through application of the Bill of Rights.

Equal protection and unfair discrimination

[75] It is convenient at this stage to restate the relevant provisions of the Constitution. Section 9(1) provides:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

It is clear that the exclusion of same-sex couples from the status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes a denial to them of their right to equal protection and benefit of the law.

[76] It is equally evident that same-sex couples are not afforded equal protection not because of oversight, but because of the legacy of severe historic prejudice against them. Their omission from the benefits of marriage law is a direct consequence of prolonged discrimination based on the fact that their sexual orientation is different

from the norm. This result is in direct conflict with section 9(3) of the Constitution, which states:

> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

[77] Some minorities are visible, and suffer discrimination on the basis of presumed characteristics of the group with which they are identified. Other minorities are rendered invisible inasmuch as the law refuses them the right to express themselves as a group with characteristics different from the norm.[84] In the present matter, the unfair discrimination against same-sex couples does not flow from any express exclusion in the Marriage Act. The problem is that the Marriage Act simply makes no provision for them to have their unions recognised and protected in the same way as it does for those of heterosexual couples. It is as if they did not exist as far as the law is concerned. They are implicitly defined out of contemplation as subjects of the law.

[78] Sections 9(1) and 9(3) cannot be read as merely protecting same-sex couples from punishment or stigmatisation. They also go beyond simply preserving a private space in which gay and lesbian couples may live together without interference from the state. Indeed, what the applicants in this matter seek is not the right to be left alone, but the right to be acknowledged as equals and to be embraced with dignity by

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[84] De Vos recounts the joke that an African-American does not have to come home and say: "Mommy, Daddy, there's something I've got to tell you – I'm black." Above n 81 at 339.

the law. Their love that was once forced to be clandestine, may now dare openly to speak its name. The world in which they live and in which the Constitution functions, has evolved from repudiating expressions of their desire to accepting the reality of their presence, and the integrity, in its own terms, of their intimate life. Accordingly, taking account of the decisions of this Court, and bearing in mind the symbolic and practical impact that exclusion from marriage has on same-sex couples, there can only be one answer to the question as to whether or not such couples are denied equal protection and subjected to unfair discrimination. Clearly, they are, and in no small degree. The effect has been wounding and the scars are evident in our society to this day. By both drawing on and reinforcing discriminatory social practices, the law in the past failed to secure for same-sex couples the dignity, status, benefits and responsibilities that it accords to heterosexual couples. Although considerable progress has been made in specific cases through constitutional interpretation, and, as will be seen, by means of legislative intervention, the default position of gays and lesbians is still one of exclusion and marginalisation. The common law and section 30(1) of the Marriage Act continue to deny to same-sex couples equal protection and benefit of the law, in conflict with section 9(1) of the Constitution, and taken together result in same-sex couples being subjected to unfair discrimination by the state in conflict with section 9(3) of the Constitution.

[79] At the very least, then, the applicants in both matters are entitled to a declaration to the effect that same-sex couples are denied equal protection of the law under section 9(1), and subjected to unfair discrimination under section 9(3) of the

Constitution, to the extent that the law makes no provision for them to achieve the dignity, status, benefits and responsibilities available to heterosexual couples through marriage. The question that then has been posed is whether the traditional law of marriage is itself constitutionally defective, or whether the solution must necessarily be found outside of it.

Marriage and recognition of same-sex unions

[80] I will now deal with the contention that respect for the traditional institution of marriage requires that any recognition of same-sex unions must be accomplished outside of the law of marriage. The applicants submitted that as a matter of simple logic flowing from the above analysis, the Marriage Act is inconsistent with the Constitution and must be declared to be invalid to the extent that it makes no provision for same-sex couples to enjoy the status, entitlements and responsibilities which it accords to heterosexual couples. The state and amici, however, argued that the fault in not furnishing same-sex couples with the possibility of regularising and giving legal effect to their unions, lay outside the Marriage Act itself. Instead, they contended, it stemmed from the failure of the law to provide an appropriate remedial mechanism that was alternative and supplementary to the Marriage Act.

[81] There is an immediate answer to this proposition. A law that creates institutions which enable heterosexual couples to declare their public commitment to each other and achieve the status, entitlements and responsibilities that flow from marriage, but does not provide any mechanism for same-sex couples to achieve the

same, discriminates unfairly against same-sex couples. It gives to the one and not to the other. The instruments created by the legal system exclude from their reach persons entitled to be protected by them. It is those instruments that stand to be identified as being inconsistent with the Constitution, and not 'the law' as an abstraction. The law must be measured in the context of what is provided for by the legal system as a whole. In this respect, exclusion by silence and omission is as effective in law and practice as if effected by express language. Same-sex unions continue in fact to be treated with the same degree of repudiation that the state until two decades ago reserved for interracial unions; the statutory format might be different, but the effect is the same. The negative impact is not only symbolic but also practical, and each aspect has to be responded to. Thus, it would not be sufficient merely to deal with all the practical consequences of exclusion from marriage. It would also have to accord to same-sex couples a public and private status equal to that which heterosexual couples achieve from being married.

[82] The conclusion is that when evaluated in the context of the legal regime as a whole, the common law definition and section 30(1) are under-inclusive and unconstitutional to the extent that they make no appropriate provision for gay and lesbian people to celebrate their unions in the same way that they enable heterosexual couples to do.

[83] The matter does not end there, however. The state and the amici contend that even if the Marriage Act and common law are under-inclusive, the remedy is not to be

found in tampering with them but in providing an appropriate alternative. Thus, they argue, given that there is discrimination against same-sex couples, and accepting that the results may be harsh and need to be corrected, the remedy does not lie in radically altering the law of marriage, which by its very nature and as it has evolved historically is concerned with heterosexual relationships. The answer, they say, is to provide appropriate alternative forms of recognition to same-sex family relationships. Several alternative arguments in support of this proposition were advanced by the state and the amici. What they have in common is an objection to any remedial measures being assimilated into the traditional institution of marriage, or permitting the unions of same-sex couples to be referred to as marriages. They submit that whatever remedy the state adopts cannot include altering the definition of marriage as contained in the common law and as expressed in section 30(1) of the Marriage Act.

[84] Four main propositions were advanced in support of the proposition that whatever remedy is adopted, it must acknowledge the need to leave traditional marriage intact. There was some overlap between the arguments but for convenience they may be identified as: the procreation rationale; the need to respect religion contention; the recognition given by international law to heterosexual marriage argument; and the necessity to have recourse to diverse family law systems contained in section 15 of the Constitution submission. I consider each in turn.

The procreation argument

[85] The Marriage Alliance, with the support of Cardinal Napier, contended that an essential, constitutive and definitional characteristic of marriage is its procreative potential. The affidavit by Cardinal Napier asserts that marriage institutionalises and symbolises, as it has done across millennia and societies, the inherently procreative relationship between a man and a woman, and it should be protected as such. Lacking such procreative potential same-sex unions could never be regarded as marriages, whatever other form of legal recognition could be given to them.

[86] This very argument was considered in *Home Affairs*. The Court held in that matter that however persuasive procreative potential might be in the context of a particular religious world-view, from a legal and constitutional point of view, it is not a defining characteristic of conjugal relationships. To hold otherwise would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations or the capacity to conceive. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. It is even demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy.[85]

[85] Per Ackermann J in *Home Affairs* above n 44 at para 51.

[87] It is clear, then, that the procreation argument cannot defeat the claim of same-sex couples to be accorded the same degree of dignity, concern and respect that is shown to heterosexual couples. More particularly, it cannot prevail in the face of the claim of same-sex couples to be accorded the status, entitlements, and responsibilities which heterosexual couples receive through marriage. It cannot be an insuperable bar to the claims advanced by the applicants.

Respect for religion arguments

[88] The two amici submitted a number of arguments from an avowedly religious point of view in support of the view that by its origins and nature, the institution of marriage simply cannot sustain the intrusion of same-sex unions. The corollary is that such unions can never be regarded as marriages, or even marriage-like or equivalent to marriages. To disrupt and radically alter an institution of centuries-old significance to many religions, would accordingly infringe the Constitution by violating religious freedom in a most substantial way.

[89] Their arguments raise important issues concerning the relationship foreshadowed by the Constitution between the sacred and the secular. They underline the fact that in the open and democratic society contemplated by the Constitution, although the rights of non-believers and minority faiths must be fully respected, the religious beliefs held by the great majority of South Africans must be taken seriously. As this Court pointed out in *Christian Education*, freedom of religion goes beyond protecting the

inviolability of the individual conscience.[86] For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights. Such belief affects the believer's view of society and founds a distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries. For believers, then, what is at stake is not merely a question of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation.[87]

[90] Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes.[88] They command ethical behaviour from their members and bear witness to the exercise of power by state and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse

[86] *Christian Education* above n 73 at para 36.

[87] Id at para 37.

[88] Id at para 33.

and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of a people's temper and culture, and for many believers a significant part of their way of life.[89] Religious organisations constitute important sectors of national life and accordingly have a right to express themselves to government and the courts on the great issues of the day. They are active participants in public affairs fully entitled to have their say with regard to the way law is made and applied.

[91] Furthermore, in relation to the extensive national debates concerning rights for homosexuals, it needs to be acknowledged that though religious strife may have produced its own forms of intolerance, and religion may have been used in this country to justify the most egregious forms of racial discrimination, it would be wrong and unhelpful to dismiss opposition to homosexuality on religious grounds simply as an expression of bigotry to be equated to racism. As Ackermann J said in the *Sodomy* case:

> "The issues in this case touch on deep convictions and evoke strong emotions. It must not be thought that the view which holds that sexual expression should be limited to marriage between men and women with procreation as its dominant or sole purpose, is held by crude bigots only. On the contrary, it is also sincerely held, for considered and nuanced religious and other reasons, by persons who would not wish to have the physical expression of sexual orientation differing from their own proscribed by the law."[90]

[89] Id at para 33 referring to the comments in this Court in *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC) at paras 49 and 52. See also *S v Lawrence; S v Negal; S v Solberg* above n 74 at paras 146-7; *Sodomy* above n 6 at paras 107 and 134-5.

[90] *Sodomy* above n 6 at para 38.

[92] It is also necessary, however, to highlight his qualification:

> "It is nevertheless equally important to point out that such views, however honestly and sincerely held, cannot influence what the Constitution dictates in regard to discrimination on the grounds of sexual orientation."[91]

It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others. Between and within religions there are vastly different and at times highly disputed views on how to respond to the fact that members of their congregations and clergy are themselves homosexual. Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies.

[93] One respects the sincerity with which Mr Smyth cited passages in the Old and New Testaments in support of his argument that what he referred to as a change in the definition of marriage would discriminate against persons who believed that marriage was a heterosexual institution ordained of God, and who regarded their marriage vows as sacred. Yet for the purpose of legal analysis, such appreciation would not imply accepting that those sources may appropriately be relied upon by a court. Whether or not the Biblical texts support his beliefs would certainly not be a question which this Court could entertain. From a constitutional point of view, what matters is for the

[91] Id

Court to ensure that he be protected in his right to regard his marriage as sacramental,[92] to belong to a religious community that celebrates its marriages according to its own doctrinal tenets,[93] and to be free to express his views in an appropriate manner both in public and in Court.[94] Further than that the Court could not be expected to go.

[94] In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream.[95] It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian

[92] See section 15 of the Constitution.

[93] See section 31(1) of the Constitution.

[94] See section 16 of the Constitution.

[95] See *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) where this Court ordered that the conduct of SA Airways in not employing the applicant as a steward because of his HIV positive status amounted to unfair discrimination. Ngcobo J said: "People living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systematic disadvantage and discrimination." (Footnotes omitted.) At para 28. As the US Supreme Court has pointed out in the context of religious speech, the support of the great majority for a policy does not lessen the offence to or isolation of the objectors; at best it narrows their number, at worst it increases their sense of isolation and affront. See *Lee v Weisman* 505 US 577 (1992) at 594. Quoted with approval in *Santa Fe Independent School District v Doe* 530 US 290 (2000) at 301-2.

positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom.

[95] The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner.[96] The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.

[96] The need for co-existence and respect for diversity of belief is in fact expressly recognised by the Marriage Act. The Act in terms permits religious leaders to be designated as marriage officers, religious buildings to be used for the solemnisation of marriages, the marriage formula usually observed by a religious denomination to be employed and its religious marriage rites to be followed. It is not only permissible to

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[96] In the 2002 René Cassin lecture published in *Recognising Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* Douglas Farrow (ed), Canadian Chief Justice Beverley McLachlin points out that the law faces the seemingly paradoxical task of asserting its own ultimate authority while carving out a space within itself in which individuals and communities can manifest alternate, and often competing, sets of ultimate commitments. (At 16.) She refers to the tension between the rule of law and the claims of religion as a dialectic of normative commitments:

> "What is good, true, and just in religion will not always comport with the law's view of the matter, nor will society at large always properly respect conscientious adherence to alternate authorities and divergent normative, or ethical commitments. Where this is so, two comprehensive worldviews collide. It is at this point that the question of law's treatment of religion becomes truly exigent. The authority of each is internally unassailable. What is more, both lay some claim to the whole of human experience. . . . This clash of forces demands a resolution from the courts. The reality of litigation means that cases must be resolved. The dialectic must reach synthesis." (At 21-2.)

She then goes on to show how the Canadian Charter of Rights and Freedoms provides the courts with a context for reconciling the competing world views. (At 28-33.) For a critique of what is referred to as triumphalistic secular fundamentalism that seeks to impose secular dogma on the whole of society, see Benson "Considering Secularism" in *Recognising Religion in a Secular Society* id at 95.

solemnise marriages in these ways. All such marriages are recognised and given legal force by the state. Legal consequences flow from them as from a civil marriage celebrated before a magistrate or other state marriage officer. The state interest in marriage ceremonies performed by religious leaders is protected by empowering the Minister of Home Affairs to designate the ministers of religion concerned and to approve of the marriage formula being followed.

[97] State accommodation of religious belief goes further. Section 31 provides:

> "Certain marriage officers may refuse to solemnize 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 solemnize a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organization."[97]

The effect of this provision is that no minister of religion could be compelled to solemnise a same-sex marriage if such a marriage would not conform to the doctrines of the religion concerned. There is nothing in the matters before us that either directly or indirectly trenches in any way on this strong protection of the right of religious communities not to be obliged to celebrate marriages not conforming to their tenets.

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[97] Similarly section 34 provides:

> "Religious rules and regulations.—Nothing in this Act contained shall prevent—
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> (a) the making by any religious denomination or organization of such rules or regulations in connection with the religious blessing of marriages as may be in conformity with the religious views of such denomination or organization or the exercise of church discipline in any such case; or
>
> (b) the acceptance by any person of any fee charged by such religious denomination or organization for the blessing of any marriage,
>
> provided the exercise of such authority is not in conflict with the civil rights and duties of any person."

[98] It is clear from the above that acknowledgement by the state of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected.[98] The two sets of interests involved do not collide, they co-exist in a constitutional realm based on accommodation of diversity.

The international law argument

[99] Considerable stress was placed by the state on the contention that international law recognises and protects heterosexual marriage only. As such, the state contended, it could not be regarded as unfair discrimination to exclude same-sex couples from the institution of marriage. The remedy to the plight of same-sex couples should therefore be found outside of rather than inside marriage. Thus, reference was made to article 16 of the 1948 Universal Declaration of Human Rights (UDHR) which states:

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[98] See too *Sodomy* above n 6 at para 137:

> "The fact that the State may not impose orthodoxies of belief systems on the whole of society has two consequences. The first is that gays and lesbians cannot be forced to conform to heterosexual norms; they can now break out of their invisibility and live as full and free citizens of South Africa. The second is that those persons who for reasons of religious or other belief disagree with or condemn homosexual conduct are free to hold and articulate such beliefs. Yet, while the Constitution protects the right of people to continue with such beliefs, it does not allow the State to turn these beliefs – even in moderate or gentle versions – into dogma imposed on the whole of society."

It should be added that, conversely, the Constitution does not allow the state to impose an orthodoxy of secular beliefs on the whole of society, including religious organisations conducting religious activities as protected by the Constitution.

> "16(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
> 16(2) Marriage shall be entered into only with the free and full consent of the intending spouses.
> 16(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

Similar provisions from a number of different instruments were referred to, as was a decision of the United Nations Human Rights Committee to the effect that a New Zealand law denying marriage licences to same-sex couples does not violate the International Covenant on Civil and Political Rights[99] (ICCPR). Support for the argument was sought from the provision in our Constitution requiring that customary international law be recognised as part of the law in the Republic[100] and that when interpreting the Bill of Rights a court must consider international law.[101]

[100] The reference to "men and women" is descriptive of an assumed reality, rather than prescriptive of a normative structure for all time. Its terms make it clear that the principal thrust of the instruments is to forbid child marriages, remove racial, religious

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[99] In *Joslin v New Zealand* (Communication No 902/1999) (17 July 2002), the Committee stated:

> "The treaty obligation of States . . . is to recognise as marriage only the union between a man and a woman wishing to be married to each other."

[100] Section 232 of the Constitution states that:

> "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

[101] Section 39(1)(b) of the Constitution states that:

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum—
> . . .
> (b) must consider international law . . ."

or nationality impediments to marriage, ensure that marriage is freely entered into and guarantee equal rights before, during and after marriage.

[101] The statement in Article 16(3) of the UDHR that the family is the natural and fundamental group unit in society, entitled to protection by the state, has in itself no inherently definitional implications. Thus, it certainly does not confine itself to the nuclear monogamous family as contemplated by our common law. Nor need it by its nature be restricted intrinsically, inexorably and forever to heterosexual family units. There is nothing in the international law instruments to suggest that the family which is the fundamental unit of society must be constituted according to any particular model. Indeed, even if the purpose of the instruments was expressly to accord protection to a certain type of family formation, this would not have implied that all other modes of establishing families should for all time lack legal protection.

[102] Indeed, rights by their nature will atrophy if they are frozen. As the conditions of humanity alter and as ideas of justice and equity evolve, so do concepts of rights take on new texture and meaning. The horizon of rights is as limitless as the hopes and expectations of humanity. What was regarded by the law as just yesterday is condemned as unjust today. When the Universal Declaration was adopted, colonialism and racial discrimination were seen as natural phenomena, embodied in the laws of the so-called civilised nations, and blessed by as many religious leaders as

they were denounced.[102] Patriarchy, at least as old as most marriage systems, defended as being based on biological fact and which was supported by many a religious leader, is no longer accepted as the norm, at least in large parts of the world. Severe chastisement of women and children was tolerated by family law and international legal instruments then, but is today considered intolerable.[103] Similarly, though many of the values of family life have remained constant, both the family and the law relating to the family have been utterly transformed.

[103] The decision of the United Nations Human Rights Committee is clearly distinguishable. The Committee held that there was no provision in the ICCPR which forbade discrimination on sexual orientation. This is a far cry from declaring that the ICCPR forbids the recognition of same-sex marriages and seals off same-sex couples from participating in marriage or establishing families. Even more directly to the point, in contradistinction to the ICCPR, our Constitution explicitly proclaims the anti-discriminatory right which was held to lack support from the text of the ICCPR. Indeed, discrimination on the grounds of sexual orientation is expressly stated by our Constitution to be presumptively unfair.

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[102] Similarly, the rights to a fair trial, workers' rights, language rights and the rights of migrants and minorities, to mention but a few, have all expanded enormously since then. Though the language of the instruments proclaiming these rights might be the same, the significance and impact of the words used is vastly different. Free speech rights and rights of movement have advanced in equal measure. Punishments that had been regarded as self-evidently necessary for centuries are now forbidden as barbarous.

[103] The list of changes is endless. The fact that environmental rights and disability rights were not expressly mentioned in the Declaration did not mean that they were to be treated as excluded from, or somehow hostile, to the specified rights. What was considered free, fair, dignified or equal then, is a far cry from what would be accepted as such today.

[104] It would be a strange reading of the Constitution that utilised the principles of international human rights law to take away a guaranteed right. This would be the more so when the right concerned was openly, expressly and consciously adopted by the Constitutional Assembly as an integral part of the first of all rights mentioned in the Bill of Rights, namely, the right to equality.

[105] I conclude that while 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.

The family law pluralism argument

[106] Much reliance was placed by the state and the amici on section 15(3) of the Constitution which, after guaranteeing freedom of religion, conscience and belief, and providing for the circumstances in which religion may be observed in state institutions, states:

> "(a) This section does not prevent legislation recognising—
>
> (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
>
> (ii) *systems of personal and family law under any tradition*, or adhered to by persons professing a particular religion.
>
> (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution." (My emphasis.)

It was submitted that these provisions presupposed special legislation governing separate systems of family law to deal with different family situations. This, it was contended, had a double effect. In the first place it entailed acknowledgement that it would be the legislature and not the courts that would be responsible for creating a legal regime to respond to the needs of same-sex couples. Secondly, the ability to cater for same-sex couples through legislation adopted under section 15(3) showed that the Constitution envisaged their rights being protected through special laws which would not interfere with the hallowed institution of marriage.

[107] Section 15(3) is undoubtedly an important provision of the Constitution, the full significance of which remains as yet undeveloped. Consistent with the theme of diversity in unity, it establishes that there is no hegemonic model of marriage inexorably and automatically applicable to all South Africans. Dealing with the disparagement to which Muslim marriages were subjected in the past, Moseneke J said in *Daniels*:[104]

> "[The] 'persisting invalidity of Muslim marriages' is, of course, a constitutional anachronism. It belongs to our dim past. It originates from deep-rooted prejudice on matters of race, religion and culture. True to their worldview, Judges of the past displayed remarkable ethnocentric bias and arrogance at the expense of those they perceived different. They exalted their own and demeaned and excluded everything else. Inherent in this disposition, says Mahomed CJ, is 'inequality, arbitrariness, intolerance and inequity'.
>
> These stereotypical and stunted notions of marriage and family must now succumb to the newfound and restored values of our society, its institutions and diverse people.

[104] *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC).

> They must yield to societal and constitutional recognition of expanding frontiers of family life and intimate relationships. Our Constitution guarantees not only dignity and equality, but also freedom of religion and belief. What is more, section 15(3) of the Constitution foreshadows and authorises legislation that recognises marriages concluded under any tradition or a system of religious, personal or family law. Such legislation is yet to be passed in regard to Islamic marriages."[105] (Footnotes omitted.)

[108] The special provisions of section 15(3) are anchored in a section of the Constitution dedicated to protecting freedom of religion, belief and opinion. In this sense they acknowledge the right to be different in terms of the principles governing family life. The provision is manifestly designed to allow Parliament to adopt legislation, if it so wishes, recognising, say, African traditional marriages, or Islamic or Hindu marriages, as part of the law of the land, different in character from, but equal in status to general marriage law. Furthermore, subject to the important qualification of being consistent with the Constitution, such legislation could allow for a degree of legal pluralism under which particular consequences of such marriages would be accepted as part of the law of the land. The section "does not prevent" legislation recognising marriages or systems of family or personal law established by religion or tradition. It is not peremptory or even directive, but permissive. It certainly does not give automatic recognition to systems of personal or family law not accorded legal status by the common law, customary law or statute. Whether or not it could be extended to same-sex marriages, which might not easily be slotted into the concept of marriage or systems of personal or family law "under any tradition", it

[105] Id at paras 74-5.

certainly does not project itself as the one and only legal portal to the recognition of same-sex unions.

[109] Thus section 15(3) is indicative of constitutional sensitivity in favour of acknowledging diversity in matters of marriage. It does not, however, in itself provide a gateway, let alone a compulsory path, to enable same-sex couples to enjoy the status, entitlements and responsibilities which marriage accords to heterosexual couples. At most, for present purposes, section 15(3) offers constitutional guidance of a philosophical kind pointing in the direction of acknowledging a degree of autonomy for different systems of family law. Yet while it reinforces a general constitutional propensity to favour diversity, it does not in itself provide the remedy claimed for it by the state and the amici, let alone constitute a bar to the claims of the applicants.

Justification

[110] Having accepted that the need to accord an appropriate degree of respect to traditional concepts of marriage does not as a matter of law constitute a bar to vindicating the constitutional rights of same-sex couples, a further question arises: has justification in terms of section 36 of the Constitution been shown to exist for the violation of the equality and dignity rights of these couples?[106] The state made the

[106] Section 36 of the Constitution states:

> "(1) 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, taking into account all relevant factors, including—
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;

bald submission in its written submissions that there was justification, without advancing considerations different from those it had referred to in relation to unfair discrimination. Mr Smyth on the other hand, devoted considerable attention to the argument that justification existed for the discrimination even if it impacted harshly on same-sex couples. His key argument was that the purpose of the limitation on the rights of same-sex couples was to maintain marriage as an acknowledged pillar of society, and to protect the religious beliefs and convictions of many South Africans. The Marriage Alliance similarly contended that any discrimination to which same-sex couples were subjected was justified on the ground that the exclusion of same-sex couples from marriage was designed to protect and ensure the existence and vitality of marriage as an important social institution. There are accordingly two interrelated propositions advanced as justification that need to be considered. The first is that the inclusion of same-sex couples would undermine the institution of marriage. The second is that this inclusion would intrude upon and offend against strong religious susceptibilities of certain sections of the public.

[111] The first proposition was dealt with by Ackermann J in *Home Affairs*.[107] Referring to possible justification in relation to exclusion of same-sex life partners from benefits accorded to married couples under immigration law, he stated:

(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

See *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at paras 53-4; 1997 (11) BCLR 1489 (CC) at paras 52-3.

[107] Above n 44 at para 59.

> "There is no interest on the other side that enters the balancing process [for justification]. It is true . . . that the protection of family and family life in conventional spousal relationships is an important governmental objective, but the extent to which this could be done would in no way be limited or affected if same-sex life partners were appropriately included under the protection of [the section]."[108]

The same considerations would apply in relation to enabling same-sex couples to enjoy the status and benefits coupled with responsibilities that marriage law affords to heterosexual couples. Granting access to same-sex couples would in no way attenuate the capacity of heterosexual couples to marry in the form they wished and according to the tenets of their religion.

[112] The second proposition is based on the assertion derived from particular religious beliefs that permitting same-sex couples into the institution of marriage would devalue that institution. Whatever its origin, objectively speaking this argument is in fact profoundly demeaning to same-sex couples, and inconsistent with the constitutional requirement that everyone be treated with equal concern and respect.

[113] However strongly and sincerely-held the beliefs underlying the second proposition might be, these beliefs cannot through the medium of state-law be imposed upon the whole of society and in a way that denies the fundamental rights of those negatively affected. The express or implied assertion that bringing same-sex couples under the umbrella of marriage law would taint those already within its

[108] Id

protection can only be based on a prejudgement, or prejudice against homosexuality. This is exactly what section 9 of the Constitution guards against. It might well be that negative presuppositions about homosexuality are still widely entertained in certain sectors of our society. The ubiquity of a prejudice cannot support its legitimacy. As Ngcobo J said in *Hoffmann*:

> "Prejudice can never justify unfair discrimination. This country has recently emerged from institutionalised prejudice. Our law reports are replete with cases in which prejudice was taken into consideration in denying the rights that we now take for granted. Our constitutional democracy has ushered in a new era – it is an era characterised by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place. Indeed, if as a nation we are to achieve the goal of equality that we have fashioned in our Constitution we must never tolerate prejudice, either directly or indirectly. SAA, as a state organ that has a constitutional duty to uphold the Constitution, may not avoid its constitutional duty by bowing to prejudice and stereotyping."[109] (Footnote omitted.)

I conclude therefore that the arguments tendered in support of justification cannot be upheld. The factors advanced might have some relevance in the search for effective ways to provide an appropriate remedy that enjoys the widest public support, for the violation of the rights involved. They cannot serve to justify their continuation.

Conclusion

[114] I conclude that the failure of the common law and the Marriage Act to provide the means whereby same-sex couples can enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes an

[109] *Hoffmann* above n 95 at para 37. The Court ordered SA Airways to employ the applicant, who was HIV positive, as a steward for as long as his immune system was strong enough for him to carry on working efficiently. See too *Home Affairs* above n 44 at paras 58-60.

unjustifiable violation of their right to equal protection of the law under section 9(1), and not to be discriminated against unfairly in terms of section 9(3) of the Constitution. Furthermore, and for the reasons given in *Home Affairs*, such failure represents an unjustifiable violation of their right to dignity in terms of section 10 of the Constitution.[110] As this Court said in that matter, the rights of dignity and equality are closely related.[111] The exclusion to which same-sex couples are subjected, manifestly affects their dignity as members of society.

III. REMEDY

[115] A notable and significant development in our statute law in recent years has been the extent of express and implied recognition that the legislature has accorded to same-sex partnerships. Yet as Ackermann J pointed out in *Home Affairs*, there is still no appropriate recognition in our law of same-sex life partnership, as a relationship, to meet the legal and other needs of its partners.[112] Since *Home Affairs* was decided a number of other statutes have been adopted, the ambit of which clearly include same-sex life partnerships. In some cases there is express reference to the inclusion of same-sex relationships, in others the term 'life partner' or 'partner' is used.[113] They

[110] I do not find it necessary to consider whether it in addition constitutes a violation of their right to privacy in terms of section 14 of the Constitution. See the discussion on privacy in the *Sodomy* case above n 6 at paras 28-57, 65-7 of the judgment of Ackermann J and paras 108-19 of my judgment in that matter.

[111] *Home Affairs* above n 44 at para 31.

[112] Id at paras 28-9.

[113] See *Volks* above n 75 at footnote 171 of the judgment of Sachs J. There are four statutes of particular relevance to the present matter. The first two deal with issues which traditionally have been directly connected with marriage law and both expressly refer to same-sex relationships. Thus the Domestic Violence Act 116 of 1998 defines a domestic relationship as a relationship between a complainant and a respondent who are of the same or opposite sex and who live/lived together in a relationship in the nature of marriage, although they are not married to each other. The Estate Duty Act 45 of 1955 provides that a "spouse" in relation to any deceased person, includes a person who at the time of the death of such deceased person was the partner of such person in

cover such socially important areas as domestic violence, estate duty, employment equity, and legislation to promote equality.

[116] While this legislative trend is significant in evincing Parliament's commitment to its constitutional obligation to remove discrimination on the ground of sexual orientation, and while these statutes are consistent with the judgment of this Court in *Home Affairs*, the advances continue to be episodic rather than global. Thus, however valuable they may be in dealing with particular aspects of discrimination, and however much their cumulative effect contributes towards changing the overall legal climate, they fall short of what this Court called for in *J*,[114] namely that comprehensive legislation regularising relationships between gay and lesbian persons was necessary; and that it was 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.

[117] At the heart of legal disabilities afflicting same-sex life partnerships today, then, is the lack of general recognition by the law of their relationships. The problem does not in fact arise from anything constitutionally offensive in what the common

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a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent. The second two are concerned with the need to achieve equality. The Employment Equity Act 35 of 1998 provides that the definition of "family responsibility" includes "responsibility of the employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care or support." Similarly, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 provides that "family responsibility" means "responsibility in relation to a complainant's spouse, partner, dependant, child or other members of his or her family in respect of whom the member is liable for care and support." It goes on to state that "'marital status' includes the status or condition of being single, married, divorced, widowed or in a relationship, whether with a person of the same or the opposite sex, involving a commitment to reciprocal support in a relationship."

[114] Above n 65 at para 23.

law definition of marriage actually contains. Nor has there been any suggestion that the formula in the Marriage Act intrinsically violates the Constitution as far as it goes. Indeed, there is no reason why heterosexual couples should not be able to take each other as husband and wife. The problem is not what is included in the common law definition and the Act, but what is left out. The silent obliteration of same-sex couples from the reach of the law, together with the utilisation of gender-specific language in the marriage vow, presupposes that only heterosexual couples are contemplated. The formula makes no allowance for an equivalent public declaration being made by same-sex couples, with all the legal and cultural consequences that would flow from it.

[118] As I have already concluded, the common law and section 30(1) of the Marriage Act are inconsistent with sections 9(1) and 9(3) and 10 of the Constitution to the extent that they make no provision for same-sex couples to enjoy the status, entitlements and responsibilities it accords to heterosexual couples. In terms of section 172(1)(a) of the Constitution, this Court must that declare any law inconsistent with the Constitution is invalid to that extent. Under section 172(1)(b) it is then open to the Court to make any order that is just and equitable. Such order may include suspending the declaration of invalidity to give the legislature time to cure the defect.

[119] Before considering what order would be just and equitable, it is important to note that the SCA decision in *Fourie* that has been appealed against, has been overtaken and to a considerable extent superseded by our decision to hear the *Equality*

Project case at the same hearing. The challenges to the common law definition and to the Marriage Act now fall to be considered together and in a comprehensive rather than piecemeal way. This enables the Court to develop a less attenuated remedy than was available to the SCA. The challenge now mounted by the Equality Project to the Marriage Act means that the question of whether and how to develop the common law need no longer be answered narrowly as an independent and abstract matter separately from how to respond to the defects of the Marriage Act.

[120] It is clear that just as the Marriage Act denies equal protection and subjects same-sex couples to unfair discrimination by excluding them from its ambit, so and to the same extent does the common law definition of marriage fall short of constitutional requirements. It is necessary, therefore, to make a declaration to the effect that the common law definition of marriage is inconsistent with the Constitution and invalid to the extent that it fails to provide to same-sex couples the status and benefits coupled with responsibilities which it accords to heterosexual couples. The question then arises whether, having made such declaration, the Court itself should develop the common law so as to remedy the consequences of the common law's under-inclusive character.

[121] The state submitted categorically that the Court did not have the power itself to cure any substantial and non-incremental defect in the common law definition, arguing that only the legislature had the competence to do so. Given the approach I have adopted, it is unnecessary to decide whether this Court has the power to develop

the common law in an incremental fashion only. This Court has already held that if a common law provision is inconsistent with the Constitution then when appropriately challenged it will be declared invalid and struck down. This is what happened in the *Sodomy* case, where this Court abolished the common law crime of sodomy. The Court emphasised that in striking down the common law offence of sodomy it was not developing the common law but exercising a power under section 172(1)(a).[115] This was an example of the direct application of the Bill of Rights which led to the conclusion that the very core of the offence was constitutionally invalid.[116]

[122] In deciding on the appropriate remedy in the present matter the possibility of altering the common law through legislative action so as to bring it into line with the Bill of Rights becomes highly relevant. Having heard the *Fourie* matter together with the *Equality Project* matter, we can take account of the impact that any correction to the Act, or enactment of a separate statute, would automatically have on the common law. Thus a legislative intervention which had the effect of enabling same-sex couples to enjoy the status, entitlements and responsibilities that heterosexual couples achieve through marriage, would without more override any discriminatory impact flowing from the common law definition standing on its own. Thus corrected, the Marriage Act would then have to be interpreted and applied in a manner consistent with the constitutional requirement that same-sex couples be treated with the same concern and respect as that accorded to heterosexual couples. The effect would be

[115] Per Ackermann J above n 6 at paras 90-1.

[116] Id at para 69.

that formal registration of same-sex unions would automatically extend the common law and statutory legal consequences to same-sex couples that flow to heterosexual couples from marriage.

[123] The Equality Project in fact urged us to adopt the simple corrective statutory strategy of reading in the words "or spouse" after the reference to husband and wife in section 30(1) of the Marriage Act. The state and the amici argued forcibly against this contention. In their view, to accept it would not merely modify a well-established institution to bring it into line with constitutional values. It would completely restructure and possibly even destroy it as an institution. Their argument was three-fold: first, that time should be given for the public to be involved in an issue of such great public interest and importance; second, that it was neither competent nor appropriate for the Court itself to restructure the institution of marriage in such a radical way; and third, that only Parliament had the authority to create such a radical remedy, so that if the Court should declare the Marriage Act to be invalid because of its under-inclusive nature, the declaration of invalidity should be suspended to enable Parliament to correct the defect.

[124] I start with the argument that the Court should not undertake what was said to be a far-reaching and radical change without the general public first having had an opportunity to have its say. Then, I deal with the question of whether in the circumstances it would be just and equitable for the Court to suspend any declaration

of invalidity it might make so as to allow Parliament an opportunity to remedy the defect.

Has the public had an opportunity to have its say?

[125] For the purposes of the present discussion I assume that the extent to which the public has been consulted would be a relevant factor in determining the appropriate remedy to be ordered. Even making that assumption, the contention by the state and the amici to the effect that the matter is not ripe for determination by this Court, cannot be sustained. The stark claim that the public has not had an opportunity to engage with the issue is not borne out by the facts. A recent memorandum by the SALRC on Domestic Partnerships[117] testifies to prolonged and intensive engagement by the SALRC with the public. The memorandum states that developments since *Home Affairs* had led to a patchwork of laws that did not express a coherent set of family law rules. In order to address this problem, the SALRC states that it has approached the reform process in what it considered to be a holistic, systematic, structured and consultative way. The investigation was aimed at harmonising the applicable family law principles with the provisions of the Bill of Rights and, specifically, with the constitutional value of equality. In order to achieve this, a new family law dispensation for domestic partnerships was being designed to supplement the traditional marriage structure.

[117] Memorandum on progress achieved concerning Project 118, made available on 19 May 2005 on request by the Court.

[126] The memorandum summarises the extensive work it has done in pursuance of achieving that harmonisation. In October 2001 the SALRC had published an Issue Paper in the form of a questionnaire.[118] One hundred and forty-five respondents had responded to the SALRC's invitation and submitted written comments. Submissions had been received from various organisations as well as ordinary members of the public. After these submissions had been considered and comparative research done,[119] the SALRC had formed various models for the reform of domestic partnerships.

[127] The memorandum points out that during August 2003 the SALRC had published a Discussion Paper for information and comment, which included six options for reform. The first three options had aimed to afford same-sex couples the same rights currently afforded to opposite-sex partners in marriage and in this regard the constitutionality of the chosen option was the main consideration. These were the three options referred to by Farlam JA.[120] As will be seen, the SALRC decided to replace them with a single new proposal.[121]

[128] Interest groups and members of the public were invited to submit comments on the proposed options. A series of eight workshops were held to discuss the proposals

[118] Issue Paper no. 17 (Project 118).

[119] The models researched varied from civil marriage (The Netherlands and Belgium), no special legal status for domestic partners (UK), de facto recognition (Australia) and civil unions (Vermont). The fact that none of the models researched emanated in a constitutional dispensation such as the South African one with specific protection of sexual orientation in an equality clause, indicated the need for a uniquely South African solution.

[120] *Fourie* (SCA) above n 12 at paras 110-1. See paras 28-31 above.

[121] At para 141 below.

made in the Paper. By the closing date for submissions on the Discussion Paper[122] a total of 230 submissions and 50 worksheets had been received.

[129] It is clear from the above summary of the work done by the SALRC that extensive opportunity has in fact been given for all sides to be canvassed, and over a lengthy period. The SALRC states in the recent memorandum that it feels after considerable research[123] it has reached a position to produce draft legislation. This it is ready to submit to Parliament as soon as it has had the opportunity to take cognisance of the judgment of this Court in the present matter.[124]

[130] The memorandum adds that the final recommendations of the Project Committee of the SALRC will be included in a report to be submitted by it to the SALRC for consideration. Upon approval of the report by the SALRC, it will be submitted to the Minister of Justice and Constitutional Development to be placed before Parliament at her discretion. The ordinary parliamentary processes will then commence. Attending to the consequential amendments necessitated by this new dispensation would form a secondary part of the investigation. The memorandum

[122] 31 March 2004.

[123] One aspect of the research indicated that although many same-sex couples were in favour of same-sex marriage, others saw it as an oppressive institution that is wrongly presented by a heterosexual society as the norm against which all other relationships should be measured. Many of them might also deliberately choose not to get married because they did not desire the consequences attached to marriage. In this context it was argued that the legislature should respect the autonomy of these partners and make provision for both these groups.

[124] It should be added that the SALRC memorandum noted that this Court's judgment would ultimately assist the SALRC in recommending legislation that might pass constitutional scrutiny and which would put an end to ad hoc applications to enforce rights on a piecemeal basis.

concludes by observing that, depending on the final recommendations, amendments to all legislation may be required.

[131] The memorandum establishes three things. Firstly, there has been extensive public consultation over a number of years. Secondly, a final SALRC report can be placed before Parliament within a relatively short period. Thirdly, the report can be expected to contain a comprehensive proposal intended to provide appropriate relief which is in a format quite different from that which the applicants propose. The matter of the relief to which same-sex couples are entitled would therefore appear to be ready for prompt consideration by Parliament. The orders to be made by this Court should take account of this fact.

Should the order of invalidity be suspended?

[132] Having concluded that the law of marriage as it stands is inconsistent with the Constitution and invalid to the extent outlined above, an appropriate declaration of invalidity needs to be made. The question that arises is whether this Court is obliged to provide immediate relief in the terms sought by the applicants and the Equality Project, or whether it should suspend the order of invalidity to give Parliament a chance to remedy the defect. The test is what is just and equitable, taking account of all the circumstances.

[133] Ordinarily a successful litigant should receive at least some practical relief. This, however, is not an absolute rule. In *Fraser (1)*[125] this Court declared invalid a provision of the Child Care Act[126] to the extent that it dispensed with the father's consent for the adoption of a child born out of marriage in all circumstances. Mahomed DP held that the consent of some fathers would be necessary, but not of all fathers. In deciding to give Parliament an opportunity to correct the defect, the Court took account of the difficulties of distinguishing between meritorious and non-meritorious fathers in these circumstances and "the multifarious and nuanced legislative responses which might be available to the legislature".[127] Mohamed DP went on to point out that the applicant in that matter was not the only person affected by the impugned provision and that proper legislation was required to regulate the rights of parents in relation to the adoption of any children born out of a relationship between them which had not been formalised by marriage.[128] In the meanwhile it would be chaotic and prejudicial to the interests of justice and good government to invalidate any adoption order previously made.[129] What was called for was an order allowing the section to survive pending its correction by Parliament.[130] Regard being had to the complexity and variety of the statutory and policy alternatives which might

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[125] *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC). [*Fraser (1)*.]

[126] Act 74 of 1983.

[127] *Fraser (1)* above n 125 at para 50.

[128] Id

[129] Id at para 51.

[130] Id

have to be considered by Parliament, such period should be two years.[131] It should be noted that pending the rectification by Parliament, the successful applicant and persons in his position received no relief from the order.

[134] In *Dawood*[132] provisions in immigration law concerning the granting of certain privileges to spouses and other family members of South Africans were held to be unconstitutional because of lack of guidance to the officials concerned concerning the factors relevant to the refusal of temporary permits. O'Regan J pointed out that:

> "It would be inappropriate for this Court to seek to remedy the inconsistency in the legislation under review. The task of determining what guidance should be given to decision-makers and, in particular, the circumstances in which a permit may justifiably be refused is primarily a task for the Legislature and should be undertaken by it. There is a range of possibilities that the Legislature may adopt to cure the unconstitutionality."[133] (Footnote omitted.)

Her judgment went on, however, to provide temporary guidance to the officials as to how their discretion should be exercised.[134] The result was that a temporary form of relief was fashioned, leaving it to the legislature to determine the final text of the corrective decisions.

[135] What these cases highlight is the need to look at the precise circumstances of each case with a view to determining how best the values of the Constitution can be

[131] Id

[132] *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

[133] Id at para 63.

[134] Id at 70.

promoted by an order that is just and equitable. In the present matter I have considered ordering with immediate effect reading-in of the words "or spouse" after the words "or husband" in section 30(1) of the Marriage Act. This would remedy the invalidity while at the same time leaving Parliament free, if it chose, to amend the law so as to provide an alternative statutory mechanism to enable same-sex couples to enjoy their constitutional rights as outlined in this judgment. For reasons which follow, however, I have come to the conclusion that correction by the Court itself should be delayed for an appropriate period so as to give Parliament itself the opportunity to correct the defect.

[136] This is a matter involving status that requires a remedy that is secure. To achieve security it needs to be firmly located within the broad context of an extended search for emancipation of a section of society that has known protracted and bitter oppression. The circumstances of the present matter call out for enduring and stable legislative appreciation. A temporary remedial measure would be far less likely to achieve the enjoyment of equality as promised by the Constitution than would lasting legislative action compliant with the Constitution.

[137] The claim by the applicants in *Fourie* of the right to get married should, in my view, be seen as part of a comprehensive wish to be able to live openly and freely as lesbian women emancipated from all the legal taboos that historically have kept them from enjoying life in the mainstream of society. The right to celebrate their union accordingly signifies far more than a right to enter into a legal arrangement with many

attendant and significant consequences, important though they may be. It represents a major symbolical milestone in their long walk to equality and dignity. The greater and more secure the institutional imprimatur for their union, the more solidly will it and other such unions be rescued from legal oblivion, and the more tranquil and enduring will such unions ultimately turn out to be.

[138] This is a matter that touches on deep public and private sensibilities. I believe that Parliament is well-suited to finding the best ways of ensuring that same-sex couples are brought in from the legal cold. The law may not automatically and of itself eliminate stereotyping and prejudice. Yet it serves as a great teacher, establishes public norms that become assimilated into daily life and protects vulnerable people from unjust marginalisation and abuse. It needs to be remembered that not only the courts are responsible for vindicating the rights enshrined in the Bill of Rights. The legislature is in the frontline in this respect. One of its principal functions is to ensure that the values of the Constitution as set out in the Preamble and section 1 permeate every area of the law.

[139] This judgment serves to vindicate the rights of the applicants by declaring the manner in which the law at present fails to meet their equality claims. At the same time, it is my view that it would best serve those equality claims by respecting the separation of powers and giving Parliament an opportunity to deal appropriately with the matter. In this respect it is necessary to bear in mind that there are different ways in which the legislature could legitimately deal with the gap that exists in the law. On

the papers, at least two different legislative pathways have been proposed. Although the constitutional terminus would be the same, the legislative formats adopted for reaching the end-point would be vastly different. This is an area where symbolism and intangible factors play a particularly important role. What might appear to be options of a purely technical character could have quite different resonances for life in public and in private. Parliament should be given the opportunity in the first place to decide how best the equality rights at issue could be achieved. Provided that the basic principles of equality as enshrined in the Constitution are not trimmed in the process, the greater the degree of public acceptance for same-sex unions, the more will the achievement of equality be promoted.

[140] Thus, Parliament could decide that the best way of achieving equality would be to adopt the first option placed before it, namely, the simple reading-in of the words "or spouse" in section 30(1) of the Marriage Act. This would be consistent with the position of the SALRC at the time when the proceedings were initiated, which indicated that it regarded reading-in of suitable words into the Marriage Act as one of three permissible options for public and legislative consideration.[135]

[135] The second option which it adopted at that stage was to abolish secular marriage as a legal institution and replace it with a civil union which would produce effects similar to marriage but be available for both heterosexual and same-sex couples. The third option which it then proposed was to establish a form of registered partnerships for same-sex couples which would operate alongside of and have the same legal status and consequences as marriage for heterosexual couples. It was the availability of these three options that led Farlam JA to decide to suspend the order of invalidity he would have made, so as to allow Parliament to make the choice. He made no pronouncement on their constitutionality. *Fourie* (SCA) above n 12 at paras 139-41.

[141] The second possibility which Parliament could consider is canvassed in the SALRC memorandum.[136] The memorandum makes it clear that as a result of further consultations the SALRC decided to move away from the three options it had originally offered for public debate, and come forward with a single proposal for submission to Parliament. This proposal is comprehensive in character and is based upon Parliament adopting a legislative scheme for marriage and family law based on express acknowledgement of the diverse ways in which conjugal unions have come to be established in South Africa. One of its features is that it would provide for equal status being accorded to all marriages, whatever the system under which they were celebrated.

[142] In developing its new single proposal, the SALRC memorandum referred to the responses it had received to the three options it had formerly placed before the public.[137] It observed that the last round of comments it had received in the course of its consultations on these three options could be divided into two categories. The first category of respondents was strongly and totally opposed to the legal recognition of same-sex relationships and other domestic partnerships on religious and moral grounds. The second category was in favour of the legal recognition of same-sex relationships and other domestic partnerships or accepted that legal recognition was unavoidable.[138] The memorandum adds that submissions received by the SALRC and

[136] Above n 117.

[137] Id

[138] Id

those following the workshops were collated and further research emanating from these responses was conducted. Follow-up meetings with specific interest groups were held.[139]

[143] From the inputs received, the memorandum continues, the SALRC felt that it was clear that the challenge facing it would be to reconcile the constitutional right to equality of same and opposite-sex couples on the one hand, with religious and moral objections to the recognition of these relationships on the other. Although no ostensibly valid legal objection was proffered against the merits of legal recognition of same-sex rights, the memorandum observes that the Project Committee[140] of the SALRC nevertheless considered it advisable from a policy viewpoint, not to disregard the strong objections against recognition. The concern for these objections was an important consideration in the Project Committee's striving to accommodate religious sentiments to the extent possible in the development of a further proposal. This proposal would embody a single comprehensive legislative scheme and not set out a range of options for the legislature.[141]

[144] The memorandum states that in terms of this proposal a new generic marriage act (to be called the Reformed Marriage Act) would be enacted to give legal

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[139] Id

[140] Appointed on request of the SALRC by the Minister of Justice to assist the Commission with its task. The Minister appointed the following persons to the Committee: The Honourable Justice Craig Howie, now President of the SCA (Chairperson), Professor Cora Hoexter, Ms Beth Goldblatt, Professor Ronald Louw and Professor Tshepo Mosikatsana.

[141] Above n 117.

recognition to all marriages, including those of same and opposite-sex couples and irrespective of the religion, race or culture of a couple. However, the current Marriage Act would not be repealed, but renamed only (to be called the Conventional Marriage Act). For the purposes of this Act, the status quo would be retained in all respects and legal recognition in terms of this Act would only be available to opposite-sex couples.[142]

[145] The SALRC memorandum expresses the view that these Acts would aim to give effect to both the right to equality in section 9 of the Constitution and the right to freedom of religion, belief and opinion in section 15 of the Constitution. They would entail no separation of the religious and civil aspects of marriage, and ministers of religion (or religious institutions) would have the choice to decide in terms of which Act they wish to be designated as marriage officers. The state would designate its marriage officers in terms of the Reformed Marriage Act.[143]

[146] The SALRC memorandum adds that the family law dispensation in South Africa would therefore make provision for a marriage act of general application together with a number of additional, specific marriage acts for special interest groups such as couples in customary marriages, Islamic marriages, Hindu marriages and now also opposite-sex specific marriages. Choosing a marriage act, the memorandum

[142] Id

[143] Id

concludes, will be regarded as the couple's personal choice, taking account of the couple's religion, culture and sexual preference.[144]

[147] There are accordingly two firm proposals for legislative action that would appear to be ripe for consideration by Parliament. The simple textual change pleaded for by the Equality Project and the comprehensive legislative project being finalised by the SALRC, do not, however, necessarily exhaust the legislative paths which could be followed to correct the defect. In principle there is no reason why other statutory means should not be found. Given the great public significance of the matter, the deep sensitivities involved and the importance of establishing a firmly-anchored foundation for the achievement of equality in this area, it is appropriate that the legislature be given an opportunity to map out what it considers to be the best way forward. The one unshakeable criterion is that the present exclusion of same-sex couples from enjoying the status and entitlements coupled with the responsibilities that are accorded to heterosexual couples by the common law and the Marriage Act, is constitutionally unsustainable. The defect must be remedied so as to ensure that same-sex couples are not subjected to marginalisation or exclusion by the law, either directly or indirectly.

[148] It would not be appropriate for this Court to attempt at this stage to pronounce on the constitutionality of any particular legislative route that Parliament might choose to follow. At the same time I believe it would be helpful to Parliament to point to

[144] Id

certain guiding principles of special constitutional relevance so as to reduce the risk of endless adjudication ensuing on a matter which both evokes strong and divided opinions on the one hand, and calls for firm and clear resolution on the other.

[149] At the heart of these principles lies the notion that in exercising its legislative discretion Parliament will have to bear in mind that the objective of the new measure must be to promote human dignity, the achievement of equality and the advancement of human rights and freedoms.[145] This means in the first place taking account of the fact that in overcoming the under-inclusiveness of the common law and the Marriage Act, it would be inappropriate to employ a remedy that created equal disadvantage for all. Thus the achievement of equality would not be accomplished by ensuring that if same-sex couples cannot enjoy the status and entitlements coupled with the responsibilities of marriage, the same should apply to heterosexual couples. Levelling down so as to deny access to civil marriage to all would not promote the achievement of the enjoyment of equality. Such parity of exclusion rather than of inclusion would distribute resentment evenly, instead of dissipating it equally for all. The law concerned with family formation and marriage requires equal celebration, not equal marginalisation; it calls for equality of the vineyard and not equality of the graveyard.[146]

[145] See section 1(a) of the Constitution.

[146] See Ackermann J in *Home Affairs* above n 44 at para 77. It could have been considerations such as these that encouraged the SALRC to drop the option of replacing civil marriage for heterosexual couples only, with the notion of abolishing civil marriage altogether and replacing it with a civil union available both to heterosexual and same-sex couples. This is a matter which this Court is not obliged to consider at this stage.

[150] The second guiding consideration is that Parliament be sensitive to the need to avoid a remedy that on the face of it would provide equal protection, but would do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation. Historically the concept of 'separate but equal' served as a threadbare cloak for covering distaste for or repudiation by those in power of the group subjected to segregation. The very notion that integration would lead to miscegenation, mongrelisation or contamination, was offensive in concept[147] and wounding in practice. Yet, just as is frequently the case when proposals are made for recognising same-sex unions in desiccated and marginalised forms, proponents of segregation would vehemently deny any intention to cause insult. On the contrary, they would justify the apartness as being a reflection of a natural or divinely ordained state of affairs.[148] Alternatively they would assert that the separation was neutral if

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[147] Justifying the exclusion of a child whose mother was referred to as a coloured woman from a school for children of European parentage or extraction, de Villiers CJ in *Moller v Keimos School Committee and Another* 1911 AD 635 at 643-4:

> "As a matter of public history we know that the first civilized legislators in South Africa came from Holland and regarded the aboriginal natives of the country as belonging to an inferior race . . . . Believing, as these whites did, that intimacy with the black or yellow races would lower the whites without raising the supposed inferior races in the scale of civilization, they condemned intermarriage or illicit intercourse between persons of the two races. Unfortunately the practice of many white men has often been inconsistent with that belief . . . . These prepossessions, or, as many might term them, these prejudices, have never died out . . . . We may not from a philosophical or humanitarian point of view be able to approve this prevalent sentiment, but we cannot, as judges who are called upon to construe an Act of Parliament, ignore the reasons which must have induced the legislature to adopt the policy of separate education for European and non-European children."

[148] See *Loving v Virginia* 388 US 1 (1966) at 2-3 Warren CJ states that a Negro woman and a white man were sentenced to a year in jail for their interracial marriage. The trial court judge, however, suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. The trial court judge stated that:

> "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

the facilities provided by the law were substantially the same for both groups.[149] In *S v Pitje*[150] where the appellant, an African candidate attorney employed by the firm Mandela and Tambo, occupied a place at a table in court that was reserved for "European practitioners" and refused to take his place at a table reserved for "non-European practitioners", Steyn CJ upheld the appellant's conviction for contempt of court as it was ". . . clear [from the record] that a practitioner would in every way be as well seated at the one table as at the other, and that he could not possibly have been hampered in the slightest in the conduct of his case by having to use a particular table."[151]

[151] The above approach is unthinkable in our constitutional democracy today not simply because the law has changed dramatically, but because our society is

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In South Africa the Prohibition of Mixed Marriages Act 55 of 1949 prohibiting marriage across the colour line, and repealed only in 1985 was based on similar offensive notions.

[149] Thus in *Minister of Posts and Telegraphs v Rasool* 1934 AD 167, which dealt with a challenge to a post office regulation requiring Europeans and non-Europeans to be attended to at separate counters, Stratford ACJ held that "[i]t would surely seem at first sight that the admission . . . to equality of service destroys at once the idea of partiality or inequality." (At 173.) He went on to say:

> "[A] division of the community on differences of race or language for the purpose of postal service seems, *prima facie*, to be sensible and make for the convenience and comfort of the public as a whole, since appropriate officials conversant with the customs, requirements and language of each section will conceivably serve the respective sections." (At 175.)

De Villiers JA likened division on the ground of race to division on the ground of initial letters of one's name. Only Beyers JA and Gardiner JA confronted the racist social reality involved. Supporting the regulation, Beyers JA held that in the Transvaal Europeans and non-Europeans had never been treated as equal in the eyes of the law. "Afskeiding loop deur ons ganse maatskaplik lewe in die hele Unie". (Separation is to be found in all of social life in the whole of the Union [of South Africa]". My translation.) (At 177.) Gardiner JA, on the other hand, regarded the regulation as invalid:

> "In view of the prevalent feeling as to colour, in view of the numerous statutes treating non-Europeans as belonging to an inferior order of civilisation, any fresh classification on colour lines can, to my mind, be interpreted only as a fresh instance of relegation of Asiatics and natives to a lower order, and this I consider humiliating treatment." (At 190-1.)

[150] 1960 (4) 709 (A).

[151] Id at 710.

completely different. What established the visible or invisible norm then is no longer the point of reference for legal evaluation today. Ignoring the context, once convenient, is no longer permissible in our current constitutional democracy which deals with the real lives as lived by real people today. Our equality jurisprudence accordingly emphasises the importance of the impact that an apparently neutral distinction could have on the dignity and sense of self-worth of the persons affected.

[152] It is precisely sensitivity to context and impact that suggest that equal treatment does not invariably require identical treatment. Thus corrective measures to overcome past and continuing discrimination may justify and may even require differential treatment.[152] Similarly, measures based on objective biological or other constitutionally neutral factors, such as those concerning toilet facilities or gender-specific search procedures, might be both acceptable and desirable.[153] The crucial determinant will always be whether human dignity is enhanced or diminished and the achievement of equality is promoted or undermined by the measure concerned. Differential treatment in itself does not necessarily violate the dignity of those

[152] See *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC).

[153] See *Weatherall v Canada (Attorney General)* [1993] 2 S.C.R 872 at 874 where it was held that it does not follow from the fact that female prison inmates are not subject to cross-gender frisk searches and surveillance that these practices result in discriminatory treatment of male inmates. Equality does not necessarily connote identical treatment; in fact, different treatment may be called for in certain cases to promote equality. Equality, in that context, does not demand that practices which are forbidden where male officers guard female inmates must also be banned where female officers guard male inmates. Given the historical, biological and sociological differences between men and women, it was clear that the effect of cross-gender searching is different and more threatening for women than for men. The important government objectives of inmate rehabilitation and security of the institution are promoted as a result of the humanising effect of having women in these positions. Moreover, Parliament's ideal of achieving employment equity was given a material application by way of this initiative. The proportionality of the means used to the importance of these ends would thus justify any breach of equality.

affected. It is when separation implies repudiation, connotes distaste or inferiority and perpetuates a caste-like status that it becomes constitutionally invidious.

[153] In the present matter, this means that whatever legislative remedy is chosen must be as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the intangibles as well as the tangibles involved.[154] 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.

Should there be an interim remedy?

[154] In coming to the conclusion that the declaration of invalidity should be suspended I am not unmindful of the fact that this case started simply with the desire of two people, who happen to be of the same-sex, to get married. The effect of the suspension of the order of invalidity will be to postpone the day when they can go to a registry and publicly say "I do." I have considered whether interim arrangements should be ordered similar to those provided for in *Dawood*.[155] I have come to the conclusion, however, that such an arrangement would not be appropriate in the present

[154] In the landmark case of *Brown v Board of Education* 347 US 483 (1954), the United States Supreme Court overturned the notorious separate but equal doctrine as affirmed in *Plessy v Ferguson* that had authorised segregated facilities for persons classified as Negroes. Chief Justice Warren stated:

> "We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though that physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe it does." (At 493.)

[155] Above n 132. When suspending a declaration of invalidity of a provision concerning certain privileges of immigrants married to South Africans, this Court provided in the order for a set of interim guidelines to fill the gap. At paras 64-8.

matter. It is necessary to remember at all times that what is in issue is a question of status. Interim arrangements that would be replaced by subsequent legislative determinations by Parliament would give to any union established in terms of such a provisional scheme a twilight and impermanent character out of keeping with the stability normally associated with marriage. The dignity of the applicants and others in like situation would not be enhanced by the furnishing of what would come to be regarded as a stop-gap mechanism.

[155] Lying at the heart of this case is a wish to bring to an end, or at least diminish, the isolation to which the law has long subjected same-sex couples. It is precisely because marriage plays such a profound role in terms of the way our society regards itself, that the exclusion from the common law and Marriage Act of same-sex couples is so injurious, and that the foundation for the construction of new paradigms needs to be steadily and securely laid. It is appropriate that Parliament be given a free hand, within the framework established by this judgment, to shoulder its responsibilities in this respect.

The period of suspension of invalidity

[156] As I have shown, Parliament has already undertaken a number of legislative initiatives which demonstrate its concern to end discrimination on the ground of sexual orientation.[156] Aided by the extensive research and specific proposals made by the SALRC, there is no reason to believe that Parliament will not be able to fulfil its

[156] See para 115 of this judgment.

responsibilities in the light of this judgment within a relatively short time. As was pointed out in argument, what is in issue is not a fundamental new start in legislation but the culmination of a process that has been underway for many years. In the circumstances it would be appropriate to give Parliament one year from the date of the delivery of this judgment to cure the defect.

What should happen if Parliament fails to cure the defect?

[157] Attention needs to be given to the situation that would arise if Parliament fails timeously to cure the under-inclusiveness of the common law and the Marriage Act. Two equally untenable consequences need to be avoided. The one is that the common law and section 30(1) of the Marriage Act cease to have legal effect. The other unacceptable outcome is that the applicants end up with a declaration that makes it clear that they are being denied their constitutional rights, but with no legal means of giving meaningful effect to the declaration; after three years of litigation Ms Fourie and Ms Bonthuys will have won their case, but be no better off in practice.

[158] What justice and equity would require, then, is both that the law of marriage be kept alive and that same-sex couples be enabled to enjoy the status and benefits coupled with responsibilities that it gives to heterosexual couples. These requirements are not irreconcilable. They could be met by reading into section 30(1) of the Marriage Act the words "or spouse" after the words "or husband", as the Equality Project proposes.

[159] Reading-in of the words "or spouse" has the advantage of being simple and direct. It involves minimal textual alteration. The values of the Constitution would be upheld. The existing institutional mechanisms for the celebration of marriage would remain the same. Budgetary implications would be minimal.[157] The long-standing policy of the law to protect and enhance family life would be sustained and extended.[158] Negative stereotypes would be undermined.[159] Religious institutions would remain undisturbed in their ability to perform marriage ceremonies according to their own tenets, and thus if they wished, to celebrate heterosexual marriages only. The principle of reasonable accommodation could be applied by the state to ensure that civil marriage officers who had sincere religious objections to officiating at same-sex marriages would not themselves be obliged to do so if this resulted in a violation of their conscience.[160] If Parliament wished to refine or replace the remedy with another legal arrangement that met constitutional standards, it could still have the last word.[161]

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[157] *Home Affairs* above n 44 at para 74.

[158] Id at paras 74-5.

[159] Id

[160] In *Christian Education* above n 73 at para 35, this Court held that:

> "The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, *the State should, wherever reasonably possible, 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*." (My emphasis.)

[161] *Home Affairs* above n 44 at para 76.

[160] Before I conclude this judgment I must stress that it has dealt solely with the issues directly before the Court. I leave open for appropriate future legislative consideration or judicial determination the effect, if any, of this judgment on decisions this Court has made in the past concerning same-sex life partners who did not have the option to marry. Similarly, this judgment does not pre-empt in any way appropriate legislative intervention to regulate the relationships (and in particular, to safeguard the interests of vulnerable parties[162]) of those living in conjugal or non-conjugal family units, whether heterosexual or gay or lesbian, not at present receiving legal protection. As the SALRC has indicated, there are a great range of issues that call for legislative attention. The difficulty of providing a comprehensive legislative response to all the many people with a claim for legal protection cannot, however, be justification for denying an immediate legislative remedy to those who have successfully called for the furnishing of relief as envisaged by the Constitution. Whatever comprehensive legislation governing all domestic partnerships may be envisaged for the future, the applicants have established the existence of clearly identified infringements of their rights, and are entitled to specific appropriate relief.

[161] In keeping with this approach it is necessary that the orders of this Court, read together, make it clear that if Parliament fails to cure the defect within twelve months, the words "or spouse" will automatically be read into section 30(1) of the Marriage Act. In this event the Marriage Act will, without more, become the legal vehicle to

[162] See *Volks* above n 75 at paras 67-8.

enable same-sex couples to achieve the status and benefits coupled with responsibilities which it presently makes available to heterosexual couples.

Costs

[162] The applicants in the cross-appeal and the applicants in the application for direct access to this Court, have both been substantially successful. It is appropriate that they should receive their costs, such costs to include the costs of two counsel.

THE ORDER

1. In the matter between the Minister of Home Affairs and the Director-General of Home Affairs and Marié Adriaana Fourie and Cecelia Johanna Bonthuys, CCT 60/04, the following order is made:

a) The application for leave to appeal against the judgment of the Supreme Court of Appeal by the Minister of Home Affairs and the Director-General of Home Affairs is granted.

b) The application for leave to cross-appeal against the judgment of the Supreme Court of Appeal by Marié Adriaana Fourie and Cecelia Johanna Bonthuys is granted.

c) The order of the Supreme Court of Appeal is set aside and replaced by the following order:

    (i) The common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it does not permit

same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples.

(ii) The declaration of invalidity is suspended for twelve months from the date of this judgment to allow Parliament to correct the defect.

d) The Minister of Home Affairs and the Director-General of Home Affairs are ordered to pay the costs of the respondents, including the costs of two counsel, in the High Court, the Supreme Court of Appeal and in respect of the appeal heard in the Constitutional Court.

2. In the matter between the Lesbian and Gay Equality Project and Eighteen Others and the Minister of Home Affairs, the Director General of Home Affairs and the Minister of Justice and Constitutional Development, CCT 10/05, the following order is made:

a) The application by the Lesbian and Gay Equality Project and Eighteen Others for direct access is granted.

b) The common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples.

c) The omission from section 30(1) of the Marriage Act 25 of 1961 after the words “or husband” of the words “or spouse” is declared to be inconsistent with the Constitution, and the Marriage Act is declared to be invalid to the extent of this inconsistency.

d) The declarations of invalidity in paragraphs (b) and (c) are suspended for 12 months from the date of this judgment to allow Parliament to correct the defects.

e) Should Parliament not correct the defects within this period, Section 30(1) of the Marriage Act 25 of 1961 will forthwith be read as including the words "or spouse" after the words "or husband" as they appear in the marriage formula.

f) The Minister and Director-General of Home Affairs and the Minister of Justice and Constitutional Development are ordered to pay the applicants' costs, including the costs of two counsel in the Constitutional Court.

Langa CJ, Moseneke DCJ, Mokgoro J, Ngcobo J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Sachs J.

O'REGAN J:

[163] There is very little in the comprehensive and careful judgment of Sachs J with which I disagree. I agree that the application for direct access should be granted. The issues raised by the Equality Project are inextricably intertwined with the issues raised in the application for leave to appeal and the decision on the application for leave to appeal will inevitably determine many of the issues in the Equality Project

application. In addition, granting direct access will assist the resolution of the issues in the application for leave to appeal. Finally, there are no disputes of fact to be determined that would deter the grant of direct access.

[164] I also agree with Sachs J, for the reasons given by him, as well as for the reasons given in both judgments in the Supreme Court of Appeal, that the common-law definition of marriage in excluding gay and lesbian couples from marriage constitutes unfair discrimination on the grounds of sexual orientation in breach of section 9 of the Constitution. Similarly, and for the same reasons, section 30 of the Marriage Act, 25 of 1961, is in conflict with the same constitutional provision. I need add nothing to the comprehensive judgment of Sachs J on this score.

[165] The difference between his judgment and this, therefore, lies solely in one significant area, namely, that of remedy. How best should these clear constitutional infringements be remedied by this Court? In *S v Bhulwana; S v Gwadiso*[1] this Court held that it is an important principle of the law of constitutional remedies that successful litigants should ordinarily obtain the relief they seek. Without doubt there are exceptions to this rule. A court must consider in each case whether there are other considerations of justice or equity which would warrant an exception to this key precept.[2] In this case, Sachs J concludes that this case does involve considerations which warrant such an exception, and he accordingly proposes an order suspending

[1] *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

[2] See *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) at paras 26-29 and para 50; also see the judgment of Sachs J at para 133.

the declaration of invalidity for twelve months. The effect of this order is that gay and lesbian couples will not be permitted to marry during this period.

[166] His main reasons for this order are firstly, that there are at least two ways in which the unconstitutionality can be remedied, as recommended by the South African Law Reform Commission; and that given these alternatives, and the important democratic and legitimating role of the legislature in our society, it is appropriate to leave it to Parliament to choose between these courses of action, or any other which might be constitutional. A second and equally important reason that he gives is that, as marriage involves a question of personal status, it would lead to greater stability if such matters were to be regulated by an Act of Parliament rather than the courts.

[167] I am not persuaded that these considerations can weigh heavily in the scales of justice and equity. We are concerned in this case with a rule of the common law developed by the courts, the definition of marriage. The provisions of section 30 of the Marriage Act rest on that definition, the definition does not arise from the provisions of the legislation. As a definition of the common law, the responsibility for it lies, in the first place, with the courts. It is the duty of the courts to ensure that the common law is in conformity with the Constitution, as this Court held in *Carmichele*.[3] This is not to say that both the common law definition and the provisions of the Act could not be altered by appropriate legislative intervention. The question is, however, whether it is appropriate in this case for a court to suspend an order of invalidity, thus

[3] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 33.

denying successful litigants immediate relief, in order to give Parliament an opportunity to enact legislation to do both.

[168] In my view, it is not. It is true that there is a choice for the legislature to make, but on the reasoning of the majority judgment, there is not a wide range of options. If as Sachs J correctly concludes, it is not appropriate to deny gays and lesbians the right to the same status as heterosexual couples, the consequence is that, whatever the legislative choice, it is a narrow one which will affect either directly or indirectly all marriages. The choice as to how regulate to these relationships will always lie with Parliament and will be unaffected by any relief we might grant in this case.

[169] In my view, this Court should develop the common-law rule as suggested by the majority in the Supreme Court of Appeal, and at the same time read in words to section 30 of the Act that would with immediate effect permit gays and lesbians to be married by civil marriage officers (and such religious marriage officers as consider such marriages not to fall outside the tenets of their religion). Such an order would mean simply that there would be gay and lesbian married couples at common law which marriages would have to be regulated by any new marital regime the legislature chooses to adopt. I cannot see that there would be any greater uncertainty or instability relating to the status of gay and lesbian couples than in relation to heterosexual couples. The fact that Parliament faces choices does not, in this case, seem to me to be sufficient for this Court to refuse to develop the common law and, in

an ancillary order, to remedy a statutory provision, reliant on the common law definition, which is also unconstitutional.

[170] The doctrine of the separation of powers is an important one in our Constitution[4] but I cannot see that it can be used to avoid the obligation of a court to provide appropriate relief[5] that is just and equitable[6] to litigants who successfully raise a constitutional complaint. The exceptions to the principle established in *Bhulwana*'s

[4] *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at paras 60-63, *S v Dodo* 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) at para 33, *Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others* 2002 (1) SA 1 (CC); 2001 (11) BCLR 1137 (CC) at para 37.

[5] Section 38 of the Constitution:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are–
>
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members."

[6] Section 172 of the Constitution:

> "(1) When deciding a constitutional matter within its power, a court–
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable, including–
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.
>
> (2) (a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
> (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
> (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
> (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

case must arise in other circumstances, where the relief cannot properly be tailored by a court,[7] or where even though a litigant would otherwise be successful, other interests or matters would preclude an order in his or her favour,[8] or where an order would otherwise produce such disorder or administrative difficulties that the interests of justice served by an order in favour of a successful litigant are outweighed by the social dislocation such an order might occasion.[9] The importance of the principle that a successful litigant should obtain the relief sought has been acknowledged by this Court through the grant of interim relief where an order of suspension is made to ensure that constitutional rights are infringed as little as possible in the period of suspension.[10]

[171] There can be no doubt that it is necessary that unconstitutional laws be removed from our statute book by Parliament. It is equally necessary that provisions of the common law which conflict with the Constitution are developed in a manner that renders them in conformity with it. It would have been desirable if the unconstitutional situation identified in this matter had been resolved by Parliament without litigation. The corollary of this proposition, however, is not that this Court

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[7] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at paras 63-64; *Fraser v Naude and Others* 1999 (11) BCLR 1357 (CC) at paras 9-10.

[8] *Fraser* id.

[9] *Tsotetsi v Mutual and Federal Insurance Co Ltd* 1997 (1) SA 585 (CC); 1996 (11) BCLR 1439 (CC) at para 10.

[10] See for example, *Dawood* above n 7 at paras 66-67, *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC); 2000 (11) BCLR 1235 (CC) at para 29-30, *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at paras 130-31.

should not come to the relief of successful litigants, simply because an Act of Parliament conferring the right to marry on gays and lesbians might be thought to carry greater democratic legitimacy than an order of this Court. The power and duty to protect constitutional rights is conferred upon the courts and courts should not shrink from that duty. The legitimacy of an order made by the Court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution. Time and again, there will be those in our broader community who do not wish to see constitutional rights protected, but that can never be a reason for a court not to protect those rights.

[172] There is one further comment I wish to add. It does not seem to me that an order developing the common law, as ordered by the majority in the Supreme Court of Appeal, coupled with an order reading in the words "or spouse" to the relevant provisions of the Marriage Act would undermine the institution of marriage at all. This Court has noted on several occasions the important role that institution plays in our society.[11] Permitting those who have been excluded from marrying to marry can only foster a society based on respect for human dignity and human difference. Nor will it undermine the special role of marriage as recognised by different religions. Such marriages draw their strength and character from religious beliefs and practices. The fact that gay and lesbian couples are permitted to enter civil marriages should not undermine the strength or meaning of those beliefs.

[11] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 58, *Dawood* above n 7 at paras 30-31, *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC) at para 22.

[173] In sum, I dissent from the judgment of Sachs J in one respect. I would not suspend the order of invalidity as proposed by Sachs J. In my view, the Court should make an order today which has immediate prospective effect. Such an order would not preclude Parliament from addressing the law of marriage in the future, and would simultaneously and immediately protect the constitutional rights of gay and lesbian couples pending parliamentary action.

Minister of Home Affairs and Another v Marié Adriaana Fourie and Another:
For the applicants: MTK Moerane SC and S Nthai instructed by the State Attorney, Johannesburg.

For the respondents: P Oosthuizen and T Kathri instructed by M van den Berg Attorneys.

For the first amicus curiae: John Jackson Smyth QC. (Written argument only.)

For the second amicus curiae: John Jackson Smyth QC.

For the third amicus curiae: GC Pretorius SC, DM Achtzehn, PG Seleka and JR Bauer instructed by Motla Conradie Attorneys

Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs and Others:
For the applicants: DI Berger SC and F Kathree instructed by Nicholls, Cambanis and Associates.

For the respondents: M Donen SC instructed by the State Attorney, Johannesburg.

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