



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

ECRI Annual Seminar with Equality Bodies

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Dear Ladies and Gentlemen,

Dear colleagues,

It is a pleasure for me to be here with you today for this year's ECRI's Annual Seminar with Equality bodies. This seminar is an excellent forum for exchanges of good practices among ECRI, Equality Bodies and other central stakeholders in the field of LGBTI rights. It is also expected to provide useful elements for the future preparation of an ECRI General Policy Recommendation on LGBTI issues.

For my part, as a representative of the European Court of Human Rights, I will use the short time I have at my disposal to provide you with a sort of a "tour de horizon" on the various fields in which LGBTI cases have come before the ECHR and which, as you will surely agree with me, are very numerous.

As the Court has stressed time and again, the European Convention is a living instrument which is to be interpreted in the light of present-day conditions ([E.B. v. France](#) [GC]; [Christine Goodwin v. the United Kingdom](#) [GC]). In other words, the Convention and the interpretation thereof evolve by taking into account developments in member States on important societal issues. The Court is required to take this evolution into account and draw from it legally coherent and logical conclusions. The living instrument doctrine is of particular relevance in the context of claims brought by LGBTI persons where the Court's case-law has also continued to evolve over the years.

However, the Court must be cautious in this area. The living instrument doctrine gives it the methodological tools to give life to the Convention, but at the same time sets certain boundaries on how far the Court can go as a court of law.

As President Spano stated in one of his previous addresses to ECRI, the European Court of Human Rights has been a judicial pioneer in its interpretation of the Convention in respect of LGBTI persons over the last few decades and has served as a rich source of jurisprudential inspiration for other national and international courts. Up until now the role of the Court in the field of LGBTI rights has been a wise and prudent one, not necessarily one that anticipates change, but rather accompanies Member States on their own path of change.

LGBTI persons have brought cases before the Court under various Articles of the Convention and have given the Court the opportunity to develop what is now a significant body of case-law on the matter.

Much of that case-law has involved the right to respect for private life guaranteed under Article 8. The Court has confirmed that elements such as gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 ([Sousa Goucha v. Portugal](#); [B. v. France](#); [Dudgeon v. the United Kingdom](#); [Beizaras and Levickas v. Lithuania](#); [Smith and Grady v. the United Kingdom](#)).

In this area, following early cases condemning criminalisation of same-sex sexual acts in private between consenting adults, the Court criticised the exclusion of gay men from the armed forces, as well as the higher age of consent for homosexual acts (as opposed to heterosexual ones).

As early as 2002 the Court has found, in the *Christine Goodwin v the UK* judgment that the State had to ensure the right of a post-operative transgender person, to respect for her private lives, in particular through legal recognition for her gender re-assignment ([Christine Goodwin v. the United Kingdom](#) [GC]; [Grant v. the United Kingdom](#)). More recently, the Court has also confirmed that laws making recognition of the gender identity of transgender persons conditional on sterilisation were not compatible with the Convention. This was so because making recognition of the sexual identity of transgender persons conditional on undergoing an operation entailing sterilisation against their wishes, amounted to making the full exercise of their right to respect for private life, enshrined in Article 8, conditional on relinquishing full exercise of their right to respect for physical integrity, safeguarded by Article 3 of the Convention, which is of

absolute character. On the other hand, making legal recognition of transgender persons' gender identity conditional on the requirement to obtain a prior psychiatric diagnosis is not considered to directly affect an individual's physical integrity or violate Article 8 ([A.P., Garçon and Nicot v. France](#)). Nor does the positive obligation of the State go so far as to require an effective and accessible procedure allowing an applicant to have her new gender legally recognised while remaining married ([Hämäläinen v. Finland](#) [GC]).

LGBTI marriages

Under the Court's case-law as it currently stands, Article 12 (which enshrines the right to marry) applies to transgender individuals wishing to marry a person of the opposite sex (i.e. opposite to her or his newly assigned sex). In the aforementioned case of [Christine Goodwin v. the United Kingdom](#), the Court held that it could no longer be assumed that the terms "man and woman" referred to in Article 12 necessarily referred to a determination of gender by purely biological criteria, since there had been major social changes in the institution of marriage as well as dramatic changes brought about by developments in medicine and science. In that case the Court found no justification for barring a transsexual from enjoying the right to marry under any circumstances.

As regards same-sex marriages, in [Schalk and Kopf v. Austria](#), while the Court conceded that Article 12 did not in all circumstances have to be limited to marriage between two persons of the opposite sex, it considered that neither Article 8 nor Article 12 taken alone or in conjunction with Article 14, imposed an obligation on Contracting States to grant same-sex couples access to marriage. The Court accepted that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another and it was careful not to rush to substitute its own judgment for that of the national authorities, who are best placed to assess and respond to the needs of society ([Schalk and Kopf v. Austria](#)). This was confirmed in [Hämäläinen v. Finland](#) [GC], [Oliari and Others v. Italy](#) and [Chapin and Charpentier v. France](#).

However, the Court has been far more critical in situations in which same-sex couples had no legal protection of their union, either because the authorities refused to register their marriages contracted abroad ([Orlandi and Others v. Italy](#)), because civil unions were open only to heterosexual couples ([Vallianatos v. Greece](#) [GC]), or because

the State did not provide any legal framework whatsoever to have same-sex relationships formally acknowledged. In the latter case, [Fedotova and Others v. Russia](#), the Court was unable to identify any prevailing community interests against which to balance the interests of the applicant same-sex couples living in stable relationships. Giving the applicants access to formal acknowledgment of their couples' status in a form other than marriage would not be in conflict with the "traditional understanding of marriage" or the views of the majority to which the Government referred, as those views opposed only same-sex marriages, but not other forms of legal acknowledgment which may exist. In this connection, the Court stressed that "it would be incompatible with the underlying values of the Convention, as an instrument of the European public order, if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority."

As regards parental issues, the Court has recognised that a limitation of parental rights – be it custody or access rights – based solely on a person's sexual orientation or gender identity, will in principle not be compatible with the Convention. In adoption cases, the Court has recognised that treating an individual or indeed a prospective adoptive couple differently on account of their sexual orientation would also in principle breach the Convention (*E.B. v France, Gas and Dubois v. France, X v Austria*).

The Court has also developed LGBTI-relevant case-law covering most other Articles, for example Article 3 cases regarding ill-treatment of LGBTI persons. In such cases, when the domestic authorities are confronted with *prima facie* indications of violence motivated by the victim's sexual orientation, they were under the obligation of elucidating the possible homophobic motive behind the violent incident and of identifying and, if appropriate, adequately punishing those responsible.

In [Sabalić v. Croatia](#), where the perpetrator of a homophobic violent attack was fined a derisory 40 euros, without the authorities having addressed the hate crime elements of the attack, the Court found that by erroneously discontinuing subsequent criminal proceedings on formal grounds (*ne bis in idem*), the domestic authorities had failed to discharge adequately and effectively their procedural obligation under the Convention.

In this context one should also mention cases of expulsion of LGBTI persons to third countries where they risk ill-treatment on account of their sexual orientation. Of particular relevance is the case of [*B and C v Switzerland*](#), where, consistently with the case-law of the Court of Justice of the European Union (CJEU) as well as with the position of the United Nations High Commissioner for Refugees (UNHCR), the Court, for the first time, held that the failure of the authorities to sufficiently assess the risk of ill-treatment on the grounds of their sexual orientation emanating from non-State actors when returning a same-sex couple to the Gambia would amount to a violation of Article 3 of the Convention.

The Court has also examined important cases on freedom of expression under Article 10, freedom of assembly and association under Article 11 as well as social rights under Article 1 of Protocol No 1.

Beizaras and Levickas v. Lithuania concerned a situation of *online* hate speech which is nowadays particularly widespread with the popularity of social media. One of the applicants had posted a photograph of himself and his partner kissing on his Facebook page, which led to hundreds of online hate comments. The authorities' refused to launch a pre-trial investigation into the hate comments; and the applicants' sexual orientation had played a role in the way they had been treated by the authorities, which had quite clearly expressed disapproval of them publicly demonstrating their homosexuality.

Article 14 of the Convention prohibiting discrimination is, of course, key to the Court's approach in this field and has been raised and examined in most of the cases I've referred today. The margin of appreciation in cases related to differences of treatment based on sexual orientation is narrow, requiring "*particularly convincing and weighty reasons*" by way of justification. "*Differences based solely on considerations of sexual orientation are unacceptable under the Convention*".

Lastly, let me point out that the Court does not operate in a vacuum; it remains attentive to what is being done on LGBTI issues within the Council of Europe, as well as in international law and civil society, and the work of all those involved provides a helpful framework of reference when interpreting Convention provisions. For instance, in *Beizaras and Levickas*, the Court extensively quoted the ECRI's 2016 monitoring report on Lithuania and a follow-up 2019 report on its recommendations. In *Aghdgomelashvili*

and Japaridze v. Georgia, which concerned abusive police conduct motivated by homophobic and/or transphobic hatred during their search of the premises of an LGBTI NGO, the Court relied on “the well-documented hostility against the LGBT community in the country at the material time” and recommendations of the Commissioner for Human Rights’ monitoring report. In *Fedotova v. Russia*, the Court relied on PACE’s resolution, ECRI’s 2018 report on Russia as well as its very recent “Factsheet on LGBTI issues”.

Dear Ladies and Gentlemen,

So, what about the future?

The Court is not a policy-making organ, but a Court of law entrusted with interpreting and applying the European Convention on Human Rights, a legal text, an international treaty. It decides cases brought before it by individuals and is in that way also limited in its actions. As a member of the Court’s Registry, I am personally not in a position to comment on issues that have not been decided by the Court or to offer predictions as to the future trajectory of the case-law. However, I can tell you that there are some interesting pending cases, which may allow the Court to offer further guidance to Member States on LGBTI matters, such as, for instance, the rights of intersex people (pending cases of *Y v France*, no [76888/17](#), concerning impossibility of registration of neutral sex and *M v France*, no [42821/18](#), concerning surgeries imposed on children in order to “enhance” one of their genitals), or the labelling of a book with fairy tales depicting same-sex relationships as harmful to children (case pending before the Grand Chamber *Macatė v. Lithuania*, no. 61435/19).

I thank you very much for your attention and I wish you all a fruitful discussion and a very successful seminar.