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Chapter 14

Gender and diversity: Contributions in international jurisprudence

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SUMARIO: I. INTRODUCTION. II. JUSTIFICATION OF THE REPRESSION OF HOMOSEXUAL RELATIONS. III. THE TRANSITION TOWARDS THE TOLERANCE OF HOMOSEXUALITY. IV. THE DISCRIMINATION OF HOMOSEXUALITY. V. THE ROAD TOWARDS EQUALITY AND FAMILY DIVERSITY. VI. THE PROTECTION OF FREEDOM OF EXPRESSION AND REPRESSION OF HOMOPHOBIA. VII. CONCLUSIONS. VIII. LIST OF SELECTED CASE LAW. 1. *Justification of criminalization (1955-1977)*. 2. *The transition (1977-1981)*. 3. *Partial de-criminalization (1981-1997)*. 4. *Against homophobia*.

ABSTRACT:

The recognition of homosexuality and subsequent condemning of homophobia has been the result of arduous work by the *European Court of Human Rights*, which has gradually developed the *European Human Rights Convention* in support of the private and family life of LGBT (lesbians, gays, bisexuals and transsexuals), as well as other fundamental rights such as the freedom of association and freedom of expression. In only a short time, the situation has changed from the justification of discrimination to the criminalization of homophobia. This chapter summarizes the legal history of this process.

KEY WORDS:

Sexual orientation, LGBT, homosexuality, human rights, European

Court of Human Rights, private life, family life, freedom of association, freedom of expression, ECHR case law.

I. INTRODUCTION

In just over 20 years, Europe has evolved from the penalization of homosexuality to the criminalization of homophobia[1]. This spectacular change is largely due to the work of the *European Court of Human Rights* (ECHR) which has been gradually developing the *European Human Rights Convention* (EHRC) to support the private and family life of LGBTI[2] (lesbians, gays, bisexuals and transsexuals), as well as other fundamental rights such as the freedom of association and freedom of expression.

October 22, 2018 marks the 37th anniversary of the decriminalization of homosexuality in Europe. In the well-known case of *Dudgeon vs. the United Kingdom and Northern Ireland*, the judges of the European Court of Human Rights ruled that the criminalization of homosexuality between two adults constituted a breach of privacy. This decision was the result of more than 25 years of court battles by gay men filing claims with the ECHR against criminal court decisions to which they had been victim in their respective countries[3].

The treatment reserved by the ECHR for sexual orientation[4] can be seen as a normal evolution from the criminalization of sexual relations between adults to the criminalization of homophobic manifestations, passing through a transition period that was initially highlighted by a certain tolerance and later by progressively equal treatment not only of individuals, but also of homoparental families and the LGBTI community in general.

This study traces the history of European case law[5]. The issues of gender

1. Although the situation in Western countries has evolved favorably, we should not overlook the fact that seventy two countries still penalize homosexuality, eight of which with the death penalty. On the other hand, there are only sixty three States with legislation against discrimination based on sexual orientation.
2. Lesbians, gays, bisexuals, transsexuals and intersexuals.
3. Mainly the Federal Republic of Germany, Austria and the United Kingdom.
4. Sexual orientation is the emotional, romantic or sexual attraction towards a person of the opposite gender (heterosexual), the same gender (homosexual) or indistinctly (bisexual). The social gender role (the observing of cultural rules on behavior and male and female roles) is different to other aspects of sexuality, such as biological sex (male/female), gender identity (transsexual) and intersexualism (hermaphroditism).
5. It is not a complete analysis of all judgments, but rather of those that have represented a positive evolution in terms of equality, non-discrimination and freedom for LGBTIs.

identity (equality between cisgender transsexuals) and inter-sexuality (hermaphroditism) are not covered, even though the evolution of these fields is more significant than that of LGBTIs, especially after the *Christine Goodwin v. The United Kingdom* judgment of 11 July 2002, in which the European Court of Human Rights acknowledged transsexuals' right to marry, a right that had even yet to be acknowledged for gays and lesbians.

The decisions of the ECHR and the former European Commission of Human Rights (a kind of first instance)[6] are analyzed at five legal moments, which correspond to the political evolution of the gay issue[7]. We firstly study the decisions relating to the grounds for repression of homosexual relations between adults (I), then examine the transition period (II) that leads to the tolerance of homosexual relations through partial decriminalization (III). We subsequently focus on the analysis of judgments upholding relative equality for gay people, homosexual couples and homoparental families (IV). Finally, we present the most important judgments relating to the freedom of expression and criminalization of hate discourse (IV).

II. JUSTIFICATION OF THE REPRESSION OF HOMOSEXUAL RELATIONS

After the Second World War, none of the major legal instruments protecting human rights established a mechanism to protect people against the discrimination of gays and lesbians, despite the fact that they had been victim to Nazi acts of barbarism[8]. In spite of the deportation and death of thousands of prisoners bearing the pink triangle (symbol used in concentration camps), neither the *Universal Declaration of Human Rights* of 1948 nor the *International Covenants* of 1966 nor the *European Convention on Human Rights* of 1950, Regional Charters such as the *American Convention* of 1969 or the *African Charter* of 1981 refer to sexual orientation and we would have to wait until 1994 for the Humans Rights Committee of the United Nations to establish that the category of "sex" in the *Covenant of Civil and*

This treatment may give the impression of a certain continuity, however, in reality, each step forward was marked by several setbacks.

6. From 1954 to the entry into force of Protocol 11 of the ECHR, people did not have direct access to the European Court of Human Rights, but had to file a claim with the Commission, which decided whether or not the case was sufficiently grounded to be analyzed by the Court. Protocol 11 of 31 October 1998, abolished the Commission and enabled private individuals direct access to the Court.
7. The expression gay (*good as you*) includes lesbians and bisexuals.
8. G. GRAU, *Hidden Holocaust? Gay and Lesbian Persecution in Germany 1933-1945*, Chicago, Fritzroy Dearborn, 1995.

Political Rights must also include sexual orientation"[9]. At a European level, the judges in Strasbourg subsequently established a similar interpretation as the UN Committee, stating that "sexual orientation is a notion that is undoubtedly covered by article 14 of the Covenant"[10].

The first claim filed with the ECHR was by a German citizen in 1955 (*W.B. v. the Federal Republic of Germany*, ruling no. 104/55). This and other claims questioned the compatibility of article 175 of the German Criminal Code with the ECHR, as the Code severely punished consented homosexual relations between adults over the age of 21. In another case of January 4, 1960 (no. 530/59), the plaintiff had been convicted on two occasions: on the first to twenty two months' prison. In case 740/60 of 4 January 1960, the plaintiff was convicted in 1940 and deported to a concentration camp for being homosexual. In 1956, he was again accused and sentenced to 12 years' prison. The victims were also frequently subject to psychiatric treatment and even chemical castration and it was not until 2016 did Germany compensate the few gay survivors.

In spite of the particular violence of the situation, the Commission rejected claims on 11 occasions that German legislation was contrary to the ECHR. Time after time, the Commission's rulings stated that: "Contracting State has allowed by the Convention to punish the homosexuality. In a democratic society the right to respect for the private life could be limited by an interference if is in accordance with the law for the protection of health or morals (art. 8-2 of the Convention)"[11]. The situation was particularly surprising, as the legal basis for the persecution, article 175, was one of the few articles that Germany had kept in its Criminal Code following the war, after the Nazis had taken it from the Prussian Code of 1872 and even toughened it further...

On 25 June 1969, the Federal Republic of Germany abolished article 175 of the criminal code *motu propio*. However, an age difference was kept between heterosexual relations (legal age of 18) and homosexual relations

9. Notification no. 488/1992, *Nicolas Toonen v. Australia*, of 4 April 1994, 55e session, § 8.7, *Rapport du Comité des droits de l'homme*, Nations Unies, vol. II, suppl. n° 40, A/49/40, p. 241. Also, *General Comment* No. 20 of the United Nations Committee on Economic, Social and Cultural Rights determined that the interpretation of "or social origin" in article 2, paragraph 2 of the United Nations *International Covenant on Economic, Social and Cultural Rights* must include sexual orientation. The United Nations Human Rights Council passed a Resolution on 17 June 2011 requesting an investigation by the High Commission into the laws, practices and acts of violence against persons on the grounds of their sexual orientation.
10. *Salgueiro Da Silva Mouta v. Portugal*. 21 December 1999.
11. In particular, see the decisions of 4 January and 4 August 1960 and 15 December 1969.

(only legal at 21). In 1972, the Commission ruled for the first time on the new German legislation, stating that the age difference did not constitute discrimination, given that the repression had a legitimate purpose. The Commission highlighted the fact that the punishment of homosexual relations between people from 18 to 21 years of age was justified by the "need to protect the rights of others (minors)". It also stated that the legislation complied with article 14 and was therefore non-discriminatory, as it only referred to male homosexual relations. The Commission blindly based its decision entirely on the psychological reports issued by German experts that considered homosexuality to be a "danger to society", in which "male homosexuals comprising a specific social and cultural group clearly intent on proselytizing adolescents".

For 26 years, European judges therefore considered that for reasons of public order and to protect young people, homosexuality could constitute a crime under democratic European legislations. The different judgments given during this time show the anti-homosexual prejudice of the judges, devoid of legal grounds, who resorted to traditional (barely camouflaged) public order reasons to justify discrimination against gays and lesbians[12].

III. THE TRANSITION TOWARDS THE TOLERANCE OF HOMOSEXUALITY

In 1977, the Commission considered, for the first time, that the issue of homosexuality would be observed from a perspective of the protection of privacy, although in the specific case of an unconsented sexual act, the criminalization of relations between persons of the same gender was fully justified[13]. The Commission's report, which provided a glimpse of certain flexibility (as the claim had not been admitted on the grounds of an alleged crime of rape, rather than one of homosexuality) was later confirmed in the Council of Europe documents: a Resolution of 1981 and a Recommendation in the same year "relating to the discrimination towards homosexual persons"[14]. In its documents, the Council of Europe recommended that the signatory states of the Convention put an end to the discrimination towards homosexual citizens in criminal, civil and

12. D. BORRILLO, "Statut juridique de l'homosexualité et droits de l'homme", in *Un sujet inclassable? Approches sociologiques, littéraires et juridiques des homosexualités*, R. MENDES-LEITE (dir), Cahiers gai kitsch camp, n° 28, Lille, février 1995, pp.99-115.
13. *X v. United Kingdom*, Claim no. 1215/75 of 7 July 1977 (not published).
14. Resolution 756 of the Council of Europe (1981) "relating to the discrimination of homosexual persons". Recommendation 934 of the Council of Europe (1981) "relating to the discrimination towards homosexual persons".

labor matters. Although these opinions are not binding upon States, they represent a political framework of reference that helped to change the perception of homosexuality from a legal perspective, taking it to the dimension of a difference that, under the principle of equality, should be respected and guaranteed by States by adopting antidiscrimination policies in all areas of personal (and family) life.

The political environment was therefore sufficiently prepared for the ECHR to change its case law in favor of the protection of private life, irrespective of a person's sexual orientation[15].

Before beginning our analysis of the different rulings relating to sexual orientation, it should be recalled that they are mainly (but not exclusively) focused on the breach of article 8 of the Convention (respect for private life), in conjunction with article 14 (principle of non-discrimination), the latter, as we know, does not contain an independent prohibition of discrimination, but only links it to the human rights and freedoms already defined by the Convention[16]. The ECHR has subsequently produced abundant case law based on the protection of family life (art. 8) and later in articles 3 (the prohibition of torture and inhuman or degrading treatment or punishment), 10 (freedom of expression) and 11 (freedom of association) of the ECHR, all of which show that it was firstly the private individual, later his/her family life[17] and, finally, the gay community that would find shelter in the Convention.

IV. THE DISCRIMINATION OF HOMOSEXUALITY

The case of *Dudgeon* v. *the United Kingdom and Northern Ireland* of 22 October 1981 was the first to judge the compatibility of the ECHR with legislation of Northern Ireland that punished voluntary sexual relations between male adults. The facts of the case are as follows: in 1976, the Belfast police decided to search the home of J. Dudgeon under an investigation into drug trafficking. During the persecution, the police confiscated an intimate diary written by J. Dudgeon describing his

15. The term "sexual orientation" appears for the first time in European law in 1997 in article 13 of the Amsterdam Treaty. This article supplements article 12, which refers to discrimination based on nationality. According to the new article, the Council may adopt suitable measures to fight discrimination based on sex, racial or ethnic origin, religion or opinion, disability, age or sexual orientation.
16. We should recall that Protocol 12 did not exist at the time.
17. According to the doctrine established in the case of *Niemietz v. Germany of 16/12/1992, in which he notion of private life not only covers the intimate sphere, but also "every individual's right to build and develop relations with others".*

(alleged) sexual adventures with men. The police decided to inform the public prosecutor's office, which proceeded to issue a report on "sodomy" and "serious indecency" that, nevertheless, did not give rise to criminal action, as the judges considered that issue was irrelevant in the interests of the general public. The infringement was indeed based on old English legislation dating back to 1861, which penalized male homosexual relations between adults, both in public and private places. Irrespective of the validity of the old English law in question, the Commission declared the claim inadmissible and concluded that it was a breach of article 8, as unjustified prohibition of sexual relations between adults over 21 years of age in private places and with the consent of both parties. The ECHR upheld the Commission's decision, stating that the legislation in itself represented "a permanent breach of the criminal complainant's right to privacy" as it "constantly and directly, due to its mere existence, affected the plaintiff's private life: either he complies with the legislation and refrains from having sexual relations with other men, even in private, or he does not comply and faces criminal punishment". The crossroad itself is a breach of the right to private life which, just like a person's sex life, according to the Commission, constitutes an element of private life that should be protected by the Convention, when practiced by adults[18].

Although the ECHR acknowledged the United Kingdom's right to protect public morality, it considered that the criminal repression was disproportionate to the intended objective "due to its extension and absolute nature", as it caused damaging and unjustifiable consequences to the plaintiff's private life. The ECHR stated, however, that to "decriminalize" homosexuality did not mean morally approving such practices, but merely "eliminating the unjustifiable aspects of criminal legislation". The ECHR therefore limited the impact of the ruling, as it only considered the general punishment of any form of homosexuality contrary to article 8, on the condition that the sexual relations take place in private and between two consenting adults. In such cases, there are not sufficient grounds to justify such punishment.

The case of *Norris v. Ireland* of 26 October 1988 was the second ruling to ratify the position of the ECHR on the issue. D. Norris was an Irish Senator who lived in Dublin and, at the time, led the *Irish Gay Rights Movement*. In 1977, he filed a claim with the Irish courts against Republic of Ireland legislation that punished sexual relations between adult men[19]. The claim

18. Prostitution, however, is not protected by such provision: *F. v. Switzerland*, (no. 11680/85 1988).

19. This legislation is the same as that challenged in the *Dudgeon* case.

was dismissed by the Irish judges on the grounds that "homosexuality had always been condemned by Christian doctrine as immoral and society had considered it a serious crime *contra natura* for centuries". In addition, the Irish Authorities stated that the Senator had not being criminally persecuted. In his claim, D. Norris referred to his participation in an Irish public television program in which he revealed his homosexuality, claiming that it was not a sickness, but rather a condition that in no way could reduce his status as a citizen. Almost immediately, the *Broadcasting Complaints Advisory Committee* considered that his appearance on the program was a breach of the television content code of ethics, stating that Norris was advocating homosexuality. Following the appearance, he was also the victim of insults and threats of physical violence, aggressions that Norris himself attributed to the existence of legislation that penalized his sexual orientation. He also claimed that, throughout his life, the fear of persecution by the police had affected his interpersonal relations with men.

The basis of the ECHR ruling is similar to that of the *Dudgeon* case. The European judge considered that an effective punishment was not necessary, as the mere existence of the repressive legislation entitled him to act and therefore confirmed the breach of Mr. Norris' private life. The ruling stated that a person can be affected by the mere existence of repressive legislation. Six years after the ECHR ruling, Ireland decriminalized homosexuality.

The case of *Modinos* v. *Cyprus* of 22 April 1993 also dealt with a militant gay person, the President of the *Cyprus Movement of Homosexual Freedom*, who claimed that the prohibition of homosexuality in articles 171 to 173 of the Cyprus criminal code was a breach of his private life. Although the Cypriot Authorities had not persecuted homosexuals since the *Dudgeon* case, the ECHR admitted the claim under the Morris doctrine and considered the State liable for not having explicitly repealed the legislation.

France (which had decriminalized homosexuality in 1791), England (which did so in 1967) and Germany (1969) were not affected by the *Dudgeon* judgment. In turn, Northern Ireland (1982), the Ukraine (1991), Estonia (1992), Latvia (1992), Lithuania (1993), Russia (1993), Ireland (1994), Albania (1995), Moldavia (1995) and Cyprus (1998) changed their criminal legislation after the ECHR ruling.

Without underestimating the progress, it should nevertheless be pointed out that decriminalization resulting from these three rulings was only partial. The references are always to adult men practicing sexual

relations in private[20]. It was only after the *A.D.T. v. The United Kingdom* judgment of 31 October 2000 that the ECHR considered the arrest of a person for possessing several videotapes in which he appeared having sexual relations with a group of other men as a breach of his private life.

The countries that had decriminalized homosexuality nevertheless maintained a legal age difference between heterosexuals and homosexuals. The ECHR had initially considered that this difference did not constitute discrimination, as "it was the States' responsibility to establish the legal age in order for criminal legislation to protect young people against homosexual relations with adults". We would have to wait until 2003 for this case law to be amended[21] and the age difference considered discriminatory. Similarly, the ECHR justified the difference between gay (21) and lesbian (16) relations, claiming that "homosexual men fight a net proselytizing towards adolescents, which is not the case with homosexual women". The judgment quoted above in *L and V v. Austria* also put and end to such discrimination.

Criminalization was also admitted by the ECHR until 1999 for national defense reasons. In the case of *B v. the United Kingdom* of 12/10/1983, the judges justified the exclusion of an assistant official for having maintained homosexual relations with other military personnel and civilians. The judges in Strasbourg upheld the arguments used by the British Authorities, according to which the repression of homosexuality in the military forces was necessary to guarantee discipline, prevent blackmail and protect national defense.

The ECHR also considered that the punishment of certain extreme practices of sadomasochism in private was justified for public health reasons. The judgment in *Laskey, Jaggard and Brown v. The United Kingdom*, of 19 February 1997 referred to such practices. In the course of a routine investigation, the British police discovered several sadomasochistic films in which the three defendants appeared. They were subsequently charged and convicted for the crime of *assault*. The acts were nevertheless voluntary and performed in private, in especially equipped rooms designed for no other purpose than sexual pleasure. The sadomasochistic

20. In its judgment in the *Johnson v. United Kingdom* case of July 17, 1986, the Commission justified the punishment of homosexuality when practiced by more than two individuals of the same gender.

21. In *L.V. v. Austria* (09-01-2003), the ECHR did not find sufficient grounds for Austrian criminal legislation to consider voluntary homosexual acts with adolescents between 14 and 18 as a crime and not heterosexual or acts between women between the same ages. According to the ECHR, the regulation breaches the anti-discrimination clause in art. 14 on the right to private life (art. 8).

relations were recorded on video and shared only amongst the group members. The defendants alleged that the participants were adults and practiced this form of sex voluntarily, also stating that there was never any physical injury, infection or need for medical assistance. The fact that such conduct led to moral corruption, as suggested by the United Kingdom, was relative according to the criminal complainants and should rather be seen as a manifestation of sexual freedom. However, the ECHR considered that the British Authorities were legitimately entitled to decide that the persecution and conviction of the appellants was necessary in a democratic society in order to "protect health" (one of the limits appearing in Art. 8.2). Therefore, the plaintiffs' rights were not breached. The decision claimed that although respect for private life included a person's sex life, in the case at hand, it was doubtful that the activity was actually private, given the number of people that intervened and the existence of especially equipped cameras and videos that were edited and distributed amongst all other club members. One of the roles that States are legitimately entitled to perform is the criminal regulation of activities that involve physical injury. Indeed, the decision was not based on the homosexuality of the participants, but rather on the extreme nature of the sadomasochist practices. In an earlier judgment, *K.A. and A.D. v. Belgium* of 17 February 2005, the ECHR reached the same conclusion in relation to heterosexual sadomasochist practices, although the issue of consent held a more prominent position than in the previous case, in which the grounds of public morality and health had prevailed. Criminal repression was also justified by the Commission in relation to homosexual prostitution by considering that "remunerated homosexual relations ... are not protected by the notion of private life established in article 8"[22], nor were those relating to civil servants (*Boitteloup v. France*, 12/12/1988). Between men, the ECHR only tolerated sexual relations between people over the age of 21, in private (homes or hotel rooms), as long as they were only between two people that were not military personnel or sadomasochists. For heterosexuals, the legal age to practice sex is 13 to 16 years of age, depending on the State, for both couples and groups.

Finally and in general terms, it is necessary to point out that this protection refers exclusively to private life *stricto sensu*: the individual homosexual (and not homosexual family relations). In successive decisions, both the Commission and the ECHR initially refused to recognize the emotional rights of same-gender couples[23] or homoparental

22. *S.L.F v. Switzerland*, 10 March 1988.
23. *Simpson v. United Kingdom* (no. 11716/85 1986); *B. v. United Kingdom* (no. 16106/90 1990, etc.

families[24]. Later, as we discuss below, European case law has evolved and been extended to the protection of emotional and homoparental relations.

V. THE ROAD TOWARDS EQUALITY AND FAMILY DIVERSITY

For 16 years, the ECHR considered that only complete criminalization constituted a breach of private life or discrimination. However, on 1 July 1997, the Commission issued a report for the first time (*Sutherland v. The United Kingdom*) on the age of consent for sexual relations which, in the United Kingdom, was 18 for relations between men and 16 for heterosexual or lesbian relations. With 14 votes in favor and 4 against, the Commission concluded that the different age of consent constituted a breach of article 8, in conjunction with article 14, stating that "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". The claims made by the United Kingdom to maintain the age difference were dismissed by the Commission. To claim that the age difference protected adolescents between 16 and 18 years of age and that society was entitled to express its disapproval of homosexual relations did not constitute legitimate arguments, according to the Commission. Indeed, medical studies prove that sexual orientation is established before 16 years of age, meaning that adolescents at such age do not need special protection and social disapproval cannot justify a legal inequality with criminal consequences, given that "to decriminalize is not the same as to approve of homosexuality", in the words of the ECHR.

The paradigm of criminalization is the legal equivalent to moral compassion and it was not until 1999 did the ECHR abandon the logic of tolerance and begin to reason in terms of equality and non-discrimination. This change clearly appears in two judgments: *Lustig, Prean and Beckett v. The United Kingdom* and *Smith and Grady v. the United Kingdom* of 27 December 1999, in which the European judges ruled that the criminalization of homosexual relations in the Armed Forces was a breach of article 8, in relation to article 14, of the ECHR. The issue originated in two claims filed with the Commission, the first by Jeanette Smith, a British citizen, on 9 September 1996 and the second by Graeme Grady, two days later. An analysis of the ECHR decision shows that the plaintiffs were discharged from the British army for the sole reason of being homosexuals.

24. *Kerkhoven v. the Netherlands* (no. 15666/89) 19 May 1992.

Together with Messrs. Lustig-Prean and Beckett (other military litigants), the plaintiffs were authorized to request judicial review of the decisions to discharge them from the army. They claimed that the policy of the British Ministry of Defense concerning homosexuals was "irrational", a breach of the Convention and contravened the European Directive relating to equality. In the opinion of the Ministry of Defense, the policy was necessary, mainly to maintain morale and the efficiency of its troops, in light of the legal guardian role of the army with respect to young recruits and the need for community life in the armed forces.

According to the ECHR, the absolute and general nature of the British policy on which the litigation was based was appalling, as it provided for the immediate discharge from the Armed Forces of a person proven to be homosexual, regardless of his/her professional conduct or service record. The judges in Strasbourg concluded that the English Government did not provide sufficiently convincing grounds to justify its policy against homosexuals in the army and therefore for discharging the plaintiffs. In short, the ECHR considered that the policy was a breach of article 8 of the Convention, as neither the investigations by the Ministry of Defense into their sexual preferences, nor the discharge of the plaintiffs because of their homosexuality was justified according to article 8.2 of the Convention.

Another significant step forward was in the case of *Salgueiro da Silva Mouta v. Portugal* in relation to family life of 23 March 2000. Joao Manuel Salgueiro da Silva Mouta, after separating with his wife, went to live with his male partner. During the divorce proceedings, an agreement was reached on the custody of his 8-year old daughter. Following the breach of the agreement by his ex-spouse, Salgueiro da Silva filed a claim for custody of his daughter, as she was under the care of her maternal grandparents and not the mother, as agreed. In her answer to the claim, his former wife alleged that her daughter had been subject to sexual abuse by her ex-husband's partner; who had asked the minor to masturbate him.

Following the relevant psychological examinations of the father, the daughter, the mother and the grandparents, the Court granted custody to the father, dismissing the allegation of sexual abuse claimed by the mother and considering it be a "manipulation of the minor"; also stating that the father was in a better position to provide the child with a more balanced and comfortable life, as the mother had repeatedly breached the Court's resolutions and was extremely uncooperative. In breach of the Court's decision, the mother took the child from her father's house, which gave rise to a criminal investigation, and filed an appeal against the Lisbon Family Court ruling with the Court of Appeal. The Court of Appeal

revoked the First Instance Court's decision and gave custody of the child to the mother. The judgment held that the child still needed her mother and that the loss of custody by the mother had been decided without sufficient evidence to question her capacity to continue holding custody. In addition, it pointed out that, in spite of the fact that both parents were capable of taking care of their child, "the homosexual environment of the father was not the healthiest or most suitable environment for the moral, social and mental development of the child ... and that it was better for her to live in a traditional Portuguese family which, indeed, was not the family that the father had decided to form [...]". According to the Portuguese Court: "we are in the presence of an abnormality" to which the girl cannot be subject. In light of the situation, Salgueiro da Silva Mouta sued the Portuguese Government for a breach of article 8 of the Convention, as the prevailing criteria for not granting him the custody of his daughter was clearly discrimination based on his sexual orientation.

Against the grounds claimed by the Portuguese Government, the European judges concluded that the mother and the plaintiff father had been treated differently because the father was homosexual. The ECHR proceeded to analyze whether the different treatment was justified, given that the only differences that constitute discrimination according to article 14 are those that cannot be objectively and reasonably justified, which means that there must be a legitimate purpose through proportional means. According to the ECHR, it was evident that the challenged judgment pursued a legitimate purpose: to protect the child's health and rights. What remained was to determine whether the means used to reach this purpose were appropriate. In this regard, the plaintiff also claimed that the judgment was discriminatory, as it was evident that the Court of Appeals' decision was essentially based on his homosexuality, which meant discrimination. The Portuguese Government considered that the judgment had been based on the father's homosexuality in a marginal way and, although it accepted that there were unfortunate statements in the judgment, it alleged that they did not constitute a breach of the Convention.

The ECHR analyzed the challenged judgment to determine whether the father's homosexuality was a decisive element or not for the Court of Appeal's decision, concluding positively. The unfortunate statements referred to by the Government constituted evidence that homosexuality had a specific weight in the Court's decision. According to the ECHR, it was therefore obvious that the difference established by the Court of Appeal was the result of the plaintiff's sexual orientation, a difference that is not tolerated under the Convention. The ECHR therefore could not

conclude that there was reasonable proportionality between the means and the purpose and ruled a breach of article 8, in relation to article 14. This judgment is particularly important, as it was the first time the judges in Strasbourg had considered that parental authority could not be altered due to the sexual preferences of the biological parents.

In the case *Karner v. Austria*, of 24 July 2003, relating to the subrogation of a lease agreement, the ECHR analyzed whether Austrian law (whose case law did not admit the right of subrogation in favor of the surviving member of a homosexual relationship) was compatible with the right to private life and non-discrimination on the grounds of sexual orientation. When dealing with differences in treatment based on sexual orientation, the ECHR requires the national authorities to provide convincing grounds. In other words, the ECHR applies the strictest standard of control, the principle of proportionality (and not simply a reasonable standard). The ECHR accepted the fact that family protection in the traditional sense could initially constitute a legitimate reason for a difference in treatment. However, in this case, the Austrian government had not provided any grounds to prove that to achieve such purpose required excluding people in stable homosexual relationships from the same right to which heterosexual couples were entitled. The ECHR subsequently considered that there had been a breach of the Convention however, to avoid having to deal with the issue of family life, the ECHR considered it was limited by home (another of the aspects of private life included in article 8)[25]. The *Karner* case thus considered the perspective of not only protecting individuals, but also gay couples, at least with respect to their home[26].

On 2 March, 2010, the judges in Strasbourg ruled Poland (*Kozak v. Poland*) guilty of a breach of articles 14 and 8 (home) by failing to acknowledge subrogation in favor of the surviving member of a homosexual couple in a lease agreement. Greece was also found guilty by the ECHR for reserving civil partnerships (*joint life agreement*, according to Greek tradition) exclusively for heterosexual couples (*Vallianatos and others v. Greece*, 7/11/2013). In this case, the judges explicitly referred to the breach of homosexual couples' right to family life, which was excluded by the law in question, as going much further than merely protecting the home.

25. A. DEBET, "Le refus d'accorder le droit au transfert du bail à un concubin homosexuel constitue une violation de l'article 14 combiné avec l'article 8 CEDH", *Revue des Contrats*, 1 July 2004 no. 3 p. 785.

26. Ph. FRUMER, "La discrimination fondée sur l'orientation sexuelle dans les relations de partenariat ou de cohabitation: une question d'intérêt général devant la Cour européenne des droits de l'Homme», *Revue trimestrielle des droits de l'Homme*, Brussels No. 59/2004 p. 687.

Although there was a glimpse of protection of homosexual couples' rights, homoparental filiation still resisted. In its judgment in *Fretté v. France*, of 26 February 2002, the Court reiterated its doctrine on sexual orientation as a feature of discrimination prohibited under art. 14 and, as a result, the requirement for strict justification of all differentiating and detrimental treatment, concluding that the government decisions on adoption by homosexuals have a wide margin of appreciation. The decision directly and efficiently interprets the arduous problem of the possibility and legal restraints of adoption by homosexuals. The ECHR began by pointing out that the Convention did not include the right to adopt and that the "right to respect of family life (art. 8-2) presupposes the existence of a family and does not protect merely the wish to form a family". However, the French authorities' decision had been based on the sexual orientation of Philippe Fretté and article 8, in relation to article 14, was therefore applicable. The French Government alleged that in the matter of adoption, the fundamental principle is the special protection of children ("the rights of a child limit the right to have a child") and that, even if the reason for refusing adoption had been the applicant's homosexuality, there were still doubts in the scientific community and democratic societies as to the "potential impact" on the "psychological development" of a minor in the case of adoption by homosexuals and, therefore, the States must have a broad margin of discretion. The ECHR accepted the claim: "It is indisputable that there is no common agreement on this issue" and, accordingly, that it was "natural", to leave a broad margin of discretion to the States and that the internal authorities were "better placed than the ECHR to "evaluate local needs and conditions". In their dissenting opinion, judges Bratza, Fuhrmann and Tulkens nevertheless considered that, although there was no right to adopt (and even less so for a single person), the right to respect for private life gave rise to this possibility (given that "private life" is an unrestricted concept and includes the right to establish and develop relationships with other human beings) and, above all, that the French authorities had committed the infringement of discrimination prohibited by art. 14, in relation to art. 8.1. The Fretté doctrine does not prevent a State from granting the right to adopt to homosexuals (individually or jointly), however neither does it claim that acknowledgement implies an obligation under the Convention. In this broad margin of State structure, the claim of a lack of scientific and political consensus still persists (and thus the reluctance for a possible recognition)[27].

27. For a more comprehensive analysis of the case, see: D. BORRILLO and Th. PITOIS-ETIENNE "Différence des sexes et adoption: la psychanalyse administrative contre

The Fretté was nevertheless revoked by the *E.B. v. France* judgment of 22 January 2008. A French woman, who lived in a stable relationship with another woman, was denied adoption (individual adoption being allowed in France) because her "lifestyle" did not meet the requirements to adopt a child. The woman claimed that she had been the victim of discrimination on the grounds of her sexual orientation (art. 14 of the Convention, in relation to the right to respect for private life, art. 8, which includes the decision to apply for adoption). The judgment observed similarities of the case with the Fretté decision, but also certain differences: the plaintiff lived with another woman in a stable manner, as opposed to Fretté, who lived alone. In any case, the ECHR did not assess the doctrine of a State margin of discretion in a scientifically controversial issue (the adoption of minors by homosexuals), as it did in the Fretté case. Its decision firstly analyzed the two grounds claimed by the national authorities to reject the application for adoption and found one of them reasonable, the lack of commitment on the part of the plaintiff's partner with regard to her application for adoption. It stated that the attitude of an applicant's partner (homosexual or heterosexual) can be a factor to be taken into account by the national authorities in assessing the minor's interests. However, the second grounds claimed for the rejection of the application, the absence of a mother or father reference, was unaccepted by the ECHR, as it prevented adoption by individuals for the mere reason of being homosexual. The judges went even further. Although the plaintiff's homosexuality had not been alleged as the cause for the rejection of the application for adoption and notwithstanding the validity of the grounds of a lack of commitment by the partner (and would have justified the theory that, in the case at hand, there was no discrimination based on sexual orientation, which would have been invalidated by the claim of the lack of a father or mother figure), the Court, after a close analysis of the administrative procedure, stated that homosexuality had, in fact, been a determining factor, even though implicitly and not explicitly, for rejecting the application. The ECHR specifically based its decision on the statements made by a psychologist who took part in the proceedings, who claimed that the plaintiff "had an unusual attitude of rejection towards men" and the child needed a mother as well as a further figure. The ECHR therefore concluded that there had been discrimination on the grounds of sexual orientation, stating that an application for adoption cannot be rejected on the grounds of a person' homosexuality, either explicitly or implicitly. In this respect, the *E.B. v. France* decision marked a turning point in criteria and has become the leading case in the matter. In another decision on 19 February 2013 (*X and A.C. v. Austria*), the ECHR found the Austrian

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les droits subjectifs de l'individu", *Revue de Droit de McGill*, vol 49, N° 4, October 2004, pages 1035-1056.

government guilty for rejecting adoption by a homosexual couple. If co-parental adoption is possible for unmarried heterosexual couples, it must also be possible for couples of the same sex in a similar situation[28].

Another important judgment in *J.M. v. The United Kingdom* of 28 September 2010, questioned British legislation relating to alimony, which it considered discriminatory, as it did not allow a reduction of alimony to a parent, without the custody of the minor, who lived in a homosexual relationship, while allowing the reduction for heterosexual couples.

The *Schalk and Kopf v. Austria* judgment of 24 June 2010 relating to family life is particularly significant. The criminal complaints had a stable homosexual relationship and applied to the Austrian authorities for authorization to contract marriage. The authorities rejected the application stating that marriage could only be contracted by persons of the opposite sex. Although the ECHR does not acknowledge a fundamental right to matrimony for persons of the same sex, it was admitting, for the first time, that homosexual relations should be considered as "family life" in the same way as heterosexual relations in similar situations. According to the *obiter dictum* statement:

"...the Court's case-law has only accepted that the emotional and sexual relationship of a same-sex couple constitutes 'private life' but has not found that it constitutes 'family life', even where a long term relationship of cohabiting partners was at stake. In coming to that conclusion, the Court observed that despite the growing tendency in a number of European States towards the legal and judicial recognition of stable de facto partnerships between gay people, given the existence of little common ground between the Contracting States, this was an area in which they still enjoyed a wide margin of appreciation (...). The Court notes that (...) a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then a considerable number of member States have afforded legal recognition to same-sex couples (see above, paragraphs 27-30). Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of 'family'"(...).

In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within

28. In a similar case, the ECHR reached the opposite decision and did not sanction the French Government precisely because co-parental adoption was only possible by married heterosexual couples: *Gas et Dubois v. France*, of 15 March 2012. The situation was resolved for France by the marriage equality act of 2013, which also acknowledges married couples' right to adopt.

the notion of "family life", just as the relationship of a different-sex couple in the same situation would.

One year later, in the *P.B. and J.S. v. Austria* case, the ECHR considered that legislation that did not acknowledge the right of an insured party's homosexual partner to coverage under a health insurance policy as discrimination and a breach of private life: "the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would".[29]

Similarly, in the case of *Oliari and others v. Italy*, the ECHR obliged the State in 2015 to pass legislation on civil marriages by couples of the same sex, after acknowledging that the inexistence of such an acknowledgement constituted a breach of homosexual couples' family life. In two similar cases: *Pajic v. Croatia* and *Taddeucci and McCall v. Italy* in 2016, the judges in Strasbourg reiterated the Oliari doctrine that European citizens' foreign partners should be entitled to obtain a residency permit at least under the same conditions as stable (unmarried) homosexual partners, or it would constitute a breach of private life and constitute discrimination. In the case of *rlandi and others v. Italy* of 14/12/2017, six homosexual couples complained that they could not register their respective same-sex marriages celebrated in other countries. The ECHR considered that Italy had acted in a discriminatory manner, as its legal system at the time did not even acknowledge *de facto* homosexual relationships and that it was under an obligation to find a way to legalize emotional relationships between homosexuals.

Even in more controversial issues such as gestational surrogacy, the ECHR has made valuable decisions relating to both homosexual and heterosexual couples. In 2014 and 2016, the judges of Strasbourg found the French Government guilty for not recording the birth certificates in civil registries of children born to surrogate mothers in foreign countries allowing the practice. Without acknowledging gestational surrogacy, the judges considered that depriving minors of their right to civil registration was a breach of their private life[30].

VI. THE PROTECTION OF FREEDOM OF EXPRESSION AND REPRESSION OF HOMOPHOBIA

The ECHR has not directly addressed the crime of homophobia, leaving the criminal matter to the national authorities. The first decision

29. *P.B. and J.S. v. Austria* 22-07-2010
30. *Menesson v. France and Labbassée v. France* 26/06/2014.

referring to hostility towards homosexuals was in *Salgueiro da Silva Mouta v. Portugal*, in which the ECHR considered the comments by the Portuguese court to be homophobic, however the reference did not use the term in a legal sense of infringement, but rather in a moral sense as reproachable conduct.

Homophobia is seen by the ECHR as a barrier to the freedom of assembly and association of LGBTIs and, therefore, in its decision of 21 October 2010 (*Alekseyev v. Russia*), it urged the Russian authorities to respond in relation to the Gay Pride marches in Moscow, which had been prohibited in 2006, 2007 and 2008 and to schedule the deadline of 20 January 2010 not only for the prohibition to cease, but also for Russia to guarantee the safety of the demonstrators. The sentence concluded that the law "does not clearly define the limits and its application had been arbitrary", adding that "it did not serve any legitimate public interest", but rather the stigma and prejudice that encouraged homophobia". Three years before, the judges in Strasbourg had found Poland guilty of restricting the right of assembly and association (art. 11) by not authorizing a gay march through the streets of Warsaw[31]. The ECHR demanded that the authorities not only allow demonstrations on the International Day against homophobia, but also protect the demonstrators against hostile groups: *Identoba and others v. Georgia* 12/05/2012. The excessive restrictions imposed by the Russian authorities on demonstrators supporting the LGBTI community also constituted a breach of the freedom of assembly and demonstration (*Lashmankin and others v. Russia*, 07/02/2017). We can therefore see that the ECHR demands a positive attitude from Governments, as well as cooperation in the fight for LGBTI equality and political freedom.

An important ruling on 9 February 2012 (*Vejdeland and others v. Sweden*) stated that the discourse of hate against homosexuals did not constitute an opinion worthy of the protection of article 10 of the Convention (freedom of expression), thus upholding the judgment by the Swedish Supreme Court prohibiting the distribution of pamphlets in a secondary school that were considered homophobic. In addition, religious convictions do not constitute exceptions to the equality of homosexual relationships, meaning that professionals that do not wish to treat homosexual couples in the same way, under conscientious objection, can be dismissed (*Ladele and McFarlane v. The United Kingdom* 15/01/2013). The matter specifically refers to the penalties imposed on the defendants as a result of their refusal

31. *Baczkowski and others v. Poland* (no. 1543/06) of 3 May 2007. Similarly, the Moldavian authorities were also condemned by the ECHR for prohibiting a demonstration in favor of LGBT rights (*Genderdoc-M v. Moldavia*, 12/06/2012).

to perform certain tasks that they considered were against their religion; in particular, they considered the tasks they had been assigned involved the approval, acceptance or tolerance of homosexuality and homosexual relations, which was against Christian beliefs.

In the case of *Kaos GI v. Turkey*, the ECHR held that the confiscation of copies of an LGBT magazine constituted a breach of the freedom of expression (art. 10) and the Russian legislation relating to "homosexual propaganda" was considered by the judges in Strasbourg as discriminatory (*Bayev and others v. Russia*, 20/06/20147).

Article 3 of the Convention (prohibition of inhumane and degrading treatment) also constitutes an important instrument against homophobia. In its judgment of 12 May 2015 (*Identoba and others v. Georgia*), the ECHR condemned the Georgian State authorities for failing to protect the LGBT demonstrators (on anti-homophobia day), who were violently attacked by extreme right wing groups of counter demonstrators. Turkey was also condemned for inhumane and degrading treatment of a homosexual detainee who, after having complained to the penitentiary authorities of harassment by other co-detainees, was isolated for eight months in an individual cell. In the same way, the ECHR ruled that Hungary had breached article 5 of the Convention (right to freedom and security) in relation to the arrest of a person from Iran claiming the right to asylum due to his homosexuality, without taking into account the victim's vulnerability due to his sexual orientation. In the case *M.C. and C.A. v. Romania* of 12 April 2016, the judges in Strasbourg also considered that the failure by the Romanian police to carry out a correct and circumstantiated survey on homophobic aggression was a breach of article 3. A homosexual person applying for asylum in Hungary cannot be detained with other refugees, without taking into account his particular vulnerability due to his sexual orientation (*O.M. v. Hungary, 5 July 2016*).

The Council of Europe (CoE), European Parliament (EP) and the EU Fundamental Rights Agency (FRA) have created important (non-binding) instruments in the fight against homophobia both at a material discrimination level and labor environment, as well as in other areas relating to the discourse of hate. In its Resolution of 18 January 2006, the EP "calls on all Member States to take any other action they deem appropriate in the fight against homophobia and discrimination on grounds of sexual orientation and to promote and implement the principle of equality in their societies and legal systems". One year later, the same Parliament "condemns the discriminatory remarks by political and religious leaders targeting homosexuals, since they fuel hate and violence even if later

withdrawn, and asks the respective organizations hierarchies to condemn them"[32]. In a Resolution issued in 2012, the EP "Is gravely concerned by developments which restrict freedom of expression and assembly on the basis of misconceptions about homosexuality and transgenderism; considers that EU Member States should be exemplary in the application and protection of fundamental rights in Europe" and "Regrets that laws of this kind are already used to arrest and fine citizens, including heterosexual citizens, who express support for, or tolerance or acceptance of, lesbian, gay, bisexual and transgender people; also regrets that these laws legitimise homophobia and, sometimes, violence". Since 2007 and under a mandate by the EP, the FRA has been monitoring and advising Member States on good practice in relation to the LGBTI community.

VII. CONCLUSIONS

After more than 60 years of claims filed with the ECHR, the progress in fundamental rights relating to sexual orientation has been considerable, in particular, with respect to the freedom of expression of LGBT associations in eastern European countries and the condemning of inhumane and degrading treatment.

However, the situation is far from ideal. The equality of same-sex couples is not guaranteed in either their right to marriage or filiation. Although the ECHR appears to be seriously concerned with the issue, it delegates the acknowledgement of *ius nubendi* and homo-parenthood (assistance in procreation and gestational surrogacy), to the Member States. At first glance, European consensus appears to be behind the reluctance of the ECHR, which believes that the existence of such a consensus would strengthen the enforcement of judgments. Currently, half the signatory countries of the Convention have some form of conjugal system (marriage, civil partnership ...) available to members of the same gender and thirteen acknowledge the right to marriage. The case of *Schalk & Kopf v. Austria* of 2010 constitutes a major step forward, given that, for the first time, the ECHR considered that family life exists between stable couples of the same sex, although the acknowledgement did not grant the right to marriage. Although the interpretative text of the *European Charter of Fundamental Rights* does not prohibit States from extending marriage, neither does it make it mandatory. The situation is therefore in the hands of national Parliaments and the capacity of different groups to mobilize public opinion and political parties.

32. Resolution of the European Parliament, of 26 April 2007, on homophobia in Europe.

Significant progress has also been achieved by the European Court of Justice (ECJ) which, in two major rulings, *Maruko*[33] (2008) and *Romer*[34] (2011), considered that gay couples in civil partnerships should have the same pension rights as married heterosexual couples. Recently, in the case of *Coman v. Romania*, the advocate general of the ECJ considered that same sex spouses should be recognized in the entire Union. The Court has yet to issue a ruling.

The policy of European consensus on the issue continues to justify the difference in treatment of same sex couples and heterosexual couples[35]. Although family life and social rights of homosexual partnerships are protected, only the right to marriage will put an end to discrimination, as claimed in the dissenting vote of judges Rozakis, Spielmann and Jebens in the *Schalk & Kopf v. Austria* case, given that after establishing the existence of a comparable situation and pointing out that the differences based on sexual orientation must be justified by particularly solid grounds, the ECHR should have concluded that there had been a breach of article 14, in relation to article 8, as the Austrian Government did not provide any reason to justify the difference in treatment and merely invoked its margin of appreciation. However, as pointed out by the dissenting judges, in the absence of solid grounds, the ECHR should not have accepted this reason. They therefore concluded that "the presence or absence of a common denominator in the legal systems of t States of the Council of Europe is a factor devoid of relevance that should only come into play secondarily with respect to the margin of appreciation. Indeed, it is only when the national authorities provide justifications that the ECHR can declare itself convinced, taking into account the presence or absence of a common denominator", however as the Austrian Government did not provide convincing justification, the margin of appreciation should not have protected it from a discriminatory provision. In its judgment in the *X and A.C. v. Austria* case of February 19, 2013, the ECHR appears to have taken notice of the dissidence by condemning a State in spite of the absence of consensus on the adoption by a second father under the framework of a homosexual partnership.

In general terms, it can be concluded that no public authority has provided sufficient legal grounds to justify the exclusion of gays and

33. CJCE 1 April. 2008, *Maruko, aff.* C-267/06, Rec. CJCE I-01757
34. European Court of Justice Judgment. Case C-147/08 of May 10, 2011: Jürgen Römer / Freie und Hansestadt Hamburg)
35. *See the thesis of Jonatan Cruz Angeles, "Teoria del consenso and margen de apreciación de los Estados en materia de orientación sexual: Estudio comparado del ECHR and la CIDH", Universidad de Jaén 2016.*

lesbians from the right to marriage, adoption or access to assisted reproduction techniques, but rather morality arguments that refer to tradition, however neither tradition nor morality are sources of Law and the grounds of consensus should therefore be considered as inappropriate, especially at a time when European history is driven by populist and integrating movements of all kinds.

VIII. LIST OF SELECTED CASE LAW

1. JUSTIFICATION OF CRIMINALIZATION (1955-1977)

10 October 1955, first judgment by the European Human Rights Commission on the issue of homosexuality. Other subsequent decisions: 104/55; 135/55; 167/56; 261/57; 530/59; 600/59; 704/60; 1307/61...

2. THE TRANSITION (1977-1981)

- Decision by the Commission to admit a claim relating to homosexuality (7-07-1977).
- Resolution 756 of the Council of Europe (1981) "relating to the discrimination of homosexual individuals".
- Recommendation 934 of the Council of Europe (1981) "relating to the discrimination of homosexual individuals"

3. PARTIAL DE-CRIMINALIZATION (1981-1997)

- *Dudgeon v. The United Kingdom and Northern Ireland*, 22-10-1981.
- *Norris v. Ireland*, 26-10-1988.
- *Modinos v. Cyprus*, 22-04-1993.

Equality (as of 1997)

- *Sutherland v. The United Kingdom* (Commission Decision dated 1 July 1997)[36]
- *Lustig, Prean and Beckett v. The United Kingdom*, 27-12-1999
- *Smith and Grady v. The United Kingdom*, 27-12-1999
- *Salgueiro da Silva Mouta v. Portugal*, 21-03– 2000

36. A law of 30 November 2000 abolished the age difference for homosexual relations in the United Kingdom (Cancellation of case EHRC 27 March 2001).

- *A.D.T. v. The United Kingdom*, 31-07-2000
- *Fretté v. France*, 26-05-2002
  - –.*L and V v. Austria*, 9-01-2003 and *S. L. v. Austria* 09-01-2003
  - *Karner v. Austria*, 24-07– 2003
  - *E.B. v. France*, 22-01-2008
  - *Porubova v. Russia*, 08-10-2009
  - *Kozak v. Poland*, 02-03-2010
  - *Schalk & Kopf v. Austria*, 24-06-2010
  - *P.B. & J.S. v. Austria*, 22-07-2010
  - *J.M. v. UK*, 28-09-2010
  - *Santos Couto v. Portugal*, 21-09-2010
  - *Vejdeland and others v. Sweden*, 09-02-2012
  - *X and A.C. v. Austria*, 19-02– 2013
  - *Vallianatos and others v. Grecia*, 07/11/2013
  - *Oliari and others v. Italy*, 21/07/2015
  - *Taddeucci and McCall v. Italy*, 30/06/2016
  - *O.M. v. Hungary*, 05/07/2016
  - *Pajic v. Croatia*, 23/02/2016

4. AGAINST HOMOPHOBIA

- *Baczkowski and others v. Poland*, 03-05-2007
- *Alekseyev v. Russia*, 21-10-2010
- *Genderdoc-M v. Moldavia*, 12/06/2012
- *X. v. Turkey*, 09/10/2013
- *Mladina D. D. Ljubliana v. Slovenia*, 17/04/2014
- *Identoba and others v. Georgia*, 12/05/2015
- *M.C. and C. A. v. Romania*, 12/04/2016
- *Kaos GI v. Turkey*, 22/11/2016
- *Bayev and others v. Russia*, 20/06/2017

- *Lashmankin and others v. Russia*, 07/02/2017

Resolutions and recommendations by the Council of Europe and European Parliament:

- Resolution of the European Parliament relating to discrimination in the workplace, March 13, 1984.
- Resolution of the European Parliament A3-0028/94 of February 8, 1994 on equal rights for homosexuals and lesbians in the European Union.
- Resolution of the European Parliament B4-824 and 0852/98 of December 17, 1998 referring to equal rights for homosexual persons and lesbians in the European Union.
- Article 13 of the Treaty of Amsterdam.
- Directive 2000/78/EC of the Council of 27 November 2000 relating to the establishment of a general framework on equal treatment in employment and occupation.
- Action program against discrimination (2001 – 2006).
- Recommendation by the European Parliament of July 5, 2001 in favor of homosexual rights (in particular, those of same sex partnerships).
- Article 21 of the European Charter of Fundamental Rights (included in the European Constitution).
- Recomendation 211 (2007) du Congrès des pouvoirs locaux et régionaux du Conseil de l'Europe sur la "Liberté d'expression et d'assemblée pour les lesbiennes, gays, bisexuels et transsexuels".

Equality and the fight against homophobia:

- Parecer n.° 216 (2000): Proyecto de protocolo n° 12 por el cual la Convención Europea de Derechos Humanos propone la protección de las personas homosexuales and lésbicas contra la discriminación fundada en la orientación sexual.
- Resolution of the European Parliament against homophobia of 19 January 2006.
- Resolution of the European Parliament, of 4 February 2014, sobre la hoja de ruta de la UE contra la homofobia and la discrimination por motivos de orientación sexual e identidad de género (2013/2183(INI))

- Programa de Estocolmo, Unión Europea 02-12-2009, medidas contra el racismo, la xenofobia, el antisemitismo and la homofobia.
- Recomendación CM/Rec (2010) del comité de ministros del consejo de Europa a los Estados miembros sobre medidas tendientes a combatir la discriminación basada en la orientación sexual and la identidad de género, 31-03-2010.
- Recomendación 1728 (2010) de la asamblea parlamentaria del Consejo de Europa sobre la discriminación basada en la orientación sexual e identidad de género, 29-04-2010.
- Discrimination on grounds of sexual orientation and gender identity in Europe. Council of Europe, September 2011
- Resolution of the European Parliament, de 24 de mayo de 2012, sobre la lucha contra la homofobia en Europa.
- Directrices del Consejo de Europa para promover and proteger el disfrute de todos los derechos humanos por parte de las personas lesbianas, gais, bisexuales, transgénero e intersexuales (11153/13)
- Protección contra la discriminación por motivos de orientación sexual, identidad de género and características sexuales en la UE: análisis jurídico comparativo (actualización de 2015) Agencia derechos fundamentales de la Unión Europea.
- Also see: Manuel de droit européen en matière de non discrimination FRA 2010