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LGBTQ Relationships

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Chapter 4

LGBTQ Relationships

Family law continues to evolve rapidly. Past orthodoxies become unsustainable, while new norms and values are ushered in.

John Murphy, The Recognition of Same-Sex Families in Britain: The Role of Private International Law, 16 Int’l J. L. Pol. & Fam. 181, 185 (2002)

Perhaps nowhere in family law is this evolution more dramatic than in the burgeoning recognition of rights of lesbian, gay, bisexual, transgendered, and questioning (LGBTQ) couples. Within the past twenty-five years courts, legislatures, and international bodies have addressed the extent to which rights and obligations formerly reserved to heterosexual married spouses should be conferred on other partners.

Most western democracies now recognize same-sex unions, assuring the partners in such unions a range of rights and benefits, similar to but distinct from the rights and benefits enjoyed by married couples. Part A of this Chapter describes the legal mechanisms which recognize and protect same-sex unions, some of which are also open to heterosexual couples. Part B focuses on the minority of states that have opened civil marriage to same-sex couples. This Part includes same-sex “marriages” which may differ from opposite-sex marriages in their treatment of children born or adopted into the marriage. Part C addresses intimate partnerships, which may or may not be same-sex, involving transgendered, bisexual and questioning people. This Part considers the growing reliance on human rights instruments to expand the rights of LGBTQ couples, including the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

A. Civil Unions

Kelly Kollman, Same-Sex Unions: The Globalization of an Idea


With the adoption of its registered partnership law in 1989, Denmark became the first country to implement a national same-sex unions (SSU) law. In the decade and a half that have followed, 15 additional West European countries have adopted similar legislation, eight of them in the past 5 years. In 2003, Jean Chrétien’s government in Canada became one of the first non-European governments to propose an SSU law at the national level and in 2005 Canada became one of only five countries to allow gay and lesbian couples to marry. By the beginning of 2006, the only major western democracies without such laws in place were the United States, Italy, Greece, and Ireland.
1. In Europe

Most states which afford same-sex couples the opportunity to formalize their relationships legally have opted to create an alternative status that coexists with the institution of marriage. As noted above, Denmark became the first nation to follow this route when it enacted registered partnership legislation. It was soon joined by other Nordic countries—Norway (1993), Sweden (1994), Greenland (1994), and Iceland (1995)—whose legislation mirrored Denmark’s.

Registered partnerships in these Nordic countries are open only to same-gender couples. The legislation explicitly guarantees that, with a few delineated exceptions, registered partners will have all of the same rights under law as married couples. Thus, the registered partnership creates mutual obligations of support, inheritance rights, insurance benefits, and the other economic and legal rights, between the partners themselves and in relation to third parties, that accompany marital status. The substantive exceptions in the original legislation all relate to parental rights. Denmark and Sweden, for example, restricted the ability of partners to have joint custody, and Iceland and Sweden restricted access to artificial insemination. Originally, all of these countries withheld the right to adopt, although subsequently Denmark, Sweden, and Iceland lifted or partially lifted those restrictions as described above in Note 3. See Martin DuPuis, The Impact of Culture, Society, and History on the Legal Process: An Analysis of the Legal Status of Same-Sex Relationships in the United States and Denmark, 9 Intl J. L. & Fam. 86, 104–05 (1995); Denmark’s Registered Partnership Act, Iceland’s Registered Partnership Act, Norway’s Act on Registered Partnerships for Homosexual Couples, and Sweden’s Registered Partnership Act, http://users.cybercity.dk/~dko12530/s2.htm (translated texts of all).

Many of the restrictions to marriage, such as age, consanguinity, and bigamy prohibitions, also apply to registered partnerships in these countries, and each of these nations requires that at least one partner be a citizen of the nation and domiciled therein. Solemnization requirements for registered partnerships, however, are not identical to marriage, and vary by country. In Denmark, for example, “[r]egistered partners do not have a right to a Danish church wedding,” nor do they have a right by law to mediation performed by clergy. DuPuis, supra, at 104–05, citing Act No. 821, 19 Dec. 1989. Registered partnerships in these countries are also dissolved under the same circumstances as marriages.

a. German Partnerships

More recently, Germany and Finland have enacted registered partnership legislation, also limiting entry to same-gender couples. Germany’s legislative scheme, the Registered Partnership Act of 2001, Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften Lebenspartnerschaften, 2001 BGBI. I S. 266, is of particular interest, as it deviates from the Nordic model in several respects.

Rather than grant all of the rights of marriage, with specified parental exceptions, the German legislature instead enumerated the rights and obligations that registered partnership would entail. While extensive, they deviate from the rules governing marriage in some significant respects. Registered partners commit to provide each other with appropriate financial support during the relationship, and to joint entitlement and obligations
arising from contracts entered by one partner, just as in marriage. Unlike marital spouses, however, partners must declare which system of property will be applicable to their partnership—a regime of accrued gains (which secures a share of property acquired for the homemaker partner), a contract that modifies the accrued gains regime, separation of property, or communal property—at the time they establish the partnership. Registered partners have the same rights of inheritance as marital spouses, and a right to become tenant of a joint residence after the death of a partner, but do not have equal tax status in terms of inheritance tax or other tax benefits. Registered partners are accorded testimonial and immigration privileges similar to marital spouses, and one partner may acquire the right, with the consent of the other partner, to participate in day-to-day decisions regarding the partner’s child. Joint adoption, or adoption of a partner’s child, is not permitted, however, nor is artificial insemination of one of the partners. If one partner does live with the biological or adopted child of the other partner over an extended period of time, the former individual has a right of access following dissolution, but would not have a right to custody. Nina Dethloff, *The Registered Partnership Act of 2001, in The International Survey of Family Law* 171, 174–78 (Andrew Bainham ed., 2002); Steven Ross Levitt, *New Legislation in Germany Concerning Same-Sex Unions*, 7 ILSA J. Int’l & Comp. L. 469, 482–88 (2001).

As in marriage, dissolution of a German registered partnership requires a court decree. The grounds for dissolution of a registered partnership, however, differ in some respects from the grounds for dissolution of marriage. Dissolution of a registered partnership is permitted (1) by agreement, 12 months after the parties file a declaration of their desire for a dissolution; (2) at the request of one partner, 36 months after that partner’s declaration has been filed; or (3) on the basis of unacceptable hardship to the partner who files, for reasons related to the other partner. Unlike dissolution of a marriage, there is no irrefutable presumption based upon breakdown and separation for a specific period. Thus, registered partners will frequently have to wait longer for the decree, because partners must declare their intent at the beginning of the statutory period, whereas marital spouses may choose to file toward the end of a separation period, and separation of spouses can be deemed to include periods in which both were physically living in the same home. Dethloff, *supra*, at 179.

German registered partnerships may, under some circumstances, create an obligation to provide post-dissolution maintenance to a former partner who cannot support himself or herself, due to age or disability. Unlike the situation following dissolution of a marriage, however, the court is directed by the legislation to look first to relatives of the financially vulnerable partner to provide support, and only if support cannot be obtained from such relatives would the obligation for post-dissolution maintenance be imposed upon an ex-partner. Levitt, *supra*, at 483.

On 12 October 2004, the Life Partnership Law (Revision) Act was passed by the Bundestag, increasing the rights of registered same-sex partners to include, among other things, the possibility of second parent adoption, pension rights for workers and employees (not for federal civil servants), and simpler alimony and divorce rules. This law, however, still excludes the same tax benefits that are available to married different-sex partners. Registered partners do not have full adoption rights.

German law allows registered partners to change their last names; joint custody over a child for whom one partner already has custody and allows partners to adopt each other’s children; grants recognition of next-of-kin rights; joint eligibility for some social security benefits; survivor’s pension right; similar rights in the field of tenancy; and immigration concessions and working permission for a foreign partner.
Notes and Questions

1. Constitutional and Political Constraints. Several unique constitutional and political factors contributed to the different model for registered partnership ultimately fashioned by the German legislature. One important constraint was the risk that the new legislation would be determined unconstitutional by the Federal Constitutional Court. See, e.g., Ilona Ostner, Cohabitation in Germany—Rules, Reality and Public Discourses, 15 Int’l J.L. Pol. & Fam. 88, 99 (2001). Levitt, supra, at 478–79, 488–89.

In an action challenging the constitutionality of the German domestic partnership legislation, brought by Bavaria and two other states, the Federal Constitutional Court voted 5–3 to uphold the law’s constitutionality. German Court Oks Gay Marriage, July 17, 2002, at http://www.nytimes.com/aponline/international/AP-Germany-Gay-Couples.html.

Another set of constraints was imposed by Germany’s federal system. Those matters regarded as impacting state governments, such as the tax benefits, were separated into a second bill, which was ultimately defeated. Levitt, supra, at 479–81, 488.

2. Should Role Assumptions Impact Creditors’ Rights? German law professor Nina Dethloff questions whether imposing contractual liability on both partners for purchases made by one partner during the relationship for food, clothing, furniture, or a vehicle is creating a windfall for the creditor. She argues that insufficient data is available regarding the role assumption of same-gender partners, but postulates that differentiated division of tasks is rarer because few children are raised in German same-gender relationships. If so, she suggests that this creditor protection is unnecessary, as the principal function of joint liability is to enable a homemaker partner to make purchases for the couple independently. Dethloff, supra, at 175.

Does it make more sense, when fashioning an alternative status, to scrutinize each legal effect of opposite-gender marriage to determine if it is reasonably applied to same-gender couples, or rather to take a broader approach, establishing rights and obligations equivalent to marriage across the board?

If you believe scrutinizing individual rights and obligations is more appropriate, do you think Dethloff’s assumption that differentiated division of tasks is far less frequent among same-gender couples would be accurate in the United States? Absent valid socio-economic studies, which Dethloff recognizes are not available, should legislatures justify differences in rights and obligations based on their individual perceptions regarding differences in role differentiation?

b. The French Pacte Civil de Solidarité (PACS)

France introduced a very different model for an alternative status when its Pacte Civil de Solidarité (PACS), Loi no. 99-994, entered into effect in November 1999. First, the status is open to opposite-sex as well as same-sex cohabitants.

Second, the law requires that the couple enter a cohabitation contract, the PACS, in which they set forth the terms and conditions that they wish to regulate their common life. It is the PACS, rather than the relationship, which is technically registered. Property issues regulated by private law, such as ownership of property and financial commitments towards each other, during and after the relationship, can be stipulated by the parties, subject to any restrictions the general law imposes. Alternatively, the partners may choose not to address some or all specific issues and declare that general law will regulate the PACS. In such cases, property acquired after the PACS is registered will be presumed to
be owned by the partners in equal shares, unless a purchase deed specifies otherwise. Anne Barlow & Rebecca Probert, Le PACS est arrivé— France Embraces Its New Style Family, 2000 Int’l Fam. L. 182, 182.

A third important difference is the fact that some of the public benefits bestowed upon the couple after registration of a PACS are phased in based on the length of the relationship or birth of a child. For example, after two years PACS partners may leave an increased portion of their estate to the other partner without tax, and after three years PACS couples will be taxed as married couples. On the other hand, PACS partners can immediately take advantage of their partner’s health insurance and social security contributions. Id. Entry into a PACS permits certain employment and immigration benefits as well. Adoption and custody are not addressed in the French PACS legislation. Collectif PACS et Caetera, http://perso.club-internet.fr/ccucs/frames/e_une.html.

Like the German registered partnership, not every feature of the PACS is equivalent to marriage. For example, partners owe each other “mutual and material assistance,” which is considered a lower standard than the “help and assistance” duty imposed on married partners. Also like the German statute, the PACS law specifically sets forth enumerated rights and obligations, including the joint and several liability of each for debts incurred by either partner for household expenses. Upon desertion or death of one partner, the other is entitled to the tenancy of the partners’ home, id., but apart from tenancies, there are no succession rights. Claude Martin & Iréne Théry, The PACS and Marriage and Cohabitation in France, 15 Int’l J. L. Pol. & Fam. 135, 150–51 (2001).

Registration of the PACS requires the attendance of both partners at the local courthouse, where the declaration of their agreement is recorded. The court must be notified of any subsequent amendments to its terms. The parties may terminate a PACS immediately upon their mutual agreement, or upon marriage to each other or the marriage of one to another individual. It can also be terminated by one partner unilaterally three months after notice is given to the other party and the court. Unless the parties marry each other, dissolution of the relationship requires that property be divided according to the terms of the PACS, and the role of the court is to resolve any disputes that might arise concerning these terms or their implementation, or to determine the financial consequences regarding those issues the PACS does not address. Id. at 182–83. See also website of Collectif PACS et Caetera, supra.

**Notes and Questions**

1. **Constitutionality.** France’s PACS legislation was also the subject of constitutional challenge, and was upheld by the Conseil Constitutionnel, subject to certain réserves d’interprétation. The Court held that the legislation is constitutional only if the parties are required to “live as a couple” and not simply as persons sharing a household; and that PACS partners not be permitted to opt out of the obligation of mutual assistance, and may be held liable to a partner if one breaks the relationship. Eva Steiner, The Spirit of the New French Registered Partnership Law—Promoting Autonomy and Pluralism or Weakening Marriage, 12 Child & Fam. L.Q. 1, 4 (2000).

2. **Demographic Changes.** The PACS legislation was a response not only to the need of same-gender couples for equality, but also to the changes that had occurred in French society over the last few decades. Between 1980 and 1997, the annual rate of marriages celebrated in France dropped from 334,000 in 1980 to 284,000 in 1997; the annual percentage of children born out of wedlock rose from 11.4% in 1980 to 40% in 1997, and
by 1999 one in three couples between the ages of 25 and 39 were cohabiting. Steiner, *supra* note 1, at 3, n.12 and accompanying text.

3. *Participation.* During the first four and one-half months in which the PACS legislation was in effect, almost 14,000 PACS were registered. During the first two years of the Dutch Registered Partnership Act, by comparison, only 2,822 Dutch couples registered. Barlow, *supra*, at 183. No confirmed statistics regarding the gender of PACS partners are available, as the registering tribunals are forbidden to release this information. Martin, *supra*, at 151. However, a media survey of court clerks indicates that the majority of couples registering PACS are heterosexual. Barlow, *supra*, at 183. Does your knowledge of French divorce law from Chapter 3 possibly shed some light on the popularity of PACS in France?

4. In the United States. According to the National Conference on State Laws, ([http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx](http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx)) as of March 26, 2014 several states in the United States have expanded the legal rights available to parties in same-sex relationships through civil unions and domestic partnerships. Six states adopted civil unions available to both same-sex and opposite-sex couples. Civil unions provide legal recognition to the couples’ relationship and provide legal rights to the partners similar to those accorded to spouses in marriages. Two states have adopted broad domestic partnerships that grant nearly all state-level spousal rights to unmarried couples. Three states and the District of Columbia provide limited domestic partnerships that provide some state-level spousal rights to unmarried couples, including same-sex couples. Civil Unions are available in Colorado, Hawaii, Illinois and New Jersey.

Civil Unions have been converted to marriages in Vermont, New Hampshire, Connecticut, Delaware and Rhode Island. Domestic Partnerships are available in California, Oregon, Washington, Maine, Hawaii, District of Columbia, Nevada and Wisconsin. In several of these states, such as California, they are available to same-sex couples and opposite-sex couples over the age of 62. In Washington, domestic partnerships “where neither party is sixty-two years of age or older, [were] automatically converted into a marriage as of June 30, 2014, unless dissolved or converted to marriage prior to that date.”

The Maine Domestic Partnership law is fairly representative, giving domestic partners limited rights, including inheritance without a will, making funeral and burial arrangements, entitlement to be named a guardian or conservator if a partner becomes incapacitated or to be named a representative to administer a deceased partner’s estate, entitlement to make organ and tissue donation, and explicit protection in the state’s domestic violence laws.

5. *Alternative Status in Other Nations.* As in France, legislation in Belgium, the Netherlands, several provinces in Spain, and the Canadian province of Nova Scotia have created domestic partnerships that are open to both opposite-gender and same-gender couples. Levitt, *supra*, at 478, n. 47; R.S.N.S. c. 494, § 54 (2002). In 2002 the Canadian province of Quebec created civil unions, which also appear to be open to both same-gender and opposite-gender partners. Civil Code of Quebec, c. 64, § 521.1 (2002). Hungary, too, has taken this route. See Orsolya Szeibert, “Same-Sex Partners in Hungary: Cohabitation and Registered Partnership”, 4 Utrecht L. Rev. 212–21 (2008). The Hungarian Act entered into force on January 1, 2009.

In 2011, the Brazilian Supreme Court ruled unanimously that partners in a same-sex union have the same rights as married heterosexuals. Amnesty International, “Brazil Supreme Court Recognizes Same-sex Civil Unions,” in Annual Report 2013 ([http://www.](http://www.)).

Same-sex couples in Croatia can now enter into life partnerships, according to the Italian news agency, “The measure, however will not grant adoption rights to gay couples but if one partner dies and had a child, the other partner will have guardianship rights.” Jason St. Amand, *Croatia Approves Civil Unions for Same-Sex Couples*, National News Editor, July 15, 2014 http://www.edgeonthenet.com/news/international/news/162405/croatia_approves_civil_unions_for_same-sex_couples.


6. Following the enactment of the United Kingdom Civil Partnership Act, 2004, c.33., the question has been raised whether it is acceptable under the European human rights conventions to maintain marriage and civil partnership as mutually exclusive institutions for opposite-sex and same-sex couples. Nicholas Bamforth, *‘The Benefits of Marriage in All But Name’? Same-Sex Couples and the Civil Partnership Act 2004*, 19 Child & Fam. L.Q. 133, 133–60 (2007). See also Wade K. Wright, “The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales”, 20 Int’l J.L. Pol’y & Fam. 249 (2006). The ECHR addresses this issue in the cases below.

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**Case of Vallianatos and Others v. Greece**


I. The Circumstances of the Case

8. The applicants in application no. 29381/09 live together as a couple in Athens. In the case of application no. 32684/09, the first and second applicants and the third and fourth applicants have lived together for a long time as couples in Athens. The fifth and sixth applicants are in a relationship together but for professional and social reasons do not live together. As shown by their bank statements, the sixth applicant pays the fifth applicant’s social-security contributions. The seventh applicant is a not-for-profit association the aims of which include providing psychological and moral support to gays and lesbians.

9. On 26 November 2008 Law no. 3719/2008, entitled “Reforms concerning the family, children and society”, entered into force. It made provision for the first time in Greece for an official form of partnership other than marriage, known as “civil unions.” Under section 1 of the Law, such unions can be entered into only by two adults of different sex.

10. According to the explanatory report on Law no. 3719/2008, the introduction of civil unions reflected a social reality, namely cohabitation outside marriage, and allowed the persons concerned to register their relationship within a more flexible legal framework than that provided by marriage. The report added that the number of children born in Greece to unmarried couples living in de facto partnerships had increased over time and by then represented around 5% of all children being born in the country. It further noted that the
position of women left without any support after a long period of cohabitation, and the phenomenon of single-parent families generally, were major issues which called for a legislative response. However, the report pointed out that the status of religious marriage remained unparalleled and, alongside civil marriage, represented the best option for couples wishing to found a family with a maximum of legal, financial and social safeguards. The report also made reference to Article 8 of the Convention, which protected non-marital unions from the standpoint of the right to private and family life, and observed that a number of European countries afforded legal recognition to some form of registered partnership for different-sex or same-sex couples. Without elaborating further, it noted that civil unions were reserved for different-sex adults. It concluded that they represented a new form of partnership and not a kind of “flexible marriage”. The report considered that the institution of marriage would not be weakened by the new legislation, as it was governed by a different set of rules.

11. A lively debate preceded the implementation of Law no. 3719/2008. The Church of Greece spoke out officially against it. In a press release issued on 17 March 2008 by the Holy Synod, it described civil unions as “prostitution”. The Minister of Justice, meanwhile, addressed the competent parliamentary commission in the following terms:

“…We believe that we should not go any further. Same-sex couples should not be included. We are convinced that the demands and requirements of Greek society do not justify going beyond this point. In its law-making role, the ruling political party is accountable to the people of Greece. It has its own convictions and has debated this issue; I believe this is the way forward.”

12. The National Human Rights Commission, in its observations of 14 July 2008 on the bill, referred in particular to the concept of family life, the content of which was not static but evolved in line with social mores.

13. On 4 November 2008 the Scientific Council of Parliament, a consultative body reporting to the Speaker of Parliament, prepared a report on the bill. It observed in particular, referring to the Court’s case-law, that the protection of sexual orientation came within the scope of Article 14 of the Convention and that the notion of the “family” was not confined solely to the relationships between individuals within the institution of marriage but, more generally, could encompass other ties outside marriage which amounted de facto to family life.

14. During the parliamentary debate on 11 November 2008 on the subject of civil unions the Minister of Justice merely stated that “society today [was] not yet ready to accept cohabitation between same-sex couples”. Several speakers stressed that Greece would be violating its international obligations and, in particular, Articles 8 and 14 of the Convention by excluding same-sex couples.

15. On 27 September 2010 the National Human Rights Commission wrote to the Minister of Justice reiterating its position as to the discriminatory nature of Law no. 3719/2008. In its letter, the Commission recommended drafting legislation extending the scope of civil unions to include same-sex couples.

* * *

B. Comparative, European and international law

1. Comparative law material

25. The comparative law material available to the Court on the introduction of official forms of non-marital partnership within the legal systems of Council of Europe member States
shows that nine countries (Belgium, Denmark, France, Iceland, the Netherlands, Norway, Portugal, Spain and Sweden) recognise same-sex marriage. In addition, seventeen member States (Andorra, Austria, Belgium, the Czech Republic, Finland, France, Germany, Hungary, Iceland, Ireland, Liechtenstein, Luxembourg, the Netherlands, Slovenia Spain, Switzerland and the United Kingdom) authorise some form of civil partnership for same-sex couples. Denmark, Norway and Sweden recognise the right to same-sex marriage without at the same time providing for the possibility of entering into a civil partnership.

26. Lastly, Lithuania and Greece are the only Council of Europe countries which provide for a form of registered partnership designed solely for different-sex couples, as an alternative to marriage (which is available only to different-sex couples).

2. Relevant Council of Europe materials

27. In its Recommendation 924 (1981) on discrimination against homosexuals, the Parliamentary Assembly of the Council of Europe (PACE) criticised the various forms of discrimination against homosexuals in certain member States of the Council of Europe. In Recommendation 1474 (2000) on the situation of lesbians and gays in Council of Europe member states, it called on member States, among other things, to enact legislation making provision for registered partnerships. Furthermore, in Recommendation 1470 (2000) on the more specific subject of the situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe, it recommended to the Committee of Ministers that it urge member States, inter alia, “to review their policies in the field of social rights and protection of migrants in order to ensure that homosexual partnership and families are treated on the same basis as heterosexual partnerships and families …”

28. Resolution 1728 (2010) of the Parliamentary Assembly of the Council of Europe, adopted on 29 April 2010 and entitled “Discrimination on the basis of sexual orientation and gender identity”, calls on member States to “ensure legal recognition of same-sex partnerships when national legislation envisages such recognition, as already recommended by the Assembly in 2000”, by providing, inter alia, for:

“16.9.1. the same pecuniary rights and obligations as those pertaining to different-sex couples;
16.9.2. ‘next of kin’ status;
16.9.3. measures to ensure that, where one partner in a same-sex relationship is foreign, this partner is accorded the same residence rights as would apply if she or he were in a heterosexual relationship:

* * *

36. The applicants alleged that the fact that the civil unions introduced by Law no. 3719/2008 were designed only for couples composed of different-sex adults infringed their right to respect for their private and family life and amounted to unjustified discrimination between different-sex and same-sex couples, to the detriment of the latter. They relied on Article 14 taken in conjunction with Article 8 of the Convention. Those provisions read as follows:

Article 14

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”
Article 8

1. Everyone has the right to respect for his private and family life [and] his home …
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

* * *

91. In addition, the Court would point to the fact that, although there is no consensus among the legal systems of the Council of Europe member States, a trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships. Nine member States provide for same-sex marriage. In addition, seventeen member States authorise some form of civil partnership for same-sex couples. As to the specific issue raised by the present case paragraph 75 above), the Court considers that the trend emerging in the legal systems of the Council of Europe member States is clear: of the nineteen States which authorise some form of registered partnership other than marriage, Lithuania and Greece are the only ones to reserve it exclusively to different-sex couples (see paragraphs 25 and 26 above). In other words, with two exceptions, Council of Europe member States, when they opt to enact legislation introducing a new system of registered partnership as an alternative to marriage for unmarried couples, include same-sex couples in its scope. Moreover, this trend is reflected in the relevant Council of Europe materials. In that regard the Court refers particularly to Resolution 1728(2010) of the Parliamentary Assembly of the Council of Europe and to Committee of Ministers Recommendation CM/Rec(2010)5 (see paragraphs 28–30 above).

92. The fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect conflicts with the Convention. Nevertheless, in view of the foregoing, the Court considers that the Government have not offered convincing and weighty reasons capable of justifying the exclusion of same-sex couples from the scope of Law no. 3719/2008. Accordingly, it finds that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention in the present case.

**Boeckel and Gessner-Boeckel v. Germany**


Facts—The applicants are two women who have been living together in a registered civil partnership since 2001. In 2008 the second applicant gave birth to a son. A birth certificate was issued naming her as the mother. The space provided in the form for the father’s name was left blank. In 2009 the applicants concluded an agreement whereby the child would be adopted by the first applicant. The district court granted the adoption order and declared that the child obtained the legal position of a child of both applicants. In the meantime the applicants requested the district court to rectify the child’s birth certificate by inserting the first applicant as the second parent. They submitted that the Civil Code, which stipulated that the father was the man who was married to the mother of the child at the time of birth, should be applied *mutatis mutandis* in cases where the mother lived in a registered civil partnership with another woman and argued that it was irrelevant whether the mother’s husband was indeed the biological father of the child born into the union. There was thus no reason to treat children born into a civil partnership
any differently from children born in wedlock. The domestic courts rejected their request and subsequent appeal.

Law — Article 14 in conjunction with Article 8: In view of the fact that the first applicant had eventually obtained full legal status as the child’s second parent, the question arose whether the applicants could still claim to be victims of a violation of their Convention rights within the meaning of Article 34 of the Convention. However, having regard to the nature of the applicants’ complaint, the Court based its further examination on the assumption that the applicants could still claim to be victims of a violation of their Convention rights in view of the fact that the first applicant had had to undergo the adoption process in order to be recognised as the second parent. The applicants lived together in a registered civil partnership and were raising the child together. It followed that the relationship between the two applicants and the child amounted to “family life” within the meaning of Article 8 of the Convention. Accordingly, Article 14 of the Convention in conjunction with Article 8 was applicable.

The first issue to be addressed was whether the applicants, who had been living together in a registered same-sex civil partnership when the second applicant had given birth to a child, were in a situation which was relevantly similar to that of a married different-sex couple in which the wife had given birth to a child. The Court took note of the domestic courts’ reasoning according to which section 1592 § 1 of the Civil Code contained the — rebuttable — presumption that the man who was married to the child’s mother at the time of birth was the child’s biological father. This principle was not called into question by the fact that this legal presumption might not always reflect the true descent. The Court also noted that it was not confronted with a case concerning transgender or surrogate parenthood. Accordingly, in cases where one partner of a same-sex partnership gave birth to a child, it could be ruled out on biological grounds that the child descended from the other partner. The Court accepted that, under these circumstances, there was no factual foundation for a legal presumption that the child descended from the second partner. Having regard to the above considerations, it could not be said that the applicants had found themselves in a relevantly similar situation to a married husband and wife in respect of the entries made in the birth certificate at the time of birth. Consequently, there was no appearance of a violation of Article 14 of the Convention read in conjunction with Article 8.

Conclusion: inadmissible (manifestly ill-founded).

(Press Release issued by the Registrar of the Court)

In the case of X and Others v. Austria

*Impossibility of second-parent adoption in a same-sex relationship in Austria is discriminatory in comparison with situation of unmarried different-sex couples.*

In today’s Grand Chamber judgment in the case of X and Others v. Austria (application no. 19010/07), which is final, the European Court of Human Rights held: *by a majority*, that there had been a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life) of the European Convention on Human Rights on account of the difference in treatment of the applicants in comparison with unmarried different-sex couples in which one partner wished
to adopt the other partner’s child; and, *unanimously*, that there had been no violation of Article 14 taken in conjunction with *Article 8* when the applicants’ situation was compared with that of a married couple in which one spouse wished to adopt the other spouse’s child. The case concerned the complaint by two women who live in a stable homosexual relationship about the Austrian courts’ refusal to grant one of the partners the right to adopt the son of the other partner without severing the mother’s legal ties with the child (second-parent adoption). The Court found that the difference in treatment between the applicants and an unmarried heterosexual couple in which one partner sought to adopt the other partner’s child had been based on the first and third applicants’ sexual orientation. No convincing reasons had been advanced to show that such difference in treatment was necessary for the protection of the family or for the protection of the interests of the child. At the same time, the Court underlined that the Convention did not oblige States to extend the right to second-parent adoption to unmarried couples. Furthermore, the case was to be distinguished from the case *Gas and Dubois v. France*, in which the Court had found that there was no difference of treatment based on sexual orientation between an unmarried different-sex couple and a same-sex couple as, under French law, secondparent adoption was not open to any unmarried couple, be they homosexual or heterosexual.

**Jürgen Römer v. Freie und Hansestadt Hamburg**

Case C-147/08, 2011 E. C. R. 1-03591 (European Union)

Opinion of Advocate General Jääskinen.

This case deals with the pension benefits allowed to the same-sex partner of a retired employee:

I think it would be helpful to explain this statement by saying that the competence left to the Member States in the sphere of civil status means that it is reserved to the Member States to legislate on marriage or on any other form of legally recognised union between persons of the same sex, as of opposite sexes, and on the legal status of children and other family members in the broad sense. It is the Member States that must decide whether or not their national legal order allows any form of legal union available to homosexual couples, or whether or not the institution of marriage is only for couples of the opposite sex. In my view, a situation in which a Member State does not allow any form of legally recognised union available to persons of the same sex may be regarded as practising discrimination on the basis of sexual orientation, because it is possible to derive from the principle of equality, together with the duty to respect the human dignity of homosexuals, an obligation to recognise their right to conduct a stable relationship within a legally recognised commitment. However, in my view, this issue, which concerns legislation on marital status, lies outside the sphere of activity of Union law.

**Problem 4-1**

You are a staff member for an advocacy group for gay and lesbian partners, drafting legislation on behalf of your members to present to the legislature when it begins its next session. Assume that at present, the state or nation in which you reside does not permit same-gender marriage, nor has it created an alternative status for partners of any type. You are meeting today with the legislative lobbyist for a local feminist organization, which is preparing draft legislation to create an alternative status for cohabitants. Slightly over 90% of the members of this particular organization are heterosexual. The two organizations have good relations and have worked together in the past to support various legislative
proposals. The purpose of today’s meeting is to attempt to negotiate a proposal for formal recognition of relationships that both organizations would enthusiastically support, if possible.

Which objectives of each organization might be likely to be the same? Which might be different?

Do you think either group would be more likely to prefer a bill creating predominantly contract-based rights and obligations, rather than status-based rights and obligations? What are the advantages and drawbacks of each model?

Do you think either group would be more likely to prefer legislation that creates a status in which rights and obligations attach upon entry, or in which they accrue based upon the length or some other characteristic of the relationship?

Would either group be likely to desire any particular preconditions to entry, such as the absence of other marriages or formalized relationships or consanguinity restrictions?

What arguments do you anticipate encountering from opponents to your legislation when you present your draft to the legislature? What counter-arguments will you make?

B. Same-Sex Marriage

This Part begins with 2001 legislation in the Netherlands recognizing same-sex marriage. It then sets out excerpts from three noteworthy cases. In the first two, the high courts of South Africa and California holds that same-sex marriage must be recognized under their respective constitutions. In the third, the U.S. Supreme Court strikes down the section of the Defense of Marriage Act that limited marriage to opposite-sex couples for purposes of federal law. Recent laws recognizing such unions in Canada and South Africa follow.

This part concludes with a brief sampling of some of the responses to these laws by states which do not recognize same-sex marriage. These range from Australia’s Marriage Amendment Act (2004), which explicitly limits marriage to opposite-sex couples, to laws in Nigeria and Uganda, which criminalize same-sex relationships.

The requirements for marriage and its legal consequences are discussed in Chapter 2. A comprehensive discussion of the recognition of foreign marriages is set out in Chapter 5. While both chapters technically apply to same-sex marriage as well as to opposite-sex marriage, there are differences which justify its separate treatment here. First, legislation enacted in opposition to same-sex marriage, such as the ‘mini DOMAs’ enacted by some states in the United States, deny same-sex married couples the benefits of marriage under state law. Thus, same-sex and opposite-sex married couples do not enjoy precisely the same rights and benefits, at least in some jurisdictions. Second, other laws regarding the refusal to recognize same-sex marriage, or even criminalizing homosexuality, mean that same-sex couples cannot assume that they will be protected under the usual principles governing recognition of foreign marriages. Rather, their marriages have been singled out by some governments as offensive to public policy. Third, in some states that recognize same-sex marriage, the presumptions of legal parenthood applicable to opposite-sex couples are considered inapplicable to same-sex parents, requiring adoption by the parent who is not biologically related to the child. Some of the unique issues raised by same-sex marriages, and the responses they have generated, are discussed here.
On April 1, 2001, the Netherlands became the first nation to permit partners of the same gender to marry. Although the Netherlands had already had domestic partnership legislation in effect since 1998 for both heterosexual and homosexual couples, the Government decided to take the further step of equalizing access to marriage for opposite-sex and same-sex couples, in furtherance of the principles of gender-neutrality and equal treatment. See Explanatory Memorandum accompanying the Act on Opening up of Marriage, Acts of 21 December 2000, Stb. 2001, no. 9 (Kees Waaldijk, trans.), at www.ilga-europe.org/content/download/11003/65185/file/Netherlands. As amended by the Act, Articles 30, 77a, and 80f of Book 1 of the Civil Code now read as follows:

Article 30—A marriage can be contracted by two different persons of different sex or of the same sex. The law only considers marriage in its civil relations.

Article 77a—When two persons indicate to the registrar that they would like their marriage to be converted into a registered partnership, the registrar of the domicile of one of them can make a record of conversion to that effect. If the spouses are domiciled outside the Netherlands and want to convert their marriage into a registered partnership in the Netherlands, and at least one of them has Dutch nationality, conversion will take place with the registrar in The Hague.

* * *

A conversion terminates the marriage and starts the registered partnership on the moment the record of conversion is registered in the register of registered partnerships. The conversion does not affect the paternity over children born before the conversion.

Article 80f—When two persons indicate to the registrar that they would like their registered partnership to be converted into a marriage, the registrar of the domicile of one of them can make a record of conversion to that effect. If the registered partners are domiciled outside the Netherlands and want to convert their registered partnership into a marriage in the Netherlands, and at least one of them has Dutch nationality, conversion will take place with the registrar in The Hague.

* * *

A conversion terminates the registered partnership and starts the marriage on the moment the record of conversion is registered in the register of marriages. The conversion does not affect the paternity over children born before the conversion. (Kees Waaldijk, trans., supra).

The legal requirements for and consequences of a same-gender marriage are identical to those of a heterosexual marriage in virtually every way. The conditions for entry, in terms of restrictions on age, plural marriages, and consanguinity restrictions, are the same. Whether or not they are a same-gender couple, at least one of the partners must be either a Dutch national or habitually resident in the Netherlands for the Dutch marriage laws to apply. Marriage for both opposite-sex partners and same-sex partners permits one to use the other’s surname, and unless a premarital agreement provides otherwise, triggers community property treatment of assets and debts of the marriage. Marriage also imposes spousal support obligations both during marriage and after divorce, joint liability for certain household debts, and restrictions upon management of joint property.
Marriage impacts many other legal rights and obligations, such as inheritance, tax consequences, and entitlements to pensions and governmental benefits, all of which will apply equally to both same-gender and opposite-gender marriages. To terminate any marriage, whether between couples of the same or different genders, a court's divorce pronouncement is required. The Ministry of Justice, Same-sex Marriages, at http://english.justitie.nl/themes/family-law/index.aspx; Wendy Schrama, Reforms in Dutch Family Law During the Course of 2001: Increased Pluriformity and Complexity, in The International Survey of Family Law 277, 278 (2002).

Only a few differences remain. Because the Netherlands is a hereditary monarchy and in this context genetic progeny are deemed important, the Government pronounced in deliberations on the bill that it would not apply to the king or queen or a potential successor to the throne. Of broader interest is the different effect of same-gender marriage on the recognition of legal parenthood. A marriage of spouses of opposite gender creates a presumption that the husband and wife are parents of any child born of the marriage. A woman who bears a child is the mother, and her husband is presumed to be the father of a child she bears. The legislature was unwilling to extend this presumption to the same-gender partner of another man, as the biological link that created the presumption for heterosexual spouses would be absent. Therefore, the Act Opening Marriages did not amend the relevant language in the Dutch statute creating marital presumptions of parenthood. If one of the spouses is a biological parent, that parent's same-gender partner is regarded as a legal parent of the child only if he or she adopts the child.

Legal parenthood must be distinguished in the Dutch system, however, from shared parenting responsibilities. In January, 2002, the law was updated to provide that a spouse in a lesbian marriage, as a matter of law, will acquire automatic shared custody of a child born to her partner during the marriage, if the child has no other legal parent. This would be the case if the child was conceived by anonymous artificial insemination. This rule does not apply to male couples, as the birth mother of the child would normally be recognized as a legal parent. A male partner of a biological father, however, or both, if neither is the legal parent, can still apply for shared custody if the other statutory requirements for shared custody are satisfied. Scharma, supra, at 295–96; Ministry of Justice, supra.

**Notes and Questions**

1. *Retention of the Domestic Partnership Alternative.* The Netherlands originally created domestic partnerships in 1998 in order to afford same-gender couples a status that would provide almost all of the benefits of marriage. Nevertheless, in order to provide equal access to the symbolic nature of marriage, the Government went further to enact the Act Opening Marriage three years later. Yet the Act retains the option of registered partnerships, and in fact permits a couple to convert their marriage to a registered partnership, or their registered partnership to a marriage, simply by making a record of conversion. If the goal of equality for same-gender couples has now been achieved by opening marriage, what purpose does retention of the registered partnership as an institution serve? Are there any drawbacks to retaining it?

In the Netherlands, the rights and obligations that the parties have towards each other are the same in both marriages and registered partnerships. There are some minor differences regarding the form of the ceremony for entering a registered partnership, as opposed to a marriage, but the major difference affects dissolution, in that a marriage can
only be dissolved through a divorce in court, but a registered partnership can be terminated by the parties themselves. The Ministry of Justice, supra.

In addition, a registered partnership does not establish legal parenthood of the male partner over a child born during the partnership, even when the partnership is heterosexual, and requires formal recognition of the child by the male partner who wishes to become the legal father. Schrama, supra, at 262–63. This last distinction would not affect the choice of a male same-gender couple regarding which institution to enter, however, as for them the legal status of father is not derived from either marriage or registered partnership. Similarly, the parental status of female same-gender partners is not altered by the fact that the relationship is a marriage rather than a registered partnership. Id. at 295–99.

2. Is Marriage the Appropriate Trigger? One argument for opening the institution of marriage to same-gender couples is that marriage is the qualifying event for numerous legal benefits, as well as obligations, under the legal systems of most nations. Yet some scholars have questioned the extent to which marriage is the appropriate trigger for legal intervention, and whether it is a worthy institution for same-gender couples to pursue. See Kenneth Norrie, Marriage is for Heterosexuals: May the Rest of Us Be Saved From It, 12 Child & Fam. L.Q. 363 (2000); Nancy D. Polikoff, We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,” 79 Va. L. Rev. 1535 (1993); Paula L. Ettelbrick, Since When is Marriage a Path to Liberation, Nat’l Gay & Lesbian Q., Fall 1989, at 9.

Would all couples be better served if other life events or incidents played the central role in the allocation of legal rights and obligations? For example, the length and stability of the relationship might be the factor that triggers entitlement to legal rights, or the birth of a child, rather than the entry into marriage. Under such a system marriage could remain a choice for personal or religious reasons, but would lose its legal significance. Although no nation has adopted such a system, Sweden, for example, has reduced the number of rights attached to marriage, emphasizing individual responsibility and equality in its allocation of governmental rights and duties. Rebecca Probert & Anne Barlow, Displacing Marriage—Diversification and Harmonisation within Europe, 12 Child & Fam. L.Q. 156, 162–63 (2000). What arguments might be made for substituting factors related to the substance of a relationship rather than entry into the marital status itself, as the criteria for legal rights and obligations? As you read the subsequent sections regarding alternative status options and rights afforded cohabitants, consider the extent to which some nations are partially moving in the direction of linking rights to the substantive characteristics of a relationship.

Another approach would be to abolish civil marriage completely and to tie legal consequences to civil registration of a relationship rather than to marriage or to the characteristics of the relationship. While some nations have created registration systems as alternatives to marriage, as discussed above, no nation has to date chosen to totally replace the institution of marriage with registration as a method of affording equality to same-gender couples. For a provocative exploration, see Elizabeth S. Scott, A World Without Marriage, 41 Fam. L. Q. 537 (2007).

3. Legislative or Judicial Initiatives. What are the advantages and disadvantages of legislative reform as opposed to judicial reform? In the following two cases, the courts, rather than the legislature, take the initiative. Note carefully the authority they rely upon for doing so.
Minister of Home Affairs and Another v. Fourie and Another, with Doctors for Life International (first amicus curiae), John Jackson Smyth (second amicus curiae) and Marriage Alliance of South Africa (third amicus curiae)

Constitutional Court—CCT 60/04 Judgment date: 1 December 2005

Summary of Judgment

(The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.)

Ms Mari Adriaana Fourie and Ms Cecelia Johanna Bonthuys, of Pretoria, are the applicants in the first of two cases (the Fourie case) that were set down for hearing on the same day in this Court. Their complaint has been that the law excludes them from publicly celebrating their love and commitment to each other in marriage. They contend that the exclusion comes from the common law definition which states that marriage in South Africa is a union of one man with one woman, to the exclusion, while it lasts, of all others. In the second case, (the Equality Project case) the Gay and Lesbian Equality Project challenge section 30(1) of the Marriage Act, which provides that marriage officers must put to each of the parties the following question: “Do you AB … call all here present to witness that you take CD as your lawful wife (or husband)?” The reference to wife (or husband), they contend, unconstitutionally excludes same-sex couples.

The two cases raised the question whether the fact that no provision is made for the applicants, and all those in like situation, to marry each other, amounts to denial of equal protection of the law and unfair discrimination by the state against them because of their sexual orientation, contrary to the provision of the Constitution guaranteeing the right to equality and dignity. And if it does, what is the appropriate remedy that this Court should order?

* * *

Writing for a Court that was unanimous on all matters except in relation to the remedy, Sachs J held that it was clearly in the interests of justice that the Fourie and the Equality Project matters be heard together.

* * *

JUDGMENTS:
BY Sachs J

Introduction

Finding themselves strongly attracted to each other, two people went out regularly and eventually decided to set up home together. After being acknowledged by their friends as a couple for more than a decade, they decided that the time had come to get public recognition and registration of their relationship, and formally to embrace the rights and responsibilities they felt should flow from and attach to it. Like many persons in their situation, they wanted to get married. There was one impediment. They are both women.

Ms Mari Adriaana Fourie and Ms Cecelia Johanna Bonthuys are the applicants in the first of two cases that were set down for hearing on the same day in this Court. Their complaint has been that the law excludes them from publicly celebrating their love and commitment to each other in marriage. Far from enabling them to regularize their union, it shuts them out, unfairly and unconstitutionally, they claim.
They contend that the exclusion comes from the common-law definition which states that marriage in South Africa is “a union of one man with one woman, to the exclusion, while it lasts, of all others”. The common law is not self-enforcing, and in order for such a union to be formalized and have legal effect, the provisions of the Marriage Act have to be invoked. This, as contended for in the second case, is where the further level of exclusion operates. The Marriage Act provides that a minister of religion who is designated as a marriage officer may follow the marriage formula usually observed by the religion concerned. In terms of section 30(1) other marriage officers must put to each of the parties the following question:

“Do you, AB, declare that as far as you know there is no lawful impediment to your proposed marriage with CD here present, and that you call all here present to witness that you take CD as your lawful wife (or husband)?, and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words: ‘I declare that AB and CD here present have been lawfully married.’” (My emphasis.)

The reference to wife (or husband) is said to exclude same-sex couples. It was not disputed by any of the parties that neither the common law nor statute provide for any legal mechanism in terms of which Ms Fourie and Ms Bonthuys and other same-sex couples could marry.

In the pre-democratic era same-sex unions were not only denied any form of legal protection, they were regarded as immoral and their consummation by men could attract imprisonment. Since the interim Constitution came into force in 1994, however, the Bill of Rights has dramatically altered the situation. Section 9(1) of the Constitution now reads:

“Everyone is equal before the law and has the right to equal protection and benefit of the law.”

Section 9(3) of the Constitution expressly prohibits unfair discrimination on the grounds of sexual orientation. It reads:

“The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” (My emphasis.)

The matter before us accordingly raises the question: does the fact that no provision is made for the applicants, and all those in like situation, to marry each other, amount to denial of equal protection of the law and unfair discrimination by the state against them because of their sexual orientation? And if it does, what is the appropriate remedy that this Court should order?

* * *

II. The issues

At the hearing two broad and interrelated questions were raised: The first was whether or not the failure by the common law and the Marriage Act to provide the means whereby same-sex couples can marry, constitutes unfair discrimination against them. If the answer was that it does, the second question arose, namely, what the appropriate remedy for the unconstitutionality should be. These are the central issues in this matter, and I will start with the first.

Does the law deny equal protection to and discriminate unfairly against same-sex couples by not including them in the provisions of the Marriage Act?

* * *
This Court has ... in five consecutive decisions highlighted at least four unambiguous features of the context in which the prohibition against unfair discrimination on grounds of sexual orientation must be analysed. The first is that South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one. The second is the existence of an imperative constitutional need to acknowledge the long history in our country and abroad of marginalization and persecution of gays and lesbians, that is, of persons who had the same general characteristics as the rest of the population, save for the fact that their sexual orientation was such that they expressed erotic desire and affinity for individuals of their own sex, and were socially defined as homosexual. The third is that although a number of breakthroughs have been made in particular areas, there is no comprehensive legal regulation of the family law rights of gays and lesbians. Finally, our Constitution represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all. Small gestures in favour of equality, however meaningful, are not enough.

* * *

A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalize people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference... At the very least, it affirms that difference should not be the basis for exclusion, marginalization and stigma. At best, it celebrates the vitality that difference brings to any society. The issue goes well beyond assumptions of heterosexual exclusivity, a source of contention in the present case. The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage... The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.

* * *

It is true that marriage, as presently constructed under common law, constitutes a highly personal and private contract between a man and a woman in which the parties undertake to live together, and to support one another. Yet the words “I do” bring the most intense private and voluntary commitment into the most public, law-governed and state-regulated domain.

* * *

(Sachs notes the legal consequences of marriage, including the reciprocal duties of support, management of property, relationships with and duties toward children, public documentation, and socio-economic benefits such as the right to inheritance, medical insurance coverage, adoption, access to wrongful death claims, spousal benefits, bereavement leave, tax advantages and post-divorce rights.)
The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.

It should be noted that the intangible damage to same-sex couples is as severe as the material deprivation. To begin with, they are not entitled to celebrate their commitment to each other in a joyous public event recognized by the law. They are obliged to live in a state of legal blankness in which their unions remain unmarked by the showering of presents and the commemoration of anniversaries so celebrated in our culture. It may be that, as the literature suggests, many same-sex couples would abjure mimicking or subordinating themselves to heterosexual norms. … Yet what is in issue is not the decision to be taken, but the choice that is available. If heterosexual couples have the option of deciding whether to marry or not, so should same-sex couples have the choice as whether to seek to achieve a status and a set of entitlements and responsibilities on a par with those enjoyed by heterosexual couples. It follows that, given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way.

* * *

Equally important as far as family law is concerned, is the right of same-sex couples to fall back upon state regulation when things go wrong in their relationship. Bipolar by its very nature, the law of marriage is invoked both at moments of blissful creation and at times of sad cessation.

* * *

Respect for religious arguments

The two amici submitted a number of arguments from an avowedly religious point of view in support of the view that by its origins and nature, the institution of marriage simply cannot sustain the intrusion of same-sex unions.

* * *

It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others. … Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies.

* * *

Acknowledgment by the State of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages.
III. Remedy

A notable and significant development in our statute law in recent years has been the extent of express and implied recognition that the Legislature has accorded to same-sex partnerships. Yet … there is still no appropriate recognition in our law of same-sex life partnership, as a relationship, to meet the legal and other needs of its partners.

[A] legislative intervention which had the effect of enabling same-sex couples to enjoy the status, entitlements and responsibilities that heterosexual couples achieve through marriage, would without more override any discriminatory impact flowing from the common-law definition standing on its own. … The effect would be that formal registration of same-sex unions would automatically extend the common law and statutory legal consequences to same-sex couples that flow to heterosexual couples from marriage.

This is a matter involving status that requires a remedy that is secure. To achieve security it needs to be firmly located within the broad context of an extended search for emancipation of a section of society that has known protracted and bitter oppression. The circumstances of the present matter call out for enduring and stable legislative appreciation. A temporary remedial measure would be far less likely to achieve the enjoyment of equality as promised by the Constitution than would lasting legislative action compliant with the Constitution.

The claim by the applicants in Fourie (supra) of the right to get married should, in my view, be seen as part of a comprehensive wish to be able to live openly and freely as lesbian women emancipated form all the legal taboos that historically have kept them from enjoying life in the mainstream of society. The right to celebrate their union accordingly signifies far more than a right to enter into a legal arrangement with many attendant and significant consequences, important though they may be. It represents a major symbolical milestone in their long walk to equality and dignity. The greater and more secure the institutional imprimatur for their union, the more solidly will it and other such unions be rescued from legal oblivion, and the more tranquil and enduring will such unions ultimately turn out to be.

This is a matter that touches on deep public and private sensibilities. I believe that Parliament is well-suited to finding the best ways of ensuring that same-sex couples are brought in from the legal cold. The law may not automatically and of its own eliminate stereotyping and prejudice. Yet it serves as a great teacher, establishes public norms that become assimilated into daily life and protects vulnerable people from unjust marginalisation and abuse. It needs to be remembered that not only the courts are responsible for vindicating the rights enshrined in the Bill of Rights. The Legislature is in the frontline in this respect. One of its principal functions is to ensure that the values of the Constitution as set out in the Preamble and section 1 permeate every area of the law.

[T]he orders of this Court, read together, make it clear that if Parliament fails to cure the defect within twelve months, the words ‘or spouse’ will automatically be read into section 30(1) of the Marriage Act. In this event the Marriage Act will, without more, become the legal vehicle to enable same-sex couples to achieve the status and benefits coupled with responsibilities which it presently makes available to heterosexual couples.
The order

(i) The common-law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples.

(ii) The declaration of invalidity is suspended for twelve months from the date of this judgment to allow Parliament to correct the defect.

BY O'Regan J

There is very little in the comprehensive and careful judgment of Sachs J with which I disagree…. The difference between his judgment and this, therefore, lies solely in one significant area, namely, that of remedy…. Sachs J … proposes an order suspending the declaration of invalidity for twelve months. The effect of this order is that gay and lesbian couples will not be permitted to marry during this period.

His main reasons for this order are firstly, that there are at least two ways in which the unconstitutionality can be remedied, as recommended by the South African Law Reform Commission; and that given these alternatives, and the important democratic and legitimating role of the Legislature in our society, it is appropriate to leave it to Parliament to choose between these courses of action, or any other which might be constitutional. A second and equally important reason that he gives is that, as marriage involves a question of personal status, it would lead to greater stability if such matters were to be regulated by an Act of Parliament rather than the courts.

In my view, this Court should develop the common-law rule as suggested by the majority in the Supreme Court of Appeal, and at the same time read in words to section 30 of the act that would with immediate effect permit gays and lesbians to be married by civil marriage officers (and such religious marriage officers as consider such marriages not to fall outside the tenets of their religion).

In re Marriage Cases
43 Cal. 4th 757, 183 P.3d 384 (2008)

We note at the outset that the constitutional issue before us differs in a significant respect from the constitutional issue that has been addressed by a number of other state supreme courts and intermediate appellate courts that recently have had occasion, in in-
interpreting the applicable provisions of their respective state constitutions, to determine the validity of statutory provisions or common law rules limiting marriage to a union of a man and a woman…. These courts, often by a one-vote margin (see, post, pp. 114–115, fn. 70), have ruled upon the validity of statutory schemes that contrast with that of California, which in recent years has enacted comprehensive domestic partnership legislation under which a same-sex couple may enter into a legal relationship that affords the couple virtually all of the same substantive legal benefits and privileges, and imposes upon the couple virtually all of the same legal obligations and duties, that California law affords to and imposes upon a married couple…. Accordingly, the legal issue we must resolve is not whether it would be constitutionally permissible under the California Constitution for the state to limit marriage only to opposite-sex couples while denying same-sex couples any opportunity to enter into an official relationship with all or virtually all of the same substantive attributes, but rather whether our state Constitution prohibits the state from establishing a statutory scheme in which both opposite-sex and same-sex couples are granted the right to enter into an officially recognized family relationship that affords all of the significant legal rights and obligations traditionally associated under state law with the institution of marriage, but under which the union of an opposite-sex couple is officially designated a “marriage” whereas the union of a same-sex couple is officially designated a “domestic partnership.” The question we must address is whether, under these circumstances, the failure to designate the official relationship of same-sex couples as marriage violates the California Constitution.

* * *

As discussed below, upon review of the numerous California decisions that have examined the underlying bases and significance of the constitutional right to marry (and that illuminate why this right has been recognized as one of the basic, inalienable civil rights guaranteed to an individual by the California Constitution), we conclude that, under this state’s Constitution, the constitutionally based right to marry properly must be understood to encompass the core set of basic substantive legal rights and attributes traditionally associated with marriage that are so integral to an individual’s liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process. These core substantive rights include, most fundamentally, the opportunity of an individual to establish — with the person with whom the individual has chosen to share his or her life — an officially recognized and protected family possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage.…. Furthermore, in contrast to earlier times, our state now recognizes that an individual’s capacity to establish a loving and long-term committed relationship with another person and responsibly to care for and raise children does not depend upon the individual’s sexual orientation, and, more generally, that an individual’s sexual orientation — like a person’s race or gender — does not constitute a legitimate basis upon which to deny or withhold legal rights.

* * *

Furthermore, the circumstance that the current California statutes assign a different name for the official family relationship of same-sex couples as contrasted with the name for the official family relationship of opposite-sex couples raises constitutional concerns not only under the state constitutional right to marry, but also under the state constitutional equal protection clause. In analyzing the validity of this differential treatment under the latter clause, we first must determine which standard of review should be applied to
the statutory classification here at issue. Although in most instances the deferential “rational basis” standard of review is applicable in determining whether different treatment accorded by a statutory provision violates the state equal protection clause, a more exacting and rigorous standard of review—“strict scrutiny”—is applied when the distinction drawn by a statute rests upon a so-called “suspect classification” or impinges upon a fundamental right. As we shall explain, although we do not agree with the claim advanced by the parties challenging the validity of the current statutory scheme that the applicable statutes properly should be viewed as an instance of discrimination on the basis of the suspect characteristic of sex or gender and should be subjected to strict scrutiny on that ground, we conclude that strict scrutiny nonetheless is applicable here because (1) the statutes in question properly must be understood as classifying or discriminating on the basis of sexual orientation, a characteristic that we conclude represents—like gender, race, and religion—a constitutionally suspect basis upon which to impose differential treatment, and (2) the differential treatment at issue impinges upon a same-sex couple’s fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple.

Under the strict scrutiny standard, unlike the rational basis standard, in order to demonstrate the constitutional validity of a challenged statutory classification the state must establish (1) that the state interest intended to be served by the differential treatment not only is a constitutionally legitimate interest, but is a compelling state interest, and (2) that the differential treatment not only is reasonably related to but is necessary to serve that compelling state interest. Applying this standard to the statutory classification here at issue, we conclude that the purpose underlying differential treatment of opposite-sex and same-sex couples embodied in California’s current marriage statutes—the interest in retaining the traditional and well-established definition of marriage—cannot properly be viewed as a compelling state interest for purposes of the equal protection clause, or as necessary to serve such an interest.

* * *

Accordingly, we conclude that to the extent the current California statutory provisions limit marriage to opposite-sex couples, these statutes are unconstitutional.

* * *

Having concluded that sections 300 and 308.5 are unconstitutional to the extent each statute reserves the designation of marriage exclusively to opposite-sex couples and denies same-sex couples access to that designation, we must determine the proper remedy.

When a statute’s differential treatment of separate categories of individuals is found to violate equal protection principles, a court must determine whether the constitutional violation should be eliminated or cured by extending to the previously excluded class the treatment or benefit that the statute affords to the included class, or alternatively should be remedied by withholding the benefit equally from both the previously included class and the excluded class. A court generally makes that determination by considering whether extending the benefit equally to both classes, or instead withholding it equally, would be most consistent with the likely intent of the Legislature, had that body recognized that unequal treatment was constitutionally impermissible.…

In the present case, it is readily apparent that extending the designation of marriage to same-sex couples clearly is more consistent with the probable legislative intent than withholding that designation from both opposite-sex couples and same-sex couples in favor of some other, uniform designation. In view of the lengthy history of the use of the term “marriage” to describe the family relationship here at issue, and the importance that
both the supporters of the 1977 amendment to the marriage statutes and the electors who voted in favor of Proposition 22 unquestionably attached to the designation of marriage, there can be no doubt that extending the designation of marriage to same-sex couples, rather than denying it to all couples, is the equal protection remedy that is most consistent with our state’s general legislative policy and preference.

CONCURRING AND DISSENTING OPINION BY CORRIGAN, J.

In my view, Californians should allow our gay and lesbian neighbors to call their unions marriages. But I, and this court, must acknowledge that a majority of Californians hold a different view, and have explicitly said so by their vote. This court can overrule a vote of the people only if the Constitution compels us to do so. Here, the Constitution does not. Therefore, I must dissent.

It is important to be clear. Under California law, domestic partners have “virtually all of the same substantive legal benefits and privileges” available to traditional spouses. (Maj. opn., ante, at p. 45.) I believe the Constitution requires this as a matter of equal protection. However, the single question in this case is whether domestic partners have a constitutional right to the name of “marriage.”

Proposition 22 was enacted only eight years ago. By a substantial majority the people voted to recognize, as “marriage,” only those unions between a man and a woman. (Fam. Code § 308.5.) The majority concludes that the voters’ decision to retain the traditional definition of marriage is unconstitutional. I disagree.

* * *

We are in the midst of a major social change. Societies seldom make such changes smoothly. For some the process is frustratingly slow. For others it is jarringly fast. In a democracy, the people should be given a fair chance to set the pace of change without judicial interference. That is the way democracies work. Ideas are proposed, debated, tested. Often new ideas are initially resisted, only to be ultimately embraced. But when ideas are imposed, opposition hardens and progress may be hampered.

We should allow the significant achievements embodied in the domestic partnership statutes to continue to take root. If there is to be a new understanding of the meaning of marriage in California, it should develop among the people of our state and find its expression at the ballot box.

Notes and Questions

1. Proposition 8. After the California decision came into effect in mid-June, about eighteen thousand lesbian and gay male couples were legally married. On November 4, 2008 a majority of California voters gave their support to Proposition 8, which amends the state constitution to read: “Only marriage between a man and a woman is valid or recognized in California.” Same-sex marriages were suspended on November 5, 2008. Jesse McKinley, With Same-sex Marriage, a Court Takes on the People’s Voice N.Y. TIMES, November 21, 2008. Proposition 8 was challenged in a motion for judicial notice filed the same day.

On May 26, 2009, the California Supreme Court rejected the constitutional challenge to Proposition 8. The court unanimously held that Proposition 8 only restricts the use of the term “marriage,” rather than the constitutional rights set out in In Re Marriage Cases, and that it does not affect the validity of the estimated 18,000 same-sex marriages entered into before it took effect.
2. Constitutionality. Compare the analysis of constitutional rights in *Fourie* and *In re Marriage Cases*. How are they similar? How are they different? Why does the South African Court seek legislative action? Why does the California court take a different route?


3. Trends? According to the National Conference of State Legislatures (NCSL), as of September 5, 2014, the following 33 states and territories had state laws and/or constitutional provisions limiting marriage to relationships between a man and a woman:


Statutory provisions: Indiana, West Virginia and Wyoming, Puerto Rico and Virgin Islands.

1 Overturned and pending court appeals.

2 Upheld by U.S. district judge, pending appeal to U.S. 5th Circuit Court of Appeals. In a separate case, a state judge ruled the ban unconstitutional. The two conflicting rulings are both pending appeal.

The following 19 states and D.C. have state laws or court decisions that allow same-sex couples to marry: California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington and the District of Columbia. NCSL, *Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage*.

On June 26, 2015, the U.S. Supreme Court upheld that same-sex marriage was protected under the U.S. Constitution, ruling in *Obergefell v. Hodges*, 14-566, that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize such marriages lawfully entered into elsewhere.

4. Advantages and Disadvantages of Rights-based Claims. What are the advantages and disadvantages of framing same-sex marriage in terms of constitutional rights or human rights? What is the view of Justice Corrigan (concurring and dissenting in *In re Marriage Cases*)?

In *Windsor v. U.S.*. 833 F. Supp. 2d 394 (S.D.N.Y. 2012), Edith Windsor challenged section 3 of the Defense of Marriage Act ("DOMA"), which required her to pay federal estate tax on her same-sex spouse's estate, a tax from which similarly situated heterosexual couples were exempt. Windsor argued that section 3 deprived her of the equal protection of the laws, in violation of the Fifth Amendment to the United States Constitution. The U.S. District Court for the Southern District of New York granted her motion for summary judgment. The case was appealed to the U.S. Supreme Court, which issued the following decision.
U.S. v. Windsor
133 S. Ct. 2675 (2013)

The States’ interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form “but one element in a personal bond that is more enduring.” Lawrence v. Texas, 539 U.S. 558, 567, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

IV

DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. The Constitution’s guarantee of equality “must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot” justify disparate treatment of that group. In determining whether a law is motivated by an improper animus or purpose, “‘[d]iscriminations of an unusual character’” especially require careful consideration. DOMA cannot survive under these principles.

* * *

The history of DOMA’s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that “it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage…. H.R. 3396 is appropriately entitled the ‘Defense of Marriage Act.’ The effort to redefine ‘marriage’ to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.” H.R.Rep. No. 104–664, pp. 12–13 (1996). The House concluded that DOMA expresses “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality.” Id., at 16 (footnote deleted). The stated purpose of the law was to promote an “interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.” Ibid. Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage Act.

The arguments put forward by BLAG are just as candid about the congressional purpose to influence or interfere with state sovereign choices about who may be married. As the title and dynamics of the bill indicate, its purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted. The congressional goal was “to put a thumb on the scales and influence a state’s decision as to how to shape its own marriage laws.” Massachusetts, 682 F.3d, at 12–13. The Act’s demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages.
for purposes of federal law. This raises a most serious question under the Constitution’s Fifth Amendment.

DOMA’s operation in practice confirms this purpose. When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans’ benefits.

DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person…. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeanes the couple, whose moral and sexual choices the Constitution protects, see Lawrence, 539 U.S. 558, 123 S.Ct. 2472, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound. It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. It deprives them of the Bankruptcy Code’s special protections for domestic-support obligations. It forces them to follow a complicated procedure to file their state and federal taxes jointly. It prohibits them from being buried together in veterans’ cemeteries.

For certain married couples, DOMA’s unequal effects are even more serious. The federal penal code makes it a crime to “assaul[t], kidnap[p], or murde[r] … a member of the immediate family” of “a United States official, a United States judge, [or] a Federal law enforcement officer,” with the intent to influence or retaliate against that official. Although a “spouse” qualifies as a member of the officer’s “immediate family,” DOMA makes this protection inapplicable to same-sex spouses.

DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers’ same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.

DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were
DOMA not in force. For instance, because it is expected that spouses will support each other as they pursue educational opportunities, federal law takes into consideration a spouse’s income in calculating a student’s federal financial aid eligibility. Same-sex married couples are exempt from this requirement.

* * *

The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.

What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages.

The judgment of the Court of Appeals for the Second Circuit is affirmed.

**Notes and Questions**


2. Compare the effect of this decision with the effect of the decisions of the European Court of Human Rights in the *Case of X and Others* and the *Case of Vallianatos, supra*. How are they similar? How are they different? Do the differences reflect structural differences in the political organization of the European Union as opposed to the United States? To what extent do they reflect cultural differences?
Civil Marriage Act
2005, c. 33
C-31.5 (Canada)
[Assented to July 20th, 2005]

An Act respecting certain aspects of legal capacity for marriage for civil purposes

Preamble

WHEREAS the Parliament of Canada is committed to upholding the Constitution of Canada, and section 15 of the Canadian Charter of Rights and Freedoms guarantees that every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination;

WHEREAS the courts in a majority of the provinces and in one territory have recognized that the right to equality without discrimination requires that couples of the same sex and couples of the opposite sex have equal access to marriage for civil purposes;

WHEREAS the Supreme Court of Canada has recognized that many Canadian couples of the same sex have married in reliance on those court decisions;

WHEREAS only equal access to marriage for civil purposes would respect the right of couples of the same sex to equality without discrimination, and civil union, as an institution other than marriage, would not offer them that equal access and would violate their human dignity, in breach of the Canadian Charter of Rights and Freedoms;

WHEREAS the Supreme Court of Canada has determined that the Parliament of Canada has legislative jurisdiction over marriage but does not have the jurisdiction to establish an institution other than marriage for couples of the same sex;

WHEREAS everyone has the freedom of conscience and religion under section 2 of the Canadian Charter of Rights and Freedoms;

WHEREAS nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs;

WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage;

WHEREAS, in light of those considerations, the Parliament of Canada’s commitment to uphold the right to equality without discrimination precludes the use of section 33 of the Canadian Charter of Rights and Freedoms to deny the right of couples of the same sex to equal access to marriage for civil purposes;

WHEREAS marriage is a fundamental institution in Canadian society and the Parliament of Canada has a responsibility to support that institution because it strengthens commitment in relationships and represents the foundation of family life for many Canadians;

AND WHEREAS, in order to reflect values of tolerance, respect and equality consistent with the Canadian Charter of Rights and Freedoms, access to marriage for civil purposes should be extended by legislation to couples of the same sex;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:
Short title

1. This Act may be cited as the Civil Marriage Act.

Marriage — certain aspects of capacity

2. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.

Religious officials

3. It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.

Freedom of conscience and religion and expression of beliefs

3.1 For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the Canadian Charter of Rights and Freedoms or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.

Marriage not void or voidable

4. For greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same sex.

Government Gazette,
Republic of South Africa
No. 17 of 2006: Civil Union Act, 2006

ACT

To provide for the solemnisation of civil unions, by way of either a marriage or civil partnership; the legal consequences of civil unions; and to provide for matters incidental thereto.

* * *

Objectives of Act

2. The objectives of this Act are—

(a) to regulate the solemnisation and registration of civil unions, by way of either a marriage or a civil partnership; and

(b) to provide for the legal consequences of the solemnisation and registration of civil unions.

Relationships to which Act applies

3. This Act applies to civil union partners joined in a civil union.

Solemnisation of civil union

4. (1) A marriage officer may solemnise a civil union in accordance with the provisions of this Act.

(2) Subject to this Act a marriage officer has all the powers, responsibilities and duties, as conferred upon him or her under the Marriage Act to solemnise a civil union.

* * *
Marriage officer not compelled to solemnise civil union

6. A marriage officer, other than a marriage officer referred to in section 5 may in writing inform the Minister that he or she objects on the ground of conscience, religion and belief to solemnising a civil union between persons of the same sex, whereupon that marriage officer shall not be compelled to solemnise such civil union.

* * *

Requirements for solemnisation and registration of civil union

8. (1) A person may only be a spouse or partner in one marriage or civil partnership, as the case may be, at any given time.

(2) A person in a civil union may not conclude a marriage under the Marriage Act or the Customary Marriages Act

(3) A person who is married under the Marriage Act or the Customary Marriages Act may not register a civil union.

(4) A prospective civil union partner who has previously been married under the Marriage Act or Customary Marriages Act or registered as a spouse in a marriage or a partner in a civil partnership under this Act, must present a certified copy of the divorce order or death certificate of the former spouse or partner, as the case may be, to the marriage officer as proof that the previous marriage or civil union has been terminated.

(5) The marriage officer may not proceed with the solemnisation and registration of the civil union unless in possession of the relevant documentation referred to in subsection (4).

(6) A civil union may only be registered by prospective civil union partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage under the Marriage Act or Customary Marriages Act.

* * *

Formula for solemnisation of marriage or civil partnership

11. (1) A marriage officer must inquire from the parties appearing before him or her whether their civil union should be known as a marriage or a civil partnership and must thereupon proceed by solemnising the civil union in accordance with the provisions of this section.

(2) In solemnising any civil union, the marriage officer must put the following questions to each of the parties separately, and each of the parties must reply thereto in the affirmative:

“Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage/civil partnership with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful spouse/civil partner?”, and thereupon the parties must give each other the right hand and the marriage officer concerned must declare the marriage or civil partnership, as the case may be, solemnised in the following words:

“I declare that A.B. and C.D. here present have been lawfully joined in a marriage/civil partnership.”

* * *

Legal consequences of civil union

13. (1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.
(2) With the exception of the Marriage Act and the Customary Marriages Act, any reference to—

(a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and
(b) husband, wife or spouse in any other law, including the common law, includes a civil union partner.

Problem 4-2

While studying in a graduate program in the Hague in the Netherlands, you met your partner, a Dutch computer programmer. You have been living together in South Africa, where your partner has been transferred, for several years. You are an American citizen currently working for a firm specializing in international family law mediation. You and your partner have made a commitment for life, and would like to formalize your relationship. You are both the same gender, and your jobs give you flexibility to move back to Texas (where your family lives), remain in South Africa, where you are now habitual residents, or relocate to the Netherlands. From a legal perspective, in which country would you and your partner prefer to formalize your relationship and take up residence, and why? Would it make any difference if you planned to have children?

Notes and Questions

1. Differences. What is the major difference between the Canadian and South African laws? Does this create a substantive difference between the rights and status of same-sex couples in Canada and South Africa? If so, which confers greater benefits on such couples? If there is no substantive difference between the rights and statuses of Canadian and South African couples, what is the point? In answering these questions, it may be useful to review the history of the South African Constitution set out in Chapter 2. See generally Peter Bowal & Carlee Campbell, “The Legalization of Same-Sex Marriage in Canada”, 21 Am. J. Fam. L. 37 (2007).

2. The following nations allow same-sex marriage:

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3. Opposition. While some suggest an inevitable progression toward legal acceptance of same-sex relationships, there has also been a backlash. Anti-gay legislation has recently been enacted in Nigeria, Uganda, Senegal, and Russia. The Nigerian law, enacted in January, 2014, criminalizes same-sex marriages and membership in gay rights organizations. See, e.g., Alison Flood, Nigerian Authors Condemn Country’s New Anti-gay Law, The Guardian, Feb. 27, 2014.
4. Minors? The Russian government is asking the European court of Human Rights to dismiss LGBT activists’ complaints about regional laws banning gay propaganda. The Russian memorandum claims, in part, “By advocating to children that homosexuality is natural and normal, that homosexuality is good, the applicants arbitrarily and illegally interfere with the child’s right to a private life, and put mental pressures upon the child.” How would you expect the ECHR to respond to Russia’s request? Rights in Russia, Russian Authorities Ask ECHR to Reject complaints from LGBT Activists, Mar. 24, 2014.


5. Foreign Influence? In Uganda, President Yoweri Museveni signed into law one of the world’s harshest anti-gay laws, authorizing life sentences for “repeat homosexuals” and requiring people to report on gays. In response, the World Bank and a number of European countries have cut off aid and loans to Uganda. Folly Bah Thibault, Uganda Punished Over Anti-gay Law, ALJAZEERA, Feb. 28, 2014. In June, the United State joined Norway, The Netherlands, Denmark, and the World Bank in condemning the law, suspending some aid, imposing visa restrictions and canceling a regional military exercise as a message to “reinforce our support for human rights of all Ugandans, regardless of sexual orientation or gender identity.”

In July, a Ugandan Court struck down the law on a procedural technicality, leaving open the possibility of its reinstatement. Jeffrey Gettleman, Court Ruling in Uganda Strikes Down Law on Gays, N.Y. TIMES, Aug. 2, 2014. According to the TIMES, “Uganda’s vehement anti-gay movement began in 2009 after a group of American preachers went to Uganda for an anti-gay conference and then worked with Ugandan legislators to draft a bill that called for putting gay people to death.” Id.

6. State Sovereignty? On a trip to Sengal in June, 2014, President Obama, citing the Supreme Court’s decision in Windsor, supra urged African nations that criminalize homosexuality to stop discriminating against gays. Adam Nossiter, Senegal Cheers Its President for Standing Up to Obama on Same-Sex Marriage, N.Y. TIMES, June 29, 2013 at A6. President Macky Sall of Senegal retorted that his country was not “homophobic,” but “we are not ready to decriminalize homosexuality,” His response pleased the public: “He responded very well, and we are all very happy with it,” Moustapha Thiam, the owner of a bustling open-air welders’ shop, said of Mr. Sall. “This is a Muslim country, and in our religion, we can’t accept that. Everyone agrees with him.” Id.

C. International Human Rights and Relationships Involving Bisexual, Transgendered and Questioning People

The first two Parts of this chapter examine the treatment of same-sex couples by their states, and the extent, if any, to which this treatment is shaped by regional and international human rights. These Parts incorporate an emerging consensus that same-sex couples, as Justice Sachs put it in Fourie:

... had the same general characteristics as the rest of the population, save for the fact that their sexual orientation was such that they expressed erotic desire and
affinity for individuals of their own sex, and were socially defined as homosexual. The issue goes well beyond assumptions of heterosexual exclusivity, a source of contention in the present case. The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage.

But what if sexuality, or gender, is not immutable, but a matter of choice? This Part considers the challenges to that consensus posed by BTQ people, and the dilemmas these challenges present to international human rights law. This Part begins with excerpts from recent law review articles setting out the issues. It then sets out the Yogyakarta Principles, and concludes with two recent decisions from the Supreme Court of India and the High Court of Australia.

1. The Issues

Elizabeth M. Glazer, Sexual Reorientation
100 Geo. L.J. 997 (2012)

2. This, That, and Then This Again: Bisexuality and Same-Sex Marriage

Until recently, bisexuals have not really factored much into the debate about legally recognizing same-sex marriage. After all, bisexuals have the right to marry in every state. Of course, this right is contingent upon bisexuals’ choosing to marry someone of the opposite sex. On this basis Yoshino argued that bisexuals experienced a harm exactly the same as the harm experienced by gays as a result of prohibitions against same-sex marriage, namely that those prohibitions “violate[ ] sex discrimination norms.” Seeking to isolate a harm particular to bisexuals, Yoshino argued that a bisexual might be harmed by the failure to recognize same-sex marriage because the state “impedes [the bisexual] from seeing ‘through’ sex to other traits that she may find more important,” but he noted that this was a weak argument for bisexual harm. Michael Boucai, in a forthcoming article, argues that prohibitions against same-sex marriage “substantially burden a right to choose homosexual relations and relationships” in violation of the Court’s protection of sexual liberty in Lawrence v. Texas. But Boucai employs bisexuality in his article “as an illuminating perspective from which to apprehend the heterosexual coarseness of marriage,” not to isolate harms particular to bisexuals. Because bisexuals arguably do not present any issues particular to their bisexuality with respect to the right to marry, bisexuals do not tend to play a role in the same-sex marriage debate. Freedom to Marry, “the campaign to win marriage nationwide,” includes a page on its website entitled “Why Marriage Matters to the Bisexual Community,” which includes the following quotation from Alan Hamilton, a former president of the East Coast Bisexual Network and a cofounder of the Unitarian-Universalist Bisexual Network:

Think about it: Even a bisexual married to someone of another gender knows that her/his partner could die from an accident or disease and leave her/him alone. After recovering from that loss, their next relationship might be with someone of the same gender. She/he will want the same rights as they currently have in a mixed-gender relationship. A bi person who is dating or in a committed same-gender relationship also wants the same rights as straight-identified people. For all these reasons, bi people have been active in Freedom To Marry and the Equal Marriage movement since its inception, and continue their strong support.
On this theory, marriage matters to the bisexual community because a bisexual person might enter into a same-sex relationship.

Bisexuality seems to have found its way into *Perry v. Schwarzenegger*, the high-profile and controversial federal same-sex marriage trial challenging the constitutionality of California’s Proposition 8. A bit about the *Perry* case as it relates to the same-sex marriage debate: Proposition 8, a ballot initiative to amend the California Constitution by adding Section 7.5, which provided that “[o]nly marriage between a man and a woman is valid or recognized in California,” passed with 52.1% of Californians’ votes in the November 2008 election. Its passage effectively overturned the California Supreme Court’s decision in *In re Marriage Cases* which had held unconstitutional California’s previous statutory bans against same-sex marriage because “statutes that treat persons differently because of their sexual orientation should be subjected to strict scrutiny” under California’s equal protection clause, and the statutory bans at issue in that case failed the strict scrutiny standard of review because “the interest in retaining the traditional and well-established definition of marriage … [could not properly be viewed as a compelling] state interest for purposes of the equal protection clause, or as necessary to serve such an interest.”

The plaintiffs in *Perry* argued that Proposition 8 was unconstitutional because it violated the Equal Protection Clause of the 14th Amendment, an argument which the Ninth Circuit ultimately accepted. In *Romer v. Evans*, the Supreme Court invalidated Colorado’s Amendment 2, which would have prevented any Colorado municipality from recognizing homosexuals, lesbians, or bisexuales as a protected class, because it “seemed inexplicable by anything but animus toward the class it affects” and therefore “lacked a rational relationship to legitimate state interests.” When Vaughn Walker, then-Chief Judge of the United States District Court for the Northern District of California, held Proposition 8 unconstitutional, he found that Proposition 8 was premised on the belief that same-sex couples simply “[w]ere not as good as opposite sex couples … [h]ether … based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman [wa]s inherently better than a relationship between two men or two women….”

As the plaintiffs in *Perry* sought to invalidate Proposition 8 because it discriminated against people on the basis of their sexual orientation, it was not surprising that on direct examination, attorneys David Boies and Ted Olson asked their clients about their sexual orientations. For example, Boies asked plaintiff Jeffrey Zarrillo, “Are you gay?” to which Zarrillo responded, “Yes, I am”; Zarrillo responded to Boies’s next question, “How long have you been gay?” by saying, “As long as I can remember.” Boies asked Zarrillo about the sexual orientation of his partner, Paul Katami, by asking, “Now, today you are in a committed relationship with another gay man, correct?” Zarrillo responded in the affirmative. Boies addressed Katami’s sexual orientation by asking him on direct examination, “Now, you say you were a natural-born gay. Does that mean you’ve always been gay?” to which Katami responded, “As long as I can remember, yes.” When questioning Kris Perry, Olson asked her, “How would you describe your sexual orientation?” to which Perry responded, “I am a lesbian.” Olson then pursued a line of questioning with Perry, asking her to address the mutability of her sexual orientation: whether she thought that she had been born with her lesbian sexual orientation, and whether she thought that it could ever change.

But the most telling exchange was between Olson and plaintiff Sandy Stier. Stier had been married to a man. When Olson asked her on direct examination to describe her sexual orientation, Stier responded, “I’m gay.” Stier claimed to have learned that she was gay “fairly late in life, in [her] mid-thirties.” She admitted that at the time she was mar-
ried to a man—from 1987 to 1999—she had no feeling that she was a lesbian. She admitted, too, that her marriage to this man “start[ed] out with the best intentions” and that she “love[d] him when [she] married him.” And though Stier met Kris Perry, a woman with whom she has now been in a relationship for over a decade, in 1996, she testified that her “sexual orientation or [her] discovery of [her] sexual orientation ha[d nothing] to do with the dissolution of [her] marriage.” When asked how convinced she was that she was gay, Stier answered: “Well, I’m convinced, because at 47 years old I have fallen in love one time and it’s with Kris.”

Olson asked Stier: “How convinced are you that you are gay? You’ve lived with a husband. You said you loved him. Some people might say, ‘Well, it’s this and then it’s that and it could be this again.’ Answer that.” To be sure, the argument here is not that Olson’s question was unreasonable, particularly in light of the lawsuit’s allegation that Proposition 8 discriminated on the basis of sexual orientation. But his question assumed that Stier needed to identify as gay in order to have the right to marry. Olson made reference in his question to a myth about bisexuals, which “some people might” believe, namely that bisexuals are promiscuous, indecisive, and occupy a transitional sexual orientation that may change at some point. As already noted, Stier responded to Olson as follows: “Well, I’m convinced, because at 47 years old I have fallen in love one time and it’s with Kris.”

A couple of things are notable about Olson’s exchange with Stier. First, Olson wanted Stier to demonstrate that she was very convinced she was gay, undoubtedly because her sexual history suggested that she could switch the sex of her sexual partner unpredictably at any time. Second, in demonstrating that she was very convinced that she was gay, Stier presented the following argument:

I have been in love only once.
I have been in love with a woman.

Therefore, I am capable of falling in love with women only.

Both Olson’s question and Stier’s answer demonstrate separate but related assumptions that have operated silently as a part of the fight for gay rights. Olson’s purpose in his examination of Stier, and in the context of the Perry lawsuit as a general matter, was to secure marriage rights for Stier, Perry, and the other plaintiffs who are parties to the lawsuit. And while same-sex marriage is a gay rights issue, it is worth noting that Olson has suggested through this line of questioning that Stier should be afforded marriage rights if and only if her gay identity is stable.

Stier’s answer to Olson presents an additional opportunity to unearth an assumption that has animated same-sex-marriage litigation. That is the assumption that an individual’s attraction to one specific person demonstrates the individual’s attraction to other people who possess the person’s sex characteristic. For illustrative purpose, consider for a moment if Olson had asked Stier not how convinced she was that she was gay but instead how convinced she was that she would always be attracted to people with green eyes. In order to demonstrate to Olson that she was very convinced of this fact about herself, Stier’s answer would take the following logical form if she employed the same logic when answering this question as she had when answering Olson’s question about her sexual orientation:

I have been in love only once.
I have been in love with a person with green eyes.

Therefore, I am capable of falling in love with people with green eyes only.
When framed this way, Stier’s response seems strange. After all, it is very common to hear that an individual has partnered with someone who is not her “type.” Moreover, if an individual partners with someone who is not her type, she is not expected to change her type but can comfortably articulate that while she is typically attracted to people with blue eyes and continues to be, she has chosen to partner with someone with green eyes. When the characteristic is eye color, or even race, an individual can talk about the difference between her general “type” and the characteristics of her partner to explain a difference between the two, if one exists.

But the rationale that Stier offered to substantiate her lesbianism signifies an assumption that rests at the core of the current conception of sexual orientation. Stier testified that because she had fallen in love only once, and because she had fallen in love with a woman, she was convinced that she was gay. It may be that Stier felt a more profound love for Kris Perry than she had felt for her late husband. But the way that Stier presented evidence of her sexual orientation demonstrated that she believed something to be true not only about her own sexual orientation but about the nature of sexual orientation, and that is that being (generally) gay and being attracted to a specific, single member of the same sex are connected.

Stier may have been convinced. She may have even become convinced because she fell in love one time with another woman. But if Stier, prior to meeting Kris Perry, had been attracted to people with blue eyes only, and Perry had green eyes, Stier would probably not encounter an interlocutor asking how convinced she was that she was now attracted to people with green eyes. If ever confronted with a question about Kris’s eye color, Stier could just explain that while she was generally attracted to those with blue eyes, she happened to fall in love with someone whose eyes were green. When the characteristic is sex, for some reason an individual will have difficulty explaining the difference between her general type and the sex of her partner. One might argue that sex, unlike eye color or even race, is not a type. Sex, one might say, is the essential characteristic on the basis of which individuals choose to associate intimately. For many—and for bisexuals—this is simply not true.

Leigh Goodmark, Transgender People, Intimate Partner Abuse, and the Legal System
48 Harv. C.R.-C.L. L. Rev. 51 (2013)
We do not yet have a common language accepted by all interested parties for talking about the experiences of transgender people. “Transgender” itself is seen by some as a contested term. Ethnographer David Valentine, for example, argues that the definition of transgender is “tentative and shifting, precisely because the meanings of the term are still being negotiated.” Transgender is often defined as an “umbrella term used to refer to all individuals who live outside of normative sex/gender relations—that is, individuals whose gendered self-presentation (evidenced through dress, mannerisms, and even physiology) does not correspond to the behaviors habitually associated with the members of their biological sex.” Two dangers of using the term “transgender” in this broad way are the possibilities of including those who do not themselves identify as transgender and of elevating a single commonality over other differences in identity—race, class, disability, sexual orientation—that shape an individual transgender person’s experiences.

* * *

Understanding that the choice to use the umbrella term “transgender” may be contested, there is some general agreement around the usage; as Currah, Juang, and Minter note, “[s]ince
about 1995, the meaning of transgender has begun to settle, and the term is now generally used to refer to individuals whose identity or expression does not conform to the social expectations for their assigned sex at birth.”


Gay rights advocates and opponents tend to hold distinct views on homosexuality’s origins. Advocates commonly contend that sexual orientation is not a choice, while at least one political opponent of gay rights has insisted that “[h]omosexuality ... [is] about sexual freedom, and they hate to be called on [it].” Coming from the camps that they do, these hardline views of homosexuality as pre-determined compulsion or free choice might strike some as ironic: Liberation was once a watchword of the gay rights movement and freedom isn’t commonly thought of as a dirty word when used by political conservatives. Regardless of the accuracy of either claim, the portrayal of homosexuality as an inborn condition likely serves legally strategic ends. It brings gays one step closer to suspect class status under the Equal Protection Clause of the Fourteenth Amendment, potentially imperiling any law in the nation that treats gays as a class differently than non-gays. This is because a law that treats people differently based on their membership in a suspect class is subject to heightened judicial scrutiny and must be at least substantially related to an important government interest to avoid being struck down as unconstitutional.


A. The First Approach—Sex as Biology

The first legal narrative determines sex according to strictly biological factors. This narrative is informed by the biological determinist view that biology is destiny and that its meaning is universal. Ormrod J. of the former English Probate Division first articulated this in *Corbett* in 1970.

At issue in *Corbett* was the status of the marriage between Arthur Corbett and April Ashley, a post-operative male-to-female (‘MTF’) transsexual who had a career in fashion modelling as a woman. Nine expert doctors gave evidence, identifying four factors as being integral to sex (although they accorded different weight to each factor): chromosomes, genitals, gonads and psychology. Ormrod J. used these opinions to determine sex strictly for the purpose of the institution of marriage. In his view there was something unique about marriage. He said: ‘Marriage is a relationship which depends on sex and not on gender.’

* * *

Within the context of marriage, Ormrod J. held that sex is a biological matter: it is determined at birth if a person’s chromosomes, gonads and genitals are congruent. A person’s psychological view of their identity is related to gender and not sex. While genitals are important to one’s sex, only the genitals one is born with are considered: if a
person has their genitals removed or reconstructed, this might affect their gender, but not their sex. Therefore, April Ashley’s sex remained male despite her sex reassignment surgery and the fact she perceived herself as female.

Although there was widespread criticism of the rigidity of this biological determinist view, it was the dominant approach in the Anglo-American legal world into the 21st century. It was upheld in the 2003 case of Bellinger. At issue was the validity of Mrs. Bellinger’s second marriage. While Mrs. Bellinger was described on her marriage certificate as a spinster, on her birth certificate she had been registered as being of the male sex. However, evidence was heard that from early in life she had felt herself to be a woman. At the age of 21 she married a woman, but just four years later the marriage was over and Mrs. Bellinger began living as a woman and undergoing treatment—including hormone treatment and gender reassignment surgery to remove her testes and penis—before marrying Mr. Bellinger in 1981.

The case, instigated by both the Bellingers, who sought a declaration of the validity of their marriage, was taken all the way to the House of Lords.

* * *

In the view of the House of Lords, Bellinger was not a sex-change case—such a thing not being legally recognisable—but a case of same-sex marriage. As a consequence, the Court held that, as Mrs. Bellinger was still legally a man, the Bellingers’ marriage was invalid under … The understanding of sex—as biological—articulated in Corbett and applied in Bellinger, means that sex is considered to be fixed at birth and immutable.

* * *

His approach, however, allows no room for agency in relation to the category of sex. More critically, neither Bellinger nor Corbett makes any attempt to analyse or articulate why a biological interpretation of sex is necessary in family law. If the ability to procreate were a requirement of both contracting parties to a marriage, then a biological test would understandably be necessary. But this is not the law in England, nor in any common law jurisdiction, including South Africa or various states of the United States (US) where the Corbett test has been subsequently applied. In England, non-consummation of a marriage is a ground for nullity but this is clearly not the same as the inability to procreate, as an infertile person may be able to consummate a marriage.

B. The Second Approach — Sex as Congruent Anatomy and Psychology

The Corbett approach has not been the only approach taken by the courts. A second, less dominant legal narrative determines sex according to the conformity of anatomical (rather than biological) and psychological factors. This approach is consistent with social constructionist views of sex, which challenge biological determinist notions of sex as apolitical and ahistorical.

* * *

However, this approach is also subject to criticism. In particular, it is thought to over emphasise anatomy, which effectively sanctions the surgical ‘mutilation’ of transsexual bodies. In addition, it is criticised for effectively leaving pre- or non-operative transsexuals unprotected because the focus on anatomy effectively distinguishes between post-operative and pre- and non-operative transsexuals. …

* * *

This, however, creates a further issue; that of determining how much anatomical change is required. Ironically, distinguishing between pre- and post-operative transsexuals also attracted criticism in Bellinger, where the distinction was cast as arbitrary. Lord Nicholls
commented that: ‘There seem[ed] to be no “standard” operation or recognized definition of the outcome of completed surgery… According to the House of Lords, determining these criteria is Parliament’s responsibility, not that of the courts. In the House of Lords’ view it was inappropriate, possibly even illegitimate, for a court to attempt to draw this ‘sex line’. Lord Nicholls listed three reasons for this. First, the courts are ‘not in a position to decide where the demarcation line could sensibly or reasonably be drawn’ in that the ‘solution calls for extensive enquiry and the widest public consultation and discussion’; second, the matter should be ‘considered as a whole and not dealt with in a piecemeal fashion’; and third, the question raises wider issues which challenge the traditional concept of marriage. Lord Hope agreed that determining the sex line in what he seemed to conceptualise as a same-sex marriage case ‘must be left to Parliament’.

C. Third Approach—Sex as Psychology

A third judicial narrative determines sex by giving primacy to behaviour and psychology, and considers anatomy to be of secondary relevance…. It further stated that a requirement that a person undergo expensive surgery in order to change their sex was unduly onerous.

* * *

However, the idea of ‘gender by choice’ in relation to marriage received some implicit support in the UK in W v. W (Physical Inter-sex). In that ‘physical inter-sex’ marriage case the Family Division was asked by the petitioner to determine whether his marriage to the intersex respondent was null on the ground that the respondent was legally male at the date of marriage. Justice Charles considered a number of factors in determining legal sex, including chromosomes, gonads, genitals, the respondent’s capability to procreate and have sexual intercourse, her ‘body habitus’ and general appearance, and her choice of sex. Although many of these factors prima facie indicated the respondent was male, it seems to have been decisive for his Honour that the respondent had made a ‘final choice to live as a woman’. As a consequence, the Court held the respondent was female at the time of the marriage, which was therefore valid.

**Problem 4-3**

Elena and Sofia have resided together in a conjugal relationship in Italy, their native country, for the past twelve years. Elena is a non-operative male-to-female transsexual. They have committed to a life-long relationship, and are raising a daughter. Italy does not allow same-sex marriage or civil unions. Having unsuccessfully sought a marriage license in proceedings in the Italian courts and exhausted all domestic remedies, they file an application with the European Court of Human Rights alleging violations of Articles 8, 12, and 14. Article 12 guarantees men and women of marriageable age a right to marry in accordance with national laws.

As an advocate for the applicants appearing before the Court, what arguments would you make to persuade the Court to rule that denial of the ability to marry violates the applicants’ rights under the Convention?

As counsel for Italy appearing before the Court, what arguments, would you submit to the Court?

**Notes and Questions**

argument from immutability, when advanced on behalf of a complex movement, many of whose members can change some aspect of their sexuality . . . [is] burdened with an ethical problem . . .: When pro-gay advocates use the argument from immutability before a court on behalf of gay men, lesbians, and bisexuals, they misrepresent us.”

What are the legal implications of Halley’s argument? How would Justice Sachs (author of Fourie) respond?

2. Schisms? Some radical feminists have argued that transgendered women should be treated as men. As Michelle Goldberg summarizes their position:

They believe that if women think and act differently from men it’s because society forces them to, requiring them to be sexually attractive, nurturing, and deferential . . . In this view, gender is less an identity than a caste position. Anyone born a man retains male privilege in society; even if he chooses to live as a woman — and accept a correspondingly subordinate social position — the fact that he has a choice means that he can never understand what being a woman is really like . . . (w)hen trans women demand to be accepted as women they are simply exercising another form of male entitlement. All this enrages trans women and their allies, who point to the discrimination that trans people endure.

Michelle Goldberg, What is a Woman? The New Yorker, Aug. 4, 2014.

3. Some commentators reject the notion that ‘immutability’ is a basis for legal, or social, acceptance. Lynn D. Wardle, The Biological Causes and Consequences of Homosexual Behavior and Their Relevance for Family Law Policies, 56 DePaul L. Rev. 997, 1015 (2007) (“[T]olerance granted on such a basis would fall short of genuine social acceptance . . . [H]istory suggests that it is unrealistic to expect any protection to be conferred on the basis of alleged biologic causality . . . [T]he undisputed innateness of skin color does not appear to have a mitigating influence on racism.”) How would you respond to Professor Wardle?

4. Some psychologists have questioned whether “true bisexuality exists, at least in men.” Benedict Carey, Straight, Gay or Lying? Bisexuality Revisited, N.Y. Times, July 5, 2005, (citing studies “suggesting that the estimated 1.7 percent of men identify themselves as bisexual show physical attraction patterns that differ substantially from their professed desires.) For a recent survey, see Benoit Denizet-Lewis, The Scientific Quest to Prove Bisexuality Exists, N.Y. Times, March 20, 2014 (describing “the Los Angeles-based American Institute of Bisexuality (A.I.B.), a deep-pocketed group partly responsible for a surge of academic and scientific research across the country about bisexuality.”) What would constitute scientific proof of bisexuality? If this is not a question for scientists, who can answer it? How would you convince a skeptic that your answer is correct?

2. The Yogyakarta Principles

In 2006, the International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations, convened a meeting in Indonesia to develop a set of international principles, as described below.

Introduction to the Yogyakarta Principles

Many advances have been made toward ensuring that people of all sexual orientations and gender identities can live with the equal dignity and respect to which all persons are
entitled. Many States now have laws and constitutions that guarantee the rights of equality and non-discrimination without distinction on the basis of sex, sexual orientation or gender identity.

Nevertheless, human rights violations targeted toward persons because of their actual or perceived sexual orientation or gender identity constitute a global and entrenched pattern of serious concern. They include extra-judicial killings, torture and ill-treatment, sexual assault and rape, invasions of privacy, arbitrary detention, denial of employment and education opportunities, and serious discrimination in relation to the enjoyment of other human rights. These violations are often compounded by experiences of other forms of violence, hatred, discrimination and exclusion, such as those based on race, age, religion, disability, or economic, social or other status.

Many States and societies impose gender and sexual orientation norms on individuals through custom, law and violence and seek to control how they experience personal relationships and how they identify themselves. The policing of sexuality remains a major force behind continuing gender-based violence and gender inequality…. However, the international response to human rights violations based on sexual orientation and gender identity has been fragmented and inconsistent. To address these deficiencies a consistent understanding of the comprehensive regime of international human rights law and its application to issues of sexual orientation and gender identity is necessary…. Following an experts’ meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November 2006, 29 distinguished experts from 25 countries with diverse backgrounds and expertise relevant to issues of human rights law unanimously adopted the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

* * *

The experts agree that the Yogyakarta Principles reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity. They also recognise that States may incur additional obligations as human rights law continues to evolve.

The Yogyakarta Principles affirm a broad range of rights, including the universal enjoyment of human rights, equality and non-discrimination, protection from all forms of exploitation, and effective remedies and redress, to which all human beings are entitled without distinction as to sexual orientation or gender identity. The Principles also set out specific measures to be taken by states so as to assure these rights.

* * *

Principle 24, The Right to Found a Family

Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members. States shall:

A. Take all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity;

B. Ensure that laws and policies recognize the diversity of family forms, including those not defined by descent or marriage, and take all necessary legislative, ad-
ministrative and other measures to ensure that no family may be subjected to
discrimination on the basis of the sexual orientation or gender identity of any
of its members, including with regard to family-related social welfare and other
public benefits, employment, and immigration;
C. Take all necessary legislative, administrative and other measures to ensure that
in all actions or decisions concerning children, whether undertaken by public
or private social welfare institutions, courts of law, administrative authorities
or legislative bodies, the best interests of the child shall be a primary consider-
ation, and that the sexual orientation or gender identity of the child or of any
family member or other person may not be considered incompatible with such
interests;
D. In all actions or decisions concerning children, ensure that a child who is capa-
ble of forming personal views can exercise the right to express those views freely,
and that such views are given due weight in accordance with the age and matur-
ity of the child;
E. Take all necessary legislative, administrative and other measures to ensure that
in States that recognize same-sex marriages or registered partnerships, any en-
titlement, privilege, obligation, or benefit available to different-sex married or
registered partners is equally available to same-sex married or registered partners;
F. Take all necessary legislative, administrative and other measure to ensure that
any obligation, entitlement, privilege, obligation or benefit available to differ-
tent-sex unmarried partners is equally available to different-sex unmarried partners
is equally available to same-sex unmarried partners;
G. Ensure that marriages and other legally-recognized partnerships may be entered
into only with free and full consent of the intending spouses or partners.

The complete text of the Principles can be found at http://www.yogyakartaprin-
ciples.org/principles_en_principles.htm.

On December 12, 2008, 66 nations at the UN General Assembly supported a ground-
breaking statement confirming that international human rights protections include
sexual orientation and gender identity. It is the first time that a statement condemning rights
abuses against lesbian, gay, bisexual, and transgender people has been presented in the Gen-
eral Assembly.

The statement was read by Argentina and a counterstatement was read by the Syrian
Arab Republic. See www.un.org, “18 December 08 General Assembly: 70th and 71st plen-
ary meeting — Morning session.”

For a provocative discussion, see Vincent J. Samar, Throwing Down the Interna-
tional Gauntlet: Same-Sex Marriage as a Human Right, 6 Cardozo Pub. L. Pol’y & Ethics J. 1
(2007).

National Legal Ser. Auth. v. Union of India
(2014) 5 S.C.C. 438 (India)

K.S. Radhakrishnan, J.

1. Seldom, our society realizes or cares to realize the trauma, agony and pain which the
members of Transgender community undergo, nor appreciates the innate feelings of the
members of the Transgender community, especially of those whose mind and body dis-
own their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society’s unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.

2. We are, in this case, concerned with the grievances of the members of Transgender Community (for short ‘TG community’) who seek a legal declaration of their gender identity than the one assigned to them, male or female, at the time of birth and their prayer is that non-recognition of their gender identity violates Articles 14 and 21 of the Constitution of India. Hijras/Eunuchs, who also fall in that group, claim legal status as a third gender with all legal and constitutional protection.

* * * 

In Dattatraya Govind Mahajan vs. State of Maharashtra (1977) this Court observed:

Our Constitution is a tryst with destiny, preamble with lucid solemnity in the words ‘Justice—social, economic and political.’ The three great branches of 103 Government, as creatures of the Constitution, must remember this promise in their fundamental role and forget it at their peril… The history of our country’s struggle for independence was the story of a battle between the forces of socio-economic exploitation and the masses of deprived people of varying degrees and the Constitution sets the new sights of the nation…. Once we grasp the dharm of the Constitution, the new orientation of the karma of adjudication becomes clear. Our founding fathers, aware of our social realities, forged our fighting faith and integrating justice in its social, economic and political aspects. While contemplating the meaning of the Articles of the Organic Law, the Supreme Court shall not disown Social Justice.

Oliver Wendell Holmes said: “the life of law has been logical; it has been experience”. It may be added that ‘the life of law is not just logic or experience. The life of law is renewable based on experience and logic, which adapted law to the new social reality’. Recognizing this fact, the aforesaid provisions of the Constitution are required to be given new and dynamic meaning with the inclusion of rights of TGs as well. In this process, the first and foremost right is to recognize TGs as ‘third gender’ in law as well. This is a recognition of their right of equality enshrined in 104 Art.14 as well as their human right to life with dignity, which is the mandate of the Art.21 of the Constitution. This interpretation is in consonance with new social needs. By doing so, this Court is only bridging the gap between the law and life and that is the primary role of the Court in a democracy. It only amounts to giving purposive interpretation to the aforesaid provisions of the Constitution so that it can adapt to the changes in reality. Law without purpose has no raison d’etre. The purpose of law is the evolution of a happy society.

* * *

As we have pointed out above, our Constitution inheres liberal and substantive democracy with rule of law as an important and fundamental pillar. It has its own internal morality based on dignity and equality of all human beings. Rule of law demands protection of individual human rights. Such rights are to be guaranteed to each and every human being. These TGs, even though insignificant in numbers, are still human beings and therefore they have every right to enjoy their human rights.

124. In National Human Rights Commission vs. State of Arunachal Pradesh (AIR 1996 SC 1234), This Court observed: “We are a country governed by the Rule of Law. Our Con-
stitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws."

125. The rule of law is not merely public order. The rule of law is social justice based on public order. The law exists to ensure proper social life. Social life, however, is not a goal in itself but a means to allow the individual to live in dignity and development himself. The human being and human rights underlie this substantive perception of the rule of law, with a proper balance among the different rights and between human rights and the proper needs of society. The substantive rule of law “is the rule of proper law, which balances the needs of society and the individual.” This is the rule of law that strikes a balance between society's need for political independence, social equality, economic development, and internal order, on the one hand, and the needs of the individual, his personal liberty, and his human dignity on the other. It is the duty of the Court to protect this rich concept of the rule of law.

126. By recognizing TGs as third gender, this Court is not only upholding the rule of law but also advancing justice to the class, so far deprived of their legitimate natural and constitutional rights. It is, therefore, the only just solution which ensures justice not only to TGs but also justice to the society as well.

* * *

129. We, therefore, declare:

1. Hijras, Eunuchs, apart from binary gender, be treated as “third gender” for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.

2. Transgender persons’ right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.

3. We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.

4. Centre and State Governments are directed to operate separate HIV Sero-surveillance Centres since Hijras/Transgenders face several sexual health issues.

5. Centre and State Governments should seriously address the problems being faced by Hijras/Transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.

6. Centre and State Governments should take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.

7. Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

8. Centre and State Governments should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.

9. Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.
130. We are informed an Expert Committee has already been constituted to make an in-depth study of the problems faced by the Transgender community and suggest measures that can be taken by the Government to ameliorate their problems and to submit its report with recommendations within three months of its constitution. Let the recommendations be examined based on the legal declaration made in this Judgment and implemented within six months.

NSW Registrar of Births, Deaths and Marriages v. Norrie
(2014) 244 CLR 390 (Austl.)

The Tribunal

22. The issue before the Tribunal was whether it was open to the Registrar under 32DC of the Act to register an applicant’s sex as “non-specific”. The Registrar argued that his powers were confined to registering a person’s sex as either “male” or “female”.

23. The Tribunal found that, as a matter of fact, Norrie does not identify as male or female, but as “non-specific”, and that she considers that identifying herself as male or female would be a false statement. Nevertheless, the Tribunal concluded that it was not open to the Registrar to register her sex as “non-specific”. In this regard, the Tribunal proceeded on the footing that “the Act is predicated on an assumption that all people can be classified into two distinct and plainly identifiable sexes, male and female… [T]he Registrar does not have the power under section 32DC of the Act to register a change of sex by a person to ‘Non specific’”.

24. Norrie appealed to the appeal panel of the Tribunal, which dismissed her appeal.

* * *

The arguments in this Court

28. The Registrar submitted that the Court of Appeal strayed too far from the text of the Act in reaching its conclusions. It was said that the Act does not contemplate a range of categories of sex, additional to the “opposite” sexes of male and female. In particular, the definition of “sex affirmation procedure” in s 32A suggests a process of seeking to become male or female, given that s 32A(a) states that the sex affirmation procedure is carried out for the purpose of “assisting a person to be considered to be a member of the opposite sex”; and to speak of the opposite sex is necessarily to speak only of male or female. Further, the Registrar submitted, it is reasonable to expect that an intention to recognise another category of “sex” would have been expressly stated in the Act. In this regard, the definition of “transgender” in Pt 3A of the Anti-Discrimination Act does refer to a person being of an “indeterminate” sex; but, significantly, this language was not used in Pt 5A of the Act.

29. The Registrar also argued that unacceptable confusion would flow from the acceptance of more than two categories of sex given that s 32J of the Act affects the operation of other laws which assume the binary division of sex. This particular argument will be addressed after the submissions made on behalf of Norrie have been summarised.

30. Norrie submitted that the purpose of the Register is to state the truth about matters recorded in the Register to the greatest possible extent. If the Act proceeded on the assumption that every person was male or female, then s 32A(b) would be superfluous because any change of sex would fall within the scope of s 32A(a). A sex affirmation procedure described in s 32A(b) of the Act, the purpose of which is to “correct or elim-
inate ambiguities relating to the sex of the person,” was said to be predicated upon legislative recognition that not everyone may be classified as male or female. In this case, the sex affirmation procedure, which is a precondition of an application under s 32DA, was carried out, but Norrie’s sex remained ambiguous so that it would be to record misinformation in the Register to classify her as male or female. There is evident force in this submission.

31. Norrie’s counsel went further, arguing that, as the Court of Appeal accepted, Norrie might more accurately be assigned to a category of sex such as “intersex” or “transgender”. On this view, the expression “change of sex” in s 32DC does not mean changing from one sex (male or female) to another (female or male): a reference to change of sex simply means an “alteration” of a person’s sex so that registration of categories of sex such as “transgender” and “intersex” is within the scope of the Registrar’s powers under s 32DC. This further argument goes too far; it should be rejected.

32. The Registrar’s submission that the Act recognizes only male or female as registrable classes of sex must be accepted. But to accept that submission does not mean that the Act requires that this classification can apply, or is to be applied, to everyone. And there is nothing in the Act which suggests that the Registrar is entitled, much less duty-bound, to register the classification of a person’s sex inaccurately as male or female having regard to the information which the Act requires to be provided by the applicant.

Additional categories of sex

33. As a matter of the ordinary use of language, to speak of the opposite sex is to speak of the contrasting categories of sex: male and female. Yet given the terms of s 32A(b) and the context in which it is to be construed, the Act recognises that a person’s sex may be indeterminate.

34. Norrie’s application to the Registrar and the Registrar’s determination did not give rise to an occasion to consider whether Pt 5A contemplates the existence of specific categories of sex other than male and female, such as “intersex”, “transgender” or “androgy nous”. It was unnecessary to do so given that the Act recognises that a person’s sex may be neither male nor female.

35. The Registrar’s initial determination of Norrie’s application was right. The appropriate record of her change of sex was from “male” (as it may be taken to have previously been recorded outside of New South Wales) to “non-specific”. To make that record in the Register would be no more than to recognise, as the Act does, that not everyone is male or female and that the change to be registered was from an assumed registered classification outside of New South Wales as a male to, as Norrie’s application put it, non-specific.

Ambiguities and indeterminacy

36. The Registrar’s submission must be rejected at the point at which it insists that the Registrar is required to decide whether he or she is satisfied (let alone that it has been demonstrated objectively) that, despite an application showing persisting ambiguity in the sex of the applicant following a sex affirmation procedure, the applicant’s sex should be recorded in the Register as being either male or female. The registration of a change of sex records the facts supplied by the application so long as the application is supported in accordance with s 32DB.

37. The provision of the Act which acknowledges “ambiguities” and the context of the 1996 Amending Act, which referred to persons of “indeterminate sex”, are a sufficient indication that the Act recognises that, as this Court observed in AB v. Western Australia, “the sex of a person is not … in every case unequivocally male or female.”
38. There is nothing in the text of the Act which gives support to the view that the Registrar must initiate, much less resolve, a dispute concerning matters of fact and expert opinions. Such a role would not be consistent with the provisions of the Act which charge the Registrar with the role of establishing and maintaining the registers by recording information provided by members of the community.

* * *

44. The Registrar’s argument from inconvenience should be rejected.

Conclusions and orders

45. The Court of Appeal went beyond the scope of Norrie’s application to the Registrar and the issue as to the Registrar’s power under s 32DC raised by the Registrar’s refusal to record her sex as “non-specific”. While the Court of Appeal did not proceed without encouragement from Norrie’s counsel, it was neither necessary nor appropriate for it to accept that encouragement. It would have been sufficient for it to determine the issue raised by the determination of Norrie’s application and the appeal from the Tribunal to hold that the Tribunal erred in answering the question as to the Registrar’s power under s 32DC on the basis that the Act is predicated on the assumption that “all people can be classified into two distinct and plainly identifiable sexes, male and female.”

46. The Act does not require that people who, having undergone a sex affirmation procedure, remain of indeterminate sex—that is, neither male nor female—must be registered, inaccurately, as one or the other. The Act itself recognises that a person may be other than male or female and therefore may be taken to permit the registration sought, as “non-specific”.

47. Accordingly, the orders of the Court of Appeal should be varied to the extent of setting aside the order of the Court of Appeal remitting the matter to the Tribunal, and ordering that Norrie’s applications to the Registrar of 26 November 2009 should be remitted to the Registrar for determination in accordance with these reasons. Otherwise, the appeal should be dismissed.

48. In accordance with the conditions subject to which special leave was granted, the order as to costs made by the Court of Appeal should not be disturbed, and the Registrar must pay Norrie’s costs of the appeal to this Court.

Notes and Questions

1. The rights and identity of transgender individuals has been a topic of debate throughout the world recently and remains controversial in many countries. In February 2014, an appeals court in Texas vacated a lower court ruling that invalidated the marriage of a transgender woman. Earlier that month, Amnesty International accused European countries of violating the human rights of those who seek to change their legal gender. In January, the Supreme Court of Maine ruled that a local school violated the state’s Human Rights Act when it refused to allow a transgender fifth-grader to use the girls’ bathroom. In November, a petition was filed in the state of California to repeal a law designed to protect transgender public school students. That same month, the U.S. Senate approved the Employment Non-Discrimination Act (ENDA), which outlaws workplace discrimination on the basis of sexual orientation or gender identity. Daniel Mullen, Australia Court Recognizes ‘Non-Specific’ Gender, Jurist Paper Chase, April 2, 2014.

2. Who counts as transgendered? What do the Indian and Australian courts require of those seeking to be considered neither male nor female? Cf. Emily Tamkin, Should Den-

Even in countries that are nominally supportive of transgender people, sterilization—whether by surgery or hormones—is often the price a trans individual must pay in order to receive legal recognition of his or her transition. It’s a paradigm that the World Health Organization has called “counter to respect for bodily integrity, self-determination and human dignity,” and it’s one that doesn’t acknowledge the fact that for many trans people, transition is not necessarily tied to invasive physical changes.

Earlier this week, Denmark moved beyond this inhumane legal logic when its new gender recognition law came into effect. Under the new policy, trans people in the country are now only required to fill out some paperwork in order to receive a new social security number and accompanying personal documentation for their gender. Medical intervention, including surgery, psychological diagnosis, and official statements, are no longer necessary prerequisites—in Denmark, gender identification is now based solely on self-determination.

What do you think should be the standard? Does it matter whether transgender people are entitled to specific benefits? (see the Indian case, supra.) See also John Parsi, The (Mis)Categorization of Sex in Anglo-American Cases of Transsexual Marriage, 108 Mich. L. Rev. 1497, 1501–03 (2010) (surveying legal bases for sex changes across the United States and finding that only two states explicitly disallow sex changes on birth certificates).