

ILGA-Europe submission to the Convention on the Future of Europe **Brussels, 27 June 2002** (revised version)

ILGA-Europe welcomes the establishment of the Convention on the Future of Europe and believes that the consultation of civil society is a positive and necessary approach for the negotiation of the Union's future.

ILGA-Europe, the European Region of the International Lesbian and Gay Association, is a European NGO for national and local lesbian, gay, bisexual and transgender (LGBT) organisations across Europe. ILGA-Europe works for human rights and against sexual orientation and gender identity discrimination at European level. One of its main objectives is to work towards an equal and inclusive Europe that respects fundamental rights as the basis of democracy and secures that everyone can live in equality and free from any kind of discrimination.

Millions of people in Europe still experience discrimination on the grounds of their sexual orientation or gender identity.¹ The unequal treatment of homosexual and heterosexual relations in criminal law has been found to be a breach of the European Convention on Human Rights. Yet the penal codes of some Member States and accession countries still discriminate against gays and lesbians. LGBT persons are still denied the fundamental right to found a family and to marry in some Member States and all accession countries. The non-recognition of same-sex couples legally recognised in their state of origin by other Member States is an unacceptable obstacle for LGBT persons in exercising their right to free movement within the Union, one of the most basic and principle rights of EU citizens.

1) Fundamental rights at the heart of Europe

Protection of fundamental rights must be a cornerstone for the future development of the European Union, most especially in an enlarged Union. The 2000 Charter of Fundamental Rights marked an important step forward in recognising the relevance of human rights protection to European integration. In particular, the Charter places strong emphasis on equality as a fundamental right, and the need to end all discrimination, including that based on sexual orientation. However, the ambiguous legal status of the Charter, as well as its limited material scope, makes it necessary for the Convention to take the next steps in providing concrete and clear protection of human rights for all people, explicitly including LGBT persons, in the Union.

The only satisfactory response is the full incorporation of the Charter's provisions in the EU founding Treaties. There should be no remaining doubt that these are legally binding standards

¹ EU law regards discrimination against transgender persons as a form of sex discrimination. This principle was established by the Court of Justice in the 1996 case of *P v S and Cornwall County Council*, where it was held that the dismissal of an individual following gender reassignment was unlawful discrimination on the grounds of her sex. (Case C-13/94, *P v S and Cornwall County Council* [1996] ECR I-2143). "Gender identity discrimination" is the term now generally used to describe discrimination against transgender persons.

that commit the Union and its Member States, and which individuals can enforce. Moreover, the incorporation process should be the opportunity to strengthen the Charter's provisions. There should be made an explicit reference to non-discrimination on grounds of gender identity, the right of LGBT persons to found a family, the protection for and recognition of family diversity and the right of same-sex couples to marry.

The European Union must also resolve the ambivalence surrounding its commitment to the regional human rights standards established by the Council of Europe. Therefore, the EU should accede to the European Convention on Human Rights, including Protocol 12 on the right to non-discrimination, as well as the 1996 Revised European Social Charter.

ILGA-Europe calls on the Convention to pursue the following objectives:

- to incorporate the Charter of Fundamental Rights into the provisions of the founding Treaties
- to strengthen the Charter's provisions, including a better recognition of the human rights of LGBT people
- to accede to the European Convention on Human Rights, including Protocol 12
- to accede to the Revised European Social Charter

2) Integration of the principle of equality

The right to equality has advanced significantly within EU law, most remarkably by the insertion in 1997 of Article 13 in the EC Treaty of 1999. The Council swiftly began to implement the Article 13 provisions through the adoption of Directives 2000/43/EC and 2000/78/EC. ILGA-Europe is pleased with this progress; however, there is a need for further steps.

First, an equality hierarchy continues to exist, with different levels of protection for different grounds of discrimination. Gender identity and sexual orientation discrimination are receiving a lower level of protection than, for example, discrimination based on racial or ethnic origin. This ignores the overlapping nature of discrimination in many instances. There is a need for a clear commitment in the Treaties to 'equal and effective protection against discrimination on any ground', as can already be found in Article 26 of the International Covenant on Civil and Political Rights.

Second, the incorporation of the Charter must be accompanied by a positive duty on the EU's institutions and bodies, as well as the Member States, to promote equality and to combat discrimination on any ground throughout all areas of policy and law.

Third, Article 13 must be retained, but strengthened in order to confer legal competence on the Union to integrate the principle of equality into all EU policies. In particular, there will be a need to legislate in the future to deal with forms of gender identity and sexual orientation discrimination not currently regulated at EU level (for example, in education, healthcare, housing and access to goods and services).

ILGA-Europe calls on the Convention to pursue the following objectives:

- to commit the Union to integrate the principle of equality for all, ensuring the effective protection against all forms of discrimination
- to agree a positive duty on the Union and its Member States to promote the fundamental principle of equality and to combat discrimination
- to strengthen Article 13, in particular by ensuring it applies to the full scope of EU law and includes express reference to discrimination based on gender identity.

3) The EU's role in promoting human rights and democracy in the world

EU and the Member States are bound to comply with international human rights law and standards. Over the years the EU has become an important international actor. It is therefore increasingly important that the EU adopts effective measures to enforce a consistent approach towards the promotion and realisation of human rights and democracy through out the world.

Since 1992 the EU has included a human right clause in all its international agreements with third countries. If the EU is to promote human rights and democratisation in a coherent way these human rights clauses must be given effect and take primacy over economic and commercial interest. Open discrimination and exclusion of LGBT people and other minorities exist in many third countries. In order to stop human rights abuse it is essential that the human rights clauses are promoted in an open dialogue with third countries.

ILGA-Europe calls on the Convention to pursue the following objectives:

- to ensure that the EU's commitment to the realisation of human rights and democracy through out the world is put at the core of the EU's Common Foreign and Security Policy
- to ensure that the human right clauses are transformed into an efficient and enforceable instrument

4) Strengthening the principle of democracy in the EU

ILGA-Europe welcomes the initiatives in the Laeken Declaration to bring all citizens closer to Europe and the inclusion of LGBT communities in the consultation process within the work of the Convention.

NGOs have an important role to play in connecting the citizens to the EU. A structured civil dialogue will reinforce the role of the citizens and the democratic legitimacy in the policy making process. This should include co-operation and communication with specific institutional expert groups, whose work and function are currently not transparent. In particular, there is an urgent need for greater openness in the internal workings of the Council. In order to make a constructive contribution to the negotiation of EU legislation, European civil society needs full access to Council committees and their documentation.

In strengthening the principle of democracy within the EU it is also important that the role of the European Parliament is strengthened by giving it co-decision powers notably in the areas involving non-discrimination measures.

ILGA-Europe calls on the Convention to pursue the following objectives:

- to insert a legal base for consultation of civil society in the Treaties
- to ensure a greater transparency within the work of EU institutions
- to extend the co-decision procedure and to ensure (full) parliamentary control of EU policies and actions

ILGA-Europe calls upon the Convention to pursue the following objectives:

Fundamental rights at the heart of Europe

- to incorporate the Charter of Fundamental Rights into the provisions of the founding Treaties
- to strengthen the Charter's provisions, including specific reference to:
 - non-discrimination on the grounds of gender identity
 - the right of LGBT persons to found a family
 - the protection for and the recognition of family diversity
 - the right of same-sex couples to marry
- to accede to the European Convention on Human Rights, including Protocol 12
- to accede to the Revised European Social Charter

Integration of the principle of equality

- to commit the Union to integrate the principle of equality for all, in so doing removing the current hierarchy of protection for different grounds of discrimination and ensuring equal treatment of homosexuals and heterosexuals in the criminal code
- to agree a positive duty on the Union and its Member States to promote the fundamental principle of equality and to combat discrimination
- to strengthen Article 13, in particular by ensuring it applies to the full scope of EU law and includes express reference to discrimination based on gender identity

The EU's role in promoting human rights and democracy in the world

- to ensure that the EU's commitment to the realisation of human rights and democracy throughout the world is put at the core of the EU's Common Foreign and Security Policy
- to ensure that the human right clauses are transformed into an efficient and enforceable instrument

Strengthening the principle of democracy in the EU

- to insert a legal base for consultation of civil society in the Treaties
- to ensure greater transparency within the work of EU institutions
- to extend the co-decision procedure and to ensure full parliamentary control of EU policies and actions