MOVING GAILY FORWARD? LESBIAN, GAY AND TRANSGENDER HUMAN RIGHTS IN EUROPE

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[This article assesses the recent jurisprudence of the European judicial institutions in the area of lesbian, gay and transgender human rights. It considers four areas of rights protection: privacy, non-discrimination, family, and marriage. It concludes that, although the record of the European judicial institutions has been mixed, recent developments suggest a greater willingness to protect lesbians, gay men and transgender people from rights violations.]

CONTENTS

I INTRODUCTION

Lesbian, gay and transgender human rights issues have only entered the international discourse on human rights in the last 20 years, even though lesbians, gay men and transgender people have suffered discrimination, persecution and injustice throughout the world since the beginning of the twentieth century. In the United Nations arena, there has been one quasi-judicial decision concerning the right to privacy for gay men: *Toonen v Australia*[1] before

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[1] United Nations Human Rights Committee, *Report of the Human Rights Committee*, Communication No 488/1992, UN Doc CCPR/C/50/D/488 (4 April 1994) ('*Toonen*'). For a discussion of *Toonen*, see Wayne Morgan, 'Identifying Evil for What It Is: Tasmania, Sexual Perversity and the United Nations' (1994) 19 *Melbourne University Law Review* 740; George Selvanera, 'Gays in Private: The Problems with the Privacy Analysis in Furthering Human Rights' (1994) 16 *Adelaide Law Review* 331; Laurence Helfer and Alice Miller, 'Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence' (1996) 9 *Harvard Human Rights Journal* 61; Kristen Walker, 'International

the UN Human Rights Committee ('HRC'). Although Mr Toonen and the Tasmanian Gay and Lesbian Rights Lobby succeeded in that case, in other areas the UN has not been particularly receptive to lesbian, gay and transgender issues.[2] Indeed, in some instances the UN has been hostile to such issues, as demonstrated by the suspension of the International Lesbian and Gay Association ('ILGA') from consultative status with the Economic and Social Council.[3] In Europe, however, lesbian, gay and transgender activists have fared better in having sexuality issues addressed by the various European institutions.[4] In particular, they have achieved a significant measure of success in rights claims brought under the European *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*ECHR*').[5]

Unfortunately, not all sexuality rights claims before the European judicial institutions have succeeded. For lesbians and gay men, privacy claims have generally succeeded, whereas claims based on respect for family life and equality have historically not fared well. Transgender people have had even less success than lesbians and gay men. Importantly, however, in the past two years there have been a series of significant decisions that suggest that the European Court of Human Rights may take a more positive view of lesbian and gay claims — and perhaps transgender claims — under the *ECHR*.

Human Rights Law and Sexuality: Strategies for Domestic Litigation' (1998) 3 *New York City Law Review* 115.

2 For example, at the *Fourth World Conference on Women* in Beijing, all references to sexual orientation were ultimately removed from the Platform for Action: see Dianne Otto, 'Lesbians? Not in My Country' (1995) 20 *Alternative Law Journal* 288, 288. More recently, during the negotiations for the International Criminal Court in Rome, the term 'gender' was the subject of sustained debate as some states believed that the term might bring lesbians, gay men and transgender people within the protection of the Court's Statute: see Cate Steains, 'Gender Issues' in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute — Issues, Negotiations, Results* (1999) 357, 372–4.

3 ILGA's suspension was a result of a US led campaign which targeted ILGA because some of ILGA's member organisations condoned inter-generational sex (such as the North American Man-Boy Love Association). ILGA expelled those organisations from its membership, but was still suspended from its consultative status with the Economic and Social Council because one further member organisation was alleged to support paedophilia. It has not been reinstated. For a detailed description and analysis of the events surrounding ILGA's removal from consultative status, see Joshua Gamson, 'Messages of Exclusion: Gender, Movements and Symbolic Boundaries' (1997) 11 *Gender and Society* 178, 183–7.

4 Lesbians and gay men have in fact had quite significant successes within some non-judicial European institutions, in particular the European Parliament. However, the powers of the Parliament are exceedingly limited and thus positive statements from the Parliament on sexuality issues have not necessarily translated into concrete action by member states: see Wayne Morgan and Kristen Walker, 'Tolerance and Homosex: A Policy of Control and Containment' (1995) 20 *Melbourne University Law Review* 202, 211–12. For discussions of other non-judicial activity around sexuality in Europe, see ILGA Europe, *After Amsterdam: Sexual Orientation and the European Union* (1999); ILGA Europe, *Equality for Lesbians and Gay Men: A Relevant Issue in the Civil and Social Dialogue* (1998).

5 Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 June 1952).

This article focuses on cases decided in the past five years.[6] In order to understand these cases, it is important to situate them in the context of the previous jurisprudence of the European judicial institutions. I thus include a brief discussion of previous cases of the now defunct European Commission on Human Rights,[7] the European Court of Human Rights, and the European Court of Justice ('ECJ'). The analysis is divided into four parts. First, I examine the European jurisprudence on privacy. Second, I consider cases dealing with non-discrimination. Third, I examine the cases concerning respect for family life. Finally, I look briefly at the cases concerning marriage. In each section I consider lesbian and gay claims separately from transgender claims, as somewhat different issues are often involved. In conclusion, I offer some thoughts as to where the European Court of Human Rights might be heading in terms of lesbian, gay and transgender human rights claims.

II PRIVACY

Article 8 of the *ECHR* provides:

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

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6 For more detailed analyses of the European jurisprudence prior to 1995, see Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention and the Canadian Charter* (1995), 91–118; Eric Heinze, *Sexual Orientation: A Human Right* (1995); Kees Waaldijk and Andrew Clapham (eds), *Homosexuality: A European Community Issue — Essays on Lesbian and Gay Rights in European Law and Policy* (1993); Laurence Helfer, 'Lesbian and Gay Rights as Human Rights: Strategies for a United Europe' (1991) 32 *Virginia Journal of International Law* 157.

7 The European Commission on Human Rights was previously the body to which human rights complaints were brought by individuals. A hearing before the European Court of Human Rights could follow only if the Commission referred a case to the Court. The *Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Thereby*, opened for signature 11 May 1994, ETS 155 (entered into force 1 November 1998) <http://conventions.coe.int/treaty/EN/cadreprincipal.htm> at 21 May 2001 (copy on file with author) revised the judicial procedures under the *ECHR* and abolished the Commission, so that cases now proceed directly to a chamber of the Court.

A *Lesbians and Gay Men*

The European Court of Human Rights' jurisprudence on privacy for lesbians and gay men has been positive for many years.[8] In the 1980s the Court was the first international body to hold that laws criminalising consensual, private sexual activity between adults violated the right to privacy protected by art 8 of the *ECHR*.[9] These cases were the forerunners of *Toonen*, where the HRC reached the same conclusion in the context of Tasmanian laws criminalising sex between men. However, until recently the European Commission of Human Rights had held that laws criminalising sex between men when more than two men were present,[10] and laws setting an unequal age of consent for sexual activity,[11] did not violate the right to privacy guaranteed by art 8.

In *Sutherland v United Kingdom*,[12] however, the European Commission of Human Rights extended the privacy jurisprudence to cover discriminatory age of consent laws in the United Kingdom. The Commission held that a law which set an age of consent for sex between men at 18, while the age of consent for sex between a man and a woman was 16, violated the right to privacy together with the non-discrimination clause in art 14 of the *ECHR*. The Commission considered that these laws, which criminalised young men who engaged in same-sex sexual activity, interfered with their private life, even though the applicant in *Sutherland* had not been prosecuted or threatened with prosecution.[13] This is consistent with the European Court of Human Rights' approach to the adult criminalisation cases and with the HRC's approach in *Toonen*.

The Commission acknowledged that legal measures which set age limits for particular types of sexual activity are, in principle, legitimate under art 8(2) insofar as they are aimed at protecting morals and the rights of others.[14] However, the Commission concluded that serious reasons are required to interfere with intimate aspects of private life and that strong justification was

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8 This was not always the case. During the 1950s and 1960s, there were nine cases brought concerning the criminalisation of sex between men. In this series of cases, 'the Commission found these applications inadmissible as "manifestly ill-founded"' and dismissed them in a summary fashion: Wintemute, above n 6, 92.

9 *Dudgeon v United Kingdom* (1981) 45 ECHR (ser A) 1 ('*Dudgeon*'); *Norris v Ireland* (1988) 142 ECHR (ser A) 1 ('*Norris*'); *Modinos v Cyprus* (1993) 259 ECHR (ser A) 1.

10 *Johnson v United Kingdom* (1987) 9 EHRR 386 ('*Johnson*').

11 *Zukrigl v Austria* (No 17279/90) (13 May, 1992, unpublished); *Johnson* (1987) 9 EHRR 386; *App No 9721/82 v United Kingdom* (1985) 7 EHRR 145; *X v Belgium* (No 9484/81) (1 March 1982, unpublished); *X v United Kingdom* (1980) 19 Decisions and Reports: European Commission of Human Rights 46; *X v Germany* (1976) 3 Decisions and Reports: European Commission of Human Rights 46; all cited in Wintemute, above n 6, 95. For a discussion of these cases see Laurence Helfer, 'Finding a Consensus on Equality: The Homosexual Age of Consent and the European Convention on Human Rights' (1990) 65 *New York University Law Review* 1044.

12 (Unreported, European Commission of Human Rights, 1 July 1997, App No 25186/94) <http://www.echr.coe.int> at 6 May 2001 (copy on file with author) ('*Sutherland*').

13 Ibid [36].

14 Ibid [38].

required to support a discriminatory law.[15] The United Kingdom was unable to satisfy the Commission that its law was justified, particularly given that it was accepted that

> a young man of 17 years of age who wished to enter into and maintain sexual relations with a male friend of the same age, was in a "relevantly similar situation" to a young man of the same age who wished to enter into and maintain sexual relations with a female friend of the same age.[16]

The Commission's judgment clearly left open the possibility that laws that criminalise older men who engage in sex with young men would be valid; it was the criminalisation of the young men's conduct that was crucial to the Commission's decision.[17]

Sutherland is important for two reasons. First, it involved the overruling of several earlier decisions in which the Commission had upheld discriminatory age of consent laws,[18] thus indicating a willingness to depart from earlier, unsatisfactory precedents in the area of lesbian and gay rights. Second, it was the first time that either the European Court of Human Rights or the Commission had upheld a claim concerning discrimination on the basis of sexual orientation under art 14. I will return to this issue in the next section, on non-discrimination.

More recently, in 1999, the European Court of Human Rights held that the investigation and discharge of lesbians and gay men from the military in the United Kingdom violated the right to privacy. In *Lustig-Prean and Beckett v United Kingdom*[19] and *Smith and Grady v United Kingdom*,[20] the applicants were members of the armed forces who had been accused of homosexuality. The military authorities had responded to these allegations with invasive investigations of the applicants, including detailed questioning about their sexual activity and searches of their homes.[21] One applicant was asked not only about her sex life with her partner, but also whether she had had sex with her teenage foster daughter.[22] Each of the applicants ultimately admitted to being lesbian or gay and was, as a result, discharged from the military.[23]

The Court held that the invasive investigations by the military police into the allegations of homosexuality constituted a direct interference with the applicants' right to respect for their private lives, and that their discharge

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15 Ibid [56].

16 Ibid [52].

17 Ibid [56].

18 *Zukrigl v Austria* (No 17279/90) (13 May, 1992, unpublished); *Johnson* (1987) 9 EHRR 386; *App No 9721/82 v United Kingdom* (1985) 7 EHRR 145; *X v Belgium* (No 9484/81) (1 March 1982, unpublished); *X v United Kingdom* (1980) 19 Decisions and Reports: European Commission of Human Rights 46; *X v Germany* (1976) 3 Decisions and Reports: European Commission of Human Rights 46; all cited in Wintemute, above n 6, 95.

19 (2000) 29 EHRR 548 ('*Lustig-Prean and Beckett*').

20 (2000) 29 EHRR 493 ('*Smith and Grady*').

21 Ibid [26].

22 Ibid [14].

23 Ibid [16]; *Lustig-Prean and Beckett* (2000) 29 EHRR 548, [16].

because of their sexual orientation also constituted an interference with privacy.[24] Furthermore, the Court held that these interferences were not justified under art 8(2). Although the discharges were 'according to law' and taken to achieve a 'legitimate aim', namely national security, the Court considered that the interferences with privacy were not 'necessary in a democratic society'.[25] In the Court's view, 'the hallmarks of [a democratic society] include pluralism, tolerance and broadmindedness'.[26] Because the interference with privacy concerned an area of the individuals' most intimate lives, particularly serious reasons justifying the interference were required.[27] Furthermore, the individuals here were discharged not because of their conduct but because of their 'innate personal characteristics', namely their sexual identity.[28]

The United Kingdom's justification for its discriminatory policy was that the presence of known homosexuals in the military impaired the operation of the military, not because of any defect in the service of lesbians and gay men, but because of the negative reaction of heterosexual soldiers.[29] The Court held that homophobic prejudices of other soldiers alone cannot justify the British policy of investigating and discharging homosexuals from the military, any more than racist attitudes could justify discharging black service members.[30] In addition, the Court noted the lack of evidence supporting the argument that allowing homosexuals to serve would damage morale and fighting power, particularly given that this had not occurred in other European countries that abandoned a ban on lesbians and gay men in the military.[31] Furthermore, in the Court's view, any difficulties that did arise could be addressed by the Government through appropriate policies, education and training, as was done with respect to race and gender integration.[32]

As a result of these cases, the British Government has altered its policy on lesbians and gay men in the military and instituted instead a code of conduct

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24 The Court decided the cases solely on the privacy ground, finding it unnecessary to consider a claim based on non-discrimination coupled with privacy: *Smith and Grady* (2000) 29 EHRR 493, [115]; *Lustig-Prean and Becket* (2000) 29 EHRR 548, [108].

25 The Court here effectively overruled its earlier decision upholding the British ban on homosexuals in the armed forces in *App No 9237/81 v United Kingdom* (1984) 6 EHRR 354, discussed in Wintemute, above n 6, 109.

26 *Smith and Grady* (2000) 29 EHRR 493, [87]; *Lustig-Prean and Beckett* (2000) 29 EHRR 548, [80].

27 *Smith and Grady* (2000) 29 EHRR 493, [89], [105]; *Lustig-Prean and Beckett* (2000) 29 EHRR 548, [87], [98] and [103].

28 *Smith and Grady* (2000) 29 EHRR 493, [93]; *Lustig-Prean and Beckett* (2000) 29 EHRR 548, [20], [86].

29 *Smith and Grady* (2000) 29 EHRR 493, [78]; *Lustig-Prean and Beckett* (2000) 29 EHRR 548, [71].

30 *Smith and Grady* (2000) 29 EHRR 493, [97]; *Lustig-Prean and Beckett* (2000) 29 EHRR 548, [90].

31 *Smith and Grady* (2000) 29 EHRR 493, [99], [104]; *Lustig-Prean and Beckett* (2000) 29 EHRR 548, [92].

32 *Smith and Grady* (2000) 29 EHRR 493, [102]–[103]; *Lustig-Prean and Beckett* (2000) 29 EHRR 548, [95]–[96].

concerning sexual behaviour applicable to all military personnel regardless of sexual orientation.[33]

Most recently, the European Court of Human Rights decided in *ADT v United Kingdom*[34] that the criminalisation of sexual activities between men when more than two men are present also violates the right to privacy. During a search of ADT's home, various video tapes and photographs showing ADT engaging in sexual conduct with four other men were seized by police. ADT was arrested, charged and convicted of the offence of gross indecency between men. This offence related solely to the sexual conduct which had taken place in his home. He was not charged with any offence relating to the making of the videos, which had not been distributed to any other person (until they were seized and viewed by the police and the Magistrates' Court). He took his case to the European Commission of Human Rights, claiming a violation of his right to privacy under art 8 of the *ECHR*. The case was heard by the Court after the Commission ceased to exist.

The Court concluded that ADT was directly affected by the legislation because he had been charged and convicted under it and because the mere existence of such legislation amounted to an interference with his private life.[35] The Court rejected the Government's submission that the activity in question was not 'private' because there were several men present and because the activities were video-taped.[36] Of particular importance was the fact that ADT had not been charged with any offence relating to the making or distribution of the videos, and that there was no evidence that the tapes were likely to be made public.[37] The Court concluded that the legislation amounted to an interference with ADT's private life; the question then was whether the interference was 'necessary in a democratic society' to achieve the Government's aims.[38]

The Government attempted to justify the legislation by drawing a distinction between 'intimate, private and therefore acceptable homosexual activity (between two men), and group, potentially public and therefore unacceptable homosexual activity (between more than two men)'.[39] The Government argued that criminalisation of the latter fell within the discretion allowed to states in relation to legitimate regulation. It sought to justify the law as necessary for the protection of morals and the rights of others.[40] The Court rejected the Government's argument. It was prepared to accept the proposition that

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33 See Rhona Smith, 'International Decision: *Lustig-Prean and Beckett v United Kingdom*, *Smith and Grady v United Kingdom*' (2000) 94 *American Journal of International Law* 382, 386.

34 (Unreported, European Court of Human Rights, 31 July 2000, App No 35765/97) <http://www.echr.coe.int> at 6 May 2001 (copy on file with author) ('*ADT*').

35 Ibid [24].

36 Ibid [25].

37 Ibid.

38 Ibid [31].

39 Ibid [27].

40 Ibid.

> at some point, sexual activities can be carried out in such a manner that state interference may be justified, either as not amounting to an interference with the right to respect for private life, or as being justified for the protection, for example, of health or morals.[41]

The Court concluded, however, that the facts of the present case did not involve such circumstances. The activities here were truly private, as they took place in ADT's home and it was most unlikely that others would become aware of his activities.[42] In addition, there were no public health considerations that warranted criminalising the behaviour in question[43] — here the Court impliedly distinguished *Laskey, Jaggard & Brown v United Kingdom*,[44] which had involved the infliction of actual bodily harm for sexual pleasure.[45] The discretion allowed to states in the regulation of intimate aspects of private life is a narrow one and thus an approach similar to that adopted in *Dudgeon* and *Norris* was considered appropriate. The Court held that the reasons submitted for the legislation criminalising sex between several men in private were insufficient to justify the legislation.[46]

ADT represents the latest stage of the 20-year battle against the discriminatory criminalisation of sex between men in Britain that began with *Dudgeon* in 1981. The case does not establish any new principles, but it is important in that it continues the process of chipping away at the regulation of gay male sex. However, other aspects of Britain's discriminatory law remain in place, such as the designation of public toilets as not private for the purposes of sex between men.[47] It would also appear from the Court's judgment that the prohibition on group sex may be permissible where the group is large enough, or perhaps where the sexual activity takes place in a private club, rather than a private home. As yet there has been no change in the law to give effect to the Court's decision in *ADT*.

Sutherland, the military cases and *ADT* demonstrate that the right to privacy is still of considerable importance to lesbian and gay rights claims. However, it should not be thought that recent privacy arguments have always been successful before the European Court of Human Rights. In *Laskey* the Court held that the prosecution and imprisonment of three gay men for engaging in consensual sadomasochistic sexual activity did not impermissibly interfere with their private lives. The Court distinguished the earlier privacy cases on the basis that the sadomasochistic activities in issue involved the infliction of harm that was more

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41 Ibid [37].
42 Ibid.
43 Ibid [38].
44 (1997) 24 EHRR 39 ('*Laskey*').
45 See below n 48 and accompanying text.
46 *ADT* (Unreported, European Court of Human Rights, 31 July 2000, App No 35765/97) <http://www.echr.coe.int> at 6 May 2001 (copy on file with author) [38].
47 *Sexual Offences Act 1967* (UK) s 1(2)(b). There is no equivalent provision for heterosexual or lesbian sex.

than 'trifling or transient', holding that states could permissibly regulate activity that involved the infliction of physical harm.[48] Although the decision in that case might appear to be neutral as to the sexual orientation of the persons involved, the House of Lords decision that was upheld by the Court was in fact clearly influenced by the sexual orientation of the participants in its approach to the question.[49] In addition, British courts have held that a heterosexual woman could consent to sadomasochistic activity with her husband (namely branding), for the reason that 'consensual activity between husband and wife, in the privacy of the matrimonial home, is not, in our judgment, a proper matter for criminal investigation, let alone criminal prosecution'.[50] *Laskey*, together with the continued existence of discriminatory regulation of sex between men in English law, reveals the limits on the usefulness of the privacy paradigm in achieving sexual rights for non-normative sexualities.[51]

B *Transgender People*

For transgender people, the right to privacy under the *ECHR* has produced very little. Of particular concern to transgenders is the fact that their new sex is not reflected in basic state documents, such as birth certificates, passports and so on. Several cases have challenged states' failures to recognise fully a transgender person's new sex, but most of these cases have failed. In two early cases, *Rees v United Kingdom*[52] and *Cossey v United Kingdom*,[53] the European Court of Human Rights took the view that a state does not have to change a person's birth certificate upon sex reassignment. However, in *B v France*[54] the Court held that a state does have to allow a transgender's new sex to be recognised on everyday documents, such as identity cards, driver's licenses and social security numbers. The Court distinguished *Rees* and *Cossey* on the basis that a refusal to alter documents in everyday use involved a much greater intrusion into a transgender person's life than did a refusal to alter a birth certificate, which was infrequently shown to others.

Following *B v France,* the United Kingdom's policy of refusing to alter birth certificates after reassignment surgery was challenged again in 1999 in *Sheffield*

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48 *Laskey* (1997) 24 EHRR 39, [43]–[45].

49 See *R v Brown* [1994] 1 AC 212, 230 (Lord Templeman), 245 (Lord Jauncey of Tullichettle), 255 (Lord Lowry). See generally Sangeetha Chandra-Shekran, 'Theorising the Limits of the "Sadomasochistic Homosexual" Identity in *R v Brown*' (1997) 21 *Melbourne University Law Review* 584; Carl Stychin, *Law's Desire: Sexuality and the Limits of Justice* (1995) 117–39; Leslie Moran, *The Homosexual(ity) of Law* (1996) 180–91.

50 *R v Wilson* [1996] 3 WLR 125.

51 For a broader discussion of the limits of privacy as a foundation for gay and lesbian rights, see Morgan, above n 1; Kendall Thomas, 'Beyond the Privacy Principle' (1992) 92 *Columbia Law Review* 1431.

52 (1987) 9 EHRR 56 ('*Rees*').

53 (1991) 13 EHRR 622 ('*Cossey*').

54 (1993) 16 EHRR 1.

and Horsham v United Kingdom,[55] in the hope that the European Court of Human Right's approach might have shifted. However, the Court saw no reason to overturn its earlier judgments in *Rees* and *Cossey*. The Court again distinguished birth certificates from everyday identity documents. In addition, the Court held that there had not been

> any findings in the area of medical science which settle conclusively the doubts concerning the causes of the condition of transsexualism. … Accordingly, the non-acceptance by [states] of the sex of the brain as a crucial element of gender cannot be criticised as being unreasonable … gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex despite … scientific advances in … gender reassignment procedures.[56]

This is clearly problematic in the way that it construes transgenderism as a pathology, a medical condition. It is also problematic because it is unlikely that 'scientific advances' will ever result in acquisition of *all* the biological features of the new sex.[57] Thus to make transgender rights turn on such a requirement is tantamount to denying those rights forever. This also seems to be an arbitrary reason to deny a transgender recognition of his or her new sex, as there are many individuals born male or female who do not possess all the 'typical' biological features of their birth sex, yet are not denied recognition on that basis. Furthermore, women who have their breasts or uterus removed due to cancer are not denied recognition as women.

III NON-DISCRIMINATION

Article 14 of the *ECHR* provides:

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

This is not a stand-alone non-discrimination clause requiring equality before the law or general non-discrimination by states. Rather, art 14 requires that states parties to the *ECHR* not discriminate in the protection and application of the rights protected by the *ECHR*. Hence the European Court of Human Rights can

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55 (1999) 27 EHRR 163 ('*Sheffield and Horsham*').

56 Ibid [56].

57 This of course depends on how the 'biological features' of a particular sex are defined. If they include a person's genetic make up, then acquisition of all the features of the new sex will never be possible. If they include acquisition of a uterus, for male-to-female transgenders, then acquisition seems unlikely, at least in the near future.

never find a violation of art 14 alone; it must find a breach of a substantive right in order to use the non-discrimination provision of the *ECHR*.[58]

A *Transgender People*

Article 14 of the *ECHR* has never been applied successfully in a transgender case. The European Court of Human Rights held in *Rees*, *Cossey* and *Sheffield and Horsham* that there was no violation of art 14 in refusing to alter a transgender person's birth certificate. In the Court's view, not every difference in treatment constitutes discrimination and the refusal to recognise a person's new sex on their birth certificate represented a reasonable balance between the rights of the individual and the needs of the community.[59]

European Community ('EC') law, however, has equality provisions that are separate from those of the *ECHR*. Essentially, under EC law it is unlawful to discriminate on the basis of sex in the area of employment.[60] In *P v S*[61] a transgender plaintiff, who had been dismissed from her job because of her transgender identity, succeeded before the ECJ on the basis of sex discrimination. The United Kingdom authorities had found that discrimination against P, because she had undergone gender reassignment from male to female, did not constitute sex discrimination; if P had been a woman who became a man she would have been treated in the same way. The matter was referred to the ECJ to determine whether the EC's directive on sex discrimination covered the dismissal of a transgender person.

The ECJ held that the scope of the directive

> cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive [also applies] to discrimination arising … from the gender reassignment of the person concerned.
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> Such discrimination is based, essentially, if not exclusively, on the sex of the person concerned. … Where a person is dismissed [because of] gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.[62]

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58 Wintemute, above n 6, 91. The *Protocol No 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 2000, ETS 177 (not yet in force) <http://conventions.coe.int/treaty/EN/cadreprincipal.htm> at 21 May 2001 (copy on file with author) ('*Protocol 12*') provides for a general prohibition on discrimination on various grounds, including 'other status'. Sexual orientation is not mentioned expressly. *Protocol 12* comes into force once 10 ratifications have been made. It presently has 25 signatures but no ratifications.

59 *Sheffield and Horsham* (1999) 27 EHRR 163, [75].

60 The Council of the European Communities, Directive, 76/207/EEC (1976).

61 (1996) 76 CMLR 247.

62 Ibid [20]–[21].

Accordingly, the dismissal of P after she underwent sex reassignment surgery constituted impermissible discrimination on the basis of sex.

B *Lesbians and Gay Men*

The ECJ's approach to transgender discrimination in *P v S* can be contrasted with a subsequent ECJ case, *Grant v South West Trains*,[63] concerning a lesbian woman employed by South West Trains ('SWT') in the United Kingdom. Heterosexual employees of SWT, whether married or unmarried, were provided with travel benefits for their partners. Ms Grant applied for, but was denied, such travel benefits for her female partner. She argued that this was sex discrimination within the meaning of art 119 of the *Treaty Establishing the European Economic Community*[64] (requiring equal pay for men and women), and also contrary to an EC directive on sex discrimination.[65]

The ECJ did not accept this argument. It held that the requirement that a person live in a relationship with a person of the opposite sex was applied regardless of the sex of the person concerned.[66] That is, travel benefits are refused to a man living with a man, just as they were refused to Ms Grant who lived with another woman. Thus there was no sex discrimination.

The ECJ's decision ignores the HRC's views in *Toonen*, where the HRC held that sex discrimination includes sexual orientation discrimination. Indeed, the ECJ expressly declined to follow the *Toonen* approach, noting that the HRC is not a judicial institution, its findings are not binding, and the HRC had simply observed that sex discrimination included sexual orientation discrimination, without providing specific reasons.[67] Furthermore, in the ECJ's view, the HRC's approach did not reflect 'the interpretation so far accepted of the concept of [sex] discrimination'.[68]

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63 (1998) 81 CMLR 993 ('*Grant*'). *Grant* has been the subject of various articles and case notes: see, eg, Laurence Helfer, 'International Decisions: Grant v South-West Trains Ltd Case C-249/96' (1999) 93 *American Journal of International Law* 200, 203–4; Carol Rasnic 'The Latest Pronouncement from the European Court of Justice on Discrimination against Homosexuals: Grant v South-West Trains Ltd' (1999) 12 *New York International Law Review* 79; Nicholas Bamforth, 'Sexual Orientation Discrimination after *Grant v South-West Trains*' [2000] *Modern Law Review* 694; Heather Hunt, 'Diversity and the European Union: *Grant v SWT*, the Treaty of Amsterdam, and the Free Movement of Persons' (1999) 27 *Denver Journal of International Law and Policy* 633; Caroline Lindberg, '*Lisa Grant v South-West Trains*: The Limited Utility of Sex Discrimination in Securing Lesbian and Gay Rights' (1998) 12 *Temple International & Comparative Law Journal* 403; Tim Connor, 'Community Discrimination Law: No Right to Equal Treatment in Employment in Respect of Same Sex Partner' (1998) 23 *European Law Review* 378.

64 Opened for signature 25 March 1957, 298 UNTS 11, art 119 (entered into force 1 January 1958) ('*EC Treaty*'). Article 119 has been renumbered as art 141 in the *Treaty Establishing the European Community (Amsterdam Consolidated Version)* (1997) OJ C340.

65 The Council of the European Communities, Directive, 75/117/EEC of (1975).

66 *Grant* (1998) 81 CMLR 993, [27].

67 Ibid [46].

68 Ibid [47].

Essentially, the ECJ took the view that the discrimination involved in *Grant* was based on sexual orientation, not sex.[69] However, the finding of sexual orientation discrimination in *Grant* should not have precluded the ECJ from holding that the unequal treatment *also* constituted sex discrimination — as the ECJ had recognised in *P v S* in relation to discrimination on the basis of transgender identity.[70] Any classification that uses sex as a criterion should be considered to discriminate on the basis of sex, even if it also discriminates on other grounds. For example, if a black woman was discriminated against because she was a black woman, it would seem odd to say that she suffered race discrimination, and so had not suffered sex discrimination (or vice versa). Clearly, she has suffered both forms of discrimination and should receive a remedy on either ground.

However, as Laurence Helfer has argued,[71] it is perhaps possible to understand, if not to support, the ECJ's decision. Any decision that sex discrimination covered sexual orientation discrimination would instantly bring lesbians and gay men and their relationships within the purview of the extensive sex discrimination provisions of EC law, covering acts of the EC itself, of states and of private persons bound by EC directives. The ECJ was, no doubt, unwilling to take such a bold step, notwithstanding that it had done so in *P v S* with respect to transgender people.

The effect of all this is that under EC law, sex discrimination encompasses discrimination against transgender people, but not against lesbians and gay men — a somewhat odd (and disappointing) outcome.[72] There is, however, some hope for change. The *Treaty of Amsterdam*,[73] which came into effect in 1999, inserted a new art 13 into the *EC Treaty* which provides:

> Without prejudice to the other provisions of this treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament,

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69 This conclusion ignored a significant body of scholarly work that argues that discrimination on the basis of sexual orientation is a form of sex discrimination: see, eg, Bridget Gilmour-Walsh, 'Exploring Approaches to Discrimination on the Basis of Same-Sex Activity' (1994) 3 *Australian Feminist Law Journal* 117; Andrew Koppelman, 'Why Discrimination against Lesbians and Gay Men is Sex Discrimination' (1994) 69 *New York University Law Review* 197; Amelia Craig, 'Musing about Discrimination Based on Sex and Sexual Orientation as "Gender Role" Discrimination' (1995) 5 *Southern California Review of Law and Women's Studies* 105; James Wilets, 'Conceptualizing Private Violence against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective' (1997) 60 *Albany Law Review* 989.

70 See above n 61 accompanying text.

71 Helfer, 'International Decisions', above n 63, 203–4.

72 For a discussion of both *Grant* and *P v S* and the role of equality in EC law, see Catherine Barnard, 'The Principle of Equality in the Community Context: *P*, *Grant*, *Kalanke* and *Marschall'* (1998) 57 *Cambridge Law Journal* 352.

73 *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, opened for signature 2 October 1997, (1997) OJ C340 (entered into force 1 May 1999).

> may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or *sexual orientation*.[74]

Article 13 does not incorporate an anti-discrimination rule directly into the *Treaty of Amsterdam*, but it does expressly allow the EC to act to combat sexual orientation discrimination and there is movement towards protection against such discrimination.[75] However, art 13 imposes quite stringent conditions for action, in particular the requirement that the Council act unanimously.

Under the *ECHR* things now look brighter on the non-discrimination front for lesbians and gay men. In July 1997, the European Commission of Human Rights for the first time upheld an art 14 claim based on sexual orientation in its decision in *Sutherland*, discussed above.[76] The Commission noted that in *Toonen* the HRC had held that sexual orientation is encompassed within the notion of 'sex' and that discrimination on the basis of sex is prohibited.[77] The Commission considered that it did not need to decide whether sexual orientation was encompassed within 'sex' or whether it fell under 'other status'; either way, discrimination on the basis of sexual orientation is covered by art 14 of the *ECHR*. The Commission found that, although age of consent laws are a way to achieve a legitimate aim, a discriminatory age of consent law was disproportionate to the aim in question.[78]

In doing so, the Commission overturned several of its older decisions that had upheld discriminatory age of consent laws.[79] It did so in part because there was medical evidence that reducing the age of consent may have positive effects on the health of young men with no harmful side effects. It was also of the view that sexual orientation was in most cases fixed by age 16, thus there was no risk of young men being recruited into homosexuality by 'predatory older men'.[80] This tends to play into the 'homosexual as paedophile' myth, but the Commission at least noted that the problem of predatory older men is equally serious, regardless of whether the victim is male or female. Finally, the Commission held that a state's desire to indicate disapproval of homosexuality and preference for heterosexuality could not constitute a reasonable justification for inequality of

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74 *Treaty Establishing the European Community (Amsterdam Consolidated Version)*, (1997) OJ C340; *European Union: Consolidated Version of the Treaty on European Union and Consolidated Version of the Treaty Establishing the European Community* (1998) 37 ILM 56 (emphasis added).

75 ILGA Europe, *After Amsterdam*, above n 4, 19; Hunt, above n 63.

76 Above n 12 and accompanying text.

77 *Sutherland* (Unreported, European Commission of Human Rights, 1 July 1997, App No 25186/94) <http://www.echr.coe.int> at 6 May 2001 (copy on file with author) [50].

78 Ibid [64].

79 *Zukrigl v Austria* (No 17279/90) (13 May, 1992, unpublished); *Johnson* (1987) 9 EHRR 386; *App No 9721/82 v United Kingdom* (1985) 7 EHRR 145; *X v Belgium* (No 9484/81) (1 March 1982, unpublished); *X v United Kingdom* (1980) 19 Decisions and Reports: European Commission of Human Rights 46; *X v Germany* (1976) 3 Decisions and Reports: European Commission of Human Rights 46; all cited in Wintemute, above n 6, 95.

80 *Sutherland* (Unreported, European Commission of Human Rights, 1 July 1997, App No 25186/94) <http://www.echr.coe.int> at 6 May 2001 (copy on file with author) [64].

treatment under the criminal law.[81] In this regard, the Commission observed that 'decriminalization does not imply approval',[82] thus continuing a trend of tolerance rather than acceptance of gay sexuality.[83]

In light of the Commission's judgment, the government in Britain swiftly moved to amend the age of consent laws, introducing the Sexual Offences (Amendment) Bill in 1999. The legislation was blocked several times in the House of Lords, but was ultimately passed by the House of Commons alone,[84] using the procedures of the *Parliament Act 1911* (UK) and *Parliament Act 1949* (UK). Britain thus now has an equal age of consent (16) for both homosexual and heterosexual sexual activity.

Sutherland was important, but it was nonetheless only a decision of the Commission. More importantly, in December 1999 the European Court of Human Rights for the first time upheld a claim of sexual orientation discrimination under art 14 of the *ECHR*. This was a very significant step for European human rights law concerning lesbians and gay men. In the case in question, *Salguiero da Silva Mouta v Portugal*,[85] a gay man was denied custody of his child because he was gay and living with his lover. The Portuguese Court of Appeal stated that

> [t]he fact that the child's father, who has come to terms with his homosexuality, wishes to live with another man is a reality which has to be accepted. It is well known that society is becoming more and more tolerant of such situations. However, it cannot be argued that an environment of this kind is the healthiest and best-suited to a child's psychological, social and mental development, especially given the dominant model in our society …. The child should live in a family environment, a traditional Portuguese family, which is certainly not the set-up her father has decided to enter into, since he is living with another man as if they were man and wife. It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations.[86]

In addition, in granting Mouta a right to contact his daughter, the Portuguese Court had warned him not to 'act in any way that would make his daughter realise that her father is living with another man in conditions resembling those of man and wife'.[87] Mouta alleged an interference with his family life contrary to art 8 and a violation of art 14 in conjunction with art 8 of the *ECHR*.[88]

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81 Ibid [65].

82 Morgan and Walker, above n 4, 208.

83 Ibid 211.

84 *Sexual Offences (Amendment) Act 2000* (UK).

85 (Unreported, European Court of Human Rights, 21 December 1999, App No 33290/96) <http://www.echr.coe.int> at 6 May 2001 (copy on file with author) ('*Mouta*').

86 Decision of the Lisbon Court of Appeal, cited in ibid [14].

87 Ibid.

88 Ibid [21].

The European Court of Human Rights upheld his claim under arts 8 and 14. It found that the denial of custody constituted an interference with Mouta's family life.[89] It also concluded that Mouta had been treated differently by the Portuguese Court of Appeal because of his sexual orientation — the Portuguese Court of Appeal's remarks were, in the Court's view, not merely obiter, but revealed that the applicant's sexual orientation was determinative in the denial of custody to him.[90] It held that sexual orientation 'is undoubtedly covered by art 14 of the Convention'[91] and that there was no reasonable justification for the differential treatment. Although the Portuguese Court of Appeal was pursuing a legitimate aim — namely the protection of the health and rights of the child — the Court concluded that there was no 'reasonable relationship of proportionality … between the means employed and the aim pursued'.[92] Notably, there was little examination of the question of reasonable proportionality — the Court simply seems to presume that discrimination on the basis of sexual orientation is not a proportionate means of pursuing the legitimate aim of protecting the welfare of the child. While this is undoubtedly correct, it is somewhat surprising that the Court found it unnecessary to deal with this presumption in more detail.

Mouta thus confirms the decision of the European Commission of Human Rights in *Sutherland* that discrimination on the basis of sexual orientation in the enjoyment of the rights protected by the *ECHR* is prohibited by art 14. It also suggests that such discrimination will not be regarded lightly as a proportionate means of achieving a legitimate aim. These cases reverse, at last, a long history of the denial of non-discrimination claims brought under art 14, including five early criminalisation cases, six age of consent cases, six same-sex couple cases and a military employment case.[93]

IV FAMILY

A *Lesbians and Gay Men*

Article 8 of the *ECHR*, already mentioned above, protects the family from state interference as well as protecting an individual's private life. However, lesbian and gay relationships have never been considered to constitute a family for the purposes of art 8 of the *ECHR*, either by the European Court of Human Rights or the European Commission of Human Rights. Many cases have been brought before the Commission, but none of these has succeeded. Rather, the Commission has held repeatedly that a same-sex relationship is not equivalent to

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89 Ibid [22].
90 Ibid [28], [33], [34].
91 Ibid [28].
92 Ibid [36].
93 See generally Wintemute, above n 6, 121–3.

a heterosexual relationship.[94] Furthermore, the Commission has held that discriminatory treatment of same-sex couples is objectively and reasonably justified and thus does not constitute discrimination under art 14.[95] None of these cases was ever referred to the Court for further consideration.

Most recently, the European Commission of Human Right's view that same-sex relationships are less deserving of protection than are heterosexual relationships was confirmed by the ECJ in *Grant*. There the ECJ held that

> [i]n the present state of the law within the [European] Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex.[96]

This approach was based on several factors. First, the ECJ noted that the EC itself has not adopted any rules providing for equivalence between same-sex and heterosexual relationships.[97] Second, although several member states treat same-sex cohabitation as equivalent to marriage, in most states it is treated as equivalent to an unmarried heterosexual relationship only with respect to a limited number of rights, or else not recognised at all.[98] Third, the ECJ relied on the approach of the European Commission of Human Rights, discussed above.[99] Finally, the ECJ referred to *Rees* and *Cossey*, where the European Court of Human Rights held that art 12 of the *ECHR*, regarding the right to marry and found a family, applied only to 'traditional marriage between two persons of opposite biological sex'.[100]

However, some hope for recognition of gay and lesbian relationships as constituting families is offered by *Mouta*. The European Court of Human Rights' judgment, which upheld Mouta's claim that his right to family life had been violated in conjunction with his right to non-discrimination, may indicate a more receptive attitude to the recognition of same-sex relationships. But it must be stressed that *Mouta* was not a case in which recognition of a same-sex relationship was in issue. Rather, the 'family life' in issue was the relationship between Mouta and his daughter, a relationship that squarely falls within the

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94 *Application No 9369/81 v United Kingdom* (1983) 5 EHRR 601; *WJ and DP v United Kingdom* (1989) 11 EHRR 49; *Simpson v United Kingdom* (1986) 47 European Commission of Human Rights 274; *C and LM v United Kingdom* (Unreported, European Commission of Human Rights, 9 October 1989, App No 1453/89) <http://www.echr.coe.int> at 6 May 2001 (copy on file with author); B v United Kingdom (1990) 64 Decisions and Reports: European Commission of Human Rights 278; *Kerkoeven and Hinke v Netherlands* (Unreported, European Commission of Human Rights, 19 May 1992, App No 15666/89) <http://www.echr.coe.int> at 6 May 2001 (copy on file with author). See generally Wintemute, above n 6, 122–3.

95 Wintemute, above n 6, 96 and 123.

96 Ibid [35].

97 Ibid [31].

98 Ibid [32].

99 Ibid [33].

100 Ibid.

traditional conception of family accepted by the Court in its previous jurisprudence, as the Court itself noted.[101]

B *Transgender People*

In relation to the protection of family life, transgender people have fared slightly better than lesbians and gay men. The key case in this area, *X, Y and Z v United Kingdom*,[102] involved a female-to-male transgender (X), his partner (Y) and their child (Z), born to them via assisted reproduction. X sought to be recognised on the birth certificate as a parent of Z, although he was not the sperm donor. A 'biological man' in his position would have been so recognised under British law. However, the British authorities refused to recognise X as a parent or as the father of Z on the birth certificate.

The European Court of Human Rights held that X, Y and Z did constitute a family for the purposes of art 8 of the *ECHR*. However, they held that the failure to recognise X as a parent did not amount to an interference with family life in violation of art 8. This was because, in light of the absence of European consensus on the question, there was no duty on member states to recognise as parents persons not biologically related to a child. The Court adopted a narrow view of what the duty to respect family life required of the state. Thus although an important principle was established by *X, Y and Z* — that X, Y and Z are a family — the application of the principle did not result in a beneficial outcome for the people in question.

One key question raised by the Court's decision in *X, Y and Z* is whether the recognition of a transgender person's relationship with his or her partner as 'family' means that the Court will also recognise same-sex relationships as constituting families under art 8. The answer to this is by no means clear. On the one hand, the broadening of the Court's understanding of family in *X, Y and Z* might indicate a willingness to include same-sex relationships within this concept. Some of the Court's comments support such a view:

> The Court recalls that the notion of 'family life' in Article 8 is not confined solely to families based on marriage and may encompass other de facto relationships. When deciding whether a relationship can be said to amount to 'family life', a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.[103]

These comments would tend to support the view that a same-sex couple who have lived together for some time and demonstrated their commitment to one another would be regarded as a family within the meaning of art 8. However, the Court went on to say:

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101 (Unreported, European Court of Human Rights, 21 December 1999, App No 33290/96) <http://www.echr.coe.int> at 6 May 2001 (copy on file with author) [22].

102 (1997) 24 EHRR 143 ('*X, Y and Z*').

103 Ibid [36] (citations omitted).

> In the present case, the Court notes that X is a transsexual who has undergone gender reassignment surgery. He has lived with Y, to all appearances as her male partner, since 1979. The couple applied jointly for, and were granted, treatment by AID to allow Y to have a child. X was involved throughout that process and has acted as Z's 'father' in every respect since the birth. In these circumstances, the Court considers that de facto family ties link the three applicants.[104]

These comments suggest that the European Court of Human Rights was influenced by the traditional heterosexual appearance of the relationship between X and Y.

In addition, the analysis in *X, Y and Z* is heavily biased towards a particular model of relationship: monogamous, long-term and based on cohabitation. Thus even if it is applied to lesbians and gay men, it may exclude same-sex relationships that do not fit this particular model. This limited view of what constitutes a family is problematic. As the South African Constitutional Court stated in interpreting the term 'family' in international human rights instruments:

> The importance of the family unit for society is recognised in the international human rights instruments … when they state that the family is the 'natural' and 'fundamental' unit of our society. However, families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.[105]

V MARRIAGE

Article 12 of the *ECHR* provides that

> [m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

In *Rees*, *Cossey* and *Sheffield and Horsham* the European Court of Human Rights held that marriage, as protected under art 12 of the *ECHR*, is the union of two persons of the 'opposite biological sex',[106] thus restricting transgenders' right to marry and, of course, lesbians' and gay men's right to marry. Given that this has been restated in 1999, it seems unlikely that the Court will reinterpret art 12 in the near future. Any reinterpretation is likely to come only after a significant number of European states alter their domestic approach to marriage.

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104 Ibid [37].

105 *Dawood v Minister of Home Affairs*, (Unreported, Constitutional Court of South Africa, O'Regan J, 7 June 2000) <http://www.concourt.gov.za/judgments/2000/dawood.pdf> at 6 May 2001 (copy on file with author) (citations omitted) [31].

106 *Rees* (1987) 9 EHRR 56, [49]–[50]; *Cossey* (1991) 13 EHRR 622, [49]–[50]; *Sheffield and Horsham* (1999) 27 EHRR 163, [66]–[67].

To date, only one European state permits same-sex marriage: the Netherlands.[107] Others permit the registration of same-sex relationships in systems akin to, but not the same as or equal to, marriage,[108] and many states offer no legal recognition of same-sex relationships.

VI CONCLUSION

The European jurisprudence on lesbian, gay and transgender human rights claims has been mixed. Although there have been some positive developments in the last few years, there have also been some more troubling decisions, including *Grant*, *X, Y and Z* and *Sheffield and Horsham*. Also troubling is the May 2000 decision of a Committee of the European Court of Human Rights, composed of three members, that rejected a claim brought against Hungary concerning the non-registration of a gay organisation unless it excluded persons under 18 from membership.[109] The non-registration was challenged on the basis that it violated the applicants' right to freedom of association, guaranteed under art 11 of the *ECHR*. The Court rejected the claim on the basis that the condition for registration 'pursued the legitimate aims of the protection of morals and the rights and freedoms of others', and that the interference with the right to association 'was proportionate to the aims pursued' and could thus be considered 'necessary in a democratic society'.[110] It concluded, without further analysis, that the application was 'manifestly ill-founded … and must be rejected' under art 35 of the *ECHR*.[111] This decision is particularly problematic because of its summary nature. The claim was rejected by a three member panel without appropriate assessment of the claim. Given that the age of consent issue has now been resolved in favour of equality, it seems wrong to conclude that a claim concerning minors' membership of a gay organisation is 'manifestly ill-founded', as the Court did.

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107 *Act of 21 December 2000* amending Book 1 of the *Civil Code*, concerning the opening up of marriage for persons of the same sex (Act on the Opening up of Marriage), (2001) 10 Staatsblad; unofficial translation by Kees Waaldijk <http://ruljis.leidenuniv.nl/user/cwaaldij/www/NHR/transl-marr.html> at 6 May 2001 (copy on file with author). The Act entered into force on 1 April 2001.

108 For example, France, the Netherlands, Iceland, Denmark, Norway and Sweden all have relationship registration systems that allow for the registration of same-sex relationships. See, eg, Kees Waaldijk, 'Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe' (2000) 17 *Canadian Journal of Family Law* 62; Katharina Boele-Woelki, 'Private International Law Aspects of Registered Partnerships and other Forms of Non-Marital Cohabitation in Europe' (2000) 60 *Louisiana Law Review* 1053; Ingrid Lund-Andersen, 'Cohabitation and Registered Partnership in Scandinavia: The Legal Position of Homosexuals' in John Eekelaar and Thandabantu Nhlapo (eds), *The Changing Family* (1998) 397.

109 *Szivarvany Tarsulas a Melegek Jogaiert v Hungary* (Unreported, European Court of Human Right, 12 May 2000, App No 35419/97) (copy on file with author and available from the Court Registry).

110 Ibid [1].

111 Ibid.

Nonetheless, I think it is possible to discern a more positive trend emerging from the jurisprudence of the European Court of Human Rights. First, it is clear that privacy remains a strong ground for contesting state laws that discriminate against lesbians and gay men, such as age of consent laws and laws excluding lesbians and gay men from the military. Second, the Court's decision in *Mouta*, the first case in which the Court upheld a claim of discrimination on the basis of sexual orientation under art 14 of the *ECHR*, is an important step in the development of an equality jurisprudence on lesbian and gay issues. In addition, *Mouta* concerned a family issue, namely a gay man's custody of his child. This indicates that the Court is willing to use an equality approach in at least some lesbian and gay family issues, signalling that perhaps recognition of same-sex relationships as families under art 8 of the *ECHR* may follow. This is reinforced by the Court's recognition that a transgender man, his female partner and their child were a family for the purposes of art 8 in *X, Y and Z*, although the messages the Court sent in that case were mixed, given the majority's emphasis on the heterosexual-like nature of the family in question.

Judicial activity in Europe has generally resulted in government action at the national level,[112] although in some cases progress has been slow. It was only in July 2000, for example, that Cyprus repealed the anti-sodomy laws that the European Court of Human Rights had found violated the *ECHR* in 1993.[113] Additionally, while the judicial process in Europe has been crucial in persuading some countries to alter their laws, other European states have in fact led the way on lesbian, gay and transgender issues, both in terms of decriminalising same-sex sexual activity and in terms of recognising same-sex relationships. Indeed, it is perhaps doubtful that the judicial response to gay, lesbian and transgender rights claims would have been what it was had there not been a significant level of support for such rights amongst the member states of the EU. One of the next challenges for Europe is the treatment of transgenders, lesbians and gay men in Eastern European countries, particularly as those countries seek to enter the EU. Compliance with the *ECHR* is important in seeking EU and Council of Europe membership, and this provides an avenue for activists to bring pressure to bear on states that may presently have a poor record on lesbian, gay and transgender human rights issues.[114]

The lesson from the European experience for other states and, indeed, for continued reform in Europe, is that it is insufficient to pursue only a litigation-

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112 For example, the British policy of excluding lesbians and gay men from the armed forces was changed quite rapidly after the Court held that the policy violated the *ECHR*: see above n 33 and accompanying text. Similarly, age or consent laws were changed after *Sutherland*: see above n 84 and accompanying text.

113 ILGA, 'World Legal Survey: Cyprus' (2000), <http://www.ilga.org/Information/Legal_survey/europe/cyprus.htm#*Laws> at 6 May 2001 (copy on file with author).

114 See ILGA, 'Media Release: Council of Europe Pressure Brings Progress for Lesbian, Gay and Bisexual Rights in Europe' (4 July 2000), <http://www.ilga.org/Current%20activities/europe/Council%20of%20Europe/council_of_europe_pressure_bring.htm> at 6 May 2001 (copy on file with author).

based strategy. While the courts are important allies in the fight for transgender, gay and lesbian rights, they will not generally lead the way in the absence of some degree of wider social support. We thus need to pursue long term legislative and policy reform as well as judicial avenues in order to move forward in the protection of lesbian, gay and transgender rights.