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COUR EUROPÉENNE DES DROITS DE L'HOMME

The evolution of the notion of equality for LGBTI persons in the Court's case-law

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Dear Ambassadors,

Dear Judges, Colleagues and Distinguished Guests,

I am pleased that the Council of Europe's Sexual Orientation and Gender Unit decided to host its conference marking the 70th anniversary of the European Convention on Human Rights here in the Human Rights Building. I am honoured that they asked the Court's President to give today's keynote speech.

The European Court of Human Rights has been a judicial pioneer in its interpretation of the Convention requiring for the recognition and protection to lesbian, gay, bisexual, trans and intersex (LGBTI) people over the last few decades. In this endeavour, the Court has served as a rich source of jurisprudential inspiration for other national and international courts.

While a vast number of the cases brought before the Court concern the issue of discrimination in conjunction with private life rights, the Court also has developed LGBTI-relevant case-law spanning most other Articles too, for example Article 3 cases regarding ill-treatment of LGBTI persons or the expulsion of aliens to third countries where there is a risk of ill-treatment. We have had important cases on freedom of expression under Article 10, freedom of assembly under Article 11 as well as the right to marry under Article 12. Finally, we also have case-law on social rights under Article 1 of Protocol No 1.

I have been asked to speak in particular about the notion of equality for LGBTI people in the Court's case-law. Before I turn to the evolution of the jurisprudence in this regard, I would like to set the stage and look more generally at the notions of equality and non-discrimination under the Convention.

As we know the Universal Declaration on Human Rights (1948), the inspiration for the Convention, provides for equality in a number of its articles including Article 7 on non-discrimination which

states, and I quote, “*All are equal before the law and are entitled without discrimination to equal protection of the law.*”

Article 14 of the Convention, does not in terms mention equality of treatment or equality before the law. It only prohibits those forms of discrimination which hamper the equal enjoyment of substantive rights enshrined in the Convention itself. Accordingly, the Court’s case-law under Article 14 is framed in terms of unjustifiable inequality of treatment. However, one may ask is inequality in treatment the same as equality for all?

Legal scholars see non-discrimination as a derivative of the principle of equality. It focuses on what the State or other individuals should not do. Equality, on the other hand, focuses on what the State should do.

So what is the content of the concept of non-discrimination under Article 14? The Court has held that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations.

However, not every difference in treatment will amount to a violation of Article 14. Firstly, the Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or “status”, are capable of amounting to discrimination within the meaning of Article 14.

Secondly, a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and its background.

The Court has found that differences based on sex or on sexual orientation require particularly serious reasons by way of justification. According to the Court’s established case-law, the margin of appreciation in cases related to differences of treatment based on sexual orientation is narrow, requiring “particularly convincing and weighty reasons” by way of justification, and according to which “[d]ifferences based solely on considerations of sexual orientation are unacceptable under the Convention” (*X and Others v. Austria* [GC], no. 19010/07, § 99 ECHR 2013).

Much of the case-law in relation to LGBTI rights has involved the concept of private life under Article 8. Indeed, the Court’s definition of private life which may “embrace multiple aspects of the person’s physical and social identity” has permitted the case-law to develop in line with societal developments. The *Christine Goodwin* judgment relied on a notion of personal autonomy whereby “protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings”.

I now turn more specifically to the evolution of the notion of equality for LGBTI people in the Court’s case-law.

My first observation is that the notion of equality as such did not feature very prominently when the European Commission and the old Court first began to hear cases, neither did the notion of non-discrimination.

If we take a look at the first cases lodged before the European Commission in the 1950s, homosexual men complained of the criminal codes in their countries, namely the Federal Republic of Germany and Austria, which criminalized consenting homosexual acts. The Commission dismissed their complaints under Articles 8 and 14 of the Convention as inadmissible. The legislative measures taken were considered necessary for the health or morals of the majority.

While finding a violation of the applicant's private life, the landmark case of *Dudgeon v. the UK* (1981) did not consider it necessary to conduct an examination under Article 14 taken in conjunction with Article 8. It was only in 1999 that the Court in *Salgueiro da Silva Mouta v. Portugal* definitively established that sexual orientation was, and I quote, 'a concept which is undoubtedly covered by Article 14 of the Convention'.

Fast-forwarding to 2017, I would like to mention the case of *Bayev and Others v. Russia*, which provides a clear and unequivocal example of how far the Court's case-law has come in relation to equality of LGBTI persons.

The case concerned a legislative ban on the promotion of homosexuality or non-traditional sexual relations among minors, which the applicants contested as inherently incompatible with the Convention. In justifying the ban the Russian government relied upon "the moral imperatives and on popular support for the measures in question". They alleged that an open manifestation of homosexuality was an affront to the mores prevailing among the religious and even non-religious majority of Russians and was generally seen as an obstacle to instilling traditional family values.

The Court firmly rejected the government's arguments on the grounds of the protection of morals, the protection of health and the protection of the rights of others. In finding a violation of Article 10 taken alone and Article 14 in conjunction with Article 10 of the Convention, the Court held that the legislative provisions in question embodied a predisposed bias on the part of the heterosexual majority against the homosexual minority and that the Government had not offered convincing and weighty reasons justifying the difference in treatment.

In the context of the issue of equality for LGBTI persons, paragraph 68 of the judgment is particularly noteworthy and I would like to read it out in full, although omitting citations. The paragraph reads:

"The Court has consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority ... It [has held] that these negative attitudes, references to traditions or general assumptions in a particular country cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment, any more than similar negative attitudes towards those of a different race, origin or colour ..."

Dear Guests,

I would now like to focus on two factors which have, as I see it, contributed to the establishment of this impressive body of case-law: firstly, the living instrument doctrine and the notion of European consensus; secondly, the broader work of the Council of Europe.

1. The living instrument doctrine and European consensus

This year we are celebrating the 70th anniversary of the signing of the Convention in Rome on 4 November 1950 and the conference today marks this important anniversary.

The three panels today will in this regard take the examples of the rights of transgender persons; same-sex civil unions and hate speech to show case the living instrument doctrine in action.

Much has been written on what the founding fathers would have understood by marriage, family and sexual minority protection in 1950. It is clear that their conception was quite different from the Court's current case-law in this field. This, again, demonstrates, that by deciding to formulate the Convention in terms of majestic generalities, encompassing fundamental principles, the founders could not have assumed that their own expected applications of provisions like Article 8 would remain static and divorced from developments in European societies. LGBTI rights implicate after all the core of human dignity as a Convention value inherent in provisions like Article 3 and 8. In this sense the trajectory of the Convention in this field is one which has allowed us to come with time to a better understanding of the many negative manifestations of human inequality and its pernicious effect in democratic societies.

I am aware that some feel that the Court should go further than it has done. For example, some argue that there is a stagnation of its jurisprudence on same-sex marriage and that the question of sexual orientation discrimination in the areas of immigration and asylum remains underdeveloped.

I am of course not in a position as a serving judge to comment directly on these particular issues. However, I would note that the scope and content of LGBTI rights is an evolving issue of societal debate, both at the domestic level, which the Court follows closely notably through its comparative research reports, and at the international level. Through the living instrument doctrine and the notion of European consensus, the Court is required to take this evolution into account and draw from it legally coherent and logical conclusions. In this sense the living instrument doctrine gives the Court both the methodological tools to give life to the Convention, but at the same time sets certain boundaries to how far the Court can go as a court of law.

Up until now the role of the Court has in my view been a wise and prudent one, not to necessarily anticipate change, but rather to accompany Member States on their own path of change, albeit sometimes giving added impetus by clarifying the legal scope and content of the Convention's fundamental principles. However, and this must be emphasised, the current case-law makes clear that on certain issues related to LGBTI rights, the Convention contains red-flags, clear and unequivocal Convention obligations which all 47 member States of the Council of Europe must adhere to.

2. The role of the Council of Europe

Allow me now to turn very briefly before I conclude to the second element in this equation, the broader work of the Council of Europe in the field of LGBTI rights which as you know from the Court's settled case-law may provide a helpful framework of reference when interpreting Convention provisions.

In 2015 the Committee of Ministers adopted an important resolution on measures to combat discrimination on grounds of sexual orientation and gender identity. There have also been resolutions from the Parliamentary Assembly and the Congress of Local and Regional Authorities; important statements and country reports of the Commissioner for Human Rights and by the European Commission against Racism and Intolerance. These have all played a part in the advancement of LGBTI rights in Europe.

I also note the creation of a new intergovernmental steering group, the CDADI. Its role is to reinforce and interconnect the work undertaken by the Council of Europe's advisory and expert bodies under the umbrella themes of discrimination, diversity and inclusion. One of its main fields of action will be sexual orientation and gender identity.

Dear Guests,

Allow me then to conclude.

Conclusion

The Convention opens with a commitment not just to the 'maintenance' of human rights, but also their 'further realisation'. The Court's case-law in relation to the rights of LGBTI persons provides a clear example of this further realisation. The Court has, using classical legal tools, identified the values of human dignity and personal autonomy as catalysts for its interpretation of the Convention in this field. As I have attempted to demonstrate, we have also seen an evolution which shied initially away from dealing specifically with the issue of non-discrimination by focusing on the private life aspects of the case, to an acceptance not just of non-discrimination but of equality.

In this sense, the Court's case-law in the field of LGBTI-rights is a paradigmatic example of the Court's attempt to enforce through its judgments the Convention's inclusive democratic concept which emphasises diversity and tolerance as hallmarks of a society which truly ensures fair and proper treatment of all peoples.

Thank you.