INTERNATIONAL DECISIONS

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Human rights—discrimination on grounds of sexual orientation—parental custody rights—privacy—criminal restrictions on private sexual activity


What legal protections does the Convention on Human Rights and Fundamental Freedoms1 (Convention) provide to the lesbians and gay men residing within the forty-one member states of the Council of Europe? Until quite recently, the answer to this question was clear: the Convention’s privacy clause prohibited national governments from criminalizing same-sex conduct between consenting adults twenty-one years of age or older.2 It was equally plain that the Convention protected no other aspects of lesbian and gay identity, conduct, or relationships. In more than a dozen decisions handed down in the 1980s and 1990s, the now-defunct European Commission on Human Rights3 rejected challenges to a profusion of national laws, administrative practices, and judicial rulings that adversely affected the public and private lives of lesbians and gay men.4 Beginning in the late 1990s, however, the European Court of Human Rights (ECHR) became increasingly receptive to human rights claims brought by lesbian and gay applicants. The two most significant recent

3 See infra notes 46–47 and accompanying text.

The judgments of, and other materials relating to, the European Court of Human Rights, as well as the European Commission on Human Rights, are available online at the Court’s Web site, <http://www.echr.coe.int>.
decisions in this regard are *Salgueiro da Silva Mouta v. Portugal* and *A.D.T. v. United Kingdom*. In *Salgueiro da Silva Mouta* the ECHR reviewed a Portuguese appellate court ruling that overturned a lower court’s decision awarding custody of a daughter to her gay father, the applicant. The ECHR held that the appellate court decision violated the Convention’s prohibition against discrimination (Article 14) when analyzed together with the Convention’s right to respect for family life (Article 8). In *A.D.T.* the ECHR reviewed an English court’s conviction of a man for gross indecency under the Sexual Offences Act of 1956. The ECHR held that a statute criminalizing homosexual acts in private in which two or more men take part or are present violated the Convention’s right to respect for private life (also within Article 8).

The applicant in the Portuguese case, João Manuel Salgueiro da Silva Mouta, separated from the child’s mother in 1990 after he began a long-term relationship with another man. In 1991, the parents agreed as part of divorce proceedings that the mother would have custody of their four-year-old daughter and that the father would have visitation rights. The mother repeatedly failed to respect these rights, however, leading Salgueiro da Silva Mouta to petition a Lisbon family court in 1992 to award custody to him. The child’s mother sought to retain custody, asserting that the father’s male partner had sexually abused the child.

After hearing conflicting testimony from the daughter, the parents, the father’s male partner, and court psychologists, the Lisbon family court awarded custody to the father. It relied upon the psychologists’ reports to determine that the allegations of sexual abuse were unfounded, reasoned that the mother’s refusal to respect the father’s visitation rights was likely to continue if she retained custody of her daughter, and concluded that Salgueiro da Silva Mouta was in a better position than his former spouse to give their daughter emotional and financial support and to respect court-ordered visitation rights.

The mother appealed the family court’s ruling to the Court of Appeal (Tribunal da Relação) of Lisbon. On January 9, 1996, that court reversed the judgment of the family court and awarded custody to the child’s mother. The Court of Appeal did so even though the mother had abducted the daughter (who had been living with her father for six months following the lower court decision in his favor) and was herself consequently subject to an independent criminal investigation.

The Court of Appeal first reviewed the relevant provisions of Portuguese law requiring custody and visitation arrangements that best serve the child’s interests. As interpreted in prior decisions, these statutes require that a child maintain contact with both parents. But they also create a presumption that “custody of young children should as a general rule be awarded to the mother unless there are overriding reasons militating against this.” The court did not dispute that the mother had failed to respect Salgueiro da Silva Mouta’s visitation rights, but it nevertheless held that the evidence presented to the family court was insufficient to overcome the presumption of maternal custody.

Having reached this conclusion, which reflected its assessment of the facts, the Court of Appeal moved its analysis one step further: “[E]ven if [this factual assessment were

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7 *Salgueiro da Silva Mouta*, para. 12.
8 Id., para. 13.
9 Id., para. 14 (p. 9). Paragraph 14, which sets forth in its entirety the decision of the Court of Appeal, is six pages long. Consequently, in order to locate material within that paragraph, the page number of the *Salgueiro da Silva Mouta* decision (as printed out from the online version on the ECHR’s Web site) will also be given.
10 Id. (pp. 9–10).
different], however, we think that custody of the child should be awarded to the mother." The court continued:

The 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 . . . 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; such are the dictates of human nature . . . .

When Salgueiro da Silva Mouta challenged this judgment before the ECHR, the Portuguese government responded that the Convention’s contracting states enjoy “a wide margin of appreciation” in custody matters and that national authorities are better suited than international judges to make decisions in the child’s interest. Thus, the government urged the Court not to “substitute its own interpretation of things for that of the national courts” unless the relevant decisions “were manifestly unreasonable or arbitrary.”

The ECHR concluded that the court’s custody ruling amounted to an interference with the right to respect for family life (Article 8), thus making the Convention’s nondiscrimination clause (Article 14) applicable to the case. As a general proposition, Article 14 “affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations.” Such a justification exists if the treatment “pursues[s] a legitimate aim” and if there is “a reasonable relationship of proportionality between the means employed and the aim sought to be realised.”

On the question of whether the Court of Appeal’s decision resulted in differential treatment, the ECHR held that the court had introduced “a new factor” into the case, “namely that the applicant was a homosexual and was living with another man.” There had therefore been “a difference of treatment between [the father] and [the] mother which

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11 Id. (p. 9).
12 Id. As for the father’s visitation rights, the Court of Appeal cautioned Salgueiro da Silva Mouta that he should shield his child from knowing that he and his male partner live together as a couple. Id. (p. 10). The mother continued to deny Salgueiro da Silva Mouta any form of access to his daughter, however, after the Court of Appeal’s ruling. Id., para. 18.
13 Id., para. 25. The phrase “margin of appreciation” refers to the zone of discretion the ECHR grants to national governments to comply with their human rights obligations under the Convention. For a discussion and critique of this doctrine, see Laurence R. Helfer, Consensus, Coherence and the European Convention on Human Rights, 26 CORNELL INT’L L.J. 133, 136–38 (1993).
14 Salgueiro da Silva Mouta, para. 25.
15 Article 8 provides, in relevant part:
   1. Everyone has the right to respect for his private and family life . . . .
   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 . . . for the protection of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
16 Article 14 provides:
   The enjoyment of the 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.
18 Id., para. 29.
19 Id., para. 28.
was based on the [father's] sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention."

Turning to the issue of whether differential treatment on the basis of the father's sexual orientation could be justified under the circumstances, the ECHR had little trouble concluding that the Court of Appeal judgment pursued the legitimate aim of protecting the health and the rights of the child. But the ECHR found the judgment deficient on the crucial issue of proportionality. It stressed that the family court had awarded custody to the father following a careful assessment of the facts, giving special attention to the evaluations of court psychologists, whereas the Court of Appeal relied solely on the case file. Taking into account this difference in approach and various remarks by the Court of Appeal (for example, that homosexuality is an "abnormality" and that a child raised by homosexual parents would "grow up in the shadow of abnormal situations"), the ECHR reasoned that the Court of Appeal's statements concerning the father's sexual orientation were not merely dictum, but a decisive and determining factor in its decision. Citing an earlier child custody case involving discrimination on the basis of religious belief, the ECHR concluded that the Portuguese court had "made a distinction based on considerations regarding the [father's] sexual orientation, a distinction which is not acceptable under the Convention." The Court thus unanimously found a violation of Article 14, together with Article 8.  

A.D.T. v. United Kingdom also involved Article 8—but this time its protection of "private life." The case concerned the applicant A.D.T.—a gay man in Great Britain—whose home was searched by police officers in April 1996. The search revealed videotapes containing footage of A.D.T. and up to four other adult men engaging in consensual oral sex and mutual masturbation in his home. There was no evidence that the videotapes had been distributed to anyone other than the participants, nor was there any evidence of sadomasochism or physical harm to the participants. On the basis of these videotapes, A.D.T. was charged and convicted of gross indecency between men in violation of Section 13 of the Sexual Offences Act 1956. Although the Sexual Offences Act 1967 had abolished the criminal ban on private sexual conduct between consenting adult men, the act treated as nonprivate any such conduct, including consensual sexual acts in a private residence, in which "more than two persons take part or are present." A.D.T. challenged both his conviction and the statutes before the ECHR on grounds that they violated Article 8 and also Article 14 in conjunction with Article 8. With respect to Article 8, the ECHR first addressed whether there had been an interference with A.D.T.'s private life. The United Kingdom argued that no such interference had occurred. "The sexual activity in the present case fell outside of the scope of 'private life'" because of the number of individuals present and the videotaping of their sexual conduct. The government relied on a 1997 decision, Laskey v. United Kingdom, in which the ECHR unanimously

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20 Id. In support of this statement, the Court noted that the protected grounds listed in Article 14 are "illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "notamment")."

21 Id., para. 35.

22 Id., para. 36 (citing Hoffmann v. Austria, 525-C Eur. Ct. H.R. (ser. A) at 58 (1993) (holding that a mother's membership in the Jehovah's Witnesses could not be used against her in a child custody decision and stating that "a distinction based essentially on a difference in religion alone is not acceptable")).

23 Id. Having found a violation of Article 14 together with Article 8, the ECHR found it unnecessary to examine whether Article 8 alone had been violated. Id., para. 37.

24 Section 13 of the Sexual Offences Act, 1956, 4 & 5 Eliz. 2, ch. 69, §13, provides that "[i]t is an offence for a man to commit an act of gross indecency with another man, whether in public or private." A.D.T. was sentenced and conditionally discharged for two years. A.D.T. v. United Kingdom, App. No. 35765/97, para. 10 (Eur. Ct. H.R. July 31, 2000).


26 In fact, A.D.T. had filed his application with the European Commission on Human Rights, but the case was transferred to the Court after Protocol No. 11 abolished the commission and replaced it with a permanent European Court of Human Rights. See infra note 46.

27 A.D.T., para. 21.
rejected the claim that criminal prosecution of a group of gay men for engaging in and videotaping consensual sadomasochistic sexual activity in a private home violated the Convention’s privacy clause.\footnote{Laskey v. United Kingdom, 1971 Eur. Ct. H.R. 120.}

The ECHR distinguished Laskey, however, accepting A.D.T.’s arguments that there was “neither organised activity nor any risk of injury in the present case,” and that the government had had no evidence to indicate that A.D.T. would have deliberately or inadvertently distributed the videotapes to the public.\footnote{A.D.T., para. 22. The Court stressed that A.D.T. had not been charged with any criminal offense relating to the making or distribution of the tapes, that he had attempted to conceal his sexual orientation from the public, and that he had expressed a desire for anonymity before the Court. \textit{Id.}, para. 25.} The Court thus concluded that there had been an interference with A.D.T.’s private life resulting both from his prosecution for gross indecency and from “the existence of legislation prohibiting consensual sexual acts between more than two men in private.”\footnote{\textit{Id.}, para. 26.}

Turning to the question of whether the interference was justified, the ECHR applied its settled test for evaluating restrictions on privacy rights, inquiring whether the legislation at issue (1) is “in accordance with the law,” (2) has an aim that is legitimate under the second paragraph of Article 8, and (3) is “necessary in a democratic society” to achieve that aim.\footnote{\textit{Id.}, para. 29. The ECHR first articulated this standard in \textit{Hchange v. United Kingdom}, 24 Eur. Ct. H.R. (ser. A) at 22 (1976).} The parties agreed that the statutes met the first two parts of this test inasmuch as they were legislatively fixed standards designed to protect public morals and also the rights and freedoms of others. As to the third prong of the test, the government argued that it was entitled to a broad margin of appreciation because of “the less intimate nature of group activities” and the “inevitable” likelihood of “such activities being publicised.”\footnote{A.D.T., para. 22.} A.D.T. stressed, however, that under the statute a crime is committed whenever more than two men are present regardless of the additional number of individuals involved.\footnote{\textit{Id.}, para. 29.}

The Court accepted the United Kingdom’s position that “at some point, sexual activities can be carried out in such a manner that State interference may be justified,” but it held that that threshold had not been reached in the present case.\footnote{\textit{Id.}, para. 32.} Emphasizing that A.D.T. “was involved in sexual activities with a restricted number of friends in circumstances in which it was most unlikely that others would become aware of what was going on,” the ECHR reasoned that his engaging in sex with “up to four other men” was “genuinely ‘private’ in nature.”\footnote{\textit{Id.}, para. 36.} The Court thus adopted the same narrow margin of appreciation it had applied in three earlier decisions in which it had found the Convention’s privacy clause violated by criminal statutes proscribing sexual activity between only two consenting adult men in private.\footnote{\textit{Id.}, para. 37.}

Having framed the case in this light, the ECHR concluded that the United Kingdom had not advanced sufficient reasons to justify either A.D.T.’s prosecution or the legislation itself as necessary in a democratic society. It thus unanimously found a violation of Article 8 of the Convention.\footnote{\textit{Id.}, para. 35.}

With respect to the violation of Article 14 in conjunction with Article 8, the ECHR noted that the Sexual Offences Acts of 1956 and 1967 did not contain corresponding restrictions of private sexual behavior between lesbian or heterosexual adults.\footnote{\textit{A.D.T.}, paras. 38–39.} Having already found
a violation under Article 8, however, the Court unanimously held that it was not necessary
to rule on A.D.T.’s claim that the United Kingdom had also violated the Convention’s
nondiscrimination clause.40

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The Salgueiro da Silva Mouta and A.D.T. judgments are noteworthy not only for their
about-face from past European human rights jurisprudence concerning sexual-orientation
issues, but also for what they portend for future legal and political developments concerning
lesbian and gay rights in Europe. Each decision concerns the intersection of Article 8
(private and family life) with Article 14 (nondiscrimination), yet there is a striking difference
in how the Court chose to address that intersection in the two cases.

Salgueiro da Silva Mouta is the ECHR’s first pronouncement that discrimination on the
basis of sexual orientation can violate the European Convention’s nondiscrimination ban.
The Court had refused to address this issue in prior decisions, and the European
Commission on Human Rights (now superseded by the European Court of Human Rights),41
while entertaining such claims on the merits, had repeatedly held that laws disadvantaging
gay men and lesbians were nondiscriminatory.42 Given this history, the language used by
the Court to rule in favor of the applicant is significant. Although Article 14 contains a
nuanced test for discrimination—which is often difficult to meet—the unequivocal statement
that denying custody because of an individual’s sexual orientation “is unacceptable
under the Convention”43 sends a strong message to all Council of Europe member states:
many forms of sexual-orientation discrimination, particularly those founded on stereotypical
beliefs about the behavior or abilities of lesbians or gay men, may no longer be acceptable.44
Indeed, if any case might have tempted the Court to succumb to such beliefs itself, a child
custody dispute would have seemed to present a very likely candidate.

Given the Court’s endorsement of a sexual-orientation nondiscrimination principle in
Salgueiro da Silva Mouta, its decision in A.D.T. to base a Convention violation solely on
Article 8 is surprising. The United Kingdom’s ban on group sex in private applied only to
gay men and not to heterosexuals or lesbians. The Court thus could easily have applied
the principles of its earlier judgment to criminal laws targeted exclusively at gay male sexual
activity. By choosing the general privacy right instead, the ECHR adopted a ruling that
protects all individuals, of either sex and whatever their sexual orientation. The Court’s
choice also increases the likelihood that it will need to distinguish between private conduct
immune from government regulation, and conduct that may be regulated even if it is fully
or partly shielded from the public’s gaze.45

A second noteworthy factor about these two ECHR judgments is the institutional and
political milieu in which they were decided. This context includes, in particular, the recent

40 Id., para. 41.
41 See infra note 46 and accompanying text.
42 See cases cited supra note 4 & infra note 47; but see Sutherland v. United Kingdom, App. No. 25186/94 (Eur.
Comm’n H.R., July 1, 1997) (Commission report) (holding that 18-year age of consent for gay men and 16-year
age of consent for heterosexuals and lesbians violates Convention’s nondiscrimination clause).
44 It is uncertain whether the ECHR will build upon Salgueiro da Silva Mouta and find that distinctions based
on sexual orientation, like those based on sex, religion, nationality, and legitimacy/ illegitimacy, can be justified
only by “overriding reasons.” See P. van Dijk & C. J. H. van Hoof, THEORY AND PRACTICE OF THE EUROPEAN
CONVENTION ON HUMAN RIGHTS 727–29 (3d ed. 1998) (identifying these four grounds of discrimination as those
that ECHR scrutinizes more strictly than others). The Court’s citation to Hoffmann v. Austria, 255-C Eur. Ct. H.R.
(sen. A) at 58 (1993), a decision involving religious discrimination, see supra note 22, suggests that the Court may
one day treat sexual orientation as what American constitutional lawyers would refer to as a suspect classification.
45 See David Feldman, The Developing Scope of Article 8 of the European Convention on Human Rights, 3 EUR. HUM. RTS.
abolition of the European Commission on Human Rights, the introduction of a new protocol to the Convention guaranteeing an independent nondiscrimination right, and the adoption of regional legislation prohibiting sexual-orientation discrimination with the European Community (EC).

First, pursuant to Protocol 11 to the Convention, the commission was phased out of existence in 1998 and replaced by a new, permanent European Court of Human Rights. In view of this change, it is noteworthy that the Court disregarded two decisions in which the commission had reached results at odds with those in the instant cases. In the first of those decisions, the commission had rejected a challenge to the same statute at issue in A.D.T., and in the other decision the commission had refused to recognize the rights of lesbian and gay families. During the first four decades of the Convention's operation, the several thousand admissibility decisions issued by the commission—versus the few hundred judgments issued by the Court during that same period—meant that the Court had in the past given at least respectful consideration to the commission's reasoning. The failure to acknowledge in the present cases even the existence of contrary commission decisions suggests that the newly restructured Court will not shirk from finding human rights violations in areas that the commission had long seen as unobjectionable. It also suggests that the Court is fully committed to interpreting the Convention as a "living instrument" that incorporates changing European legal and social developments.

Second, the Court's interpretation of Article 14 in Salgueiro da Silva Mouta occurred at a time when the Council of Europe was debating whether to amend the Convention to provide an independent right to equal treatment under the law. Article 14 of the Convention does not contain such a right. Rather, it is applicable only if the alleged discrimination relates to the exercise of one of the other substantive rights or freedoms protected by the Convention and its Protocols. Article 14's limited scope led the Council of Europe on November 4, 2000, to open for signature Protocol No. 12 to the Convention, which would establish a free-standing nondiscrimination right.

During the debates on Protocol No. 12, lesbian and gay advocacy groups argued that its text should include an express reference to "sexual orientation" as a status protected from

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47 Johnson v. United Kingdom, 47 Eur. Comm'n H.R. Dec. & Rep. 72 (1986) (rejecting challenge to Sexual Offences Act 1957 provision prohibiting private conduct in which two or more men "take part or are present"); Kerkhoven v. The Netherlands, App. No. 15666/89 (Eur. Comm'n H.R. May 19, 1992) (unpublished admissibility decision) (rejecting claim that relationship of a woman with the child of her long-term lesbian partner falls within the scope of family life or that government's failure to grant parental rights to such a person is discriminatory). Admittedly, Kerkhoven—which involved the familial link between a nonbiological parent and her long-term partner's biological daughter—presented more difficult issues than Salgueiro da Silva Mouta.


49 Thus, the Court has repeatedly held that Article 14 has "no independent existence" and merely complements the other substantive provisions of the Convention and its Protocols. See, e.g., Camp v. The Netherlands, App. No. 28369/95, para. 34 (Eur. Ct. H.R. Oct. 3, 2000).

50 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177), opened for signature Nov. 4, 2000. Article 1 of the protocol states:

The enjoyment of any right set forth by law 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.

No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

The protocol will enter into force after ten member states of the Council of Europe have ratified it. Id., Art. 5.
discrimination. The Council of Europe’s Steering Committee for Human Rights ultimately rejected this proposal. In a statement in the protocol’s Explanatory Report, however, the committee stressed that it declined to include “additional non-discrimination grounds (for example, physical or mental disability, sexual orientation or age)” not because it was unaware that such grounds “have become particularly important in today’s societies,” but because the list of grounds is not exhaustive and the “inclusion of any particular additional ground might give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included.” The committee then made a specific reference to Salgueiro da Silva Mouta to stress that the ECHR “has already applied Article 14 in relation to discrimination grounds not explicitly mentioned in that provision.”

Protocol No. 12, when interpreted in light of the Explanatory Report, provides reinforcement from the Council of Europe’s political bodies for the ECHR’s treatment of sexual orientation as a status protected from discrimination. The Explanatory Report also potentially extends the impact of Salgueiro da Silva Mouta by endorsing the Court’s approach in the context of a new, independent right to equal treatment under the law. Moreover, even if some Council of Europe member states choose not to ratify Protocol No. 12, the Court’s jurisprudence interpreting the protocol is likely to influence its interpretation of Article 14, which applies to all member states.

The third significant institutional factor underlying the ECHR’s judgments in the two instant cases is the recent activity within the EC in the area of sexual-orientation discrimination. Article 13 of the 1997 Treaty of Amsterdam authorized the EC Council to adopt legislation prohibiting discrimination on various grounds, including sexual orientation. On November 27, 2000, the EC Council adopted the final version of a new directive mandating equal treatment in employment. The directive, which applies to both public and private employers, prohibits direct discrimination (disparate treatment), indirect discrimination (disparate impact), and harassment based on religion, belief, disability, age, or sexual orientation in access to employment and occupations, including promotions, vocational training, employment conditions, and membership in organizations of workers, employers, and professionals. The fifteen EC member states will have until December 2, 2003, to adopt whatever laws, regulations, and administrative provisions are needed in order to comply with the directive’s provisions dealing with sexual orientation, religion, and belief.

The new directive will significantly alter Europe’s legal landscape concerning sexual-orientation discrimination. The directive will also become part of the acquis communautaire.


56 Id.

57 Id., para. 20. Sixteen of the 41 member states did not sign the protocol on the date it was opened for signature.


61 Id., Art. 18. Three additional years are allowed for implementing legislation concerning disability and age.

62 As of the end of 2000, 7 of the 15 EC member states, with a population of over 230 million people (or roughly two-thirds of the EC’s population), had not enacted legislation barring sexual orientation discrimination in employment. The 7 states are Austria, Belgium, Germany, Greece, Italy, Portugal, and the United Kingdom. Wintemute, supra note 56.
meaning that the thirteen countries seeking membership in the EC, including several eastern European nations, must pass legislation implementing it if and when they are admitted to the EC.60 These changes in national law are likely to interact dynamically with the European human rights system, accelerating the pace of legal change that the ECHR considers essential to limiting the deference that it affords member states to act outside of the European mainstream.61

The Salgueiro da Silva Mouta and A.D.T. judgments suggest that the ECHR is emerging as a hospitable forum for claims relating to privacy and sexual-orientation discrimination. One must bear in mind, however, the ECHR’s repeated statements that national governments are the primary guarantors of the rights protected by the Convention, and that the Court’s powers of judicial review merely supplement the mechanisms of redress available under domestic law.62 One should also consider the crushing workload facing a Court hearing cases from all forty-one member states,63 including eastern European nations whose traditions of protecting the human rights of minority groups are recent and fragile. This increasingly clogged docket may lead the Court to screen out at the admissibility stage complaints that raise significant and unsettled issues.64

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National postal monopolies—international credit card billing—remailing restraints under Universal Postal Convention and European competition law


Court of Justice of the European Communities, February 10, 2000.

“Remailing” refers to the practice of transmitting material from country A to country B so that it can be mailed back to country A through the postal service of country B. Article 25 of the Universal Postal Convention (UPC)1 allows country A to refuse to deliver such

60 Id. The 13 applicant countries are Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia, and Turkey. Id.
61 See, e.g., T. v. United Kingdom, App. No. 24724/94, para. 70 (Eur. Ct. H.R. Dec. 16, 1999) (“since the Convention is a living instrument, it is legitimate when deciding whether a certain measure is acceptable under one of its provisions to take account of the standards prevailing amongst the member States of the Council of Europe”).
64 One such complaint is Szivovényi v. Hungary, App. No. 55419/97 (Eur. Ct. H.R. May 12, 2000), in which the ECHR refused to hear a challenge to a decision of the Constitutional Court of Hungary that upheld a law refusing to permit the registration of gay rights organizations where such organizations did not exclude individuals under 18 years of age from their membership. See Dec. 21/1996 on the Minimum Age for Membership of Homosexual-Oriented Associations (Const. Ct. Hung. May 17, 1996) (English translation on file with author).
1 The relevant version of Article 25 of the UPC for the present case is the 1989 version. This version reads as follows:

(1) A member country shall not be bound to forward or deliver to the addressee letter-post items which senders resident in its territory post or cause to be posted in a foreign country with the object of profiting by the lower charges in force there. The same shall apply to such items posted in large quantities, whether or not such postings are made with a view to benefiting from lower charges.

(2) Paragraph 1 shall be applied without distinction both to correspondence made up in the country where the sender resides and then carried across the frontier and to correspondence made up in a foreign country.

(3) The administration concerned may either return its items to origin or charge postage on the items at its internal rates. If the sender refuses to pay the postage, the items may be disposed of in accordance with the internal legislation of the administration concerned.