

## Gay and Lesbian Rights and EU Enlargement

*Joke Swiebel*

What can be done in the framework of the EU accession process to promote gay rights? What has been done so far - what are the achievements on which we have to build?

Before trying to answer these questions two preliminary remarks must be made.

First, the upcoming accession of new member states in Eastern and South Eastern Europe to the European Union is an historic obligation and a challenge for Europe as a whole, both for existing and new member states. It is not something that can be taken for granted - as the Western Europe public often appears to believe. The enlargement of the EU, to be decided in 2003, is essential for safeguarding lasting peace and stability. It will promote prosperity and economic growth and so provides leverage for countering discrimination and fostering a climate of pluralism and tolerance.

Secondly, gay rights are not "special" rights, as though gays and lesbians were a kind of rare species needing protection. Gay rights form an integral part of human rights. [\[1\]](#) Human rights can only mean human rights for all.

### **The Copenhagen political criteria**

The European Council, meeting in Copenhagen in 1993, called on EU accession states to fulfil basic conditions regarding "the rule of law, democracy, human rights and respect for and protection of minorities". This is widely considered the ideological core of enlargement, indicating that the EU is not just a single market but, first and foremost, a community of values. This notion has been reinforced by the solemn adoption of the EU Charter of Fundamental Rights by the European Council in Nice in December 2000.

However, almost ten years on, some accession states still contain discriminatory provisions in their Penal Codes affecting gays and lesbians. In particular, some "age of consent" provisions stipulate different age limits for heterosexual and for homosexual acts - discriminating, in other words, on the basis of sexual orientation. These provisions tend to legitimate discrimination in daily life, they encourage blackmail and force gays to lead double lives. They block honest sexual education for the young and prevent them from learning about themselves in freedom.

Provisions of this type have been found contrary to the European Convention of Human Rights. [\[2\]](#) The European Parliament has asked for the repeal of these discriminatory provisions in numerous resolutions. [\[3\]](#)

In the past, in their annual reports on the progress of the accession countries, the European Commission has mentioned these areas only briefly and cursorily. The 2000 reports referred only to Romanian and Cypriot provisions, although similar provisions were also in force at that date in Bulgaria, Estonia, Hungary and Lithuania. In summer 2001, two things happened: the European branch of the International Lesbian and Gay Association (ILGA) published a comprehensive report on the region, [\[4\]](#) and the Intergroup for Gay and Lesbian Rights organised a hearing in the European Parliament on the situation of gays and lesbians in the accession states. Both events placed gay rights more firmly on the enlargement agenda - a fact borne out in subsequent resolutions adopted by the European Parliament in September 2001. [\[5\]](#) All this pressure resulted in more thorough reporting by the Commission in their next round of

reports. Apparently, Commission officials had been told to take the issue on board. Let's see how well they have done.

In the 2001 reports, we are told that Estonia, Lithuania and Romania have abolished the offending provisions. No mention is made of the fact that at that time (November 2001) the Romanian Senate had yet to approve the country's new "Emergency Ordinance", and that in the two other countries the new laws had yet to enter into force. The reports also noted that provisions still exist in Bulgaria, Cyprus and Hungary, but only the Bulgarian report explicitly refers to this as a discriminatory provision and calls for its removal. The other reports merely mention the provisions without comment.

In general, the Commission's opinion is that all accession countries, with the exception of Turkey, continue to fulfil the Copenhagen political criteria. On the issue of non-discrimination in general, the Commission only remarks that further efforts are needed. This is strange and possibly contradictory. Commissioner Gunter Verheugen, speaking in the European Parliament on 4 September 2001, said he wished to make it crystal clear that the Commission will continue to press in the enlargement negotiations for human rights and non-discrimination, including on grounds of sexual orientation. But can we believe him, if that same Commission continues to claim that the accession states already fulfil the political criteria despite the persistence of discriminatory provisions in their Penal Codes?

Indeed, to quote the Commissioner again, further efforts are needed.

EU politicians are in a position to put more pressure on the negotiating process.

Politicians in the accession states can be called on to work towards law reform. In this context, gay youth groups can play a major role. Let us not forget, for example, that a discriminatory age of consent provision in the Dutch Penal Code was abolished in 1971, only after political pressure resulting from a demonstration organised by gay youth and student groups. These are people with a clear interest to defend.

### **Implementation of the *Acquis Communautaire***

Accession states are also required to adopt and implement the existing body of European Community legislation, known as the *acquis communautaire* and extending to more than 80,000 pages. Much discussion is now underway concerning the extent that accession states can realistically live up to this expectation, and what the consequences would be if they failed.

Although it is difficult, and possibly counter-productive, to distinguish between first and second class European legislation, it is safe to say that legislation intended to counter discrimination and promote the rule of law deserves some priority. For our purposes, the most significant piece of legislation at EU level is the "Framework Employment Directive". [\[6\]](#)

This directive is based on Article 13 of the Treaty of the European Communities, introduced with the Treaty of Amsterdam (1997). In a significant step forward, this article - and the resulting directive - specifically address discrimination on the grounds of "sexual orientation" *inter alia*, requiring appropriate action in all European Union member and candidate states.

The directive forbids discrimination in all aspects of employment relations and contains precise definitions of both direct and indirect discrimination. This means it will not be

enough for future (and existing) member states to hint at the general equality clauses that may exist in their Constitutions. The transposition of the directive requires detailed legislation on such issues as harassment, victimisation, sanctions, and positive action, as well as possible legal exceptions. In addition, the directive obliges governments to encourage dialogue with NGOs working in the field. In other words, governments will have to consult with gay and lesbian interest groups before proposing any legislation to implement this directive - and will therefore, implicitly or explicitly, have to recognise lesbian and gay groups as legitimate political actors.

Existing and new member states are required to have adopted the directive by December 2003. In addition, all will have to report to the European Commission by December 2005 on steps taken, providing the information necessary for the Commission to draw up a report to the European Parliament and the Council on the implementation of the directive.

It should not be forgotten that if a member state fails to comply with EU legislation, the Commission, as guardian of the European Treaties, can in the last resort bring that state before the European Court of Justice - a powerful weapon that has proved its worth on many occasions. At the parliamentary hearing on gay rights, Anna Diamantopoulou, who, as Commissioner for Employment and Social Affairs, is responsible for equal treatment legislation, left little doubt that the Commission will take this issue seriously. We can therefore hold states to account and monitor both the implementation of the Directive in all members and candidates, and their provision of information to the Commission.

But the work will not end there. Weaknesses and omissions in the legislation must be repaired. First and foremost, legislation forbidding discrimination on grounds of sexual orientation (and sex, age, religion, belief, and handicap) will have to be extended to the same material scope (area of application) as is now in place for the best protected grounds, i.e. discrimination based on race or ethnicity. This form of discrimination is forbidden not only in employment, but also with respect to social advantages, education and the supply of and access to goods and services. This disparity in the protection against different forms of discrimination appears to indicate a hierarchy, and sends the wrong political signal. What is more, it creates a hotch-potch of rules which adversely affect not only the quality of the legislation but also its transparency for the citizen.

#### **The Action Programme to combat discrimination**

Under the Action Programme, adopted together with the directive in November 2000, nearly one hundred million Euros is made available for actions initiated by civil society. The programme covers all the grounds for discrimination mentioned in Article 13. The thinking behind this programme is that, notwithstanding its importance, legislation is not in itself sufficient to solve the problem of discrimination. Money is available for fact-finding and research, for capacity building, organisational work and awareness-raising. If the strategy works, the outcomes generated by these activities may in turn contribute to new legislative actions.

The Action Programme is open to accession countries, depending on arrangements between the European Commission and the government concerned. This means that gay and lesbian NGOs have good reason to ensure that the Action Programme - and its

financial resources - are brought to the attention of their governments, and request their legitimate slice of the pie.

### **The EU Charter of Fundamental Rights and other developments**

The Charter, proclaimed at the European Council in Nice in December 2000, contains an overall anti-discrimination clause - Article 21 - which includes sexual orientation among the grounds on which discrimination is to be prohibited. However, the Charter is only directed at the governments of the member states in their application of community law and, so far, lacks binding force. Nevertheless, it seems likely that the Charter will gradually take on indirect legal force, in, for example, the rulings of the Court of Justice. The Convention on the Future of the European Union, which began in February 2002, will need to examine the proper place of the Charter as Europe goes forward. In the meantime, Article 21 should be cherished as a political jewel with potentially extensive political and legal consequences.

The swift adoption of EU instruments to fight discrimination on grounds of sexual orientation has partly been caused by concern in the European political arena about the phenomenon of racial hatred and the accession to power of right-wing and populist parties. The challenge now is to build a solid structure of real substance that goes beyond lip-service. For that, a coalition is needed, composed of all interested parties working inside the European institutions as well as in civil society. Divided we fall, united we stand.

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#### Footnotes

[1] I use the term "gay rights" to encompass lesbian, gay, bisexual and transgender rights, rather than struggle with the tongue-twisting abbreviation "LGBT".

[2] *Sutherland v UK*, no. 25186/94, 1 July 1997, European Commission on Human Rights.

[3] Res. A5- 0223/2001, adopted 5 July 2001, para. 80 and 83;  
Res. A5- 0050/2000, adopted 16 March 2000, para. 59 and 60;  
Res. A4- 0468/98, adopted 17 December 1998, para. 53;  
Res. B4- 0824 en 0852/98, adopted 17 September 1998;  
Res. A4- 0034/98, adopted 17 February 1998, para 69;  
Res. A4- 0112/97, adopted 8 April 1997, para. 136 and 140;  
Res. A4- 0223/96, adopted 17 September 1996, para. 84;  
Res. A3- 0028/94, adopted 8 February 1994, para. 6.

[4] *ILGA-Europe*, "Equality for Lesbians and Gay men. A relevant issue in the EU accession process", Brussels 2001. Online here, visited 31 March 2002.

[5] B5- 0538/01, adopted 5 September 2001, para. 55 (on enlargement in general),  
A5-0251/01, adopted 5 September 2001, para. 6 (Estonia),  
A5-0253/01, adopted 5 September 2001, para. 5 (Lithuania),

A5-0257/01, adopted 5 September 2001, para. 14 (Hungary),  
A5-0258/01, adopted 5 September 2001, cons. H and para. 9 (Bulgaria),  
A5-0259/01, adopted 5 September 2001, para. 6 (Romania),  
A5-0261/01, adopted 5 September 2001, cons. B and para 25 (Cyprus).

All reports can be found at the EP's website here

[\[6\]](#) Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation.