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# The Protection of the Rights of Homosexuals Under the International Law of Human Rights: European Perspectives

Philip Girard

*Osgoode Hall Law School of York University*, [pgirard@osgoode.yorku.ca](mailto:pgirard@osgoode.yorku.ca)

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Philip Girard

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### **Abstract:**

The Parliamentary Committee on Equality Rights heard a number of submissions from various groups urging the amendment of the Canadian Human Rights Act to include "sexual orientation" as a prohibited ground of discrimination, and amendment of the Charter itself to rectify the lack of specificity on the topic in the enumeration of equality rights contained in section 15. This article provides a comparative perspective by examining the rights of homosexuals under the international law of human rights. Particular attention is paid to the experience under the European Convention on Human Rights.

### **Keywords:**

Equality Rights, Canada, Charter of Rights and Freedoms, Canadian Human Rights Act

### **Author(s):**

Philip Girard

Professor

Osgoode Hall Law School

York University, Toronto

E: [pgirard@osgoode.yorku.ca](mailto:pgirard@osgoode.yorku.ca)

# The Protection of the Rights of Homosexuals Under the International Law of Human Rights: European Perspectives

*Philip Girard\**

Introduction

1. The General Framework
2. The Jurisprudence Under the European Convention on Human Rights
3. European Political Initiatives of the 1980's
  - (a) The Council of Europe
  - (b) The European Parliament

Conclusion

*The Parliamentary Committee on Equality Rights heard a number of submissions from various groups urging the amendment of the Canadian Human Rights Act to include "sexual orientation" as a prohibited ground of discrimination, and amendment of the Charter itself to rectify the lack of specificity on the topic in the enumeration of equality rights contained in section 15. This article provides a comparative perspective by examining the rights of homosexuals under the international law of human rights. Particular attention is paid to the experience under the European Convention on Human Rights.*

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*Plusieurs groupes ont été entendus par le Comité parlementaire sur les droits à l'égalité. Ces groupes ont tous réclamé que la Loi canadienne sur les droits de la personne ainsi que la Charte constitutionnelle soient modifiées afin d'inclure expressément "l'orientation sexuelle" comme motif de discrimination prohibé. Le thème traité ici est enrichi par l'apport du droit international des droits de l'homme développé plus particulièrement en regard de la Convention européenne des droits de l'homme.*

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\*Professor, Dalhousie Law School.

## INTRODUCTION

The Parliamentary Committee on Equality Rights held hearings across Canada in the summer of 1985 in the course of its examination of federal laws which might be affected by the coming into force of section 15 of the Canadian *Charter of Rights and Freedoms*. Various groups representing Canadian gays and lesbians appeared before the Committee, urging the amendment of the *Canadian Human Rights Act* to include "sexual orientation" as a prohibited ground of discrimination; some urged the Committee to recommend the amendment of the Charter itself, to rectify the lack of specificity on the topic in the current enumeration of equality rights contained in section 15. Church groups, women's groups, labour organizations and others supported either or both of these changes.

Regardless of the Committee's recommendations, the courts may soon be faced with claims to Charter protection by Canadian gays and lesbians. They are claims which the precedent books leave the courts ill-equipped to handle. Canadian law has presented almost exclusively negative images of "the homosexual" to the courts: the homosexual as dangerous sexual offender, the homosexual as undesirable immigrant, the homosexual as perpetrator of grossly indecent acts. The tendency to construct an unfavourable stereotype based on a limited sample of the gay population must be strong, especially among judges who have had extensive experience in criminal law.

Some recent Canadian writing has attempted to redress this imbalance, and to suggest that gays and lesbians do have legitimate claims to protection which might be addressed by the Charter.<sup>1</sup> The purpose of this article is to provide a comparative perspective by examining the protection of the rights of homosexuals under the international law of human rights, and more particularly to look at the experience under the European Convention on Human Rights. Part 1 looks briefly at the general international law framework within which issues relating to gays and lesbians might arise. Part 2 examines at some length the jurisprudence on homosexual rights under the European Convention, and Part 3 concludes with a look at recent political initiatives in the Parliamentary Assembly of the Council of Europe and the European Parliament.

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1. N. Duplé, "Homosexualité et droit à l'égalité dans les Chartes canadienne et québécoise" (1984), C. de D. 801; R. Demers, "De la lex scantinia aux récents amendements au Code criminel..." (1984), 25 C. de D. 777; Arnold Bruner, "Sexual Orientation and Equality Rights," in *Equality Rights and the Canadian Charter of Rights and Freedoms*, eds. M. Eberts and A. Bayefsky (Toronto, Carswell Co. Ltd., 1985); Jim Jefferson, "Gay Rights and the Charter" (1985), 43 U.T. Fac. L. Rev. 70.

## 1 THE GENERAL FRAMEWORK

None of the major post-war declarations or conventions on human-rights expressly mentions sexuality or sexual orientation. However, three of the major ones contain provisions which are relevant to the issue.

The Universal Declaration of Human Rights, the international Covenant on Civil and Political Rights and the European Convention on Human Rights all contain the usual guarantees of freedom of thought, expression and association. However, they also contain two other provisions which are of more direct relevance: a prohibition on interference with "privacy, family, home or correspondence,"<sup>2</sup> and an "equality rights" clause which contains a non-exhaustive list of prohibited grounds of discrimination.<sup>3</sup> Experience under the latter provision is obviously relevant to Canada because of the almost identical wording of section 15 of our Charter. Interpretation of the articles on "private life" will also be relevant because Canadian courts are likely to import the general concept of a constitutional right to privacy from American jurisprudence.<sup>4</sup>

These three international texts vary in terms of their mechanisms for enforcement and their effect on individuals in particular nations. The Universal Declaration has no enforcement apparatus as such, though it may have attained the status of customary international law.<sup>5</sup> The International Covenant on Civil and Political Rights provides in Part IV for the establishment of a Human Rights Committee which is to supervise the progress of State Parties to the Covenant in the implementation of its goals. There is a procedure whereby one State Party may file a complaint that another State Party is not fulfilling its obligations under the Covenant, but there is no procedure for complaints by individuals. The Optional Protocol to the Covenant, however, does allow the Committee to consider communications by individuals regarding alleged violations of the Covenant by their own States, once domestic remedies have been exhausted.<sup>6</sup> While the Committee must bring such communications to the notice of the state in question, the only obligation imposed upon the state is to submit

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2. U.D.H.R., art. 12, I.C.C.P.R., art. 17, E.C.H.R., art. 8. The wording varies slightly in each text.
  3. U.D.H.R., arts. 2, 7, I.C.C.P.R., arts. 2, 27, E.C.H.R., art. 14. All, like the Canadian *Charter of Rights and Freedoms*, use the words "such as" before listing prohibited grounds of discrimination.
  4. See *R. v. Morgentaler* (1984), 47 O.R. (2d) 353 at 394-408, 41 C.R. (3d) 193, 14 C.C.C. (3d) 258, 11 C.R.R. 116, 12 D.L.R. (4th) 502 (Ont. H.C.), quashed 48 O.R. (2d) 519, 41 C.R. (3d) 262; 16 C.C.C. (3d) 1, 14 C.R.R. 107, 14 D.L.R. (4th) 184, 6 O.A.C. 53 (Ont. C.A.).
  5. John P. Humphrey, "The Implementation of International Human Rights Law" (1978-9), 24 N.Y.L.Sch.L. Rev. 31.
  6. Optional Protocol to the I.C.C.P.R., arts. 1, 2. The Optional Protocol and the I.C.C.P.R. were ratified by Canada and have been in force since August 19, 1976.

a written explanation to the Committee within six months.<sup>7</sup> The Committee has no power to alter the domestic law of any State Party, although its views carry considerable moral force in the international community.

The *European Convention on Human Rights*, however, does provide mechanisms which can be used by individuals to redress Convention violations by the High Contracting Parties. The European Commission of Human Rights<sup>8</sup> is empowered to accept petitions from individuals regarding alleged violations of the Convention by any state which has declared that it will be bound by this procedure.<sup>9</sup> If, having found a complaint admissible, and it cannot effect a friendly settlement between the parties, it must prepare a Report stating its opinion as to whether the State concerned has violated its Convention obligations.<sup>10</sup> This Report is submitted to the Committee of Ministers of the Council of Europe<sup>11</sup>, which, if the matter is not referred to the European Court of Human Rights within three months, may find (by a two-thirds majority) that a Party has violated the Convention; the Committee of Ministers must then prescribe measures (for example, amending or repealing legislation, altering administrative policy) which the Party in violation must implement.<sup>12</sup>

The alternative route is for the Commission to refer alleged violations to the European Court of Human Rights.<sup>13</sup> The Court may find a violation of a Convention obligation, which will require the Party in question to take appropriate action,<sup>14</sup> supervised by the Committee of Ministers.<sup>15</sup>

The Court, and to a lesser extent, the Commission, are in a very real sense constitutional courts which apply a supra-national charter of rights to disputes between individuals and states. The matters with which they are seized are very similar to those which our own courts will face very soon. Hence their jurisprudence should be of considerable interest to Canadian courts. It is true that the European Court is a supra-national body while the Supreme Court of Canada is a national body, but this distinction is not crucial in the field of human rights. In both cases a judicial authority must decide whether a political authority has violated the human rights of an individual or group. If a distinction is to be made, it might

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7. Optional Protocol to the I.C.C.P.R., art. 4.

8. Hereinafter, "the Commission". See arts. 20-37, E.C.H.R.

9. Only Cyprus, Greece, Malta and Turkey had not permitted their citizens to invoke this procedure as of December 1, 1983: P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (Deventer, Neth., 1984), p. 487.

10. E.C.H.R., art. 31.

11. For the composition of the Committee of Ministers, see the Statute of the Council of Europe, art. 14.

12. E.C.H.R., art. 32.

13. Arts. 38-56.

14. Art. 53.

15. Art. 54.

be with regard to the “reasonable limits” provisions contained in the Canadian *Charter of Rights and Freedoms* and the European Convention.<sup>16</sup> One might expect that the European Court of Human Rights would accord a rather more liberal “margin of appreciation” to States in deciding which limitations on rights were “necessary in a democratic society” than the Supreme Court of Canada would accord to provinces or the national government under the Charter. One would expect this difference in part because the parties to the Convention are fully sovereign nation-states while the members of a federal system such as Canada’s are sovereign only within their spheres of competence, but also because the differences (political, economic, social and cultural) among the parties adhering to the Convention<sup>17</sup> are so much greater than the differences between various parts of Canada. Thus if the European Court has found that a particular Convention violation could not be justified as “necessary in a democratic society,” it would be very difficult for a Canadian court to find the contrary should a violation of an analogous provision of our Charter be shown.

## 2 THE JURISPRUDENCE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Nothing better illustrates the rapidity of change in attitudes towards homosexuality than the *volte face* which has occurred in the decisions of the European Commission and the European Court of Human Rights in a mere twenty years.

In the 1950’s the Commission received a number of petitions from German citizens who had been imprisoned for contravening article 175 of the German *Criminal Code*, which prohibited certain kinds of consensual male homosexual conduct (sexual activity between females was not the subject of any criminal sanction).<sup>18</sup> The complaints alleged that articles 8 (respect for private life) and 14 (discrimination on the basis of sex) of the Convention had been violated. In tersely-worded decisions the Commission dismissed these complaints as “manifestly ill-founded,” involving the “health and morals” exception to article 8.<sup>19</sup> In the Commission’s view, the State’s ability to rely on the exception to article 8 meant that it was

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16. E.C.H.R., arts. 6, 8, 9, 10, 11.

17. The parties to the Convention are Austria, Belgium, Cyprus, Denmark, France, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey and United Kingdom.

18. Applications 104/55, 167/56, 261/57, 530/59, 1307/61.

19. These distinctions must be seen in context. The Commission considered only 52 out of some 3800 applications admissible in the 1953-1969 period: *Basic Documents on Human Rights*, ed. Ian Brownlie (Oxford: Clarendon Press, 1971), 338.



legitimate to treat men and women differently, presumably on the basis that male homosexuals presented a graver moral and social hazard than females.<sup>20</sup>

The decade of the 1960's proved to be untroubled by similar applications, presumably because the Commission had shut the door so firmly in the 1950's. However, in the 1970's things began to change. The Commission declared admissible two complaints by British citizens that the criminal laws relating to male homosexual acts in England and Northern Ireland were both discriminatory and an unjustifiable interference with private life.<sup>21</sup> In the English case the Commission also declared admissible a complaint based on an alleged interference with freedom of expression. In its subsequent full reports on these cases the Commission declared that the English complaint involved no violation of the Convention, while the complaint from Northern Ireland did.<sup>22</sup> The European Court of Human Rights agreed with the Commission, finding that the existence in Northern Ireland of laws imposing criminal sanctions on private homosexual acts between consenting adult (that is, over 21) males involved an interference with the right to "respect for private life" guaranteed under article 8(1) of the Convention which was not justified by any of the grounds mentioned in article 8(2).<sup>23</sup> It will be necessary to examine these decisions in some detail, but before doing so it is necessary to set them in their proper context.

During the first two decades of its operation, the European Commission of Human Rights developed a considerable jurisprudence on the "respect for family life" branch of article 8 of the Convention,<sup>24</sup> but relatively little on the right to "respect for private life."<sup>25</sup> This situation began to change in the later 1970's, when numerous complaints regarding interferences with "private life," particularly its sexual aspect, began to come before the Commission. They involved matters as diverse as

20. App. no. 5935/72, 3 D.R. 46 at 56 (1975).

21. App. no. 7215/75, 11 D.R. 36 (1977) (Eng.); app. no. 7525/76, 11 D.R. 117 (1978) (N.I.).

22. 7215/75, 19 D.R. 66 (1978), 3 E.H.R.R. 63; 7525/76 (1980), 3 E.H.R.R. 40.

23. *Dudgeon v. U.K.* (1981), 4 E.H.R.R. 149.

24. T. Opsahl, "The Convention and the Right to Respect for Family Life," in *Privacy and Human Rights*, ed. A.H. Robertson (Manchester: Manchester University Press, 1973), pp. 182-247.

25. J. Velu, "The E.C.H.R. and the Right to Respect for Private Life, the Home and Communications," in ed. Robertson, *supra*, note 24, at 12-95. See also A.H. Robertson, *Human Rights in Europe*, 2d ed. (Manchester: Manchester University Press, 1977), p. 87.

abortion,<sup>26</sup> transsexualism,<sup>27</sup> obscenity<sup>28</sup> and illegitimacy,<sup>29</sup> as well as homosexuality. These applications forced the Commission to begin to articulate a theory of “private life” and to delineate the permissible limits of state regulation in that domain. I will attempt to summarize this jurisprudence before returning to the cases dealing specifically with homosexuality.<sup>30</sup>

The Commission chose to make one of its first important statements about the scope of the right to privacy in the case of an Icelandic national who was challenging his country’s ban on the keeping of dogs as pets.<sup>31</sup> The Commission noted that numerous authors had stressed that the primary element of the right to privacy was “the right to life, as far as one wishes, protected from publicity.”<sup>32</sup> But the Commission went on to declare that

the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfillment of one’s own personality.<sup>33</sup>

This is an important step in the definition of privacy, because it shows that what is relevant under article 8 is not the *locus* of the activity in question but the *nature* of the activity. In other words, privacy is not just geographical, but psychological and sociological. It involves the idea that the human personality depends on social interaction, and to the extent that the state prohibits or regulates that interaction, it affects the development of the human personality.<sup>34</sup>

In its decision on admissibility in the *Brüggermann* case,<sup>35</sup> made the day after the decision in *X. v. Iceland*, the Commission quoted the above

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26. *Bruggemann v. Fed. Republic of Germany*, app. no. 6959/75, 5 D.R. 103 (1976) (decision on admissibility); 10 D.R. 100, 3 E.H.R.R. 244 (1977) (report).

27. App. no. 6699/74, 11 D.R. 16 (1977) (decision on admissibility), 17 D.R. 21 (1979) (friendly settlement); *Van Oosterwijck v. Belgium*, app. no. 7654/76, 11 D.R. 194 (1978) (decision on admissibility); (1980), 3 E.H.R.R. 557 (Eur. Ct. H.R.).

28. App. no. 7308/75, 16 D.R. 32 (1978) (decision on admissibility).

29. *Marckx v. Belgium* (1979), 2 E.H.R.R. 330 (Eur. Ct. H.R.).

30. For a recent overview, see P.J. Duffy, “The Protection of Privacy, Family Life and Other Rights under Article 8 of the E.C.H.R.” (1982), 2 *Yrbook of Eur. L.* 191.

31. *X. v. Iceland*, app. no. 6825/74, 5 D.R. 86 (1976) (decision on admissibility). Exceptions could be allowed by town councils or parish committees.

32. *Ibid.*, at 87, citing Velu, *supra*, note 25 at 27-28.

33. *Ibid.*, at 87.

34. Unfortunately for the applicant, the Commission drew the line at social interaction with human beings, and did not find that State interference with the bonds of affection that might exist between a person and an animal constituted a violation of the Convention.

35. *Supra*, note 26.

passage and added that "sexual life is also part of private life."<sup>36</sup> Consequently, the power of the State to impose restrictions on the availability of abortion was not absolute. In its report on the case the Commission had this to say on the scope of "private life" under the Convention:

The right to respect for private life is of such a scope as to secure to the individual a sphere within which he can freely pursue the development and fulfillment of his personality. To this effect, he must also have the possibility of establishing relationships of various kinds, including sexual, with other persons. In principle, therefore, whenever the State sets up rules for the behaviour of the individual within this sphere, it interferes with the respect for private life and such interference must be justified in light of para. (2) of Art. 8.<sup>37</sup>

In the end, the Commission decided that the question of abortion involved interests in addition to the mother's right to respect for her private life, and reached a *Roe v. Wade*<sup>38</sup> type compromise in finding the German legislation at issue not to be in violation of the Convention.<sup>39</sup>

In two cases involving transsexuals the Commission has been prepared to find a violation of article 8 in the refusal of national authorities to alter the registers of civil status to reflect the new status of the applicants. A friendly settlement was reached in the first case after the Commission had declared such a complaint admissible.<sup>40</sup> In the second, the Commission opined that Belgium was in violation of the Convention by refusing to take account of "an essential element of [the applicant's] personality: his sexual identity resulting from his changed physical form, his psychological make-up, and his social role."<sup>41</sup>

Two other areas of European Convention jurisprudence which touch on the themes of privacy and sexuality are illegitimacy and sex education for children. In *Marckx v. Belgium* the European Court of Human Rights declared that certain aspects of Belgian legislation unfavourable to illegitimate children constituted a violation of article 8 (respect for family life) and article 14 (non-discrimination) of the Convention.<sup>42</sup> An interference with the mother's right to privacy was not argued, as the stronger

36. 10 D.R. 100, 115.

37. *Ibid.*

38. 410 U.S. 113 (1973).

39. The German law was in some ways less "liberal" than post-*Roe v. Wade* American law, and was quite close to Canadian law.

40. App. no. 6699/74, *supra*, note 27.

41. *Van Oosterwijk v. Belgium*, Report of the Commission, March 1, 1979, para. 52, quoted in van Dijk and van Hoof, *supra*, note 9, at 288. The case was eventually referred to the European Court of Human Rights, which did not reach the question of violation because it found the applicant had not exhausted his domestic remedies: (1980), 3 E.H.R.R. 557.

42. *Supra*, note 29.

argument related to the discriminatory treatment of children born out of wedlock. But the two concepts clearly go together — removing the stigma of illegitimacy also removes an important state sanction on the “immoral” conduct of the mother, and could not be contemplated unless the continuing necessity of that sanction had been put into question. In *Kjeldsen v. Denmark*<sup>43</sup> the European Court of Human Rights was asked to decide whether a Danish law of 1970 instituting compulsory sex education in primary schools infringed, *inter alia*, the rights of dissenting parents to respect for their private and family life. The parents in question objected to a policy that students in public schools could not be exempted from this instruction as, for example, could students whose parents did not wish them to take religious instruction. The Court unanimously rejected the parents’ claim under article 8, accepting that the state had a legitimate interest in the dissemination of precise scientific knowledge about sexuality among the younger generation, in order to stem the tide of unwanted births, abortions and venereal disease among adolescents.

The main themes of the European Convention jurisprudence on “private life” are clear from the above review. The Commission and the Court have repudiated the restrictive notion of the right to privacy as prevailing only against “the four o’clock in the morning rat-a-tat on the door” or other forms of egregious state surveillance of individuals’ lives.<sup>44</sup> They have put the emphasis on the development of the human personality, including its sexual aspects, and have placed significant limits on the power of the State to mold or redirect that development. In doing so they have gone beyond the liberal notion of freedom as simply the absence of State restraint: the right to respect for private life is more than a shield against the interference of the state in the affective domain. It also includes a positive element, a right to public recognition of certain attributes of the human person, which may demand rather than frustrate State action in certain cases. Thus in the cases relating to transsexuals, the Commission has said that it is not enough that the State presents no barriers to “sex-change” operations. The State must also recognize for official purposes the change in status of a woman who, though “chromosomally” still female, is psychologically and socially male (or *vice versa*). In other words, the right to privacy requires that certain aspects of “private life” be recognized in the *public* domain in order for the right itself to be fully effective. This approach shows an awareness on the part of the Commission of the link between the “interior” and “exterior” influences on the development of

43. (1976), 1 E.H.R.R. 711.

44. The phrase is that of Sir Gerald Fitzmaurice in his dissenting opinion in *Marckx v. Belgium*, *supra*, note 29, at 366. He views art. 8 as providing only “domiciliary protection” for the individual.

the human person. The right to “be” X or Y is a hollow one if one cannot compel public recognition of the state of Xness or Yness. Or, as Laurence Tribe has said, “freedom to have impact on others — to make the ‘statement’ implicit in a public identity — is central to any adequate conception of the self.”<sup>45</sup>

Of course the right to respect for private life has limits. These are enunciated in paragraph 2 of article 8,<sup>46</sup> and are subject to the overriding requirement that they be “in accordance with the law and . . . necessary in a democratic society,” similar to the phrase used in section 1 of the Canadian Charter. The right to obtain an abortion is not absolute because the interests of the foetus must at some point be taken into account.<sup>47</sup> The right to view sexually explicit material in private does not extend to the right to receive photographs of sexual relations between adults and adolescents.<sup>48</sup> It is not necessary to multiply the examples at this point, but simply to note the general principle.

Now that the *lignes de force* of the European Convention jurisprudence on the topic of privacy have been set out, it is possible to discuss the jurisprudence on the rights of homosexuals in its proper perspective. It will be seen that the evolution in the case law on this topic closely follows that set out above regarding the right to respect for private life. One remarkable fact about the privacy jurisprudence as a whole is the rapidity with which it evolved: after a long period of quiescence, all of the key decisions occurred within the half-dozen years between 1975 and 1981.

The first thing to note about the Convention jurisprudence regarding homosexuals is that complaints based on equality arguments are generally unsuccessful or not fully considered while complaints based on privacy arguments are treated more seriously. I will summarize the arguments based on equality in the course of the following review and analyze them synthetically at the end.

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45. *American Constitutional Law* (New York: Foundation Press, 1978), p. 888. He refers to the “inward-looking” and “outward-looking” aspects of privacy.

46. (1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

47. *Supra*, note 26.

48. *Supra*, note 28. The Commission qualified its decision by saying that such would be the case where such relations are a criminal offence in the country of receipt and are accompanied by requests to send similar photographs to the publisher, constituting an incitement to commit a criminal offence. Cf. *Stanley v. Georgia*, 394 U.S. 557 (1969).

One of the first cases in which the Commission displayed a more receptive attitude toward homosexuals was application no. 5935/72, decided in 1975.<sup>49</sup> The Commission rejected the application as manifestly ill-founded in as much as it involved a claim to protection for sexual activity with boys under 16. However, it noted, consistently with the jurisprudence which it was developing in the area of heterosexual relations, that “[a] person’s sexual life is undoubtedly part of his private life of which it constitutes an important aspect.”<sup>50</sup> This approach is evidence of a break with the “hands-off” attitude taken by the Commission in its earlier jurisprudence, mentioned above.<sup>51</sup> In other words, the Commission accepts that the regulation of homosexual activity is *prima facie* an interference with the private life of an individual which needs to be justified by the State. When the State asserts that it is protecting the “rights and freedoms of others” (article 8(2)) it must show why that need for social protection exists. The Commission accepted that the need “to protect the rights of children and adolescents and enable them to achieve true autonomy in sexual matters” was a valid objection.<sup>52</sup> It remained, then, “to decide up to what age the protection of an adolescent is necessary and justifies making [male] homosexuality a criminal offence.”<sup>53</sup> The Commission thought the age limit of 18-21 (contained in the relevant German legislation) “relatively high” but did not need to decide the point because the applicant’s offences had involved boys under 16.

The question of age limits soon came up in a more acute form. In application no. 7215/75, *X. v. U.K.*, decided in 1977, the Commission declared admissible the complaint of a citizen of the United Kingdom who had been imprisoned in 1974 for buggery with two eighteen-year old males. According to the applicant he had had a “private and reciprocal homosexual relationship lasting nine months with [one of the] 18 year-old male adult[s].”<sup>54</sup> He alleged violations of articles 8, 10, and 14,<sup>55</sup> and the Commission declared all three complaints admissible.

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49. 3 D.R. 46 (decision on admissibility).

50. *Ibid.*, at 54.

51. *Supra*, text accompanying notes 18, 19.

52. 3 D.R. 46, at 55.

53. *Ibid.*

54. 11 D.R. 36, at 37.

55. Art. 8 is reproduced *supra*, note 45. Arts. 10 and 14 read as follows:

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

As to the interference with X's private life, the government of the U.K. admitted an interference but sought to rely on the "health and morals" provision in article 8, paragraph 2, basing itself on the Commission's early rulings. The Commission virtually repudiated its prior decisions, being

of the opinion that it should examine the issues presented by this application taking into account the development of moral opinion in recent years concerning state interference with the private, consensual sexual lives of adults.<sup>56</sup>

It rejected the submission of the government that young people needed protection from the attentions of older male homosexuals, observing that "one of the fundamental issues in the present case is whether eighteen year olds ought to be considered as 'young people' in need of protection."<sup>57</sup> A similar argument was made by the government of the U.K. in response to the applicant's complaint of discrimination based on the differing ages of consent for heterosexual and homosexual relations and the absence of a ban on consensual sexual activity between females. The Commission noted that such differential treatment should have an "*objective and reasonable justification*" and must display "*reasonable relationship of proportionality* between the means employed and the aim sought to be realised."<sup>58</sup> In this regard the Commission wished to consider further

whether the view, as expressed twenty years ago by the Wolfenden Committee, that eighteen to twenty-one year-olds ought to be protected from "attention and pressures of an undesirable kind" remains valid for a moral and cultural climate which has evolved significantly since then.<sup>59</sup>

Finally, and perhaps more surprisingly, the Commission declared admissible the applicant's complaint that his freedom of expression had been interfered with in that

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2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

56. 11 D.R. 36, at 43.

57. *Ibid.* The age of legal majority in the U.K. was 18 at the relevant time.

58. *Ibid.*, at 44 (emphasis in original).

59. *Ibid.*

as a result of the high age of consent he was denied his right to express feelings of love to other men who may be between sixteen years and twenty-one years and who may wish to reciprocate his love.<sup>60</sup>

While it was seized of this application (which I will call "the English application") the Commission also received the complaint of Mr. Jeffrey Dudgeon of Belfast regarding the criminal prohibitions on male homosexual activities existing in Northern Ireland.<sup>61</sup> The Commission's decision that Dudgeon's complaint was admissible came eight months after its decision regarding the earlier English application, in March 1978. Its report on the English complaint came seven months after that, in October 1978, followed in March 1979 by the report on Dudgeon's complaint. Thus both complaints were roughly contemporaneous and raised similar issues, though the article 10 argument was not presented or declared admissible in Dudgeon's case.

The progress of the complaints diverged at the report stage, however. In the case of the English complaint the Commission accepted evidence that one of the applicant's relationships had involved an element of coercion and found that, for obvious reasons, there could be no violation of the Convention in such a case. The curious aspect of the case is that the Commission had been aware of the conflict in the evidence at the admissibility stage, but had allowed the case to proceed, suggesting that the applicant's version of the story must have been reasonably convincing. However, as a more searching examination of the facts occurs after a complaint has been declared admissible, it is possible that the evidence took on a new character at that time.<sup>62</sup>

The report in the Dudgeon case, on the other hand, concluded that in the opinion of the Commission,<sup>63</sup> there had been a violation of the Convention. The European Court of Human Rights agreed with the Commission, finding that the U.K. was in violation of article 8 of the Convention in so far as it had not altered the laws of Northern Ireland prohibiting consensual homosexual acts between adult (that is, over 21)

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60. *Ibid.*, at 42. The applicant used the age of 16 because it was the age at which males were allowed to marry in the U.K.

61. App. no. 7525/76, 11 D.R. 117 (1978) (decision on admissibility); (1979), 3 E.H.R.R. 40 (report). It was this case which subsequently went to the European Court of Human Rights: see *infra*, text accompanying notes 63-79.

62. In the author's view, the fact of coercion was never properly established, and the Commission decided to defer to certain statements made in the English Court of Appeal upon the applicant's appeal from sentence on the buggery charge: 19 D.R. 66, at 71-72, 74-75.

63. Technically, the Commission cannot "find" a violation of the Convention; it can only state that, in its opinion, a violation has occurred: E.C.H.R., art. 31. Only the European Court of Human Rights can state that a violation has occurred: art. 50.



males in private.<sup>64</sup> The Court, with two dissenting voices,<sup>65</sup> thought that “no useful legal purpose [could] be served” in examining the article 14 issue, because “it cannot be said that a clear inequality of treatment remains a fundamental aspect of the case.”<sup>66</sup>

Before examining the statements by the Court on the scope of article 8, it is necessary to understand the personal circumstances of the applicant and the precise activities about which he had complained. The following is taken from the judgment of the Court:

The applicant has, on his own evidence, been consciously homosexual from the age of 14. For some time he and others have been conducting a campaign aimed at bringing the law in Northern Ireland into line with that in force in England and Wales and, if possible, achieving a minimum age of consent lower than 21 years.

On 21 January 1976, the police went to Mr. Dudgeon's address to execute a warrant under the Misuse of Drugs Act 1971. During the search of the house a quantity of cannabis was found which subsequently led to another person being charged with drug offences. Personal papers, including correspondence and diaries, belonging to the applicant in which were described homosexual activities were also found and seized. As a result, he was asked to go to a police station where for about four-and-a-half hours he was questioned, on the basis of these papers, about his sexual life. The police investigation file was sent to the Director of Public Prosecutions. It was considered with a view to instituting proceedings for the offence of gross indecency between males. The Director, in consultation with the Attorney-General, decided that it would not be in the public interest for proceedings to be brought. Mr. Dudgeon was so informed in February 1977 and his papers, with annotations marked over them, were returned to him.<sup>67</sup>

The Commission and the Court “saw no reason to doubt the general truth of the applicant's allegations concerning the fear and distress that he has suffered in consequence of the existence of the laws in question.”<sup>68</sup> It was not really debated that “the very existence of the legislation continuously and directly affects his private life.”<sup>69</sup> In particular, the police investigation “showed that the threat hanging over him was real.”<sup>70</sup> Although the Court did not explicitly say so, it was adopting the (by this point well-established)) jurisprudence of the Commission to the effect that one's sexuality is an important part of one's private life.<sup>71</sup>

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64. *Supra*, note 23. Judges Zekia, Walsh, Matscher and Pinheiro Farina dissented on this point. Nineteen judges heard the case.

65. Judges Evrigenis and Garcia de Enterría thought that the equality issue should have been considered.

66. 4 E.H.R.R. 149, at 170.

67. *Ibid.*, at 158-159.

68. *Ibid.*, at 161.

69. *Ibid.*

70. *Ibid.*, at 162.

71. *Supra*, text accompanying notes 43, 44.

The real debate centred on the justification advanced by the U.K. government for the maintenance of the laws in question. Was the law “necessary in a democratic society . . . [for] the protection of morals . . . [or] of the rights and freedoms of others,” as alleged by the government?

The Court began by noting that “necessary” does not mean “useful”, “reasonable”, or “desirable”, but connoted the existence of a “pressing social need.”<sup>72</sup> As

the present case concerns a most intimate aspect of private life . . . there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of Article 8(2).<sup>73</sup>

The notion of “democratic society” meant that any measures taken by the state had to be “proportionate to the legitimate aim pursued.”<sup>74</sup>

With regard to the prohibition on consensual sex between males over 21, the government relied on the allegedly more conservative nature of Northern Ireland society when contrasted with that of Great Britain, and on the opposition generated by proposals to bring the law into conformity with that of England and Wales. The Court accepted that there were some differences in the moral climate of Northern Ireland and Great Britain, and that a strong body of sincere opposition to liberalization of the law existed. Nonetheless, in view of marked changes in attitudes towards homosexuality, reflected in the domestic law of the great majority of the member-states of the Council of Europe, a “pressing social need” to criminalize homosexual activity could no longer be demonstrated.<sup>75</sup> On the issue of proportionality, the Court was of the opinion that

such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.<sup>76</sup>

Finally, the Court noted that

the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant’s private life to such an extent.<sup>77</sup>

72. 4 E.H.R.R. 149, at 164.

73. *Ibid.*

74. *Ibid.* The failure of the Commission to take these factors into account in its early decisions on homosexuals was criticized by Roger Pinto, *Les organisations européennes*, 2nd ed. (1965), pp. 102-104.

75. 4 E.H.R.R. 149, at 167.

76. *Ibid.*

77. *Ibid.*, at 168.

On the issue of age of consent, which was 17 in Northern Ireland for all sexual activity other than male homosexual activity, the Court declared that

it falls in the first instance to the national authorities to decide on the appropriate safeguards of this kind required for the defence of morals in their society and, in particular, to fix the age under which young people should have the protection of the criminal law.<sup>78</sup>

In a technical sense, the Court was correct in not pronouncing on this issue. As there was no age at which male homosexual acts were permitted, under the existing law of Northern Ireland, it was up to Parliament, in view of the Court's decision, to pass a law specifying the age of consent.<sup>79</sup> Only when that had been done could the Court review the chosen age (be it 21, 18 or 16) in order to ascertain whether the U.K. had exceeded the "margin of appreciation" accorded to states under the Court's established jurisprudence. From another point of view, however, the refusal of the Court to intervene on this point reflects an astute political judgment as to what the European traffic would bear in this controversial area of social policy. Had the Court declared that the age of consent could be no higher than 17 or 18, for example, the resultant backlash may well have obscured the more fundamental point made in the case: that one's sexuality is an important aspect of one's personhood, which cannot be interfered with by the state, absent compelling justification.<sup>80</sup>

It is this principle which is the cornerstone of *Dudgeon*, and which will prove to be *fécond en conséquences* for the national and international protection of human rights in the future. The Court implicitly recognized that the issue in *Dudgeon* is not the permissible limits of the regulation of homosexuality, but the limits on the regulation of sexuality, *tout court*.<sup>81</sup> This fact emerges clearly when one sets *Dudgeon* in the context of the Commission's jurisprudence on heterosexual relations and transsexuals. Such an approach is obviously the result of changing elite attitudes in the fields of psychology, psychiatry, sociology and medicine as well as the emergence of women's liberation and gay liberation movements whose ideas entered the mainstream of political discourse in the 1970's.

A word must be said about "moral majoritarianism" in this context. The Court has made it clear that moral disapproval alone, even by a majority of the citizens of a particular state, of certain sexual practices,

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78. *Ibid.*

79. Which it did in the Homosexual Offences (N.I.) Order, S.I. 1982/1536, which entered into force on December 9, 1982.

80. The Court may also have feared the possibility of certain nations withdrawing their consent to be bound by the individual application procedure.

81. E.g., at 4 E.H.R.R. 149, at 163.

is not sufficient to justify state incursions into the domain of "private life". This must be correct, or the concept of human rights has no meaning at all. The philosophy of human rights is anti-majoritarian by nature in that it aims to protect the liberties of certain individuals and groups whether they are popular or not in a given society. Even if some social harm, or perceived social harm, is associated with their recognition that harm must be balanced against the extent of the incursion.

While the European Court did not go the final step and state that any categorization based on sexual orientation is *prima facie* suspect, its decision provides a solid basis for moves in that direction. In stating that any intrusion into the sexual aspects of one's private life must be predicated on a "pressing social need" and carried out by measures which are "proportionate to the legitimate aim pursued," the Court is effectively saying that categorizations based on sexual orientation *are* suspect, and will be reviewed using a standard of at least intermediate and possibly strict scrutiny. In other words, the Court has stated that it wants convincing evidence of social harm to justify such categorizations.<sup>82</sup> In this context, it is interesting to note that the decision in *Dudgeon* was rendered on the eve of a recommendation and resolution of the Parliamentary Assembly of the Council of Europe calling for the elimination of discrimination against homosexuals.<sup>83</sup> It is to the political arena that we will now turn.

### 3 EUROPEAN POLITICAL INITIATIVES OF THE 1980's

#### (a) The Council of Europe

The Council of Europe is sometimes referred to as the political arm of European unity, while the European Communities<sup>84</sup> are seen as the tool of economic integration. The Statute of the Council provides for a Consultative Assembly to be comprised of representatives from each member-state appointed by, or after consultation with, the national

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82. So far, however, the Commission has been willing to accept "potential disorder" in the armed forces as a sufficient justification for the British policy of discharging homosexuals: app. 9237/81, 6 E.H.R.R. 354 (1983) (decision on admissibility). It has also refused to accept that a (male) homosexual couple involved in a long-term, stable relationship could be said to have a "family life" under art. 8 of the Convention: app. no. 9369/81, 5 E.H.R.R. 601 (1983) (decision on admissibility).

83. Recommendation 924 and Resolution 756 on discrimination against homosexuals, October 1, 1981, adopted at the 10th Sitting of the 33rd Ordinary Session of the Parliamentary Assembly of the Council of Europe. *Dudgeon* came down on September 23, 1981.

84. The European Coal and Steel Community (E.C.S.C.), European Atomic Energy Community (E.A.E.C.) and the European Economic Community (E.E.C.).

Parliaments.<sup>85</sup> Although the Assembly changed its name to the "Parliamentary Assembly of the Council of Europe" in 1974, it remains (unlike the European Parliament) an appointed and not an elected body. The functions of the Assembly are to

discuss and make recommendations upon any matter within the aim and scope of the Council of Europe ... [and to] discuss and ... make recommendations upon any matter referred to it by the Committee of Ministers with a request for an opinion (art. 23).

The Committee of Ministers is the executive organ of the Council (article 13) and is comprised of the Ministers of Foreign Affairs of the member-States or their deputies (article 14). It too, however, is essentially a recommendatory body, its role being confined to the communication of its conclusions and proposals to the governments of member-States (article 15).

Although the powers of these bodies are "wide in scope but narrow in effect," they do exert considerable influence on the formulation of policies in the member-States. More importantly, perhaps, "[t]he Assembly is already recognised as a mouthpiece of European public opinion and also as an important factor in its formulation."<sup>86</sup>

In the late 1970's the Assembly decided to investigate the question of discrimination against homosexuals and charged its Committee on Social and Health Questions with the task of preparing a report on the topic. The report (known as the Voogd Report) was tabled before the Assembly on July 8, 1981 and formed the basis of the recommendation and resolution referred to above.<sup>87</sup> As the first such statements by a supranational political body, they are worthy of some consideration.

In the preamble to its recommendation, the Assembly placed the issue squarely in the context of human rights by noting "its firm commitment to the protection of human rights and to the abolition of all forms of

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85. Art. 25. Art. 26 specifies the number of representatives to which each state is entitled. As of 1982 there were some 170 representatives in the Assembly.

86. A.H. Robertson, *European Institutions. Co-operation; Integration; Unification*, 3rd ed. (London: Stevens & Sons Ltd., 1973), p. 45.

87. The report is Document 4755 of the Assembly's Committee on Social and Health Questions. A "recommendation" of the Assembly is directed to the Council of Ministers and calls for it to take certain action; a "resolution" does not call for such action and may be addressed to a body other than the Committee of Ministers: Robertson, *supra*, note 86, at 44. Resolution 756 (1981), was aimed mainly at the World Health Organisation (W.H.O.), urging it to delete homosexuality from its International Classification of Diseases. The Assembly noted "that the label of mental disturbance can constitute a severe handicap to homosexuals as regards their social and professional development, and can be used in some countries as a pretext for repressive psychiatric practices."

discrimination.” But it clearly views the question as being of universal importance in declaring its belief

that all individuals, male or female, having attained the legal age of consent provided by the law of the country they live in, and who are capable of valid personal consent, should enjoy the right to sexual self-determination.

This statement echoes the theme in the Commission jurisprudence that there is a certain sphere of personal decision-making which should be reserved to the individual with minimal State intrusion. It should be noted, however, that the word “privacy” nowhere appears in the recommendation or resolution. The notion of a “right to sexual self-determination” avoids the problems associated with the “inward-looking” and “outward-looking” aspects of the right to privacy.

The Assembly recommended that the Committee of Ministers

1. urge those member states where homosexual acts between consenting adults are liable to criminal prosecution, to abolish those laws and practices;
2. urge member states to apply the same minimum age of consent for homosexual and heterosexual acts;
3. call on the governments of the member states:
  - a. to order the destruction of existing special records on homosexuals and to abolish the practice of keeping records on homosexuals by the police or any other authority;
  - b. to assure equality of treatment, no more no less, for homosexuals with regard to employment, pay and job security, particularly in the public sector;
  - c. to ask for the cessation of all compulsory medical action or research designed to alter the sexual orientation of adults;
  - d. to ensure that custody, visiting rights and accommodation of children by their parents should not be restricted on the sole grounds of the homosexual tendencies of one of them;
  - e. to ask prison and other public authorities to be vigilant against the risk of rape, violence and sexual offences in prisons.

It is worth noting what exactly the Assembly has said here. It has not advocated the immediate pursuit of some vague goal of “equality” but has proposed specific, easily attainable goals in the particular areas where gays and lesbians have traditionally encountered discrimination. The Committee of Ministers, for its part, seemed rather nonplussed with the Assembly’s action, and “decided, without wishing to comment on the content of these texts, to transmit them to the government’s member-States.”<sup>88</sup> The requests of the Assembly have not, however, fallen on deaf ears. France brought its penal legislation into conformity with paragraph 7(ii) of Recommendation 924 in 1982 by fixing the age of consent for

<sup>88</sup> Information Bulletin on Legal Activities within the Council of Europe, no. 13 (September 1982), p. 12.

sexual activity at 15 for both sexes;<sup>89</sup> in 1985 it also passed a law forbidding discrimination on the basis of sexual orientation.<sup>90</sup> Even before the Voogd Report, Norway had amended its *Criminal Code* to penalize harassment of or discrimination against persons on the basis of their sexual orientation.<sup>91</sup> The Netherlands has included sexual orientation in its human rights legislation since 1980, and Spain has recently removed homosexual acts from its code of military offences.<sup>92</sup> The Spanish Parliament has also become the first to announce (in June, 1985) that it supports Recommendation 924 of the Parliamentary Assembly of the Council of Europe.<sup>93</sup>

### (b) The European Parliament

Elected for the first time by direct suffrage in 1979, the European Parliament is still mainly a consultative body and in that sense is analogous to the Parliamentary Assembly of the Council of Europe.<sup>94</sup> It does, however, have certain powers of supervision over the Commission of the European Communities, the body which drafts proposed European legislation for the consideration of the Council of Ministers.<sup>95</sup> On occasion it proposes amendments to legislation which it transmits to the Commission for submission to the Council.<sup>96</sup>

Following upon the Dudgeon decision and the subsequent action of the Parliamentary Assembly of the Council of Europe, two motions for resolutions were put forward in the European Parliament in 1982, one

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89. Law no. 82-683, August 4, 1982, replacing an amendment to the *Code pénal* of December 23, 1980 which had imposed more severe penalties for sexual acts with a minor of the same sex than with one of the opposite sex. Denmark also has a uniform age of consent (15), as does the Netherlands (16). Belgium adopted a uniform age of 16 as of June 4, 1985.

I do not necessarily support the principle of a uniform age of consent. The grave consequences which an early pregnancy can have for a girl in her early teens simply do not exist for males of the same age, and could arguably support a *higher* age of consent for females than for males.

90. *The Body Politic*, no. 119, October 1985, p. 27.

91. Law no. 14 of May 8, 1981: see Information Bulletin on Legal Affairs, no. 13 (September 1982), p. 37. For similar legislation in Canada (quasi-criminal rather than criminal), see the Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12, s. 10 as am. by S.Q. 1982, c. 61, s. 3: "No one may harass a person on the basis of any ground mentioned in section 10" (s. 10 includes "sexual orientation" as a prohibited ground of discrimination).

92. *The Body Politic*, no. 112, March 1985, at 19.

93. *Ibid.*, no. 117, August 1985, at 24.

94. See, generally, Michael Palmer, *The European Parliament* (Oxford, Pergamon Press, 1981).

95. *Ibid.*, at 31.

96. *Ibid.*

on "sexual discrimination" in employment,<sup>97</sup> the other on "statutory and other discrimination against homosexuals."<sup>98</sup> These motions were referred to the Committee on Social Affairs and Employment which tabled its report (the Squarcialupe Report) before the European Parliament on February 1, 1984.<sup>99</sup> The report was debated on March 13, 1984 and a "Resolution on sexual discrimination at the workplace" adopted on the same date.<sup>100</sup> It covers essentially the same ground as the recommendation and resolution of the Parliamentary Assembly of the Council of Europe, in spite of the ambiguity of the title. The main focus is on discrimination in the workplace partly because the European Communities are primarily concerned with economic matters and employment, but also because there had been a number of well-documented cases in which individuals were dismissed from their jobs solely on the basis of their sexual orientation.<sup>101</sup> The resolution calls on the Commission to submit proposals ensuring that discrimination in the employment field is prohibited, and to report under article 122 of the EEC Treaty on the existence of discriminatory provisions in the legislation of the member-States.

#### 4 CONCLUSION

The European Court of Human Rights has decided that homosexuals have a right to privacy which is part of the international law of human rights.<sup>102</sup> If the Court has not yet touched on the issue of whether homosexuals are beneficiaries of the anti-discrimination provisions of article 14 of the *European Convention on Human Rights*, there are probably three reasons for this reticence. The first is that the Court has avoided equality issues wherever possible in its jurisprudence,<sup>103</sup> as "no article has

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97. Doc. 1-172/82.

98. Doc. 1-1072/82.

99. Doc. 1-1358/83, European Parliament Working Documents, 1983-1984.

100. See O.J. No. C. 104/46, 16.4.84, for the text of the resolution and an account of the voting. The resolution passed by a majority of 114 to 45, with 22 abstentions.

101. Referred to at p. 10 of the Report, *supra*, note 98. The resolution also finds it deplorable "that in some Member States homosexuals are barred from certain professions such as the armed forces, the diplomatic service and the merchant navy."

102. The Court will soon be called upon to apply *Dudgeon* in a case arising out of the decision of the Irish Supreme Court in *Norris v. A.G.* (April 22, 1983), which seems on all fours with *Dudgeon*. For comment on *Norris*, see the case note by Conor Gearty at (1983), 5 Dublin U.L.J. 264.

103. The Court will not consider art. 14 arguments unless a clear inequality of treatment in the enjoyment of the right is a fundamental aspect of the case: see Warwick McKean, *Equality and Discrimination under International Law* (Oxford: Clarendon Press, 1983), p. 217.



been more controversial in its interpretation and application.”<sup>104</sup> The second is that the type of restrictions at issue in *Dudgeon* were aptly suited for a privacy-type analysis. Issues such as discrimination in employment or housing or custody law may not be, and will require a direct confrontation with article 14. Finally, one would be naive not to recognize that the Court is very reticent about opening the Pandora’s box of “equality” in the gay rights context. Cases such as *Dudgeon* can be defended using traditional liberal notions about the appropriate sphere of State action. “Equality” raises questions which are much more discomfiting.

But much has happened since *Dudgeon*. The actions of the Parliamentary Assembly of the Council of Europe, the European Parliament, and the member-States of both organizations indicate that there is an emerging political consensus on the desirability of recognizing that homosexuals are entitled to equal rights under the *European Convention on Human Rights*. They cannot be ignored by the Court in its future decisions, and should not be overlooked by courts in other jurisdictions adjudicating human rights issues.

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104. *Ibid.*, at 214.