

The Global Politics of LGBT Human Rights

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“Recent Progress at the European Level and its Impact on the National and International Levels”

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When I speak on recent progress at the European level, I will limit my presentation to the Council of Europe and the European Union. This is basically caused by the time limit I have. There is also a third international organisation working at the European level, the Organization for Security and Co-operation in Europe (OSCE), which I will ignore on this occasion, although indeed there has been substantial lobbying towards this organisation by LGBT groups for more than two decades but the achievements at the OSCE are not so much rights-based but rather in “soft areas” such as recommendations, awareness raising and naming and shaming member states.

With regard to progress for LGBT rights, the Council of Europe has been much more important than the European Union. However, there are some quite strong links and interrelations between the developments within both organisations, as I will explain in a moment. Such important and crucial links do exist also between the national levels and the European level.

In my view, of the two most relevant achievements made at the European level we owe one to the Council of Europe, and the other one to the European Union.

The fact that Europe, today, is free from discrimination in the criminal law is certainly the biggest advancement, and this is due to the Council of Europe.

The other great progress is that all 27 member states of the European Union have enacted legislation banning discrimination based on sexual orientation at the work place.

Let me start with the Council of Europe and its role in eradicating anti-homosexual penal code provisions throughout all its 47 member states. This was made possible through successful applications to the European Court of Human Rights claiming that discriminatory criminal law provisions would be in breach of the European Human Rights Convention. These complaints to the Strasbourg court clearly show the influence between the national and the European levels and how the victories at the national level – through the European level – would also radiate to other national levels.

The jurisprudence of the Strasbourg court in LGBT cases, by the way, is a very striking example of how human rights are subject to political and societal developments, and that human rights are certainly not static but subject to wide and broad interpretation. It is amazing to see how differently the very same provision in the Convention can be interpreted over time. With regard to LGBT rights, the Strasbourg court has certainly not been very progressive, running in front of developments, on the contrary, it rather lagged behind and in most cases only ruled in favour of LGBT people when the issue in question had reached European-wide consensus.

A good example for this is the first big victory in Strasbourg: In 1981 the Court ruled, in *Dudgeon against the United Kingdom*, that the total ban on homosexual activity in Northern Ireland was in breach of the Convention. In the two decades before, Strasbourg had rejected a couple of similar complaints as “inadmissible” as the Commission, at that time in place, could not see any violation. When the positive judgment finally was made in 1981, only three other Council of Europe member states – Ireland, Cyprus and Liechtenstein – and some other territories under the British Crown still had a total ban while all the other member states had already repealed such legislation. So, this judgment was everything else than a landmark decision.

However, the judgment in *Dudgeon* later turned out to be of great significance because after the collapse of the Soviet Union and Yugoslavia, there were suddenly more than a dozen new states with a total ban on homosexuality queuing up to join the Council of Europe in the 1990s. The European LGBT movement lobbied that these countries be not allowed to join with law provisions obviously in breach of the Human Rights Convention. And this lobbying turned out to be successful: In the following 15 years, the total ban on homosexual behaviour was repealed in 19 European countries and

dependent territories: Albania, Azerbaijan, Armenia, Bermuda, Bosnia-Herzegovina, Estonia, Georgia, Gibraltar, Guernsey, Jersey, Latvia, Lithuania, Macedonia, Isle of Man, Moldova, Romania, Russia, Serbia, and Ukraine.

A similar story can be told regarding the other “big” criminal law issue – the discriminatory higher age of consent for homosexual than for heterosexual acts. Such provisions had existed in many European countries. Again for decades, until 1995, the European Human Rights Commission had rejected all applications filed against various countries as no violation of the Convention could be seen in such a higher age of consent.

It was only in 1997 that the European Commission of Human Rights ruled – in *Sutherland – again – versus United Kingdom* – that such a discriminatory provision violated the Convention. At that time only a third of the Council of Europe member states still had such provisions in their criminal code. Since the UK government did not challenge the opinion of the Commission and agreed to amend the law, the case never reached the Court of Human Rights. It was only in 2003 that also the Court – in judgments against Austria – ruled that a discriminatory age of consent was a breach of the Convention.

Since most of the former East-bloc countries had joined the Council of Europe at that point, the *Sutherland* decision could not be used to block the admission of these countries to the Council of Europe. However, this judgment was used – by the European LGBT movement – to demand the repeal of such discriminatory laws as a precondition for accession to the European Union. And this demand was again successful. The European Union, screening all accession countries for their human rights record, insisted that these countries, in view of the so-called Copenhagen accession criteria, had to abolish any discriminatory legislation against lesbians and gays. Here, the LGBT movement had a very strong ally in the European Parliament. In September 1998 the EP adopted a resolution stating “that it will not give its consent to the accession of any country that, through its legislation or policies, violates the human rights of lesbians and gay men” Subsequently, six countries – Bulgaria, Cyprus, Estonia, Hungary, Latvia, Lithuania and Romania – had to repeal their anti-gay law provisions before their accession to the EU in 2004 and 2007 respectively.

Therefore, we can proudly say today that discrimination in the criminal law provisions has been eradicated throughout Europe.

Before moving over to the European Union, let me just highlight one more case before the Strasbourg court – the first positive decision in an application dealing with same-sex partnership rights. The case – *Karner versus Austria* – concerned a gay man who was evicted from the apartment of his deceased partner because due to the jurisprudence of Austria's high court, he was not entitled to take over the lease contract from his deceased partner. While the wording of the Austrian Rent Act is neutral and does not distinguish between same-sex and opposite-sex non-married domestic partners, the Austrian high court had argued that the neutral language was for linguistic but not legal reasons.

With the judgment in *Karner versus Austria* the Strasbourg Court also changed its previous approach to rule in favour of LGBT rights only when these already have been mainstreamed and become standard throughout Europe. Because in July 2003, when the Court handed down its judgment, only 12 of the then 45 Council of Europe member states had adopted some form of legal recognition of same-sex partnerships, thus in theory having 33 countries to adapt to this decision. With this judgment, therefore, the Court, for the first time, has clearly been ahead of the legal developments in Europe, and not just lagging behind.

The significance of the Karner judgment, however, not only lies in its geographical potential but also in its potential scope of similar application. Because the Court argued that a government must have convincing and weighty reasons to justify a different legal treatment of same-sex and opposite-sex domestic partners. There is hardly any legal area where such weighty reasons could be put forward to exclude same-sex couples from certain rights granted to opposite-sex non-married couples. So in reality, the Karner decision means nothing less than that all now 47 member states of the Council of Europe must grant the same rights to non-married same-sex partners as they grant to non-married opposite-sex partners.

So, let's move on to the European Union:

For a long time, the European Union has been, in the first place, an economic community as was also reflected in its previous name: European Economic Community – EEC. Human Rights were considered to be the realm of the Council of Europe.

With the increasing economic integration, however, there has been a growing recognition of the need for more common policies in the social field because these issues cannot be completely separated from each other.

One aspect of creating fair and equal conditions of competition for all employers and companies throughout the Union is to have also harmonised provisions to prohibit discrimination against certain groups of the population. Take for example equal pay for women and men: Obviously, in countries where women could legally be paid less than men, companies would have an advantage towards other countries where such inequality is illegal. But of course, the same is valid for other groups, too.

In addition, continuing high levels of unemployment and the growth of poverty and social exclusion in the EU in the 1990s, have also contributed to an increased recognition that the EU should address socio-economic problems. And moreover, non-governmental organisations (NGOs) active in the areas of social and human rights have become increasingly active in lobbying at the European level and have pressed for change.

Later, in promoting the European social model, the European Union has committed itself to fight social exclusion of certain exposed or vulnerable groups, also as part of the strategy to make the Union a more competitive and knowledge-based economy. Certain EU programmes are designed to address social inclusion of such groups and to create new job opportunities for them.

Another relevant factor in this context was the debate about EU citizenship. One of the – limited – rights any EU citizen enjoys is the right to move freely and work within the whole territory of the Union. And this is one of the most basic rights. And again, there has soon been a growing acceptance that the freedom of movement could not be fully

enjoyed by all citizens without addressing disparities in the level of protection against any form of discrimination.

The European Parliament has played a significant role in pushing issues of discrimination and human rights onto the political agenda. It has adopted comprehensive resolutions highlighting the effect and extent of various forms of discrimination, including based on sexual orientation, and demanded action to combat it.

In May 1999 the Treaty of Amsterdam came into force. For lesbians and gays, this treaty was a real milestone: For the first time, discrimination on the grounds of sexual orientation was explicitly mentioned not only in a Treaty of the European Union, but in any international treaty. Article 13 provides for the European Union to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

As one of the first measures, the Union adopted a directive “establishing a general framework for equal treatment in employment and occupation” in 2000. As mentioned in the beginning, all 27 member states had to enact legislation banning discrimination based on sexual orientation at the work place. Because of its repercussions on so many countries, this directive must be regarded as the most important single piece of legislation for gay and lesbian rights and a historic achievement.

Let me also mention that the EU Charter of Fundamental Rights adopted at the Nice EU Summit in December 2000 is the first international human rights charter that explicitly lists sexual orientation as a non-discrimination category. However, as you all know, the charter is not yet legally binding as it still is waiting for its ratification as part of the EU Constitution or Reform Treaty.

All these lobbying work at the European level was spearheaded and co-ordinated by ILGA-Europe, the European Region of the International Lesbian and Gay Association. The establishment of ILGA-Europe, in 1996, coincided with the debates, at EU level, of these important issues just mentioned: Article 13, the framework directive in employment, and the EU Charter. It was extremely important that ILGA-Europe got

involved in all these discussions to make sure that sexual orientation got expressly included in each of these legal instruments as a non-discrimination ground.

Lucky coincidence again, the European Union not only adopted the framework directive but, as an additional measure, a vast Community Action Programme to combat discrimination. In this programme running from 2001 to 2006, the European Union had earmarked almost 100 million euros to support the fight against discrimination. A couple of European NGOs, such as ILGA-Europe, started to receive core-funding under this programme to carry out their tasks.

This has made it possible for ILGA-Europe to set up an office in Brussels in 2000 and to hire its first full-time employees. ILGA-Europe has become *the* European LGBT lobby. One important feature of ILGA-Europe is that it has members in almost all European countries, and that it has a network of strong member organisations lobbying jointly on European issues both at the European and the national levels – the latter being as important. To be successful it is indispensable to supplement the lobbying in Brussels by advocacy work at the national level.

The progress made throughout Europe has also impacted on the European Union's attitude towards LGBT human rights globally. More resources are now available to be used at the global level. Especially large national LGBT organisations in countries where legal change has also been done with regard to partnership or even marriage rights, do not need to focus mostly on national issues anymore – they can commit more resources for international activities. This applies for example for Scandinavia, the Netherlands, but also Great Britain, Spain or Germany. Also the governments of these countries have been influenced by the progress made at national level and are more inclined now to combat human rights violations against LGBT people on a global scale.

In recent years, both the EU and the member states have also increasingly been willing to take up LGBT rights in bilateral dealings, negotiations and agreements with third countries. The commitment of the EU to fight against violations of the human rights of LGBT people world-wide has considerably increased, as can be seen by the efforts to raise this issue within the UN Human Rights Council or in supporting the applications for UN ECOSOC status submitted by both ILGA, ILGA-Europe and some of its member

organisations. Last December, the long-year struggle of some LGBT organisations finally had a happy-ending: Both ILGA-Europe and the national LGBT organisations of Denmark and Germany were granted ECOSOC status. This July the Canadian *Coalition gaie et lesbienne du Québec (CGLQ)* and the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights (RFSL) were granted ECOSOC status. The above-mentioned governments have been very crucial in supporting the applications for ECOSOC status, lobbying themselves in a very positive and active way for this within the UN system.

To conclude I would like to stress that Europe has become the most advanced region of the World in terms of LGBT human rights and equality. This progress was made possible through the concerted lobbying work of a strong LGBT movement at national and local level, spearheaded and co-ordinated by ILGA-Europe, with the support of the European Parliament, the European Commission and progressive governments in many European countries, and this extremely positive development has also had a very positive impact of Europe's attitude regarding these issues at the global level.