

Towards Freedom and Equality

The Legal Status of Homosexuality in European and National Law

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Just slightly more than 200 years ago sexual relations between persons of the same gender could and in fact have been punished with the severest penalties. From the late antiquity until the French Revolution homosexual behavior was a criminal offence all over Europe in most cases liable to death by burning alive.

I. Three Revolutions

Three revolutions brought the change.

The exponents of the Enlightenment did not consider homosexuality as equal to heterosexuality, not even as approvable, but they opposed criminal persecution as violating innate individual human rights. Homosexual relations have been viewed as a vice or a mental illness but not anymore as a crime.

This new thinking has first been implemented in Austria where emperor Joseph II in 1787 removed capital punishment for homosexual contacts and lowered the sanction to a maximum of one month imprisonment. He did however not decriminalize homosexuality.

That was the feat of the *French Revolution* which did away with all criminal sanctions for homosexual behavior. Napoleon then disseminated this law reform over large parts of the continent. All countries which took over the Napoleonic Criminal Code (Code Napoléon) did lift the ban on homosexual relations in the course of the 19th

century with the effect that homosexuality has not been mentioned in the criminal law anymore, that homo- and heterosexual contacts have been treated completely equal. Special laws or offences for homosexual contacts whatsoever, such as higher minimum age limits, a ban on homosexual prostitution only or stiffer penalties for homosexual acts in public or homosexual violence did not exist. And the minimum age limits (equal for hetero- and homosexual relations) have been set remarkably low, in most of these countries between 11 and 14.

In the countries however not having come under the influence of French (Napoleonic) penal law homosexuality remained a criminal offence. Decriminalisation in the 19th century was limited to the Roman law countries and their sphere of influence.

The 20th century then in its first six decades has been marked by two inconsistent lines of development.

On the one side the countries, which decriminalized homosexuality during the 19th century, reintroduced discriminatory special criminal offences for homosexual behavior, in most cases higher minimum age limits. There are only two countries in Europe which decriminalized in the 19th century already and hitherto without reintroducing any discriminatory special provisions whatsoever have been treating homo- and heterosexual relations completely equal (as far as concerns their criminal law): Turkey and Italy. There were however also only four countries in Europe which turned all way back to a total ban: Portugal (1912-1945), Spain (1928-32), Serbia (1929-1994) and Romania (1948-1996).

On the other side the *Russian Revolution* which led to the lift of the total ban in the USSR in 1918 triggered off a second wave of decriminalization in Europe this time affecting also jurisdictions outside the Roman law area: Denmark (1930), Poland (1932), Iceland (1940), the German-speaking cantons of Switzerland (1942), Sweden (1944) and Greece (1950). But among these only the USSR and Poland did introduce full equality. All the others kept special provisions, mostly higher minimum age limits, for homosexual relations. Among the countries of this second wave only the USSR did take steps back from its reform: in 1934 Stalin reintroduced the total ban on homosexuality.

The third and most effective wave of decriminalization came with the *Sexual Revolution* in the sixties. After Czechoslovakia (1961) and Hungary (1961) and jurisdictions as important as the English (1967) and the German (GDR: 1967; FRG: 1969) lifted the ban ever more countries decriminalized homosexual relations, a process recently speeded up by the dismantling of the Eastern bloc and the democratization of its former member countries. At the same time – beginning in the sixties - the Roman law countries again repealed the discriminatory special provisions reintroduced during the 20th century and returned to full equality. With time also most of the other European jurisdictions (outside the Roman law area) did away with special provisions for homosexual relations so that today no member state of the EU, only one in the COE and five jurisdictions all over Europe still have a total ban on homosexuality. And just five of the 15 EU-member states, 15 of the 40 members of the COE and 23 of all 57 jurisdictions on the continent have any discriminatory special criminal law provisions whatsoever. See Table 1

II. Homosexuality as a Human Right

Unlike as in the days on the Enlightenment these days homosexuality increasingly is viewed not as an illness or a vice anymore but as a fundamental human right. Some aspects of this human right have been acknowledged in the case-law of human rights tribunals.

So the *European Court on Human Rights* repeatedly declared a total ban on homosexual relations as violation of the right to privacy enshrined in the European Convention on Human Rights. And the *European Commission on Human Rights* recently decided that higher minimum age limits for heterosexual contacts than for homosexual ones do violate the right to non-discrimination in connection with the right to privacy both enshrined in the European Convention on Human Rights (Sutherland vs UK 1997).

Also the *Human Rights Committee of the United Nations* in 1994 declared a total ban to be in violation of the International Treaty on Civil and Political Rights (Toonen vs. Australia 1994).

Other cases of discrimination however so far have not been successfully litigated before the *European Commission on Human Rights*. Criminalization of homosexual contacts for members of the armed forces (also with civilians), criminalization of homosexual contacts between more than two persons, deportation of the same-sex partner, impossibility to succeed into the tenancy of the deceased partner, impossibility of adoption of the child of the same-sex partner, all these cases of discrimination of homosexuals (compared to heterosexuals) have been decided to be compatible with the European Convention on Human Rights. For some of these examples that might however change following the abovementioned Sutherland-case.

III. Homosexuality as a Protected Good

When criminal persecution ends numerous discriminations in many areas nevertheless still remain. Mere neutrality of the state does not guaranty protection against such discriminations. Since the beginning of the eighties homosexuality has been seen not only as a human right requiring the state to refrain from interference with the criminal law but increasingly as banning any disadvantage on the basis of "sexual orientation" and as obliging the state to actively protect against discrimination. "Sexual orientation" increasingly becomes a legally protected category, a legally protected good.

The *European Parliament* has expressed its rejection of sexual orientation discrimination repeatedly since the year 1984. In 1994 it called for an end of all kinds of discrimination in all areas of the law and full equality of treatment, including not only equality in the criminal law but also ending the barring of lesbian and homosexual couples from marriage or from an equivalent framework. And in a resolution just two weeks ago the EP made clear that it will not give its approval to the accession of any new member state which enshrines any discriminatory

provisions within its (criminal) law. The EP however has no legislative powers and so by far community law knows just one binding legal instrument banning discrimination on the basis of sexual orientation: the EC-Staff Regulations in April amended with such a clause. The *European Court of Justice* earlier this year decided that community law does not supply protection against discrimination on the basis of sexual discrimination (Case Lisa Grant 1998). The Court however emphasized that this will change with community measures taken according to Art. 13 EC-Treaty as amended by the Treaty of Amsterdam. Once the Treaty of Amsterdam will come into force Art. 13 supplies the EC-Council of Ministers with the power to take action against discrimination on the basis of sexual orientation. However in the fields of competence of the EC only and without prejudice to the other provisions of the treaty and the Council will have to take his respective decisions unanimously.

Also the Parliamentary Assemblies of the *Council of Europe (COE)* (1981) and the *OSCE* (1995) have called for equal treatment and the end of all kinds of discrimination on the basis of sexual orientation.

The *International (UN) Treaty on Civil and Political Rights* in its Art. 26 states that all humans have the right without discrimination to the same protection of the law and that the law has to ban all kinds of discrimination and to grant everyone equal and effective protection against discrimination of any kind. Accordingly a "study on the legal and social problems of minorities" ordered by the *Economic and Social Council* of the UN in 1988 called not only for equality in the criminal law but also for a legal ban of discrimination on the basis of sexual orientation. And the *UN-Human Rights Committee* in its report on human rights in Hong Kong of 1995 called on the government to set the necessary steps to grant homosexuals equal legal protection against discrimination.

According to this clear trends in international law in nearly all European jurisdictions a tendency towards equal treatment of gays and lesbians can be identified, a tendency towards legal equality and towards improved protection against discrimination, far beyond mere equality in the criminal law. *Norway (1981), France (1985, 1986), Denmark (1986, 1996), Sweden (1987), Ireland (1989, 1991, 1994), the Netherlands (1992, 1994), Finland (1995), Spain (1995), Slovenia (1995), Iceland (1996),*

Luxemburg (1997) and four states of the Federal Republic of Germany did enact Anti-Discrimination-Laws offering special protection against sexual orientation discrimination. The scope of these laws is very diverse. For details see table 2.

IV. Partnership

The ultimate test for lesbian and gay equality is the legal status of same-sex partnerships. Society attributes numerous rights and social protection to marriage and in many cases also to informal communities of life between a man and a woman. Rights and social protection denied to partners of the same sex, who are treated as strangers before the law.

As Denmark as first country in the world did introduce Registered Partnership in 1989 this triggered off a remarkably rapid development towards legal recognition of same-sex partnerships. The several European jurisdictions thereby developed quite different solutions which however can be classified into four groups.

The first is the *Scandinavian Model* adopted by far the most countries recognizing same-sex partnerships. Thereby a Registered Partnership is established, an institute open for partners of the same sex only. And this institute is given all the rights, obligations and protections given to marriage which remains confined to a man and a woman. All laws applicable to marriage also apply to Registered Partnership; with only a few exceptions: no church weddings, no artificial insemination, no joint adoption and one of the partners must be citizen or at least a permanent resident of the state. So this model creates something like marriage for homosexuals without calling it marriage and with a few exceptions. Countries which stick to this way are: Denmark (1989), Norway (1993), Greenland (1994), Sweden (1994) and Iceland (1996), Iceland however – unlike the others - allows for joint custody also.

The second model is the *Hungarian model*. Hungary after a decision of the Constitutional Court in 1996 completely equalized the status of nonmarried cohabitants of same and different gender. Marriage and the rights and protections attributed to it however remain a privilege of heterosexuals. So while the Scandinavian model equalizes on the level of marriage (without calling same-sex-

partnerships marriage however) and leaves inequalities and disadvantages for samegender-partners on the level of informal cohabittees, the Hungarian model goes the other way round: equalizing on the level of informal cohabittees and continuation of inequality and disadvantages on the level of marriage. So far only Hungary sticks to that model.

The third model, the *Mediterranean Model*, does not intend to grant legal status and open legal institutions now available to heterosexual partners also to homosexual ones but rather leaves the existing choices for heterosexuals as they are (marriage and informal cohabitation with certain rights and protections) and introduces a completely new legal form of (registered) partnership which then is open not only for samegender-partners but also for partners of different sex. This partnership then is attributed more rights and protection than informal (heterosexual) cohabittees but less than marriage. This model introduces equality in respect of a complete new form of legal status but leaves inequality and disadvantages on the level of informal cohabittees and on the level of marriage. This model is especially popular in the Roman law countries (e.g. France, Spain, Portugal). It also meets the argument that lesbians and gays should not struggle to rush into the patriarchal institution of marriage. So far only Catalonia and Belgium stick to that model. Also the draft bill currently debated in the French parliament belongs to that model.

Finally the fourth model is *Marriage* itself. It should be called the *Dutch Model* since the Netherlands are rapidly heading towards full equality by opening up marriage for same-sex-partners. On 01.01.1998 the NL introduced something like a mixed system, a mix between the Scandinavian and the Mediterranean model. They introduced a Registered Partnership with nearly all rights and obligations of marriage (with the exception of joint adoption and the requirement of citizenship or residency only; and with the opportunity of joint custody) but at the same time accessible for couples of different gender as well. Dutch parliament however does not intend to stop here. It called on Government to submit a proposal for opening up marriage two times now: in 1996 and 1998. An expert-commission set up by the government (the Kortmann-Commission) this year recommended to make full marriage available to same-sex-partners with only one exception: joint adoption of foreign children should be excluded out of regard to the international relations of the Netherlands, joint adoption

of Dutch children however should be made possible. The Dutch government recently announced that it intends to submit legislation to parliament following the commissions proposals before the end of this year.

VI. Conclusion

It's a long and stony way from homosexuality as a crime to sexual orientation as a human right and not all jurisdictions are passing it uniformly and with the same speed. The overall picture however seems to be one of a clear and lasting legal development towards freedom and equality for homo- and bisexual women and men in Europe.

Table 1

Homosexuality in the Criminal Law

General Ban	(Other) Discriminatory Provisions	Equality
Bosnia-Herzegovina Georgia Cosovo <i>Macedonia</i> Belarus	<i>Albania</i> Austria <i>Bulgaria</i> <i>Croatia</i> <i>Cyprus</i> <i>Estonia</i> <i>Färöer</i> Gibraltar Greece Guernsey <i>Hungary</i> Ireland Isle of Man Jersey <i>Liechtenstein</i> <i>Lithuania</i> <i>Moldova</i> Northern Ireland Portugal <i>Romania</i> Scotland Serbia England & Wales	Finland Monaco <i>Latvia (1)</i> Sweden <i>Malta</i> <i>Russia</i> <i>Ukraine</i> <i>Czech Republic</i> <i>Slovak Republic</i> Italy Luxemburg Montenegro Spain <i>Turkey</i> <i>Norway</i> Denmark Germany <i>Switzerland</i> <i>Andorra</i> France Netherlands Belgium <i>Slovenia</i> <i>Poland</i> <i>Greenland</i> <i>Iceland</i> Vatican <i>San Marino</i> Vojvodina

Italics: Members of the Council of Europe














































Bold: Members of the European Union

(1) Passed by Parliament, not yet in force pending implementation legislation

Table 2

Anti-Discrimination Laws in Europe

protecting against discrimination
on the basis of sexual orientation

	Protection by the Constitution	Protection Against Incitement to Hatred	Protection Against Discrimination in Exercising State Authority	Protection Against Individual Insult and Humiliation	Protection Against Discrimination in the Supply with Goods and Services	Protection Against Discrimination in the Labour Market
Denmark						
FRG-Berlin						
FRG-Brandenburg						
FRG-Saxony-Anhalt						
FRG-Thuringia						
Finland						
France						
Ireland						
Iceland						
Luxemburg						
Netherlands						
Norway						
Austria						
Sweden						
Slovenia						
Spain						
United Kingdom			