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DANIEL BORRILLO

## Sexual Orientation and Human Rights in Europe

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AFTER WORLD WAR II, when the main international human rights instruments were being drafted, no provision was dedicated to protection against discrimination based on sexual orientation. Today, if one were to search for a specific reference to homosexuality in one of these instruments, one would search in vain. Neither instruments with universal application, such as the United Nations Universal Declaration of Human Rights of 1948 or its International Covenant on Civil and Political Rights of 1966, nor regional instruments such as the Organization of American States' American Convention on Human Rights of 1969 or the Organization of African Unity's African Charter on Human and Peoples' Rights of 1981, deals with the question.

Over the years the list of rights protected by the Council of Europe's European Convention on Human Rights has been extended through additional protocols but no new norm or provision deals addresses homosexuality as such. Despite the numerous homosexual victims of persecution, especially as a result of the Nazi policy of extermination, the main international human rights conventions have not found it advisable to establish legal mechanisms for protecting homosexuals.

The paradigm of homosexuality as an illness and the homosexual as a pervert represented the most progressive concept of homosexuality at the time. But because discrimination based on disability was not yet widely prohibited, gays and lesbians could not even invoke this form of protection. As a result, abandoned to the shadows outside the law, millions of homosexuals had to

protect themselves by leading a double life, involving the apparent respectability of a marriage of convenience or a family formed in most cases against their will.

It is only recently that protection against sexual orientation discrimination has seen the light of day. Whether it is by the indirect route of a recourse to classical notions of "private life," a right to "nondiscrimination," or "freedom of expression," or by appeals to the application of the principle of equality without regard to one's sexual leanings or tendencies, or by the introduction of a specific reference to the notion of sexual orientation in the 1997 Treaty of Amsterdam (which amends the 1957 European Community Treaty), both "Greater Europe" (the forty-member Council of Europe) and the "Europe of 15" (the fifteen-member European Union) are beginning to build (a still embryonic) area of legal protection of sexual orientation.

In order to present this embryonic legal protection of persons without regard to their sexual orientation, I have structured my analysis around four variables: hard law of the Council of Europe (the Europe of forty members, European Convention on Human Rights, case law of the European Court and European Commission of Human Rights in Strasbourg); hard law of the European Community (the Europe of fifteen members, European Union Treaty and European Community Treaty, case law of the European Court of Justice in Luxembourg); soft law of the Council of Europe (recommendations of the Parliamentary Assembly of the Council of Europe in Strasbourg); and soft law of the European Community (resolutions of the EC's European Parliament in Strasbourg and Brussels).

### **Hard Law of the Council of Europe**

The first step in a slow and incomplete evolution towards equality of rights was the decriminalization of same-sex sexual activity. Even though the French Revolution caused the removal of the offence of "sodomy" from the Penal Code of 1791 (which was confirmed by the Napoleonic Code of 1810), many European countries continued to punish sexual acts between consenting adults of the same sex. Thus, between 1955 and 1977, the European Commission of Human Rights in Strasbourg considered that, although a person's sexual life was a part of their "private life" protected by Article 8 of the Convention, complete criminalization of same-sex sexual activity between consenting adults was not a violation of the Article 8 right to "respect for private life," because it could be justified as necessary for the "protection of health or morals," or for the "protection of the rights and freedoms of others." Indeed, the Commission declared that "the Convention allows a High Contracting Party to punish homosexuality since the right to respect for private life may, in a democratic society, be subject to interference as provided for by the law of that Party for the protection of health or morals."

It was only in 1981, twenty-six years after the rejection of the first application submitted to the Commission, that the European Court of Human Rights finally held in *Dudgeon v. United Kingdom* that criminalization of all sexual activity between men in Northern Ireland violated Article 8. In order to comply with the court's judgement, the United Kingdom decriminalized sexual acts between consenting men over twenty-one. Nonetheless, as the court reminded us, decriminalization does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features." In 1988 in *Norris v. Ireland*, and in 1993 in *Modinos v. Cyprus*, the court applied *Dudgeon*, finding that criminalization in the Republic of Ireland and in Cyprus also violated Article 8.

Even though the European Court of Human Rights established in 1981 that criminalization of sexual acts between consenting adults of the same sex is an unjustifiable interference with private life, the European Commission of Human Rights held repeatedly that a higher age of consent for sexual acts between men, compared with sexual acts between men and women or between women, could be justified. However, in 1997 in *Sutherland v. United Kingdom*, the Commission concluded for the first time that the maintenance of different ages of consent for same-sex and different-sex sexual activity could not be justified in a democratic society. The *Sutherland* case was referred to the court, but is on hold under an agreement between the Stonewall litigation and lobbying group in London and the United Kingdom government, which requires the government to permit a free vote in the House of Commons on equalizing the age of consent. Such a vote was held in June 1998 and produced a large majority in favour. But the amendment was rejected in July 1998 by the unelected House of Lords. On 24 November 1998, the government outlined its legislative programme in the Queen's Speech. It will include an Age of Consent and Abuse of Trust Bill, which will equalize the age of consent at sixteen but criminalize sexual activity between persons between sixteen and eighteen and persons in positions of trust or authority over them, such as schoolteachers.

In other areas, no such progress has been made. In *Bruce v. United Kingdom* in 1983, the European Commission of Human Rights upheld the dismissal of gay and lesbian members of the armed forces, finding it justifiable under Articles 8 (private life) and 14 (nondiscrimination) of the Convention. In *Johnson v. United Kingdom* in 1986, the Commission permitted criminalization of sexual acts involving more than two men. Similarly, in *Laskey v. United Kingdom* in 1997, the court found a justification for the criminalization of sado-masochistic sexual acts in private involving a group of consenting adult men.

Apart from "private life" in Article 8, homosexuals have been unsuccessful in finding protection for their unions or partnerships. The Commission (but not

yet the court) has decided that gay and lesbian couples do not have a "family life," which must be respected under Article 8, or a right to marry and to found a family" under Article 12 (*C & L.M. v. United Kingdom* in 1989). In three cases dealing with transsexual persons, the court has held that the right to marry in Article 12 refers "to the traditional marriage between persons of opposite biological sex." *Rees v. United Kingdom* (1986), *Cossey v. United Kingdom* (1990), *Sheffield & Horsham v. United Kingdom* (30 July 1998).

The current state of the "hard law" of the Council of Europe is that decriminalization of sexual behaviour involving two consenting persons over eighteen of the same sex is required. As a result, every country joining the Council of Europe and signing the European Convention must decriminalize: Opinion No. 176 (1993) of the Parliamentary Assembly regarding Romania's application to join the Council of Europe. But, as the court indicated, decriminalization does not mean in any way the recognition of homosexuality as a source of rights, or its being rendered so commonplace that it ceases to be a hindrance to the enjoyment of Convention rights. The refusal to include gays and lesbians within the right to marry in Article 12 or the right to respect for "family life" in Article 8, is used to justify in particular their exclusion from family law and from immigration rights.

This minimal protection, which arises more from a concept of tolerance than one of strict application of principles of equality and nondiscrimination, is the result of a "consensus-oriented approach" which interprets and applies the Convention with regard to the legal situations existing in the member states of the Council of Europe. It is clear that the new member states, in most of which same-sex sexual activity has only recently been decriminalized, have preferred an extremely conservative interpretation of notions such as "private life," "family life," "right to marry" and "discrimination based on sex" (interpretation was conservative pre-1989, before these states joined, when there were only twenty-three member states, all from western Europe). To improve protection under the Convention, three reforms can be proposed.

First, the Convention countries could consider adopting a specific protocol on sexual orientation discrimination; second, Article 14 of the Convention could be amended so as to add "sexual orientation" as a specific prohibited ground of discrimination, alongside "sex;" and third, the European Community could sign the European Convention, thereby bringing European Community law and European Community institutions clearly under the jurisdiction of the European Court of Human Rights in Strasbourg (the European Court of Justice in Luxembourg already applies the Convention to EC law and EC institutions itself). Of these three reforms, the second seems to me to be both the most realistic and the most effective.

### ■ Hard Law of the European Community

For many years, European Community law took no interest in the lot of gays and lesbians, whose cases were traditionally dealt with by the European Court of Human Rights in Strasbourg. In *P. v. S. & Cornwall County Council* in 1996, the situation changed significantly when a transsexual woman succeeded in convincing the European Court of Justice in Luxembourg (the highest court of the European Community), that her dismissal constituted discrimination based on sex. It therefore violated the 1976 Equal Treatment Directive (76/207/EEC), which prohibits sex discrimination in employment in relation to hiring, promotion, dismissal and working conditions. If the notion of discrimination based on sex protects transsexual persons, one would imagine that the same legal protection would be extended to gay, lesbian and bisexual persons. This reasoning was adopted by the lawyer for Lisa Grant, a lesbian woman who invoked Article 119 of the European Community Treaty (the 1957 Treaty of Rome), which requires equal pay for men and women, and had her case referred to the Luxembourg Court. She claimed that her employer's refusal to provide free rail travel benefits to her female partner, as the employer did to the unmarried female partners of male employees, was a violation of Article 119. A similar argument was used by the lawyer for a gay employee of the Royal Navy, Terence Perkins, who had been dismissed, and who invoked the same 1976 Equal Treatment Directive on which the transsexual woman, P., had relied.

In the *Grant v. South-West Trains*, advocate General Elmer considered that the notion of discrimination based on sex could also include the notion of discrimination based on sexual orientation. Thus, by comparing the situation of Lisa Grant and her female partner to that of a heterosexual man with a female partner (with whom he was living outside of marriage), Advocate General Elmer concluded that the sex of Lisa Grant was also the cause of the discrimination, and not only the fact that she is lesbian. Even though the Luxembourg Court often follows the opinion of the Advocate General, and did so in the P. transsexual case, in *Grant* the Court rejected this opinion and adopted a traditional analysis under which there is no discrimination based on sex, but only discrimination based on sexual orientation. This analysis precluded the application of European Community law, which currently prohibits employment discrimination only when it is based on sex, and not when it is based on race, religion, disability, age or sexual orientation.

The *Grant* decision makes it clear why specific European Community legislation on sexual orientation discrimination is needed. This is the approach taken by the new Article 13 which will, after the ratification of the 1997 Treaty of Amsterdam by all fifteen member states, be inserted into the European Community Treaty. This new Article 13 provides as follows: "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council (the effective legislature of the

EC), acting unanimously on a proposal from the Commission (the executive of the EC) and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

Once Article 13 comes into force it will give specific power to the European Community institutions authorizing them to adopt legislation banning discrimination based on sexual orientation. However, there is no obligation for the Commission to exercise this power by making a proposal to the Council, or for the Council to agree to any proposal. New legislation will require the consent of all fifteen member states. Although Article 13 represents an important symbolic advance, it is unlikely to lead to effective legal protection in the immediate future. Indeed, given the variations between the current laws of the fifteen member states in this area, it is hard to imagine a consensus in favour of a European Community directive on sexual orientation discrimination.

#### ■ Soft Law of the Council of Europe

In 1979 a commission of the Council of Europe directed by Mr. Voogd presented a proposed recommendation (document 4436), which aimed to provide "moral and legal protection to homosexuals," the "elimination of discrimination in employment and other areas" and the "enjoyment of the rights and opportunities granted to other citizens." The proposal was accepted and a report on discrimination against homosexuals was issued in 1981. The report proposed a draft recommendation to the member states of the Council of Europe, and a draft resolution to the World Health Organization asking it to remove homosexuality from its international classification of illnesses. The report's argument had a liberal tone which sought "equality of human beings and the defence of human rights" by respecting an individual's sexual preferences. After having considered the history of the question and a synthesis of the social, political and legal situation in Europe, the report tried to define homosexuality. It criticized strongly the notions of "mental problems," "sexual problems" or "deviation," and proposed the rejection of any type of medical or psychiatric definition by speaking simply of "sexual preference."

The report ended with a number of suggestions. It proposed: (a) the amendment of Article 14 of the European Convention by adding the notion of "sexual preference" (*penchant sexuel* or "sexual leaning or tendency" in French). The current text of Article 14 reads as follows:

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.

(b) the destruction of police files on homosexuals.

(c) equality of treatment for homosexuals with regard to employment, pay and job security.

(d) an end to all medical research or activity seeking a compulsory modification of the sexual preferences of adults.

(e) the removal of any discrimination against lesbian and gay parents with regard to custody of children, or rights of access to children.

(f) the payment of reparations to homosexuals who suffered in concentration camps.

(g) vigilance by prison directors and other public authorities to prevent homosexuals from being the victims of rapes and acts of violence in prisons.

The report did not take a position on the age of consent to same-sex sexual activity: "Every society must fix this limit with regard to the degree of social and cultural maturity. It is hard to understand why the age selected should be different for boys and girls who are heterosexual or homosexual." But the report did propose (in an informal way) better information for the public. Following the report, Recommendation 924 (1981) and a resolution regarding discrimination with respect to homosexuals reproduce in part the report's proposals, emphasizing the decriminalization and demedicalization of homosexuality.

In 1984 the Legal Affairs Division of the Council of Europe published a study on "Sexual Behaviour and Attitudes and Their Effects on Criminal Law," by D. J. West, director of the Institute of Criminology at the University of Cambridge. The study contained a chapter on homosexuality.

#### **Soft Law of the European Community**

Within the European Community institutions, it is the European Parliament that has dealt most with the question of discrimination against gays and lesbians. On 13 March 1984 (O.J., C 104, p. 46, published on 16 April 1984), the Parliament adopted a "Resolution on sexual discrimination at the workplace," proposed by Vera Squarcialup. The term "sex" was given a broad meaning, in that the resolution dealt with discrimination against homosexuals. The resolution called on member states to abolish national laws discriminating against homosexuals and to pass laws prohibiting discrimination against them. On 11 June 1986, the Parliament urged member states to apply, in their national legislation, the principle of nondiscrimination based on sex, marital status and sexual preference. Unlike the Legal Affairs Division of the Council of Europe, the Parliament proposed an explicit reference to "sexual preference." The Parliament also proposed that member states prevent any discrimination in certain occupations, such as the armed forces, the civil service or the diplomatic service.

On 27 May 1990 the Council of Ministers adopted a resolution (O.J. 1990, C 157/3) recommending that employers take action against sexual harassment in



the workplace. Thanks to the work of the International Lesbian and Gay Association, a special clause on harassment based on sexual orientation was inserted into the resolution.

On 8 February 1994, a "Resolution on equal rights for homosexuals and lesbians in the EC" was approved by the Parliament. It urged all member states to establish the same age of consent to sexual activity, whether same-sex or different-sex, to protect homosexuals against any form of discrimination, and to encourage and support financially associations of homosexuals. The resolution also proposed that the Commission of the EC present "a draft recommendation on equal rights for lesbians and homosexuals," which should seek to end "the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework," and "any restrictions on the rights of lesbians and homosexuals to be parents or to adopt or foster children."

### **Conclusion**

To date, no European country has been able to eliminate discrimination based on sexual orientation. The advances made by the European Court and Commission of Human Rights in Strasbourg have been limited to requiring decriminalization of sexual activity between two consenting adults of the same sex and equalization of the age of consent or sexual activity, whether same-sex or different-sex. These tribunals have adopted extremely restrictive interpretations of "private life" as an intimate sphere surrounding an atomized individual, of "family life" as exclusively heterosexual, of "discrimination based on sex" as independent of and unconnected to sexual orientation, and the "right to marry" as applying only to unions between one man and one woman. As for the European Court of Justice in Luxembourg, by also concluding that discrimination based on sexual orientation is not discrimination based on sex, it has closed the door to the application to gays and lesbians of the huge body of European Community sex discrimination law. In view of the failure of the case law of the Strasbourg Court and Commission and the Luxembourg Court to develop mechanisms for protecting gays and lesbians, the solution would seem to be the use by the European Community of the new Article 13 of the EC Treaty, hoping that the necessary political will on the part of the member states will be there.

Things are better at the national level in Europe. Countries such as France, Denmark, Norway, the Netherlands, Luxembourg, Spain and Ireland have legislation expressly prohibiting sexual orientation discrimination, especially with regard to employment. As for recognition of same-sex couples, the European Parliament's resolution of 8 February 1994 is unambiguous. It requires access to marriage or to forms of partnership granting the same rights as those of married couples and to adoption and medically assisted procreation. The first country to have passed legislation granting rights to same-sex couples was Denmark in 1989. Since then, Norway, Sweden, Hungary, Iceland, the Netherlands, Belgium,

Catalonia and Arapón (Spain) have followed. In most of the fifteen member-states of the European Union, bills providing for the registration of civil partnerships by same-sex couples are being proposed and debated. Despite the strong opposition of conservative groups, both secular and religious, and even though much remains to be done, the dynamic of equality seems to be spreading gradually throughout the continent of Europe.