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The European Court of Human Rights

by Kurt Krickler

In Europe we have two pan-European courts which people, including journalists, often confuse: one is the *European Court of Justice,* which is the court of the European Union, based in Luxembourg and which only rules in matters of European Union law; the other one is the *European Court of Human Rights* based in Strasbourg, France, which is a body of the Council of Europe, an international organisation that today comprised 46 member states, i. e. all European states except from Belarus and the Vatican.

The two courts are often simply referred to by the name of the city where they have their headquarters. So one would say “Luxembourg has ruled…”, “Strasbourg has ruled…”.

I am only talking about Strasbourg, the European Court of Human Rights, and how LGBT people and the LGBT movement in Europe have used it to advance their human rights.

The Court is interpreting and ruling on the basis of the “Convention for Protection of Human Rights and Fundamental Freedoms”, mostly referred to as the “European Convention on Human Rights”, and on a dozen or so of additional “Protocols”. The Convention originally dates from 1950, and stands today in its version as amended by Protocol 11 on 1 November 1998. There was one relevant major change in 1998: The two organs that had existed before, the European Commission of Human Rights and the European Court of Human Rights, were merged into one permanent court. I am not going into the details but it is important to know that before 1998 this Commission had existed, because it will often pop up later in my presentation as it used to be the body that received complaints of individuals in the first place and whose decisions or opinions subsequently could be challenged before the Court. Also today, after the 1998 reform, a kind of appeal system exists as the Court usually would decide on individual complaints in Chambers of seven judges; and in exceptional cases, a judgement of such a chamber, upon request of any party to the case, can be referred to a Grand Chamber of seventeen judges. The whole Court as such is made up of 46 judges, one from each of the Council of Europe member states.

Under the European Convention, discrimination against LGBT people has usually been challenged under its Article 8 guaranteeing the right to respect for private and family life, in some cases under Article 11, freedom of assembly and association. One of the basic flaws of the European Convention has been and still is the fact that it does not contain a free standing non-discrimination clause. Article 14 only secures the non-discriminatory enjoyment of those rights and freedoms set forth in the other articles of the Convention. This situation is now being remedied through Protocol 12 to the Convention which constitutes such a free standing equality provision, but it will only apply to a member state after having individually ratified the Protocol. So countries actually can choose to guarantee protection under such a general non-discrimination article or not. What it

means in practice, I will explain later when giving examples of relevant complaints to the Court. So far, only a dozen of the 46 member states have ratified Protocol 12.

Although sexual orientation and gender identity are not explicitly mentioned among the protected grounds listed in Article 14, the Court has already ruled in various judgments that these grounds fall under the “other status” ground.

The jurisprudence and the case-law of the European Court of Human Rights in LGBT cases are 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 and standard.

A good example for this is the first big victory of LGBT people in Strasbourg. In 1981 the Court ruled, in the complaint *Dudgeon against the United Kingdom,* that the total ban on homosexual activity, i. e. also among consenting adults, in Northern Ireland was in breach of the Convention. In the two decades before, Strasbourg had rejected a couple of similar complaints against a total ban 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 revolutionary or landmark decision.

Funny enough Liechtenstein was allowed to join the Council of Europe three years earlier, in 1978, under the reservation that its total ban on homosexuality would be exempted from the Convention’s applicability. And bitter enough, the judgment in Dudgeon versus UK had no direct effect on the same provisions in Ireland and Cyprus which, inherited from British colonialism, were even identical in their wording. So citizens from these two countries had to go through the same long procedure – complaints in Strasbourg usually take 5-7 years, and since a complainant must first exhaust all domestic remedies, the average duration of such a legal battle is around 8-10 years. In 1988, David Norris finally won against Ireland, and in 1993 Alecos Modinos against Cyprus. The lack of any mechanism to force other countries to change the same or similar legislation that has been found to be in violation of the Convention in the case of another country is another important flaw of the Council of Europe system.

However, the judgments in Dudgeon, Norris and Modinos 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. And here, thanks to the political lobbying efforts of the International Lesbian and Gay Association and its European members, the Council of Europe insisted that any country wishing to be admitted to the organisation would have to repeal its total ban on homosexual acts. This was an easy argument after Dudgeon, Norris and Modinos: Countries whose criminal laws would be in violation of the Convention could simply not be admitted. A similar reservation as Liechtenstein had

made was not possible any longer after these three judgments. And so, in the last 15 years, the total ban on homosexual behaviour was repealed in 19 other European countries and dependent territories: Albania, Azerbaijan, Armenia, Bermuda, Bosnia-Herzegovina, Estonia, Georgia, Gibraltar, Guernsey, Jersey, Latvia, Lithuania, Isle of Man, Macedonia, Moldova, Romania, Russia, Serbia, and Ukraine. Today there is no country or territory left in Europe with a total ban.

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, and as late as in 1995, the Commission had rejected all complaints against various countries as "inadmissible" as no violation of the Convention could be seen in a higher age of consent. It was only in 1997 that the European Commission on Human Rights ruled – in *Sutherland 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 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 is a breach of the Convention. Again, citizens of different countries concerned had to go through the whole process since there is no automatic mechanism to provide for a judgment against one country to be applicable for other countries, too. The Sutherland decision, however, was used by the European LGBT movement to demand the repeal of such discriminatory laws as a precondition for accession to the European Union (for accession to the Council of Europe it was too late as most of the countries concerned had already joined the Council of Europe). And this 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, must abolish any discriminatory legislation against lesbians and gays. And that has subsequently happened in Bulgaria, Cyprus, Estonia, Hungary, Latvia, Lithuania and Romania before their accession to the EU in 2004 or in 2007 in the case of Bulgaria and Romania. Today, Albania and Serbia are the only European countries with higher age of consent legislation.

So, for Europe we can say that discrimination in the criminal law is more or less completely eliminated.

Before turning to the Court's case law regarding the topical issue of recognition and equality of same-sex partnerships, let me just flag up a few interesting and relevant other LGBT cases the Court had to examine and decide upon.

In 1997, there was a backlash when the Court did not find a violation of the Convention by the United Kingdom in a case that involved SM sex between gay men. Although all the accused man and witnesses declared that no activities happened against the will of the people involved, that nobody was harmed and that everybody had enjoyed the SM practices, the men were sentenced for physical injury or bodily harm by British courts. The Strasbourg Court argued that it is a matter for the state to fix the limits of tolerable harm even in cases where the "victim" (sic!) consents to it.

In 1999 the Court delivered again a so-called "landmark" decision that actually came rather late. In a complaint against the United Kingdom the Court ruled that the ban for

gays and lesbians to work in the British army was a violation of their right to respect for private life. Again, with this judgment, the Court only overruled a previous decision, handed down by the Commission 16 years earlier, in 1983, when it had upheld the ban on homosexuals serving in the British armed forces.

In 2000, Britain was again convicted by the Court that found the total ban on homosexual group sex was a violation of Article 8 of the Convention. At that time, a British law had banned homosexual activity of more than two men, even if all persons involved were consenting adults and the activity took place in private.

Let's turn now to cases involving civil law provisions and same-sex partners. In this field again, the Commission held very conservative opinions and positions and rejected basically all complaints as "inadmissible" in the 1980s and up until 1998 when the Commission ceased to exist. Since a complainant, under the old system, could not appeal an inadmissibility decision to the Court, none of these cases involving same-sex partners has ever made it to the Court in the old system. Complaints rejected by the Commission concerned for example the refusal of family union with a foreign same-sex partner or joint parenting rights regarding the same-sex partner's child.

This only changed very late in the 1990s, in December 1999 – just ten days before the year-dates would start to get a "2" as the first digit. It almost seemed as the Court wanted to signal with this Christmas present that a new era would begin for LGBT rights, too. On 21 December 1999 the Court published its judgment in a complaint against Portugal filed by a man who was deprived of his parenting right, he originally had been granted after divorce from his wife, after his coming-out as a homosexual. The Court ruled that there was a violation of Article 8 (right to respect for family and private life).

However, there was a kind of backlash in 2002 when the Court ruled in a complaint against France and did not find a violation of Article 8 in the French authorities' refusal to grant an adoption licence to a gay man. One of the arguments put forward was that there is no right to adoption set out under the Convention, and therefore there cannot be a violation of the Convention. Had Protocol 12 – the free standing equality clause I mentioned before – been in force already, the Court would have been forced to rule differently as single heterosexual man can get an adoption licence in France.

In July 2003, the Court handed down its first positive decision in a same-sex partnership case. 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 but the Austrian high court had argued that the neutral language was for linguistic but not legal reasons). To illustrate again how changeable human rights obviously are, I would like to point out that in 1986, the Commission in Strasbourg had declared inadmissible a complaint against the United Kingdom in a similar case in which a non-married same-sex partner was denied successor rights to accommodation.

The judgment in *Karner versus Austria* is really a landmark decision because it clearly marked a change in the Court's previous approach to only rule in favour of rights when

these already have been mainstreamed and become standard throughout Europe. Because in July 2003, out of the then 45 Council of Europe member states only 12 had adopted some form of legal recognition of same-sex partnerships. 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 – in theory there have been 33 countries to adapt to this decision – 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 46 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. But again, there is no automatic mechanism to implement that.

Another such case is already pending in Strasbourg. It is a complaint submitted in 2002 against the provision in the Austrian Social Security Act that limits the possibility to persons of the opposite sex of having a domestic partner without a social insurance on his/her own, covered under the insurance of the partner. While this case is awaiting its admissibility decision in Strasbourg, another similar complaint was decided upon in October 2005 by the Austrian Constitutional Court which has ruled in favour of the complainant in light of the Karner decision – and thus overruled its own negative decision of 2000 when it had dismissed the complaint of the couple whose case is now pending in Strasbourg.

So, the next exciting issue will be how the Court will decide in a complaint against discrimination based on a right that is exclusively granted to married couples only – or against the ban on same-sex marriage for that matter. In August 2004, two Austrian men filed a first complaint in Strasbourg against such a ban on marriage of two persons of the same sex. It will take again a couple of years before the Court will decide in this matter. In this delicate issue it is, however, very likely that the Court will not be so courageous as with its Karner decision where it seemed to have been committed to true human rights in the first place. With marriage, the Court will likely not want to play this role of running ahead of societal and political developments in Europe and impose the opening up of civil marriage to all member states of the Council of Europe at a stage where only three countries have done so. But we will see.

Before concluding I would also briefly mention the few cases that involved transgender issues. Here we have the same picture: It was only in the 1990s that the Court finally ruled that discrimination against transsexuals is a violation of the Convention, thus overruling all the negative decisions taken in the decades before. The first of the positive decisions was *B. versus France,* handed down by the Court in 1992, and dealt with the refusal of French authorities to have a person's forenames changed after gender reassignment and to issue a new birth certificate stating the new gender. Funny enough, the Court later handed down conflicting decisions in cases against the United Kingdom in 1998 arguing the refusal in the UK to issue new birth certificates had not as severe practical consequences as in France.

Concerning the United Kingdom, the Court finally changed its mind in 2002 in the cases *Goodwin against the United Kingdom* and *I. versus UK.*

The United Kingdom had refused to issue a new birth certificate stating Christine Goodwin's new gender after she had undergone gender reassignment treatment. As a consequence of this refusal, Christine Goodwin was not allowed to marry a man and retire from work at the age of 60, as a woman, but was supposed to retire at 65, the retirement age for men. The Court unanimously held that the UK's failure to recognise in law Christine Goodwin's new identity as a woman breached her rights to respect for private life and her right to marry.

Another positive judgment in a transsexual case was handed down by the Court in 2003 in *van Kück versus Germany* and dealt with the costs of gender reassignment. In this case, the Court held that German courts violated Article 6 (right to a fair trial) and Article 8 of the Convention (respect for private life) by interpreting a health insurance contract between a transsexual and a private insurance company as not requiring reimbursement of the costs of the surgery and other medical treatment necessary for her gender reassignment.