

歐洲人權法院判決Hämäläinen v. Finland 重點摘要

一、案件事實（9~16段）

1963年，原告出生，出生時是男性，但他總是認為自己是個活在男體裡的女性。
1996年，她與妻子結婚
2002年，長子出世
2004年，原告開始覺得感覺不佳，2005年決定尋求醫療協助。
2006年4月，被診斷為跨性別（transsexual），自此之後，他以女性身分生活。
2009年9月29日，原告接受性別重置手術
2006年6月7日，原告更改名字，更換護照及駕照，但他無法更換身分證號碼（identity number），身分證號碼與護照仍標示他是男性。
2007年6月12日，原告請求地方戶政機關（local registry office）確認他的女性身分，並將他的身分號碼由男性改登記為女性。
2007年6月19日，地方戶政機關拒絕原告的請求，因為依據芬蘭跨性別法第1條及第2條，要求當事人必須未婚或取得配偶同意者。當原告的妻子拒絕同意將他們的婚姻關係變更為伴侶關係時，原告的新性別就無法記錄在人口登記簿。
2007年7月6日，原告先在Helsinki行政法庭打訴訟，除了因未取得妻子同意不能變更性別登記外，原告與妻子均較青睞婚姻關係，因為離婚違反她們的宗教信仰。他們認為伴侶關係並未提供等同於婚姻的保障，使得他們小孩將無法與婚生子女一視同仁。
2008年5月5日，Helsinki行政法庭駁回原告的請求。

二、歐洲人權公約

第8條：「人人有權使他的私人和家庭生活，他的家庭和通信受到尊重。」

第12條：「達到結婚年齡的男女有依照有關行使此權的國內法，結婚和成立家庭的權利。」

第14條：「人人對本公約列舉的權利與自由的享受，應予保證，不得因性別、種族、膚色、語文、宗教、政治的或其他見解，民族或社會的出身、同少數民族的聯繫、財產、出生或其他地位而有所歧視。」

三、判決內容重點摘譯

（非逐字翻譯，重要部分附原文對照）

內國法：

芬蘭婚姻法第1條將婚姻限定於一男一女（24段）

比較法：

31段：僅10個會員國允許同性婚姻

32段：關於已婚人士進行性別重置後的婚姻法律效果，24個會員國並未有有進一步的規範。有6個會員國對於性別認同有明文規定。僅三國例外承認已婚人士進行性別重置後，無庸終止婚姻關係。

33段：（小結）同性婚姻是不被允許的，只有三個會員國允許性別重置後，不用終止既有的婚姻關係，但仍有24國家對此仍無明確規定。

where same-sex marriage is not permitted, only three member States permit an exception which would allow a married person to gain legal recognition of his or her acquired gender without having to end his or her existing marriage. In twenty-four member States the position is rather unclear, given the lack of specific legal regulations in place.

（一）未違反第八條私生活家庭保障

71段：法院重申，第八條並未賦予締約國通過同性婚姻的義務。法院同時也認為，在婚姻關係中性別重置後的法律效果，締約國有裁量餘地（margin of appreciation）。伸言之，公約並未要求為特殊安排，但依個案處置。法院曾在2006年Parry v UK案，即使英國法律不允許同性婚姻，原告仍可繼續他們的關係，雖然不是婚姻，但仍可透過民事結合（civil union）給予近似婚姻權利與義務的法律地位。法院由此認為民事結合是合適的選項（civil partnership as an adequate option）。

71. The Court reiterates its case-law according to which Article 8 of the Convention cannot be interpreted as imposing an obligation on Contracting States to grant same-sex couples access to marriage (see Schalk and Kopf v. Austria, no. 30141/04, § 101, ECHR 2010). The Court has also held that the regulation of the effects of a change of gender in the context of marriage falls to a large extent, though not entirely, within the margin of appreciation of the Contracting State (see Christine Goodwin v. the United Kingdom [GC], cited above, § 103). Furthermore, the Convention does not require that any further special arrangements be put in place for situations such as the present one. 中略 The Court thus regarded civil partnership as an adequate option.

73段：多數會員國不允許同性婚姻，同時對於性別重置已婚人士的法定性別未有明文。不允許同性婚姻的會員國中，只有六國對於性別承認（gender recognition）有相關規範。

Moreover, in the majority of the member States not allowing same-sex marriage there is either no clear legal framework for legal gender recognition or no legal provisions specifically dealing with the status of married persons who have undergone gender reassignment. Only in six member States which do not allow same-sex marriage does relevant legislation on gender recognition exist.

74段：因此，不能說存在「通過同性婚姻」的任何「歐洲共識」（European consensus）（框

號為譯者所加)

74. Thus, it cannot be said that there exists any European consensus on allowing same-sex marriages.

75段：既然欠缺歐洲共識，且本案無疑引發敏感的道德和倫理議題，本院認為被訴國擁有廣泛的裁量空間（margin of appreciation）...（中略）...以平衡公共利益與私人利益間的競爭。

75. In the absence of a European consensus and taking into account that the case at stake undoubtedly raises sensitive moral or ethical issues, the Court considers that the margin of appreciation to be afforded to the respondent State must still be a wide one（中略）in order to achieve a balance between the competing public and private interests.

76段：對於國內系統，法院發現芬蘭國內的規範已提供原告不同選擇。首先，她（指男跨女）可以仍維持既有的婚姻，並容忍男性身分號碼（male identity number）所造成的不便。依據芬蘭法規，異性伴侶的法定婚姻不因其中一方進行性別重置手術而終止。

Finnish domestic law currently provides the applicant with several options. First of all, she can maintain the status quo of her legal situation by remaining married and tolerating the inconvenience caused by the male identity number. The Court finds it established that in the Finnish system a legally contracted marriage between a different-sex couple is not annulled or dissolved on account of the fact that one of the spouses has undergone reassignment surgery and is thus subsequently of the same sex as his or her spouse.

77段：其次，如原告期望新的性別獲得法定承認，同時與妻子的關係能獲得保障。只要獲得配偶同意，芬蘭法律提供將婚姻轉換為伴侶關係的可能性。依據內國法，若配偶同意更換性別，婚姻關係依法即自動轉變為註冊伴侶關係（registered partnership），及依個案情況，由註冊伴侶關係轉變為婚姻關係。

77. Secondly, if the applicant wishes both to obtain legal recognition of her new gender and to have her relationship with her wife legally protected, Finnish legislation provides for a possibility to convert their marriage into a registered partnership, with the consent of the applicant's wife. Under the domestic law, if the spouse's consent to the change of gender is received, a marriage turns automatically, ex lege, into a registered partnership and a registered partnership into a marriage, depending on the situation.

79段：本案的爭點為：芬蘭目前的制度是否滿足國家積極義務？原告是否維持婚姻關係，同時新的性別受法律承認，即使此選擇將暗示原告與配偶間為同性婚姻？

Thus, the key question in the present case is whether the Finnish system currently fulfils the positive obligation on the State in this respect or whether the applicant should be allowed to remain

married while at the same time obtaining legal recognition of her new gender even if that option would imply a same-sex marriage between the applicant and her spouse.

82段：其中一個原告認為，關於配偶同意之要求，對她而言是「強迫」離婚。儘管如此，本院考量依據芬蘭法規，關係可自動轉換。配偶對於改變性別登記之同意是基本要求，此設計係為從他方單方決定中提供保障。因此，要求同意顯然是重要的保護措施，保障不想尋求性別承認的配偶。

83段：結論是，法院認為婚姻與註冊伴侶間的差異，對於原告的法律地位並無涉及本質上的改變（essential change）。原告仍可繼續享受與婚姻同等的伴侶法律保障。

the differences between a marriage and a registered partnership are not such as to involve an essential change in the applicant's legal situation. The applicant would thus be able to continue enjoying in essence, and in practice, the same legal protection under a registered partnership as afforded by marriage

84段：原告與其妻子轉換成登記伴侶關係後，並未損失在婚姻裡的各樣權利。

84. Moreover, the applicant and her wife would not lose any other rights if their marriage were converted into a registered partnership.

88段：總而言之，法院認為芬蘭制度對於原告並無不成比例的效果，且在本案競爭的利益中，有公正的平衡。

88. In conclusion, the Court considers that the current Finnish system as a whole has not been shown to be disproportionate in its effects on the applicant and that a fair balance has been struck between the competing interests in the present case.

89段：依上，本案並無違反公約第八條。

（二）本案未違反公約第十二條「婚姻保障」

96段：本院重申，公約第12條為婚姻權的特別法，其所保障者為一男一女結婚與建立家庭的基本權利。公約第12條顯然可作為提供各內國法婚姻的規範，其所奉行的是一男一女間的傳統婚姻觀。雖然部分締約國將婚姻擴張至同性伴侶，公約第十二條並無法被理解成締約國有准許（grant）同性伴侶結婚的義務。

96. The Court reiterates that Article 12 of the Convention is a *lex specialis* for the right to marry. It secures the fundamental right of a man and woman to marry and to found a family. Article 12

expressly provides for regulation of marriage by national law. It enshrines the traditional concept of marriage as being between a man and a woman (see *Rees v. the United Kingdom*, cited above, § 49). While it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples

(三) 本案並未違反公約第14條「禁止歧視保障」

102段：依據本院判決，公約第八條與第十二條並未賦予締約國准許同性伴侶進入婚姻的義務。公約第十四條亦不能連同公約第八條，解釋國家有准許同性伴侶維持婚姻權利的義務。因此，原告無法獲得女性身分證號碼並非歧視，本案並無違反公約第14條。

According to the Court's case-law, Articles 8 and 12 of the Convention did not impose an obligation on Contracting States to grant same-sex couples access to marriage. Nor could Article 14 of the Convention, taken in conjunction with Article 8 of the Convention, be interpreted as imposing an obligation on Contracting States to grant same-sex couples a right to remain married. Therefore, it could not be said that the applicant had been discriminated against vis-à-vis other persons when she had been unable to obtain a female identity number

(四) 結論

1. 14對3票：本案未違反公約第八條
2. 14對3票：本案未違反公約第十二條
3. 14對3票：配合第八條與第十二條檢視，本案未違反公約第十四條