

Application No. 40183/07, CHAPIN and CHARPENTIER v. France
European Court of Human Rights, Fifth Section

WRITTEN COMMENTS OF FIDH, ICJ, AIRE CENTRE & ILGA-EUROPE
Submitted on 27 October 2009

1. Prof. Robert Wintemute, School of Law, King's College London, respectfully submits these Written Comments on behalf of FIDH (*Fédération Internationale des ligues des Droits de l'Homme*), ICJ (International Commission of Jurists), AIRE Centre (Advice on Individual Rights in Europe), and ILGA-Europe (European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association). For their interest and expertise, see "Application for leave to submit written comments" (7 July 2009), granted 31 Aug. 2009 (Rule 44(2), Rules of Court).

Introduction

2. Since 1989, national legislatures and courts in Council of Europe (CoE) member states and other democratic societies have been accepting, at an ever faster rate, that lesbian women and gay men have the same human capacity as heterosexual women and men to fall in love with another person, establish a long-term emotional and sexual relationship, set up a joint home and, if they wish, raise children with their partner. These national institutions have understood that same-sex couples therefore have the same emotional and practical needs as different-sex couples to have their relationships recognised by the law, and that same-sex couples can justly claim access to the same rights and obligations as different-sex couples.

3. The first judgment of the European Court of Human Rights (ECtHR) to reflect these legal and social developments was *Karner v. Austria* (24 July 2003). The ECtHR held that unmarried same-sex couples must generally be granted the same rights and obligations as unmarried different-sex couples. The case of *Stéphane Chapin & Bertrand Charpentier* raises the questions of whether European consensus with regard to equal treatment of same-sex couples has now grown enough to permit the ECtHR: (1) to declare that a same-sex couple (without children) enjoys "family life" for the purposes of Art. 8, European Convention on Human Rights ("EConvHR"); (2) to interpret Art. 12 (alone or combined with Art. 14) as requiring CoE member states to grant equal access to legal (as opposed to religious) marriage to same-sex couples; or (3) to interpret Art. 14 combined with Art. 8 ("family life" or "private life") as prohibiting CoE member states from: (a) attaching rights and obligations to legal marriage, (b) excluding same-sex couples from legal marriage, and (c) providing same-sex couples with no other means of proving their relationships in order to qualify for these rights and obligations.

I. Do two men or two women who live together as an unmarried couple (without children) enjoy "family life" under Art. 8?

4. In Europe in 2009, two men or two women who live together in a long-term relationship clearly enjoy "family life" under Art. 8 of the EConvHR, interpreted in light of social change as a "living instrument". This interpretation is supported by all the evidence in these Written Comments of the growing consensus that same-sex

couples should enjoy the same legal rights and obligations as different-sex couples. Whenever a different-sex couple is considered a "family", a same-sex couple in the same circumstances should be considered a "family". It is implicit in several of the ECtHR's judgments and decisions that an unmarried different-sex couple (without children) enjoys "family life".¹ In *Emonet v. Switzerland* (13 Dec. 2007), the ECtHR made it absolutely clear that "partners" or a "couple" who "live together" may enjoy "family life", without being married or having children together (emphasis added): "34. ... the notion of a 'family', for the purposes of Article 8, is not confined solely to marriage-based relationships but may also encompass other *de facto* 'family ties' where **partners live together** without being married ...36. ... a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together [children are a relevant factor but are not essential, because commitment can be demonstrated in other ways]." Nothing in *Emonet* suggests that the "partners" or the "couple" cannot be of the same sex. Indeed, it would be discrimination based on sexual orientation, contrary to the principle in *Karner*, to interpret "family life" as excluding unmarried same-sex couples.

5. In *Karner* (paras. 39-43), the ECtHR found no justification for excluding unmarried same-sex couples from rights granted to unmarried different-sex couples. The ECtHR's references to "the family in the traditional sense" (to which Austria had added unmarried different-sex couples without children) suggest that Mr. Karner's "less traditional family" (an unmarried same-sex couple without children) also enjoyed "family life". The Interveners respectfully urge the ECtHR to state that a same-sex couple without children enjoys "family life", like a different-sex couple without children. Such a statement would be consistent with decisions of the highest courts of the UK, New York State, Canada and South Africa,² treating same-sex couples as families because of their mutual care and support.

6. It is important that the ECtHR make such a statement, in one of its judgments, to provide guidance to national governments and courts.³ In an 8-year-old admissibility decision, *Mata Estevez v. Spain* (10 May 2001), the ECtHR said that "according to the established case-law of the Convention institutions [as of May 2001], long-term homosexual relationships between two men do not fall within the scope of the right to respect for family life". In 2001, the ECtHR relied on two very old (1983 and 1986) admissibility decisions of the European Commission of Human Rights ("ECommHR"), which Mr. Mata Estevez was probably unable to challenge,⁴ and which the ECtHR implicitly overruled in *Karner* in 2003 (ie, the ECommHR's opinion that the Convention permits unequal treatment of unmarried different-sex and same-sex couples). Despite *Karner*, the French Government's observations (para. 37) cite *Mata Estevez* as establishing that an unmarried same-sex couple without children

¹ For a more detailed argument, see Application No. 30141/04, *Schalk & Kopf v. Austria*, ECtHR, First Section, "Written Comments of FIDH, ICJ, AIRE Centre & ILGA-Europe", 26 June 2007.

² See *Fitzpatrick*, [1999] 4 All E.R. 705 (UK); *Braschi*, 543 N.E.2d 49 (New York 1989); *M. v. H.*, [1999] 2 S.C.R. 3, paras. 58, 73 (Canada); *National Coalition for Gay & Lesbian Equality*, Case CCT10/99 (2 Dec. 1999), paras. 49, 53 (South Africa).

³ See *Schalk & Kopf*, "Written Comments", *supra* n. 1, at p. 3, n 2.

⁴ He appears not to have been represented by a lawyer (see "The Facts", first two sentences).

does not enjoy family life. Two judges of the United Kingdom's highest court, the House of Lords, cited *Mata Estevez* in the same way in *M.*, [2006] UKHL 11.⁵

II. Should Art. 12 (alone or combined with Art. 14) be interpreted as requiring equal access to legal marriage for same-sex couples?

7. The ECtHR should interpret the EConvHR as requiring CoE member states to grant equal access to legal marriage to same-sex couples (two women or two men who are legally, physically and psychologically of the same sex, and neither of whom has ever undergone gender reassignment), as well as to different-sex couples in which one partner is transsexual (*Christine Goodwin v. UK*, 11 July 2002).

A. Are there any arguments against this interpretation?

8. The argument for interpreting Art. 12 (alone or combined with Art. 14) in this way is almost unanswerable. First, excluding same-sex couples from the public institution of legal marriage involves a difference in treatment that is directly based on sexual orientation. In France, different-sex couples are permitted to marry if they are not closely related, are not already married, and are willing and able to consent. Same-sex couples satisfying the same conditions are not permitted to marry.

9. Second, differences in treatment based on sexual orientation, like those based on race, religion or sex, can only be justified by "particularly serious reasons".⁶

10. Third, no such reasons exist. As the ECtHR said in *Karner*: "41. ... It must ... be shown that it was necessary in order to achieve [the] aim [of protecting the family in the traditional sense] to exclude ... persons living in a homosexual relationship ..." The same reasoning applies to legal marriage. How does excluding same-sex couples from access to legal marriage "protect" different-sex couples, or in any way improve their lives? There is no shortage of marriage licenses and no need to ration them. Tradition is not a justification (cf. the long tradition of discriminating against women and ethnic or religious minorities), and sending the symbolic message that same-sex couples are inferior to different-sex couples is not a legitimate aim.

11. The only factual difference between different-sex and same-sex couples is that most different-sex couples are able to procreate without a third party's assistance, whereas no same-sex couple is able to do so. But in *Christine Goodwin*, the ECtHR rejected as justifications both Ms. Goodwin's lack of procreative capacity, and the fact that she was legally male and able to marry a woman: "98. ... Art. 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to [marry] ... 101. ... [I]t is artificial to assert that post-operative transsexuals ... remain able to marry a person of their former opposite sex. The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. ... [S]he may therefore claim that the very essence of her right to marry has been infringed." Thus, in the case of two men, it is irrelevant that

⁵ *M.*, which is similar to *Karner*, is now *J.M. v. UK* (No. 37060/06). See R. Wintemute, "Same-Sex Couples in ... *M.*", [2006] *Eur. Hum. Rights Law Review* 722, 726-30.

⁶ *Karner v. Austria* (24 July 2003), para. 37; *Mouta v. Portugal* (21 Dec. 1999), para. 36; *Smith & Grady v. UK* (27 Sept. 1999), para. 97; *Dudgeon v. UK* (22 Oct 1981), para 52.

they cannot produce a child on their own, or that each man could marry a woman.

12. The ECtHR also observed: "100. ... There have been major social changes in the institution of marriage since the adoption of the Convention [in 1950] ... Art. 9 of the [2000] [EU] Charter of Fundamental Rights departs, no doubt deliberately, from the wording of Art. 12 [EConvHR] in removing the reference to men and women."⁷

13. There is a long-term international trend towards the elimination of all discrimination in legislation that is directly based on sexual orientation.⁸ This trend began with repealing the death penalty for sexual activity between men, and will end when legal marriage is open to same-sex couples in every democratic society. The evolution towards full legal equality for lesbian and gay individuals and same-sex couples has been completed in 5 CoE member states (the Netherlands, Belgium, Spain, Norway, Sweden), as well as in Canada, South Africa and 5 US states (Mass., Connecticut, Iowa, Vermont, New Hampshire).⁹ Luxembourg, Portugal and Slovenia could follow in 2010,¹⁰ as could Denmark and Iceland (in view of Norway and Sweden). A New York State bill (passed by the Assembly) awaits Senate approval.

B. Have any national courts ordered that same-sex couples be allowed to marry?

14. In the Netherlands, Belgium, Spain, Norway and Sweden, as well as the U.S. states of Vermont and New Hampshire, the final step¹¹ needed for full legal equality was taken by the national legislature. In Canada, South Africa, and the US states of Massachusetts, California, Connecticut and Iowa, it resulted from judicial decisions (implemented by the national legislature in Canada and South Africa; reversed by a referendum in California; see Appendix). The **British Columbia Court of Appeal** held in *EGALE Canada* (1 May 2003), 225 D.L.R. (4th) 472, that excluding same-sex couples from legal marriage is discrimination violating the Canadian Charter. The B.C. Court could not see: "127. ... how according same-sex couples the benefits flowing to opposite-sex couples in any way inhibits, dissuades or impedes the formation of heterosexual unions. ... 156. ... [T]he redefinition of marriage to include same-sex couples ... is the only road to true equality for [them]. Any other form of recognition of [their] relationships, including the parallel institution

⁷ Art. 9 is a "modernised" version of Art. 12, which "neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex" ("Explanations relating to the Charter", http://www.europarl.europa.eu/charter/convent49_en.htm), and will become legally binding in all 27 EU member states (see new Art. 6(1) of the EU Treaty), if the Treaty of Lisbon is ratified. The "modernisation" of Art. 12 was not necessary, because it does not specify, in its English version ("men and women") or its French version ("l'homme et la femme"), that a man must marry a woman, or that a woman must marry a man: the text is not "a man and a woman" or "un homme et une femme". Cf. Constitution of Spain (Art. 32: "El hombre y la mujer tienen derecho a contraer matrimonio con plena igualdad jurídica."; "Men and women have the right to contract marriage with full legal equality.").

⁸ See R. Wintemute, "Same-Sex Marriage: When Will It Reach Utah?", (2006) 20 *Brigham Young University Journal of Public Law* (Provo, UT, USA) 527.

⁹ See Appendix. Legislation in Maine is subject to a referendum on 3 Nov. 2009. The marriages of same-sex couples are not yet recognised by US federal law.

¹⁰ See Luxembourg: <http://www.gouvernement.lu/gouvernement/programme-2009/programme-2009/programme-gouvernemental-2009.pdf> (p. 108); Portugal: <http://www.ps.pt/media/>

[Programa_de_Governo_do_PS.pdf](http://www.ps.pt/media/Programa_de_Governo_do_PS.pdf) (p. 76); Slovenia: new Family Code, 21 Sept. 2009 draft.

¹¹ Second-parent or joint adoption usually precedes marriage. See Wintemute, *supra* n. 8, 532-33.

of [registered domestic partnerships], falls short of true equality. This Court should not ... grant a remedy which makes same-sex couples 'almost equal', or ... leave it to governments to choose amongst less-than-equal solutions."

15. The **Ontario Court of Appeal** agreed in *Halpern* (10 June 2003), 65 O.R. (3d) 161: "107. ... [S]ame-sex couples are excluded from a fundamental societal institution – marriage ... and the benefits that are available only to married persons ... Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships ... [and] offends the dignity of persons in same-sex relationships." The Ontario Court ordered the issuance of marriage licenses to same-sex couples that day. The B.C. Court followed on 8 July 2003 (228 D.L.R. (4th) 416), as did the Québec Court of Appeal on 19 March 2004.¹² A federal law (approved by the Supreme Court)¹³ extended these appellate decisions to all 10 provinces and 3 territories from 20 July 2005.¹⁴

16. On 18 Nov. 2003, the **Supreme Judicial Court of Massachusetts** reached the same conclusion in *Goodridge*, 798 N.E.2d 941: "The Massachusetts Constitution ... forbids the creation of second-class citizens. ... [Same-sex couples are] deprived of membership in one of our community's most rewarding and cherished institutions. ... [C]ivil marriage ... is a 'social institution of the highest importance' ... a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family ... [which] fulfils yearnings for security, safe haven, and connection that express our common humanity ... Without the right to ... choose to marry--one is excluded from the full range of human experience ... 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 ... [different-race marriage] devalues [same-race] marriage ... The marriage ban works a deep and scarring hardship on a ... segment of the community for no rational reason[,] ... suggest[ing] that [it] is rooted in persistent prejudices against persons who are ... homosexual. ... [C]ivil marriage mean[s] the voluntary union of two persons as spouses, to the exclusion of all others."

17. On 3 Feb. 2004, the Massachusetts Court found unconstitutional a bill creating "civil unions" for same-sex couples:¹⁵ "The history of our nation has demonstrated that separate is seldom, if ever, equal. ... '[C]ivil marriage' and 'civil union' is ... a considered choice of language that reflects a demonstrable assigning of same-sex ... couples to second-class status. ... [T]he question ... 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 ..., and withhold from that class the right to participate in the institution of civil marriage ... Maintaining a second-class citizen status for same-sex couples ... is the constitutional infirmity ..." Same-sex couples began to marry on 17 May 2004.

18. On 30 Nov. 2004, **South Africa's Supreme Court of Appeal** agreed with the Canadian and Massachusetts courts, and restated the common-law definition of marriage as: "the union between two persons to the exclusion of all others for life."¹⁶ On 1 Dec. 2005, **South Africa's Constitutional Court** concluded that the remaining

¹² *La Ligue Catholique pour les Droits de l'Homme v. Michael Hendricks & René Leboeuf*.

¹³ *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698.

¹⁴ See R. Wintemute, "Sexual Orientation and the Charter", (2004) 49 *McGill Law Journal* 1143; Civil Marriage Act, Statutes of Canada 2005, chapter 33.

¹⁵ *In re the Opinions of the Justices to the Senate*, 802 N.E.2d 605.

¹⁶ *Fourie v. Minister of Home Affairs* (30 Nov. 2004), Case No. 232/2003.

statutory obstacle to marriage for same-sex couples was discriminatory: "71. ... The exclusion of same-sex couples from ... marriage ... represents a harsh if oblique statement by the law that same-sex couples are outsiders ... that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples ... that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples ... 81. ... Same-sex unions continue ... to be treated with the same degree of repudiation that the state until [1985] reserved for interracial unions ... [The remedy] 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. ... 150. ... Historically the concept of 'separate but equal' served as a threadbare cloak for covering distaste for ... the group subjected to segregation ..."¹⁷ South Africa's Parliament interpreted this judgment as not permitting the segregation of same-sex couples. On 30 Nov. 2006, the Civil Union Act (No. 17 of 2006) came into force, allowing any couple, different-sex or same-sex, to contract a "civil union" and choose to have it known as a "marriage" or a "civil partnership".

19. The judicial trend gained further strength with the **Supreme Court of California's** decision *In re Marriage Cases* (15 May 2008).¹⁸ Almost sixty years after it struck down a law banning "the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race", in *Perez v. Sharp* (1 Oct. 1948),¹⁹ the Calif. Court found that legislation excluding same-sex couples from legal marriage breached (prima facie): (a) their fundamental right to marry, an aspect of the right of privacy (pp. 49, 79); and (b) their right to equal protection based on sexual orientation, a "suspect classification" (pp. 97-98, 101, 106). The Court subjected the legislation to "strict scrutiny" and found (pp. 115-121) that it was not "necessary" to further a "compelling constitutional interest", even though same-sex couples could acquire nearly all the rights and obligations attached to marriage by Calif. law through a "separate but equal" institution known as "domestic partnership": "... [I]f we have learned anything from the significant evolution in ... societal views and official policies toward members of minority races and ... women ..., it is that even the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that ... is not recognized or appreciated by those not directly harmed [in this case, heterosexual persons]. ... [T]he [legislation] clearly is not necessary to preserve the rights and benefits of marriage currently enjoyed by opposite-sex couples. ... 'There are enough marriage licenses to go around for everyone.' ... [P]ermitting same-sex couples access to the designation of marriage will not alter the substantive nature of the legal institution ... [or] impinge upon ... religious freedom ... no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs. ... [B]ecause of the historic disparagement of gay persons, ... a distinction in nomenclature by which the term 'marriage' is withheld ... is all the more likely to cause [a] parallel institution ['domestic partnership'] ... to be considered a mark of second-class citizenship. ... [T]he [the Family Code's text] limiting ... marriage to a union 'between a man and a

¹⁷ *Minister of Home Affairs v. Fourie; Lesbian & Gay Equality Project* (Cases CCT60/04, CCT10/05).

¹⁸ See <http://www.courtinfo.ca.gov/opinions/archive/S147999.PDF>.

¹⁹ *Perez*, 32 Cal. 2d 711, paved the way for *Loving v. Virginia* (12 June 1967), 388 U.S. 1.

woman' is unconstitutional and must be stricken ... [T]he [rest] must be understood as making ... marriage available both to opposite-sex and same-sex couples."

20. The Calif. Court's decision allowed same-sex couples to marry in Calif. from 16 June 2008 until 4 Nov. 2008, when 52% of voters in a referendum supported an amendment to the Calif. Constitution (Proposition 8).²⁰ Prop. 8 converted the rule denying access to legal marriage to same-sex couples from a sub-constitutional rule (adopted after the 2000 referendum on Prop. 22 and struck down by the Court in 2008) to a constitutional rule that can only be repealed after a second referendum. The Court upheld Prop. 8 in *Strauss v. Horton* (26 May 2009), but maintained the validity of the legal marriages of 18,000 same-sex couples who married before 4 Nov. 2008.²¹ Repeal of Prop. 8 is likely to happen within 5 years, because support for the exclusion of same-sex couples from legal marriage fell from 61% in the 2000 referendum on Prop. 22 to 52% in the 2008 referendum on Prop. 8.²² Prop. 8 can thus be considered a temporary suspension of the Court's 15 May 2008 decision, which merely demonstrates that the Calif. Constitution is too easy to amend.

21. On 10 Oct. 2008, the **Supreme Court of Connecticut** agreed with the Calif. Court in *Kerrigan v. Commissioner of Public Health*.²³ As in Calif., same-sex couples in Connecticut had access to all or nearly all the rights and obligations attached by state law to marriage through a "separate but equal" institution known as "civil union". Yet the Court held: "[p. 11] In view of the exalted status of marriage in our society, it is hardly surprising that civil unions are perceived to be inferior ... Although [they] ... embody the same legal rights ..., they are by no means 'equal'. ... [Marriage] is an institution of transcendent historical, cultural and social significance, whereas [civil union] most surely is not. Even though ... [this] differential treatment ... may be characterized as symbolic or intangible ... it is no less real than more tangible forms of discrimination, at least when ... [it] singles out a group that historically has been the object of scorn, intolerance, ridicule or worse. ... [p. 64] Tradition alone never can provide sufficient cause to discriminate against a protected class ... [p. 66] ... [W]e do not exceed our authority by mandating equal treatment for gay persons; in fact, any other action would be an abdication of our responsibility. [p. 67] ... [O]ur conventional understanding of marriage must yield to a more contemporary appreciation of the rights entitled to constitutional protection ... [which] leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice. ... [p. 5] We conclude that, in light of the history of pernicious discrimination faced by gay men and lesbians, ... the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm[,] ... that ... our state scheme discriminates on the basis of sexual orientation, ... and ... [that] the state has failed to provide sufficient justification ..."

22. On 3 April 2009, in *Varnum v. Brien*,²⁴ the **Supreme Court of Iowa** became the first court in the central US to agree with those on the east and west coasts. Unlike the 4-3 majority decisions in Massachusetts, California and Connecticut, the Iowa decision was unanimous (7-0), like those in Ontario (3-0),

²⁰ Art. I, Sec. 7.5: "Only marriage between a man and a woman is valid or recognized in California."

²¹ See <http://www.courtinfo.ca.gov/opinions/documents/S168047.PDF> (pp. 12-13, 135).

²² See <http://primary2000.sos.ca.gov/returns/prop/00.htm>;

http://www.sos.ca.gov/elections/sov/2008_general/7_votes_for_against.pdf.

²³ See <http://www.jud.state.ct.us/external/supapp/archiveAROsop08.htm> (released 28 Oct. 2008).

²⁴ See [http://www.judicial.state.ia.us/wfData/files/Varnum/07-1499\(1\).pdf](http://www.judicial.state.ia.us/wfData/files/Varnum/07-1499(1).pdf).

British Columbia (3-0) and South Africa (9-0): "[p. 15] Our responsibility ... is to protect constitutional rights ..., even when the rights have not yet been broadly accepted, were at one time unimagined, or challenge a deeply ingrained practice or law viewed to be impervious to the passage of time. [pp. 30-31] [C]ivil marriage with a person of the opposite sex is as unappealing to a gay or lesbian person as civil marriage with a person of the same sex is to a heterosexual. Thus, the right of a gay or lesbian person ... to enter into a civil marriage only with a person of the opposite sex is no right at all. ... [pp. 64-67] State government can have no religious views, either directly or indirectly, expressed through its legislation. ... This ... is the essence of the separation of church and state. ... [C]ivil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals.... [O]ur constitutional principles ... require that the state recognize both opposite-sex and same-sex civil marriage. Religious doctrine and views contrary to this principle of law are unaffected ... A religious denomination can still define marriage as a union between a man and a woman ... The only difference is [that] *civil* marriage will now take on a new meaning that reflects a more complete understanding of equal protection of the law. ...[p. 67] The legislature has excluded a historically disfavored class of persons from a supremely important civil institution without a constitutionally sufficient justification."

23. As for national supreme courts in Europe, although no court has yet interpreted its national constitution as prohibiting the exclusion of same-sex couples from legal marriage, on 9 July 2009, **2 of 5 judges of the Tribunal Constitucional in Portugal dissented** from the majority's decision to uphold the exclusion, despite an express prohibition of sexual orientation discrimination (Art. 13(2) of Portugal's Constitution).²⁵ On 2 July 2009, the **Constitutional Court of Slovenia** held in ***Blažič & Kern v. Slovenia*** (U-I-425/06-10) that same-sex registered partners must be granted the same inheritance rights as different-sex spouses. On 7 July 2009, the **German Federal Constitutional Court** held (1 BvR 1164/07) that same-sex registered partners and different-sex spouses must be granted the same survivor's pensions.

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C. Should European consensus be decisive?

24. Is there any reason for the ECtHR not to extend its judgment in *Christine Goodwin* to the right of a same-sex couple to enter a legal marriage? The only difference between the claims of a different-sex couple (in which one partner is transsexual and has undergone gender reassignment) and a same-sex couple is the state of European consensus. In *Goodwin*, the ECtHR observed: "103. It may be noted from [Liberty's] materials ... that ... fewer countries permit the marriage of transsexuals in their assigned gender than recognise the change of gender itself. The Court is not persuaded however that this supports an argument for leaving the matter entirely to ... Contracting States as ... within their margin of appreciation ... 57. ... Liberty's survey indicated that 54% of Contracting States permitted such marriage ... while 14% did not ... The legal position in the remaining 32% was unclear."

25. As of 27 Oct. 2009, 5 of 47 CoE member states (10.6%) grant equal access to legal marriage to same-sex couples. Within a year or two, the adoption of

²⁵ See *Acórdão* 359/09 (9 July 2009), <http://w3.tribunalconstitucional.pt/acordaos/acordaos09/301-400/35909.htm> (*Declaração de Voto*: Judges Gil Galvão and Maria João Antunes).

legislation proposed by governments in Luxembourg, Portugal and Slovenia, as well as likely harmonisation of the legislation in Denmark and Iceland with that in Norway and Sweden, could bring the total to 10 of 47 member states (21.3%).

26. The Interveners strongly believe that it is inevitable that the ECtHR will hold, at some point, that the exclusion of same-sex couples from the public institution of legal marriage violates Art. 12 (alone or combined with Art. 14). The ECtHR need not wait until the majority of CoE member states have abolished this exclusion. The Interveners respectfully urge the ECtHR to consider attaching less weight to European consensus, and focussing instead on the absence of any justification for the difference in treatment. If the ECtHR decides to do so, and applies its *Karner* reasoning (*supra*, para. 10), the Interveners are confident that the ECtHR will reach the same conclusion as the courts in Ontario, British Columbia, Massachusetts, South Africa, California, Connecticut and Iowa, and the 2 dissenting judges in Portugal.

III. If the EConvHR does not yet require equal access to legal marriage for same-sex couples, is it indirect discrimination based on sexual orientation (contrary to Art. 14 combined with Art. 8, "family life" or "private life") to limit a particular right or benefit to married different-sex couples, but provide no means for same-sex couples to qualify?

27. On 28 Nov. 2006, the ECtHR's 4th Section declared inadmissible *Parry v. UK* (No. 42971/05), in which a gender reassignment had converted a different-sex couple into a same-sex couple. The couple's choices were to remain married as a legally different-sex couple and forgo legal recognition of the gender reassignment, or to divorce, obtain legal recognition that the spouse born male is female, and register a civil partnership as a same-sex couple. Under Art. 8, the 4th Section ruled that: "the applicants may ... give [their relationship] a legal status akin, if not identical to marriage, through a civil partnership which carries with it almost all the same legal rights and obligations". The 4th Section also concluded: "Art. 12 ... enshrines the traditional concept of marriage as being between a man and a woman ... While it is true that there are a number of Contracting States which have extended marriage to same-sex partners, this reflects their own vision of the role of marriage in their societies and does not ... flow from an interpretation of the fundamental right [in Art. 12] ... [T]he matter falls within the appreciation of the Contracting State ..."

28. *Parry* suggests that the ECtHR might not yet be ready to interpret Art. 12 (alone or combined with Art. 14) as requiring equal access to legal marriage for same-sex couples. But it is important to stress that the two women in *Parry* could secure almost all the rights and obligations attached to legal marriage through a UK "civil partnership".²⁶ This is clearly not the case for the "*pacte civil de solidarité*" in France.

A. Excluding same-sex couples from particular rights or benefits attached to legal marriage is prima facie indirect discrimination based on sexual orientation.

29. In *Thlimmenos v. Greece* (6 April 2000), the ECtHR recognised that: "44. [t]he [Art. 14] right not to be discriminated against in the enjoyment of [EConvHR] rights ... is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different. ... 48. ...

²⁶ The last few exceptions were removed by the Human Fertilisation and Embryology Act 2008.

[Greece] violated the applicant's right not to be discriminated against in the enjoyment of his right under Art. 9 ... by failing to introduce appropriate exceptions [eg, for persons convicted because of their religious beliefs] to the rule barring persons convicted of a felony from the profession of chartered accountants." This reasoning applies to a same-sex couple who seek a right or benefit attached to marriage but are legally unable to marry. Failure to treat them differently because of their legal inability to marry, by providing them with another means of qualifying for the right or benefit, requires an objective and reasonable justification.

30. The concept of indirect discrimination, recognised in *Thlimmenos*, is defined in Council Directive 2000/78/EC, Art. 2(2)(b): "an apparently neutral ... criterion... would put persons having a ... particular sexual orientation at a particular disadvantage compared with other persons unless [it] is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary." If there is no justification, governments must grant same-sex couples an exemption from a requirement that they be legally married to qualify for a particular right or benefit. E.g., an employer or pension scheme could justifiably maintain a marriage requirement for different-sex couples²⁷ (just as the rule on felony convictions could be maintained in *Thlimmenos*), but must exempt same-sex couples and find some alternative means for them to qualify (eg, a registered partnership certificate, a sworn statement, or other reasonable evidence of a committed relationship).

31. In *Christine Goodwin*, the ECtHR required CoE member states to legally recognise gender reassignment, but left the details of recognition to each member state. An obligation to exempt same-sex couples from a marriage requirement, to avoid indirect discrimination, would leave to member states the choice of the method used to do so. The ECtHR's approach in *Goodwin* (para. 85; see also 91, 93, 103) applies *mutatis mutandis*: "The Court ... attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems [of same-sex couples], than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of [same-sex couples] but of legal recognition of [their relationships]."

32. A member state would find at least 5 options within its margin of appreciation: (1) it could grant same-sex couples, who could prove the existence of their relationship for a reasonable period, a permanent exemption from the marriage requirement;²⁸ (2) it could grant the same exemption to unmarried different-sex couples; (3) it could grant a temporary exemption to same-sex couples until it had created an alternative registration system, with a name other than marriage, allowing same-sex couples to qualify; (4) it could grant access to the same system to different-sex couples; or (5) if it did not wish to grant the right or benefit to unmarried couples, or to create an alternative registration system, it could grant a temporary exemption to same-sex couples until it had time to pass a law granting them equal access to legal

²⁷ See *Irizarry v. Board of Education of City of Chicago*, 251 F.3d 604 (7th Cir. 2001).

²⁸ The European Court of Justice effectively granted such an exemption in *K.B.*, Case C-117/01 (7 Jan. 2004), which implicitly entitled Ms. K.B. and Mr. R. (her transsexual male partner) to an exemption from the marriage requirement until UK legislation was amended. If she had died on 8 Jan. 2004 (the day after the judgment), he would have been entitled to a survivor's pension even though he was not married to her (the UK had yet to implement *Goodwin*). Cf. *Maruko*, Case C-267/06 (1 April 2008) (Council Directive 2000/78/EC requires equal survivor's pensions for same-sex registered partners if national law places them "in a situation comparable to that of [different-sex] spouses").

marriage. It could also decide (subject to subsequent ECtHR supervision) whether any exceptions could be justified, eg, relating to parental rights.

B. Excluding same-sex couples from particular rights or benefits attached to legal marriage generally cannot be justified.

33. As the ECtHR said in *Karner*: "41. In cases in which the margin of appreciation ... is narrow, as ... where there is a difference in treatment based on ... sexual orientation, the principle of proportionality does not merely require that the measure chosen is ... suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude ... persons living in a homosexual relationship ..." The ECtHR found no evidence of necessity where the difference of treatment was between unmarried different-sex and same-sex couples. The necessity test is very hard to satisfy in relation to the exclusion of same-sex couples from access to legal marriage (see *supra*, paras. 8-11). The same will generally be true with regard to prima facie indirect discrimination resulting from applying a marriage requirement to same-sex couples who are unable to comply.

C. Consensus in European and other democratic societies increasingly supports finding an obligation to use some means to legally recognise same-sex couples.

34. There is an emerging consensus, in European and other democratic societies (see Appendix), that a government may not limit a particular right, benefit or obligation to married couples, and then tell same-sex couples that it is impossible for them to qualify for it, because they are not permitted to marry. Of the 47 CoE member states, 17 have already passed some kind of legislation permitting same-sex couples to register their relationships: Andorra, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Luxembourg, the Netherlands, Norway, Slovenia, Spain, Sweden, Switzerland, and the UK. Three more (Austria, Croatia and Portugal) have legislation recognising cohabiting same-sex couples. If Ireland passes a pending government bill permitting registration, the total number of member states would rise to 21 of 47 (44.7%). The total would also include any member state with widespread recognition of unmarried different-sex couples (other than Austria) that has already implemented *Karner*.

35. Outside of Europe, legislation has been adopted in Australia (federal level and all 8 states and territories), Canada (federal level and all 13 provinces and territories), New Zealand and South Africa. In the US, 14 of 50 states and the District of Columbia have granted substantial legal recognition to same-sex couples, under a registration system resulting from legislation or a judicial decision.

36. As for the argument that a marriage requirement puts same-sex couples at a particular disadvantage compared with different-sex couples, and is therefore indirect discrimination based on sexual orientation, it has been accepted by at least 3 US appellate courts²⁹ and South Africa's Constitutional Court.³⁰ In *Satchwell* (case of

²⁹ *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435 (Oregon Ct. of Appeals 1998); *Levin v. Yeshiva Univ.*, 754 N.E.2d 1099 (New York Ct. of Appeals 2001) (justification not considered); *Alaska Civil Liberties Union v. State of Alaska*, 122 P.3d 781 (Supreme Ct. of Alaska 2005).

³⁰ *National Coalition*, Case CCT10/99 (2 Dec. 1999); *Du Toit*, CCT40/01 (10 Sept. 2002); *Satchwell*, CCT45/01, CCT48/02 (25 July 2002, 17 March 2003); *J. & B.* (28 March 2003), CCT46/02.

a lesbian judge and her partner), the S.A. Court held that unmarried same-sex partners are entitled to the same employment benefits as married different-sex partners.

37. The Parliamentary Assembly of the CoE has recommended: (a) that member states "review their policies in the field of social rights and protection of migrants ... to ensure that homosexual partnership[s] and families are treated on the same basis as heterosexual partnerships and families", Recommend. 1470 (2000); and (b) that they "adopt legislation which makes provision for registered [same-sex] partnerships".³¹ The EU's European Parliament called for equal treatment of different-sex and same-sex couples in a 1994 resolution seeking to end "the barring of [same-sex] couples from marriage or from an equivalent legal framework".³²

38. In 2004, the EU's Council amended the Staff Regulations to provide for benefits for the non-marital partners of EU officials: "non-marital partnership shall be treated as marriage provided that ... the couple produces a legal document recognised as such by a Member State ... acknowledging their status as non-marital partners, ... [and] ... has no access to legal marriage in a Member State".³³

39. Finally, in 2008, the CoE's Committee of Ministers agreed that: "A staff member who is registered as a stable non-marital partner shall not be discriminated against, with regard to pensions, leave and allowances under the Staff Regulations ..., vis-à-vis a married staff member provided that ...: i. the couple produces a legal document recognised as such by a member state ... acknowledging their status as non-marital partners; ... v. the couple has no access to legal marriage in a member state."³⁴

Conclusion

40. There is a growing consensus in European and other democratic societies that same-sex couples must be provided with some means of qualifying for rights or benefits attached to marriage. As the ECtHR noted in *Smith & Grady v. UK* (27 Sept. 1999): "104. ... 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".³⁵

³¹ Recommend. 1474 (2000), para. 11(iii)(i). See also Resolution 1547 (2007), para. 34.14.

³² "Resolution on equal rights for homosexuals ... in the EC" (8 Feb. 1994), OJ C61/40 at 42, para. 14. Cf. "Resolution on respect for human rights in the [EU] ..." (16 March 2000), A5-0050/00, para. 57.

³³ Staff Regulations of [EC] officials ..., Article 1d(1); Annex VII, Article 1(2)(c); Annex VIII, Art. 17, as amended by Council Regulation 723/2004/EC (22 March 2004), OJ L124/1. Cf. Decision No. 2005/684/EC of the European Parliament, Art. 17(9), (28 Sept. 2005), OJ L262/6 (amending Statute of the Members: "[p]artners from relationships recognised in the Member States shall be treated as equivalent to spouses").

³⁴ Resolution CM/Res(2008)22, 19 Nov. 2008.

³⁵ *Chapin & Charpentier* concerns a continuing situation: the exclusion of same-sex couples from civil marriage in France. The ECtHR should therefore consider the level of European consensus at the date of its decision on admissibility and, if the application is admissible, at the date of its judgment on the merits. In *M.W. v. UK* (No. 11313/02) (inadmissible, 23 June 2009), the ECtHR concluded that "the applicant [could not] claim, for the purposes of Article 14, that, at the material time, he was in an analogous situation to a bereaved spouse". The material time was the date of his male partner's death (10 April 2001). In *Courten v. UK* (No. 4479/06) (inadmissible, 4 Nov. 2008), the material time was also the date the applicant's same-sex partner died (1 Jan. 2005). In both *M.W.* and *Courten*, the applicant's partner died before the couple could register their relationship under the UK's Civil Partnership Act 2004 (registrations began in England on 21 Dec. 2005). The Act eliminated, for same-sex couples who register, the two forms of indirect sexual orientation discrimination challenged in *M.W.* (denial of a bereavement payment) and *Courten* (denial of an inheritance tax exemption) These

APPENDIX – NATIONAL (FEDERAL, REGIONAL, LOCAL) LEGISLATION RECOGNISING SAME-SEX COUPLES³⁶

Council of Europe Member States

Andorra - *Llei 4/2005, del 21 de febrer, qualificada de les unions estables de parella*, (23 March 2005) 17 *Butlletí Oficial del Principat d'Andorra* no. 25, p. 1022 ("unions estables de parella"; "stable unions of couples")

Austria - The direct effect (under Austrian law) of *Karner v. Austria* (ECtHR, 24 July 2003) requires that all Austrian legislation (granting rights or benefits to unmarried couples) be interpreted as applying to both different-sex and same-sex unmarried couples (unless the text expressly precludes this).

Belgium - *Loi du 23 novembre 1998 instaurant la cohabitation légale*, *Moniteur belge*, 12 Jan. 1999, p. 786 ("cohabitants légaux"; "statutory cohabitants"); *Loi du 13 février 2003 ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil*, *Moniteur belge*, 28 Feb. 2003, Edition 3, p. 9880, in force on 1 June 2003

Croatia - Law on Same-Sex Civil Unions (*Zakon o istospolnim zajednicama*), passed by Parliament on 14 July 2003, signed by President on 16 July 2003 ("partneri" or "partnerice"; "partners")

Czech Republic - *Zákon ze dne 26. ledna 2006 o registrovaném partnerství a o změně některých souvisejících zákonů* (Act no. 115/2006 Coll. on Registered Partnership and on the Change of Certain Related Acts)

Denmark - Law on Registered Partnership (*Lov om registreret partnerskab*), 7 June 1989, nr. 372 ("registrerede partnere"; "registered partners")

Finland - Law 9.11.2001/950, Act on Registered Partnerships (*Laki rekisteröidystä parisuhteista*) ("parisuhteen osapuolet"; "registered partners")

France - *Loi no. 99-944 du 15 novembre 1999 relative au pacte civil de solidarité*, ("partenaires"; "partners"); also inserting a new Art. 515-8 into the *Code civil*: "*Le concubinage est une union de fait, caractérisée par une vie commune présentant un caractère de stabilité et de continuité, entre deux personnes, de sexe différent ou de même sexe, qui vivent en couple.*"

Germany

Federal Level - Law of 16 Feb. 2001 on Ending Discrimination Against Same-Sex

cases therefore concerned the fact that the Act could not be invoked retroactively by a surviving same-sex partner, who could not marry, to obtain benefits granted to surviving different-sex spouses.

³⁶ An earlier version appeared in R. Wintemute (ed.) & M. Andenæs (hon. co-ed.), *Legal Recognition of Same-Sex Partnerships* (Oxford, Hart Publishing, 2001).

Communities: Life Partnerships (*Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften*), [2001] 9 *Bundesgesetzblatt* 266 ("Lebenspartner"; "life partners")

Hungary – Civil Code, Art. 685/A, as amended by Act No. 42 of 1996 ("Partners – if not stipulated otherwise by law – are two people living in an emotional and economic community in the same household without being married."); Act on Registered Partnership, Law 29 of 2009 (incorporated into new Civil Code adopted on 21 Sept. 2009)

Iceland – Law on Confirmed Cohabitation (*Lög um staðfesta samvist*), 12 June 1996, nr. 87 ("parties to a confirmed cohabitation")

Ireland - Civil Partnership Bill (No. 44 of 2009), presented by the Government to the Irish Parliament (lower house) on 24 June 2009 (**not yet passed**), <http://www.oireachtas.ie/viewdoc.asp?DocID=12249&&CatID=59> ("civil partners")

Luxembourg - *Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats*, *Mémorial A*, nr. 143, 6 August 2004 ("partenaires"; "partners")

Netherlands - Act of 21 June 1979 amending the Civil Code [Art. 7A:1623h] with respect to rent law, *Staatsblad* 1979, nr. 330 ("*duurzame gemeenschappelijke huishouding*"; "lasting joint household"); Act of 5 July 1997 amending Book 1 of the Civil Code and the Code of Civil Procedure, concerning the introduction therein of provisions relating to registered partnership (*geregistreerd partnerschap*), *Staatsblad* 1997, nr. 324 ("*geregistreerde partners*"; "registered partners"); Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening Up of Marriage), *Staatsblad* 2001, nr. 9 ("*echtgenoten*"; "spouses")

Norway – Law on Registered Partnership (*Lov om registrert partnerskap*), 30 April 1993, nr. 40 ("*registrerte partnere*"; "registered partners"); Marriage Act (*Lov 4 juli 1991 nr. 47 om ekteskap*), as amended by Act of 27 June 2008 No. 53, (in force 1 January 2009, Decree of 27 June 2008 No. 745) ("spouses")

Portugal – *Lei No. 7/2001 de 11 de Maio, Adopta medidas de protecção das uniões de facto*, [2001] 109 (I-A) *Diário da República* 2797 ("*uniões de facto*"; "de facto unions")

Slovenia - *Zakon o registraciji istospolne partnerske skupnosti (ZRIPS) Ur.l. RS, št. 65/2005* (Registered Partnership Law)

Spain

Spanish State – see, e.g., Law on Urban Leasing (*Ley de Arrendamientos Urbanos*) of 24 Nov. 1994, Arts. 12, 16, 24, *disposición transitoria segunda B(7)*: housing rights granted to a person cohabiting "in a permanent way in an emotional

relationship analogous to that of spouses, without regard to its sexual orientation [*con independencia de su orientación sexual*]; *Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio* (Law 13/2005, of 1 July, providing for the amendment of the Civil Code with regard to the right to contract marriage), *Boletín Oficial del Estado* no. 157, 2 July 2005, pp. 23632-23634 (in force 3 July 2005)

Autonomous Communities (*Comunidades Autónomas*):

- Andalucía - *Ley de parejas de hecho*, (5 Dec. 2002) 422 *Boletín Oficial del Parlamento de Andalucía* 23987 ("parejas de hecho"; "de facto couples")
- Aragón - *Ley relativa a parejas estables no casadas*, (26 March 1999) 255 *Boletín Oficial de las Cortes de Aragón* ("parejas estables no casadas"; "unmarried stable couples")
- Asturias - *Ley 4/2002, de 23 de mayo, de Parejas Estables* ("parejas estables"; "stable couples")
- Balearic Islands - *Llei 18/2001 de 19 de decembre, de parelles estables* ("parelles estables"; "stable couples")
- Basque Country - *Ley 2/2003, de 7 de mayo, reguladora de las parejas de hecho*, (9 May 2002) 92 *Boletín Oficial del Parlamento Vasco* 9760 ("parejas de hecho"; "de facto couples")
- Canary Islands - *Ley 5/2003, de 6 de marzo, para la regulación de las parejas de hecho*, (13 March 2003, V Legislatura) 150 *Boletín Oficial del Parlamento de Canarias* 2 ("parejas de hecho"; "de facto couples")
- Cantabria - *Ley 1/2005, de 16 de mayo, de parejas de hecho*, (24 May 2005) 98 *Boletín Oficial de Cantabria* ("parejas de hecho"; "de facto couples")
- Catalonia - *Llei 10/1998, de 15 de juliol, d'unions estables de parella*, (10 July 1998) 309 *Butlletí Oficial del Parlament de Catalunya* (BOPC) 24738 ("unions estables de parella"; "stable unions of couples")
- Extremadura - *Ley de Parejas de Hecho*, (26 March 2003) 377 *Boletín Oficial de la Asamblea de Extremadura* 13 ("parejas de hecho"; "de facto couples")
- Madrid - *Ley de Uniones de Hecho de la Comunidad de Madrid*, (28 Dec. 2001) 134 *Boletín Oficial de la Asamblea de Madrid* (V Legislatura) 160003 ("uniones de hecho"; "de facto unions")
- Navarra - *Ley Foral 6/2000, de 3 de julio, para la igualdad jurídica de las parejas estables*, [7 July 2000] 82 *Boletín Oficial de Navarra* ("parejas estables"; "stable couples")
- Valencia - *Ley por la que se regulan las uniones de hecho*, (9 April 2001) 93 *Boletín Oficial de las Cortes Valencianas* 12404 ("uniones de hecho"; "de facto unions")
- Sweden** – Homosexual Cohabitees Act (*Lag om homosexuella sambor*), SFS 1987:813 (replaced by SFS 2003:376); Law on Registered Partnership (*Lag om registrerat partnerskap*), 23 June 1994, SFS 1994:1117 ("registrerade partner"; "registered partners"); SFS 1987:230 as amended by SFS 2009:253 ("spouses")

Switzerland

Federal Level - *Bundesgesetz vom 18. Juni 2004 über die eingetragene Partnerschaft gleichgeschlechtlicher Paare (Partnerschaftsgesetz)*, Bundesblatt, 2004, No. 25 (29 June 2004), p. 3137; *Loi fédérale du 18 juin 2004 sur le partenariat enregistré entre personnes du même sexe (Loi sur le partenariat)*, Feuille fédérale, 2004, No. 25 (29 June 2004), p. 2935 ("Partner/Partnerinnen"; "partenaires"; "partners") (approved by 58% of voters in a referendum on 5 June 2005; entered into force on 1 January 2007)

United Kingdom - Civil Partnership Act 2004 ("civil partners")

Other Democratic Societies

Argentina

Buenos Aires (Autonomous City) - *Ley No. 1.004, Reconócense las Uniones Civiles*, 12 December 2002 ("members of the civil union")

Australia

Federal Level - [Same-Sex Relationships \(Equal Treatment In Commonwealth Laws - General Law Reform\) Act 2008](#) (No. 144 of 2008); [Family Law Amendment \(De Facto Financial Matters And Other Measures\) Act 2008](#) (No. 115 of 2008); [Same-Sex Relationships \(Equal Treatment In Commonwealth Laws-- Superannuation\) Act 2008](#) (No. 134 of 2008); [Evidence Amendment Act 2008](#) (No. 135 of 2008)

States and Territories:

Australian Capital Territory – eg, [Domestic Relationships Act 1994](#) ("parties to a domestic relationship"); [Legislation \(Gay, Lesbian and Transgender\) Amendment Act 2003](#) ("domestic partners"); [Civil Partnerships Act 2008](#) ("civil partners")

New South Wales - [Property \(Relationships\) Legislation Amendment Act 1999](#); [Miscellaneous Acts Amendment \(Relationships\) Act 2002](#) (eg, "de facto spouses", "de facto partners", "parties to a de facto relationship")

Northern Territory - [Law Reform \(Gender, Sexuality and De Facto Relationships\) Act 2003](#), Act. No. 1 of 2004 ("de facto partners")

Queensland - eg, [Property Law Amendment Act 1999](#) ("de facto spouses")

South Australia - [Statutes Amendment \(Domestic Partners\) Act 2006](#) ("domestic partners")

Tasmania - [Relationships Act 2003](#), [Relationships \(Consequential Amendments\) Act 2003](#) ("partners" include two persons in a "significant relationship", ie, "who have a relationship as a couple"; they may register a "deed of relationship")

Victoria – [Statute Law Amendment \(Relationships\) Act 2001](#) ("domestic partners"); [Relationships Act 2008](#) ("persons in a registered relationship")

Western Australia - [Acts Amendment \(Lesbian and Gay Law Reform\) Act 2002](#)

("de facto partners")

Canada

Federal Level - Modernization of Benefits and Obligations Act,
Statutes (S.) of Canada 2000, chapter (c.) 12 ("common-law partners", "*conjoints de fait*"); Civil Marriage Act, Statutes of Canada 2005, c. 33 ("spouses", "*époux*")

Provinces and Territories:

- Alberta - Adult Interdependent Relationships Act, S.A. 2002, c. A-4.5 ("adult interdependent partners")
- British Columbia - Definition of Spouse Amendment Acts, S.B.C. 1999, c. 29, S.B.C. 2000, c. 24 ("spouses")
- Manitoba - Charter Compliance Act, S.M. 2002, c. 24 and Common-Law Partners' Property and Related Statutes Amendment Act, S.M. 2002, c. 48 (registered and unregistered "common-law partners")
- New Brunswick - eg, Family Services Act, N.B. Acts, c. F-2.2, section (s.) 112(3), as amended in 2000 (spousal support obligations of unmarried persons living in a family relationship)
- Newfoundland - Same Sex Amendment Act, S.N. 2001, c. 22 ("cohabiting partners")
- Northwest Territories - Family Law Act, S.N.W.T. 1997, c. 18, s. 1(1), as amended by S.N.W.T. 2002, c. 6 ("spouses")
- Nova Scotia - Law Reform (2000) Act, S.N.S. 2000, c. 29 (unregistered "common-law partners", registered "domestic partners")
- Nunavut - eg, An Act to amend the Labour Standards Act, S. Nunavut 2003, c. 18 ("common-law partners")
- Ontario - Amendments Because of the Supreme Court of Canada Decision in *M. v. H.* Act, S.O. 1999, c. 6 ("same-sex partners"); An Act to amend various statutes in respect of spousal relationships, S.O. 2005, c. 5 ("spouses")
- Prince Edward Island - Family Law Act, R.S.P.E.I. 1988, c. F-2.1, s. 29(1), as amended by S.P.E.I. 2002, c. 7 ("common-law partners")
- Québec - An Act to amend various legislative provisions concerning de facto spouses, S.Q. 1999, c. 14, 1st session, 36th legislature, Bill 32 ("*conjoints de fait*", "de facto spouses"); An Act instituting civil unions and establishing new rules of filiation, S.Q. 2002, c. 6, 2nd session, 36th legislature, Bill 84 ("*conjoints en union civile*" or "*conjoints unis civilement*" or "civil union spouses"; capacity to become "*conjoints mariés*" or "*époux*" or "married spouses" is governed by the 2005 federal law)
- Saskatchewan - Miscellaneous Statutes (Domestic Relations) Amendment Acts, 2001, S.S. 2001, cc. 50-51 ("common-law partners", or persons "cohabiting as spouses" or "cohabiting in a spousal relationship")
- Yukon Territory – eg, Family Property and Support Act, R.S.Y. 1986 (Vol. 2), c. 63, ss. 1, 30, 31, as amended by S.Y. 1998, c. 8, s. 10 ("spouses")

Mexico

- Federal District (Mexico City) - *Decreto de Ley de Sociedad de Convivencia para el Distrito Federal*, *Gaceta Oficial*, 16 November 2006 ("convivientes"; "cohabitants")
- Coahuila - *Decreto* No. 209, 11 Jan. 2007, adding the *Pacto Civil de Solidaridad* to the Civil Code ("*compañeros civiles*"; "civil companions")

New Zealand - Civil Union Act 2004, Relationships (Statutory References) Act 2004 ("parties to a civil union")

South Africa - Civil Union Act, No. 17 of 2006 (same-sex or different-sex "civil union partners", who include "spouses in a marriage" and "partners in a civil partnership")

United States (specific citations can be provided if the ECtHR would find them helpful)

- Calif. - "domestic partners" - 1999, 2001, 2003 ("spouses": 16 June-3 Nov. 2008)
- Colorado - "designated beneficiaries" - 2009
- Connecticut - "parties to a civil union" - 2005 ("spouses" from 2008)
- District of Columbia - "domestic partners" - 1992
- Hawaii - "reciprocal beneficiaries"- 1997
- Iowa - "spouses" - 2009
- Maine - "domestic partners" - 2004 ("spouses" from 3 Nov. 2009, depending on referendum result)
- Massachusetts - "spouses" - 2004
- Nevada - "domestic partners" - 2009
- New Hampshire - "spouses in a civil union" - 2007 ("spouses" from 2010)
- New Jersey - "civil union partners" - 2006
- Oregon - "domestic partners" - 2007
- Vermont - "parties to a civil union" - 2000 ("spouses" from 2009)
- Washington - "domestic partners" - 2007, 2009 (subject to 3 Nov. 2009 referendum on 2009 expansion of rights)
- Wisconsin - "domestic partners" - 2009

Uruguay - *Ley No. 18.246 de Unión Concubinaria*, published in *Diario Oficial*, 10 Jan. 2008, No. 27402 (same-sex or different-sex "*concubinos*")