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"LGBT" go Luxembourg: on the stance of Lesbian Gay Bisexual and Transgender Rights before the European Court of Justice**

(judgment in the Case C-267/06, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, ECJ April 1, 2008)

In early April 2008 the European Court of Justice (ECJ) delivered a landmark decision concerning same-sex partnerships. The judgment is the first one addressing the issue of sexual discrimination as laid out in the Framework Directive 2000/78 and is already hailed by some as a major breakthrough towards a more fair society. Others might rather view it with suspicion as part of an EU-driven domino effect which is going to pull down the concept of the traditional family in Europe. Given this background it seems timely to have a closer look at the case law of the Court in order to gain a broader view on how lesbian, gay, bisexual and transgender rights have been framed thus far by the ECJ, and what this means for the regulation and reinterpretation of the family within Europe.

I. Prologue: Europe and sexual diversity

According to Sigmund Freud nothing would astonish an extraterrestrial creature visiting our planet earth more than the fact that humankind exists in two forms of sex.[1] But one century on, E.T. and his kin would rather be astonished by the variety of inter-, intra- and transsexual phenomena of contemporary societies. Sexuality offers through its subcategories of heterosexuality, bisexuality, homosexuality and various transgendered identities a very diverse picture of human behaviour. This leads to a remarkable diversity *within* the 27 societies of the European Union. At the same time the legal responses to this diversity vary from member state to member state and in that sense sexuality also stands for a remarkable diversity *between* the 27 states. And there is overall consensus that the European Union should not do entirely away with this legal pluralism. However, at the level of the EU, different institutions might have different perceptions as to which degree this legal pluralism has to be preserved. When it comes to minorities – be they of national, cultural, sexual or linguistic nature – the European Parliament (EP) tends to strengthen diversity within the member states. This of course requests a stronger federal intervention from the EU level which again can result in a reduction of the differences between the member states' legal systems. In this sense diversity is a self-restrictive value: maintaining diversity between the member states reduces the potential flowering of diversity within (some of) the member states just as - the other way round – the fostering of diversity within the states by means of the EU reduces the diversity of

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[1] See Sigmund Freud, Three contributions to sexual theory Journal of Nerv. and Ment. Dis., Monograph series No. 9, Vienna 1905.

approaches between the states.[2] It is only natural that the Council, representing member states' interests, will – in contrast to the federal institution of the European Parliament – rather defend national approaches and thereby the diversity between the states.[3] The same applies as well in the field of sexual minorities.

Already back in 1994 the Parliament not only argued for equal treatment of homosexuals with regard to employment and pay but also called on the member states and the Commission to end barring lesbians and homosexual couples from marriage or from an equivalent framework.[4] Recently, when intersexual relations where an issue at the level of European legislation, the Parliament pressed – in the context of the Free Movement Directive[5] - for an obligation of the host member states to recognise same-sex spouses and registered partners in accordance with the rules of the *state of origin*. This however was not acceptable for the Council. As a consequence a Union citizen will be entitled to move with his or her registered partner (who does not him- or herself hold EU-citizenship) across state borders only if the *host state* "treats registered partnerships as equivalent to marriage and in accordance with the conditions as laid down in the relevant legislation of the host member state".[6] The Council also argued for a restrictive approach when it came to the definition of family in the Family Reunification Directive.[7] The directive does recognise the existence of partnerships outside marriage but grants the member state a maximum of discretion. They "may" (or may not) authorise entry and residence of unmarried partners in a "duly attested long-term stable relationship".[8]

With this overall constitutional background of two diverging institutional interests and the two mentioned readings of what European diversity is about, the Court has to find a position vis-à-vis LGBT rights. So far the Court proved to be more ready to accommodate the needs of transsexuals than those of gay and lesbian persons. The very recent judgement in the case of Maruko sends however new (though not unambiguous) signals in this context.

II. What the Court so far had to say on LGBT Rights

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[2] On diversity as a self-restrictive constitutional value see Gabriel N. Toggenburg, The Debate on European Values and the Case of Cultural Diversity, European Diversity and Autonomy Papers 2004/1, available at «http://www.eurac.edu/documents/edap/2004_edap01.pdf. Compare recently Armin von Bogdandy, The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Friendship, Jean Monnet Paper 2007/13, available at http://www.jeanmonnetprogram.org/papers/07/071301.html.

[3] Of course the picture of European diversity management is even more complex since this *horizontal* dimension (Parliament – Council – Commission - Court) is complemented by a *vertical* dimension (EU institutions – member states). See on this Gabriel N. Toggenburg, Who is managing ethnic and cultural diversity within the European Condominium? The moments of entry, integration and preservation, in Journal for Common Market Studies, Volume 43, Number 4, pp. 717-737.

[4] Resolution on equal rights for homosexuals and lesbians in the EC, OJ 1994C 61, p. 40.

[5] Directive 2004/58/EC of 29 April on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states, OJ 2004 L 229, p. 35

[6] Art. 2(2) (b) Directive 2004/58/EC.

[7] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 L 251, p. 12.

[8] Art. 4 Para. 3 Directive 2004/86/EC.

a) P. v. S. and Cornwall County Council (1996): the prohibition to discriminate on the basis of sex extends to transgender issues - but how far?

In P. v. S. and Cornwall County Council the applicant P. used to work as a manager in an educational establishment operated by the local administrative authority, the Cornwall County Council (UK).[9] A year after being taken on, P. informed S., the Director of the establishment, of his intention to undergo gender reassignment. The latter began with a "life test", a period during which P. behaved and dressed as a woman, followed by surgery to give P. the physical attributes of a woman. At the beginning of September 1992, after undergoing minor surgical operations, P. was dismissed. The final surgical operation was performed before the dismissal took effect, but after P. had been given notice. It appears from the proceedings that the true reason for the dismissal was P.'s proposal to undergo gender reassignment, although the County maintained that the reason for the dismissal was redundancy. P. brought an action against S. and the County Council before the Industrial Tribunal on the ground that she had been a victim of sex discrimination. The Tribunal found that the situation at hand is not covered by the Sex Discrimination Act 1975, in as much as the latter only applies to cases in which a man or a woman is treated differently because he or she belong to their specific sex. If P. had been female the employer would still have dismissed her on account of the operation. However the Tribunal was not sure whether Article 1(1) of the Council Directive 76/207/EEC on the implementation of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions[10] might not be wider in this context than the Sex Discrimination Act 1975 and therefore stayed the proceedings in order to ask the Court whether the Directive prohibits discrimination on the basis of a reason related to a gender reassignment.

Not only the United Kingdom, but also the Commission submitted in this procedure before the ECJ that a dismissal on the basis of a gender reassignment does not constitute sex discrimination for the purpose of the directive. The Court however came to the conclusion that the scope of the Directive "cannot be confined to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned".[11] To tolerate such discrimination would be tantamount, so the Court continues, "to a failure to respect the dignity and freedom to which he or she is entitled and which the Court has a duty to safeguard".[12]

Methodologically the Court explains this reading by underlining that the discrimination at hand is "essentially if not exclusively" based on the sex of the person concerned. Where a person is dismissed on the ground of gender reassignment, he or she "is treated unfavorably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment".[13] So in a way one could say that the Court applies a dynamic reading of sex. It compares the (treatment of) a female person with the (treatment of) a male-to-female transsexual. The biological sex of origin is

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[9] ECJ, P. v. S. and Cornwall County Council, Case C-13/94, judgement of 30 April 1996, ECR I-2143.
[10] Council Directive 76/207/EEC of 9 February 1976, OJ 1976 L 39, p. 40.
[11] P. v. S. and Cornwall County Council, loc.cit., Para. 20.
[12] P. v. S. and Cornwall County Council, loc.cit., Para. 22.
[13] P. v. S. and Cornwall County Council, loc.cit., Para. 21.

thereby equated to the transgender sex of choice. To which *degree* the concept of sex remains in the context of EU equality law determined by biology remains open. In any event the Court clearly says that it does constitute a discrimination on the basis of sex not only if transgender people are dismissed on the ground that they *have* undergone gender reassignment surgery, but also if they are dismissed because he or she "*intends* to undergo" gender reassignment.

But what about such transgender people who neither have undergone nor "intend to undergo" reassignment surgery?[14] This is an important question since it seems nowadays scientifically recognized that a considerable percentage of transsexuals do not undertake final reassignment surgery and do not even see such an operation as a compulsory step on their way towards their "right sex". In fact the German Constitutional Court recently quoted in a prominent order the number of "20 up to 30" per cent of transsexual persons who are permanent transsexuals but never undergo reassignment surgery.[15] It remains unclear, whether and to which degree EC equality-law law provides protection to this group of transsexuals.[16] So far this was not an issue before the Court.[17]

b) Lisa Jacqueline Grant v. South-West Trains Ltd. (1998): Gays and Lesbians are left outside the protective shield of the prohibition to discriminate on the basis of sex.

Lisa Grant is an employee of the South-West Trains Ltd. (SWT), a company operating railways in the Southampton region (UK). Her employer provides not only for the spouse and dependants certain travel concessions but also for non-married partners of staff "subject to a statutory declaration being made that a meaningful relationship has existed

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[14] Confronted with the question, whether Article 13 EC covers "transgender discrimination" the European Commission says that what can be deduced from the case law of the Court of Justice is (only) that "discrimination on grounds of the gender reassignment of a person" would be covered by the ban on discrimination on grounds of sex. See reply to written question E-1842/02, in OJ 2003 C 52, p. 106.

[15] See Beschluss des Ersten Senates, 5 December 2005, 1 BvL 3/03, Para. 66.

[16] In fact this was what the above quoted order of the German Constitutional Court was about. End of 2005 the Bundesverfassungsgericht ruled that the legislator has to accommodate the situation of those persons who are transsexuals but who did not undergo reassignment surgery ("grosse Loesung" implying a legally recognized change of sex - as opposed to the "kleine Loesung" consisting merely in a legally recognised change of ones first name). These persons found themselves in a legal deadlock once they decided to enter a legally protected form of partnership with a person who had the same sex they affiliate with: The institution of marriage is reserved for two persons of different sex, whereas the legal institution of "Lebenspartnerschaft" is reserved for persons having the same (legally recognised) sex. The political consequence of the judgment is that a transsexual person A who had its first name changed ("kleine Loesung") is in administrative practice no longer forced to re-change his/her first name before marrying a person B belonging to the same sex the person A identifies with. Further reforms are on their way. See reply to the Parliamentary question by Gisela Piltz et al., Drucksache 16/8327, February 29, 2008, p. 5. Compare in this context also the order of the Austrian Constitutional Court in which it ruled that the official change of names of postoperative transsexual persons may not be made conditional on the termination of an pre-existing marriage (see VfGH, order of 2 December 2005, B 947/05).

[17] Ten years after P. v. S. the Court decided another case involving a transsexual person. However also the case of Sarah Margaret Richards concerns a postoperative transsexual. The Court applied the principle as developed in P. v. S. and ruled that the scope of Directive 79/9 (on the progressive implementation of the principle of equal treatment for men and women in matters of social security) precludes different treatment arising from the gender reassignment of a person: a male-to-female transsexual has in the context of pension entitlements to be treated as a person of the same age who was a female from her birth. See ECJ, Sarah Margaret Richards v. Secretary of State for Work and Pensions, case C-423/04, judgment of 27 April 2006, ECR I-3585.

for a period of two years or more".[18] Ms Grant applied in early 1995 for travel concessions for her female partner with whom she declared she had a meaningful relationship over two years. SWT refused to allow the benefit sought, on the ground that for unmarried persons travel concessions could be granted only for a partner of the opposite sex. Ms Grant made an application against the SWT to the Industrial Tribunal arguing that this refusal constituted discrimination based on sex, contrary to the Equal Pay Act 1970, Article 119 EC and/or Directive 76/207. In fact, when referring to the ECJ, the Industrial Tribunal made reference to P. v. S. and Cornwall County Council as constituting "persuasive authority for the proposition that discrimination on the ground of sexual orientation [was] unlawful,"[19] Furthermore, the General Advocate identified a discrimination on the basis of sex which was in violation of Article 119 EC and which could not be justified by the moral conceptions of the employer, since these are "a purely subjective reason as opposed to objective circumstances".[20]

The Court examined two separate issues, namely whether the case at hand constitutes a discrimination on the basis of sex – which it answers in the negative and, secondly, whether discrimination on the basis of sexual orientation is covered by Community law (a question which, again, it answered in the negative). As regards the issue of sex-discrimination, Ms Grant submitted that her employer's decision would have been different if the benefits at stake would have been claimed not by her but by a man living in her condition (i.e. living with a woman). In her submission, if a female worker does not receive the same benefits as a male worker, all other things being equal, she is the victim of discrimination based on sex. The Court to the contrary did not compare her situation with that of a man who (just like Ms Grant) lives with a woman, but with a man who (unlike Ms Grant) lives with a man. Hence the Court did not compare an individual of a certain sex with one of another sex, nor did it compare the situation of Ms Grant and her partner (a lesbian couple) with that of a heterosexual couple. It compared the lesbian context of Ms Grant with a hypothetical gay context. This approach allowed the Court to conclude that "[s]ince the condition imposed by the undertaking's regulations applies in the same way to female and male workers, it cannot be regarded as constituting discrimination based on sex".[21] The Court's assumption that same-sex partners are not "in the same situation" as heterosexual partners[22] - and are therefore not be comparable - is based on its finding that "in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex".[23]

With regard to the question as to whether or not the prohibition to discriminate on the basis of sex covers also the notion of sexual orientation (a reading the applicant advocated) the Court remained equally dismissive. The Court made clear that the P. v. S.

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[18] ECJ, Lisa Jacqueline Grant v. South-West Trains Ltd., Case C-249/96, judgment of 17 February 1998, ECR I-621, Para. 5. The contract of employment refers to "common law opposite sex spouse of staff". According to the AG this expression does neither in statute law nor common law have any legal significance (and is therefore no institution in the sense of UK family law). See Advocate General Elmer, opinion of 30 September, 1997, ECR I-621, Para. 30.
[19] ECJ, Lisa Jacqueline Grant v. SWT, loc.cit., Para. 10.
[20] See opinion of the AG, loc.cit., Para 39.
[21] ECJ, Lisa Jacqueline Grant v. SWT, loc.cit.,Para. 28.
[22] ECJ, Lisa Jacqueline Grant v. SWT, loc.cit.,Para. 29.
[23] ECJ, Lisa Jacqueline Grant v. SWT, loc.cit., Para. 28.

line of thinking remains limited to the "case of a worker's gender reassignment and does not therefore apply to differences of treatment based on a person's sexual orientation".[24] As regards the references to the UN Human Rights Committee which have been used as arguments by the applicant, the Court showed itself not at all impressed. It underlined that the findings of that international body have no binding force in law. And further, although fundamental rights form an integral part of EC law, "those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the Competences of the Community".[25] The Court clearly states that "Community law as it stands at present does not cover discrimination based on sexual orientation…It should be observed, however, that the Treaty of Amsterdam … will allow the Council …to take appropriate action".[26] In other words the Court retreated in emphasising that it is up to the European legislator to design the role of EU law in the area of sexual orientation.

The latter argument has its value. One should not expect the Court to develop its own hidden policy-agenda in the area of LGTB besides or beyond the European legislator. Such a tendency would undermine the Union's legitimacy in this politically charged and highly sensitive area. What is however clearly open to criticism is the Court's methodological approach to the question: That is, whether a different treatment of homosexual and heterosexual couples may constitute discrimination based on sex. Of course, at first glance what makes the treatment at hand seem less discriminatory is the fact that SWT was obviously not concerned by the specific sex of Ms Grant. SWT was concerned by the combination of the two sexes, namely the sex of Ms Grant on the one hand and her partner on the other. This however does not diminish with the fact that the decision of SWT was based on sex. Even if one would argue that it is not the sex of Ms Grant which motivated the dismissive decision of SWT, but rather the sex of her partner, this remains discrimination by association based on sex.[27]

The consequence of the Court's reductionist approach to sex as developed in Grant v. SWT is that employers are "not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married or who has a stable relationship outside marriage with a partner of the opposite sex".[28] The argument used by the Court is that member states hardly treat homosexual relationships as equivalent to marriage (which is true) and that stable homosexual relationships are only partly treated as equivalent to heterosexual relationships or are "not recognized in any particular way" (which is also true).[29] It is however not clear at all how this assessment can serve as an argumentative basis for ignoring the discriminatory character of a system which entitles stable (not married)

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[24] ECJ, Lisa Jacqueline Grant v. SWT, loc.cit., Para. 42.
[25] ECJ, Lisa Jacqueline Grant v. SWT, loc.cit., Para. 45. The Human Rights Committee established under Article 28 of the Covenant that the term "sex" is including sexual orientation (communication No 488/1992, Toonen v Australia, 31 March 1994, 50th session, point 8.7).
[26] ECJ, Lisa Jacqueline Grant v. SWT, loc.cit., Para. 48.
[27] Note that the General Advocate Elmer was already arguing in this direction: "The provision must further, in order to be effective, be understood as prohibiting discrimination against employees not solely on the basis of the employee's own gender but also on the basis of the gender of the employee's child, parent or other dependent". See opinion of the AG, Para. 16. Compare Gabriel N. Toggenburg, Discrimination by association: a notion covered by EU equality law?, in ELR 2008/3, pp. 82-87.
[28] ECJ, Lisa Jacqueline Grant v. SWT, loc.cit., Para. 35.
[29] ECJ, Lisa Jacqueline Grant v. SWT, loc.cit., Para. 32.

heterosexual couples to travel concessions--a household benefit which in the concrete case was worth around 1500 Euro a year[30]--while denying this same benefit to equally stable homosexual couples.

c) D and Kingdom of Sweden v. Council of the European Union (2001): even within the centre of the EU, namely its own institutions, homosexual life-partners may remain excluded from marriage-related benefits

D is an official of the Council of the European Union of Swedish nationality who registered a partnership with another Swedish national of the same sex in Sweden in 1995. In 1996 he applied to the Council for his status as a registered partner to be treated as equivalent to marriage for the purpose of obtaining the household allowance provided for in the Staff regulations of the Council. The latter rejected the application and D, supported by the Kingdom of Sweden, brought an application to the Court of First Instance. His application was dismissed and D and the Kingdom of Sweden (supported by the Kingdom of Denmark and the Kingdom of the Netherlands) brought an appeal before the Court of Justice.

The Staff regulations of the Council foresee that household allowances shall be granted to married officials only (or unmarried with dependent children).[31] On the other hand, the Swedish law on registered partnership provides that a partnership shall have the same legal effects a marriage has. The Council rejected the application of D on the ground that the provisions of the Staff regulation could not be read as allowing a registered partnership to be treated as being equivalent to marriage. The Court of First Instance said that the concept of "marriage" must be understood as a relationship based on civil marriage within the traditional sense and that reference to the law of the member states is not necessary where the relevant provisions of the Staff Regulations are capable of independent interpretation. Moreover the Court of First Instance held that the Council was under no obligation to regard, for the purpose of the Staff Regulations, stable same-sex partnerships as equivalent to marriage. It would be for the Council as legislator and not as employer, to make any necessary amendments to the Staff Regulations.

D and the Kingdom claimed that the Court of Justice should set aside the contested judgment and the Council's decision dismissing D's application. The Court however remained dismissive. Where the Council has said it could – as employer – not disregard the clear wording of the Staff Regulation, the Court now says it can – as Community judicature – not interpret that wording in a way that "legal situations distinct from marriage are treated in the same way as marriage".[32] The Court stressed that it was the intention of the Community legislature to grant the household allowance only to married couples and that only the legislature can alter that situation. The fact that "in a limited number of member states, a registered partnership is assimilated, although incompletely, to marriage cannot have the consequence that, by mere interpretation, persons whose

[30] See opinion of the AG, Para. 23.

[31] Art. 1(2) of Annex VII to the Staff Regulation. This provision was amended in 2004 and does now provide for an equal treatment of marriages and partnerships (see regulation 723/2004/EC as of 22 March 2004, OJ L 124, p.1).

[32] ECJ, D. and Kingdom of Sweden v. Council of the European Union, Case C-122/99 P and C-125/99P, judgment of 31 May 2001, ECR I-4319, Para. 37.

legal status is distinct from that of marriage can be covered by the term married official as used in the Staff Regulations".[33]

With regard to the allegation of a discrimination based on sex the Court used a similar argumentation as was used in Grant v. SWT. It stressed that it is irrelevant for the purpose of granting the household allowance, whether the official is a man or a woman. Whether or not an applicant gets a household allowance depends on the "legal nature of the ties between the official and the partner".[34] The Court concurred with the Court of First Instance that the term marriage as it is used in the provisions of the piece of EU administrative law at hand is "capable of being given an independent interpretation": whether or not a specific national legal form of partnership is to be regarded as marriage is up to the Court.[35] At the same time, however, the Court indicated that its independent reading of the Community term of "marriage" does somehow depend on the readings of the legal term of "marriage" in the various member states. The Court recognized that there are increasingly arrangements for registering same-sex partnership, but stressed that these arrangements are characterized by a "great diversity" and are "regarded in the member states concerned as being distinct from marriage". In light of "such circumstances," the Court felt unable to interpret the Community term of "marriage" as encompassing also a homosexual partnership officially registered according to Swedish law.[36]

d) K.B. v. National Health Service Pensions Agency and Secretary of State for Health (2004): "with a little help from my friend" the Court declares de facto prohibition of transsexual marriages illegal under EC law

K.B. is a member of the UK National Health Service (NHS) for which she has been working for approximately 20 years, inter alia as a nurse. She is a member of the NHS Pension Scheme. K.B. had for a number of years a relationship with R. who was born as a woman and registered as such in the Register of Births and has, following surgical gender reassignment, become a man. However R. was not allowed to amend his birth certificate to reflect this change officially. As a result, and contrary to their wishes, K.B. and her (now) male partner R. have not been able to marry. Therefore, when K.B. claimed a widower's pension for her partner (for the case she would pre-decease), the NHS Pension Agency replied dismissively since "widower" in the sense of the Pension Scheme Regulation refers to a person married to the scheme member.

K.B. brought proceedings in the Employment Tribunal arguing that Article 119 EC and the Directive 75/117 require that in her context "widower" should be interpreted in such a way as to encompass the surviving member of a couple, who would have achieved the status of a widower had his sex not resulted from surgical gender reassignment. The case finally came before the Court of Appeal which halted the proceedings and asked the Court of Justice whether indeed the exclusion from the benefit at hand constituted discrimination in the sense of EC law. In their respective statements K.B. referred to the line of thinking as exposed in P. v. S. whereas the UK government made reference to

[33] ECJ, D and Kingdom of Sweden v. Council, loc.cit., Para. 38.
[34] ECJ, D. and Kingdom of Sweden v. Council, loc.cit., Para. 47.
[35] Compare ECJ, D. and Kingdom of Sweden v Council, loc.cit., Para. 11.
[36] See ECJ, D. and Kingdom of Sweden v. Council, loc.cit., Paras. 36 and 37. Note that the staff regulation was subsequently changed (see fn. 31).

Grant v. SWT. The Commission, rather salomonically found that in this specific case P. v S. is not applicable since the unfavorable treatment at hand (denial of widower pension) did not directly result from R.'s gender reassignment but rather indirectly from the fact that it was impossible for the couple to marry and the definition of marriage remains – as recognized by the Court – a matter of national family law (remember that in P. v S., P. was dismissed in consequence of his reassignment surgery). It does not seem implausible that the Court would have followed this line of thinking had the Strasbourg Court not just sent new signals into the European Fundamental Rights Space at the time when the Luxembourg Court was dealing with the K.B. case.

In the Goodwin case the European Court of Human Rights departed from its earlier case law in which it had consistently held that there was no positive obligation on the UK Government to alter the existing national system for the registration of births which does not allow for a later change of status and therefore de facto bars transsexual couples from marrying. The Court made reference to the changing conditions within the Contracting States and underlined that a failure to maintain a dynamic and evolutionary approach would indeed risk rendering the ECHR a bar to reform or improvement.[37] Therefore the Court did away with its prior opinion that the continued adoption of biological criteria in domestic law for determining a person's sex for the purpose of marriage was encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry. The Court labels the argument that post-operative transsexuals have not been deprived of the right to marry since by law they remain able to marry a person of their former opposite sex as an "artificial" one (which it indeed is).[38] In conclusion the Court in Strasbourg established that whereas it is for the Contracting State "to determine *inter alia* the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages", there is "no justification for barring the transsexual from enjoying the right to marry under any circumstances".[39]

The Court in Luxembourg made wide reference to this timely help from Strasbourg and declared that legislation which "prevents a couple such as K.B. and R. from fulfilling the marriage requirement" in order to gain the benefit at stake (widower pension) "must be regarded, in principle, incompatible with the requirements of Article 141 EC." Since it is however for the member states "to determine the conditions under which legal recognition is given to the change of gender of a person in R.'s situation … it is for the national court to determine whether in a case such as that in the main proceedings a person in K.B.'s situation can rely on Article 141 EC in order to gain recognition of her right to nominate her partner as the beneficiary of a survivor's pension".[40]

III. Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen (2008): only once national legal systems set spouses and same-sex partners in a

[37] ECJ, K.B. v. National Health Service Pensions Agency and Secretary of State for Health, Case C-117/01, judgment of 7 January 2004, ECR I-541, Para 73 and 74.
[38] ECJ, K.B. v. NHS, Para. 101.
[39] ECJ, K.B. v. NHS, Para. 104.
[40] ECJ, K.B. v. NHS, Paras. 35 and 36.

comparable legal situation, EU anti-discrimination applies--*adieu effet utile?*

a) The legal and factual background of the case

In 2000 the EU issued the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (Framework Directive)[41] which lays down "a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the member states the principle of equal treatment" (Article 1). Thereby the Framework Directive is the first EC law document which rules out discrimination based on sexual orientation. It had to be transposed into national law no later than 2 December 2003. However Germany did not enact such a law until 14 August 2006 (and was consequently found in early 2006 to be in violation of its obligation under the Framework Directive).[42] Since Tadao Maruko, the claimant in the case at stake, invoked the Directive already in February 2005 before national authorities, the question arose as to whether Articles 1, 2 and 3 of the Framework Directive can be directly invoked. Not only the Commission but also the Bayrisches Verwaltungsgericht – the Bavarian Administrative Court in Munich which brought the case to the Luxembourg Court - answered to the affirmative. Hence the issue of direct effect played no role in the proceedings before the Court.[43] So far the European Court of Justice has released only three judgements interpreting the substance of the Framework Directive and none of these dealt with the issue of sexual orientation.[44]

At the national level, the year 2001 witnessed an important event in German legislation: Germany introduced a Law on registered partnerships which provides same-sex couples with a legally protected form of partnership (Lebenspartnerschaftsgesetz, LParG).[45] The law which was revised in 2004 creates a family institution which resembles marriage. Paragraph 1(1) provides that, to register such a union, it is necessary to demonstrate the desire to set up a life-long partnership. For the duration of the relationship, the partners must support and care for one another (Paragraph 2). They must contribute to the common needs of the partnership and, with regard to maintenance obligations, they are bound by the provisions of the Civil Code applicable to spouses (Paragraph 5). Moreover, like spouses, the partners are subject to the financial system of common ownership of property acquired ex post facto, although they are free to agree to a different system (Paragraph 6). In addition, each partner is regarded as a member of the other partner's family (Paragraph 11). In a further similarity to the provisions of the Civil Code, should the partners separate, the maintenance obligation remains (Paragraph 16) and there must

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[41] Directive 2000/78/EC of 27 November 2000, OJ L 303, 2 December 2000, p. 16–22

[42] ECJ, Commission of the European Communities v. Federal Republic of Germany, Case C-43/05, judgment of 23 February 2006, ECR- I-33. The Gesetz zur Umsetzung Europäischer Richtlinien zur Vewirklichung des Grundsatzes der Gleichbehandlung, BGBl.I, p. 1897 transposes the Framework Directive, the Race Directive and two Directives in the area of sex discrimination.

[43] The Advocate General shares the view of the referring Court and the Commission, see Opinion of AG Ruiz-Jarabo Colomer delivered on 6 September 2007, ECR I-2008, nyr, Para. 35.

[44] See ECJ, Werner Mangold v. Rüdiger Helm, Case C-144/04, judgment of 22 November 2005, ECR I-9981 (age discrimination); ECJ, Sonia Chacón Navas v Eurest Colectividades SA, Case C-13/05, judgment of 11 July 2006, ECR I-6467 (disability); ECJ, Félix Palacios de la Villa v. Cortefiel Servicios SA, Case C-411/05, judgment of 16 October 2007, nyr (age discrimination).

[45] Gesetz über eingetragene Lebenspartnerschaften of 16 February 2001, BGBl. 2001, p. 266.

be an equalising apportionment of pension entitlements (Paragraph 20). Finally according to the German Social Security Code registered partnerships are placed on an equal footing with marriage for the purposes of old-age pension schemes.

Mr. Maruko is the life partner of a costume designer. He and his partner Hans Hettinger have entered into a registered partnership pursuant to the LParG in autumn 2001. On 12 January 2005 Mr. Hettinger died. The pay scheme for Germany's theatres provides that all employers must take out an old-age pension and a survivor's pension for the artists they engage. The body responsible for administering the insurance is the Versorgungsanstalt der deutschen Bühnen (VddB), which is a legal person governed by public law. Paragraphs 32 and 34 of the pay scheme provide that a "wife" or a "husband" is entitled to a widow's or a widower's pension.[46] Mr. Maruko's partner had been affiliated with the VddB continuously since 1 September 1959. In February 2005 Maruko applied for a widower's pension – a request the VddB refused in the same month on the ground that the regulations mentioned make no provisions for survivor's benefits to be paid to registered partners. After appealing unsuccessfully against that decision, the claimant brought an action before the Court arguing that the terms "widow" and "widower" have to be interpreted broadly so as to include partners in the sense of a registered partnership. The Bayrisches Verwaltungsgericht München stayed the proceedings and referred five questions to the Court of Justice regarding the interpretation of the Framework Directive.

Firstly the Bavarian Administrative Court wanted to know whether a compulsory pension scheme, such as the one at stake administered by the VddB is similar to state schemes as referred to in Article 3 of the Framework Employment Directive. Article 3 limits the scope of the Directive by excluding "payments of any kind made by state schemes or similar, including state social security or social protection schemes" from the application of the Directive. Secondly the Bavarian Administrative Court seeks a judgment as to whether benefits paid by a compulsory professional institution to survivors in the form of a widower's allowance are to be construed as pay within the meaning of Article 3 (3) of the Directive. This declares the Directive to be applicable to all persons as regards both the public and private sectors in relation to "employment and working conditions, including dismissals and pays". Thirdly, for the case wherein the Directive is to be regarded applicable, the Bavarian Administrative Court wants to know whether the Directive precludes a national regulation as the one at hand which exclude registered partners from a widower's pension. Fourthly, if the preceding questions are answered in the affirmative, the referring Court requests a ruling on whether discrimination based on sexual orientation is permissible by virtue of recital 22 in the preamble to the Framework Employment Directive. The latter states that the Community rules are "without prejudice to national laws on marital status and the benefits dependent thereon". Finally the Court asked whether the entitlement to the survivor's pension would be restricted to the period from 17 May 1990.

b) The judgement of the Court

As regards the applicability of the Framework Directive to the facts at hand the Court concluded that the pension scheme managed by the VddB is not a social security or social

[46] Tarifordnung für die deutschen Theater, 27 October 1937, Reichsarbeitsblatt 1937, part IV, p. 1080.

protection scheme in the sense of Article 3 (3) of the Directive. The Court drew attention to the fact that the pension program managed by the VddB was designed only to supplement the social security benefits payable under national legislation of general scope. Moreover the scheme is financed exclusively by the worker and the employers of the sector concerned, without any financial involvement by the State. And the scheme is not generally applicable but aims at a specific group of professionals (those employed in German theatres). Finally what clearly demonstrates that the benefit at issue is not linked to general considerations of social policy (as argued by the VddB) is that under the VddB regulations, retirement pensions are not fixed by statute. Rather the amount of the retirement pension, by reference to which the survivor's benefits are calculated, is determined by the period of the worker's membership. All this brought the Court to the conclusion that the survivor's pension for which Maruko applied is derived from the employment relationship of Maruko's life partner and must therefore be classified as pay within the meaning of Article 141 EC.[47] The fact that the VddB is a public body and that membership in the scheme was compulsory could not change this scenario.

As regards the status of the Recital 22 in the Framework Directive, the VddB and the United Kingdom had submitted in the proceedings that the latter determines the scope of the Directive and that the Directive therefore does not apply to provisions of law relating to civil status or to benefits dependent on that status. The Court responded that, admittedly, these matters fall within the competence of the member states "and Community law does not detract from that competence". However in the exercise of that competence member states "must comply with Community law and in particular, with the provisions relating to the principle of non-discrimination".[48]

This led the Court directly to the question of whether Article 1 and Article 2 (2) (a) of the Framework Directive preclude national provisions such as the ones at hand. According to the VddB there is no obligation to treat marriage and life partnership identically, since life partnership is an institution sui generis. The Court however referred to the Bavarian Administrative Court which had explained that the conditions of the life partnership have been gradually made equivalent to those applicable to marriage. The referring Court had explained to the Court of Justice that a life partnership, while not identical to marriage, places persons of the same sex in a situation comparable to that of spouses so far as concerns the survivor's benefit at issue. And "if the referring Court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's benefit, legislation such as that at issue on the main proceedings must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78."[49] In other words the Framework Directive precludes national legislation "under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit. It is for the referring court to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the

[47] Compare in this context also EFTA Court, Case E-2/07 judgement of 30 October 2007.
[48] ECJ, Tadao Maruko v. Versorgungsanstalt der deutschen Buehnen, Case C-267/06, judgement of 1 April 2008, nyr, Para 59.
[49] ECJ, Tadao Maruko v. Versorgungsanstalt, loc.cit., Para 72.

survivor's benefit provided for under the occupational pension scheme managed by the VddB".[50]

Finally, as regards the fifth question, the Court saw nothing in the documents which would suggest that the financial balance of the scheme managed by the VddB is likely to be retroactively disturbed if the effects of the judgement are not restricted in time.

c) Comment

At first glance this judgement looks rather revolutionary. For the first time the Court ruled against discrimination based on sexual orientation. Moreover the Court provided in concretu rights which the national system did not foresee: a homosexual "widower" is granted a pension which national law had denied him. The benefit at stake was not denied on the basis of his sexual orientation (that would have amounted to direct discrimination) but on the basis of the fact that he has been living in a registered partnership and not in a marriage. Since marriage is open only for heterosexual couples, the refusal to grant a survivor's benefit to a surviving life partner constitutes indirect discrimination. Interestingly – and in contrast to the Advocate General, the European Commission and Mr. Maruko who all argued for the existence of an indirect discrimination[51] - the Court of Justice identified legislation such as that at issue as being a direct (!) discrimination on the basis of sexual orientation contrary to Article 1 and 3 of the Framework Directive.[52]

A closer look reveals however that the Court remains rather restrictive in its approach towards gay rights. For the judgement boils down to a rather demure statement communicating little more than the obvious: Once member states place same-sex couples via the institution of a "life partnership" in a situation which is legally speaking comparable to that of spouses, they have to provide both institutions (life partnership and marriage) with comparable benefits. Germany delineates in its Social Security Code that widower pensions are paid also to a partner surviving his life-partner. However such a treatment was precluded in the concrete case at hand. This exclusion was found in violation with the Framework Directive. But the result would have been very different if Germany would not provide life partners with a "comparable situation so far as concerns that survivors benefit" – in this case the exclusion of Matuko would be perfectly legal under EC law.[53] In essence this means that the member states frame the comparability between homo- and heterosexual situations and thereby indirectly decide upon the applicability of EU law. How did this come about? The opinion of the Advocate General reads that the main proceedings "concern the inequality between married couples and people who form partnerships governed by different legal arrangements". True, but the Advocate General continues: "Accordingly, the dispute does not turn on access to marriage but rather on the effects of the two types of union. It is therefore necessary to establish whether those two types of union warrant equal treatment".[54] Here the tracks are laid which inevitably lead toward a station dominated by national law.

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[50] ECJ, Tadao Maruko v. Versorgungsanstalt, loc.cit., Para 73.

[51] See ECJ, Tadao Maruko v. Versorgungsanstalt, loc.cit., Para. 63. Also the Advocate General stated clearly that „there is no direct discrimination contrary to Article 2 of Directive 2000/78". See Opinion of AG Ruiz-Jarabo Colomer, 6 September 2007, Case C-267/06, Para. 96.

[52] ECJ, Tadao Maruko v. Versorgungsanstalt, loc.cit., Para. 72.

[53] ECJ, Tadao Maruko v. Versorgungsanstalt, loc.cit., Para. 72.

[54] Opinion of the,AG, loc.cit., Paras. 99 and 100.

The Court's approach applied in Maruko has two major weaknesses. Firstly, it provides no protection against discrimination where it is most needed, namely in national systems where homosexual relationships find no legal recognition. Secondly, the definition and identification of the point at which EU law steps in is entirely left to the member states. The latter point raises doubts as to whether the Court will prove efficient to bring the (after all, EC law) prohibition of discrimination on the basis of sexual orientation into life. Whereas in the case at hand the Bavarian Administrative Court in Munich had considered the German situation as one characterised by a dense harmonisation between marriage and life partnership which places same-sex couples in a situation comparable to that of spouses and which therefore raises the question of potential discrimination, the German Constitutional Court in Karlsruhe recently depicted a quite different scenario in its decision on the so called "Verheiratetenzuschlag". According to the Federal Law on Salaries (Bundesbesoldungsgesetz, BBesG) this special financial benefit is to be granted unconditionally only to those civil servants who are married, divorced or widowed. Ms. O had established a life partnership in late 2001 and asked that this financial benefit should equally be granted to her due to her partnership. This was denied on the basis that she is only living in a life partnership. The case went up to the Constitutional Court and the latter found no violation of the principle of equality as enshrined in Article 3 of the German Constitution (Grundgesetz). Rather it established that the different treatment of life partnership and marriage emanates from and is justified by Article 6 of the German Constitution (Article 6 Paragraph 1 reads that "marriage and family enjoy the special protection of the state"). As regards the reach of the EU Framework Directive the Constitutional Court does not, just as the lower Courts did not, see a necessity to refer the case to the European Court of Justice. The Constitutional Court arrived at the remarkable conclusion that a difference in treatment based on whether the applicant is living in a marriage or in life partnership cannot be a discrimination since spouses and life partners differ in the very legal nature of the relationship they live in![55] If this reading prevails, the Maruko line of argumentation will, in terms of EU law, not prove very useful. German Courts would in the future simply follow Germany's highest Court, deny the comparability between marriage and life partnership and thereby preclude the application of the EU directive. While Maruko might be an elegant example of judicial subsidiarity, it could also turn out to be a slap in the face of any *effet utile* reasoning so commonly used by the Court of Justice.

IV. Conclusion: Family law as national fortress versus taking LGBT Rights seriously –- is it either/or?

"Marriage" is a traditional institution belonging exclusively to the member states' family law systems. Admittedly, both the Courts in Strasbourg as well as in Luxembourg underlined that it is illegal to bar postoperative transsexuals from enjoying the right to marry under any circumstances. This however is not an intrusion into the concept of *heterosexual* marriage. It remains up to the member states to redefine the sex of transsexual persons. And only once the two persons are considered by the respective state to be of the opposite sex may they marry. The terms and the design of marriage under national law remain untouched. Most importantly, there are no signs on the horizon that

[55] BVerfG, 2 BvR 855/06, decision of 20 September 2007, Para 33.

European Union Law would push the member states in the direction of opening the institution of marriage to homosexual couples. It is true that the Strasbourg Court noted en passant that Article 9 of the EU's Charter of Fundamental Rights (which will become legally binding with the Treaty of Lisbon) "departs, no doubt deliberately" from the wording of Article 12 of the ECHR "in removing the reference to men and women".[56] It is nevertheless clear from the Charter itself that the right to marry and the right to found a family "shall be guaranteed in accordance with the national laws governing the exercise of these rights".[57] Furthermore the explanations elaborated by the Convention drafting the Charter state that this Article "neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex".[58] With the words of General Advocate Colomer one can say that "Community law accepts each Member State's definition of marriage, singleness, widowhood, and the other forms of 'civil (marital) status'".[59] At the same time the Court made clear that the exercise of the member states' competence in the field of civil status and the benefits flowing there from must be exercised in a way which complies with "Community law and, in particular, with the provisions relating to the principle of non-discrimination".[60] This Community limit on domestic family law implies that certain national rules denying specific entitlements to non-married couples have to be justified in order to be legal. If they cannot be justified, member states have to provide for alternative means and forms in order that non-married partners can profit from comparable benefits.

Thus, the central question is whether benefits linked to the institution of marriage can be *ex-ante* and *pro toto* reserved to married persons only. The Court so far has staunchly defended the member states' right to reserve marriage-related benefits to spouses exclusively, first in Grant v. SWT in 1998 and then again three years later in the context of an EU institution (D. and Sweden v. Council). The 1998 case is worrying in that the Court not only allowed a different treatment of married and non-married couples but it even gave its *sanctus* to a treatment which outside marriage differentiated--without any plausible justification--between homosexual and heterosexual couples. What should also be critically assessed is *how* the Court arrived at its restrictive conclusions in the cases at hand. The Court has looked to the "present state of the law"[61] as defined by the member states in order to ascertain whether homosexual relationships "are regarded in the member states concerned as being distinct from marriage"[62]. In the case of Maruko it became especially evident that such an approach leads to a situation where the question

[56] ECtHR, case of Christine Goodwin v. The United Kingdom, Application no. 28957/95, judgement of 11 July 2002, Par. 100. Note that Poland felt it necessary to attach a declaration to the Lisbon Treaty underlining that the Charter does not affect "in any way" the right of member states to "legislate in the sphere of public morality, family law as the protection of human dignity and respect for human physical and moral integrity". Declaration 61 (Declaration by the Republic of Poland on the Charter of Fundamental Rights of the European Union).

[57] See Art. 9 of the Charter of Fundamental Rights, OJ 2000 C 364, pp. 1-22.

[58] The explanations further explain that the provision is based on Art. 12 ECHR. Its wording "has been modernised to cover cases in which national legislation recognizes arrangements other than marriage for founding a family". The provision is "thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides". See Convention document CHARTE 4473/00 as of 11 October 2000.

[59] Opinion of the AG in the case Maruko, loc.cit., Para. 77.

[60] ECJ, Tadao Maruko v. Versorgungsanstalt, loc.cit., Para, 59.

[61] ECJ, Lisa Jacqueline Grant v. SWT, loc.cit., Para. 35

[62] ECJ, D and Kingdom of Sweden v. Council, loc.cit., Para. 36.

of applicability of EU law is entirely left in the hands of the national legislators. Now that the Framework Directive clearly forbids discrimination based on sexual orientation, the European Court of Justice should adopt a more sophisticated approach. The Treaty of Lisbon will not only make the prohibition to discriminate based on sexual orientation a principle applying in the whole range of EC law,[63] it will also place all EU institutions--the Court included--under an obligation to combat discrimination based inter alia on sexual orientation "in defining and implementing" their activities[64].

These new provisions could be motivation enough to change the course. If the Court were to build on its Maruko line of thinking it will place at risk-–for the sake of preserving diversity between the States–-the very unity of European Union law. The motivation for the Court's approach in the Maruko case presumably derived from the fact that family law is an area falling in the most inner circle of the member states' competences. This however should not imply that the Court's does not take its own caveat (namely the duty to exercise national competence in a way which respects Community law and, in particular, the principle of non-discrimination) seriously. When the Court for instance was confronted with national norms addressing linguistic minorities it found itself equally in a context legally and politically dominated by the member states. However, when deciding whether or not those who are excluded from a certain right are comparable to those who are granted it, the Court did not make reference to the overall set of rights the two groups of people are granted under national law (which would render the identification of a discrimination impossible). It instead referenced whether or not "they are in the same circumstances"[65] (and thus equating in the specific context to the question whether "their language is the same")[66]. Those who are *de facto* in the same situation should also *de jure* be granted the same rights and benefits, unless a restriction can be justified. This approach should not only be applied in the context of discrimination based on nationality, but also in that of discrimination due to sexual discrimination.

Where member states distribute benefits and differentiate between marriage and non-marriage (potentially an indirect discrimination) or between heterosexual relations and homosexual relations (potentially a direct discrimination), the Court should not make the application of the Framework Directive dependent on the *de iure* existence or the specific legal design of a life-partnership in those states. The comparability of hetero- and homosexual situations should depend on whether their *de facto* situation (needs, vulnerability, stability) is comparable in the very concrete context.[67] Judicial subsidiarity can be granted in a second moment, namely when discussing whether or not an identified discrimination is justified by a legitimate aim. Of course, under such an approach EU law steps in very early when compared to the Maruko approach, where EU law applies only once a member state provides for a marriage-like form of partnership. Nevertheless the approach proposed here does not imply that family law is harmonized. Member states

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[63] Art 21 of the Charter of Fundamental rights will, just as the rest of the Charter, "have the same legal value as the Treaties". See the new Article 6 EU as amended by Art. 1 of the Treaty of Lisbon.

[64] See Art. 2 of the Treaty of Lisbon which introduces a new Article 5b in the EC Treaty.

[65] ECJ, Robert Heinrich Maria Mutsch, Case C-137/84, judgment of 11 July 1985, ECR I-2681, Para 18.

[66] ECJ, Horst Otto Bickel and Ulrich Franz, Case C-274/96, judgement of 24 November 1998, ECR I-6, Para. 31.

[67] This is not necessarily so. To give the most obvious example: a rule sustaining couples on the basis of pregnancy has obviously not to be extended to homosexual couples.

would in any event remain free to design their family institutions. Admittedly, those which have not yet established legally protected forms of same-sex partnerships will have to do so in the long run, since otherwise same-sex couples can hardly prove that they indeed are in a comparable life-situation as regards stability, mutual obligations, commitment, and the like. In the eyes of some this might be indirect harmonization dictated by the Framework Directive which so reduces diversity between the states. But this is the price to pay if sexual diversity is to be protected in all EU societies and if the duty not to discriminate on the basis of sexual orientation is to be taken seriously.