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<http://www.ilga-europe.org/>

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## **EUROPEAN COURT OF HUMAN RIGHTS CONDEMNS AUSTRIA FOR PERSECUTION OF GAY MEN**

*Platform Against Art. 209 calls for immediate rehabilitation and compensation of all victims*

With two judgments published 9 January 2003 the European Court of Human Rights condemned Austria for its years of criminal persecution of gay and bisexual men. The age of consent of 18 years for male same-sex relations, contained in former Art. 209 Criminal Code, violated fundamental human rights, the Strasbourg judges held unanimously.

The Court with its judgments gave way to the applications of two gay men convicted to suspended prison terms under the anti-homosexual criminal law Art. 209 CC and to the application of a 17-year-old adolescent who asserted his right to sexual self-determination.

It found no justification for the special age-of-consent of 18 years for male homosexual relations, since on the one hand according to recent scientific evidence sexual orientation is fixed before puberty and on the other hand the majority of European states does not have such laws anymore. The Court specifically criticized the 1996 refusal of the Austrian parliament to lift Art. 209 despite the fact that its members, through the 1995 hearing of experts, already have been aware of the lack of justification for the law.

### **Repeal of Art. 209 did not end discrimination**

Europe's highest court in human rights affairs qualified discrimination of homo- and bisexuals as serious as discrimination on the basis of race, origin, colour and sex. The judges thereby explicitly held that the repeal of the law from the books last year did not terminate discrimination since Austria never acknowledged Art. 209 and the criminal persecution based upon it as human rights violations and since Austria did not afford adequate redress for the victims. Also the Austrian Constitutional Court, the Court said, did not acknowledge let alone afforded redress for the violations of the Convention.

Austria has to pay more than EUR 57.000,-- just satisfaction to the three applicants. The two convicts have been awarded EUR 15.000,-- each as redress for distress and humiliation suffered by the criminal proceedings, in particular, by the trial during which details of the applicant's most intimate private life were laid open in public. Those proceedings "have to be considered as profoundly destabilising events in the applicants' lives which had and, it cannot be excluded, continue to have a significant emotional and psychological impact on each of them", the

Court said. The 17-year-old adolescent, who always felt particularly attracted by men older than himself, has been awarded EUR 5.000,-- as redress for "the fact that the applicant was prevented from entering into relations corresponding to his disposition until he reached the age of eighteen". In addition the Court awarded each of the applicants a contribution to their costs and expenses for legal representation.

### **Austrian government must act now**

Platform Against Art. 209, which already last June effected the repeal of Art. 209 CC by the Austrian Constitutional Court, now calls for immediate and comprehensive compensation and rehabilitation of all victims of Art. 209. Despite the repeal of the law last summer victims of Art. 209 have not been compensated and they are still registered in the nationwide registry of criminal offenders; non-final convictions still have been confirmed by appeals courts, mitigation of sentences been refused and prisoners been denied release. This despite the fact that persons jailed under Art. 209 CC are undoubtedly prisoners of conscience within the mandate of Amnesty International.

"We are calling upon the upcoming federal government of Austria to act immediately and to rehabilitate and compensate the victims of Art. 209", says Dr. Helmut Graupner, spokesperson for "Platform Against Art. 209" and attorney of the prisoner, "It is a disgraceful shame for our country that an Art. 209-prisoner-of-conscience even had to die in an institution for mentally abnormal offenders around last Christmas because a Vienna court persistently refused to release him after the repeal of Art. 209."

The interdenominational and supra-partisan Platform Against Article 209 comprises more than 30 organizations that joined in the fight against the discriminatory supplemental minimum age of 18 years for homosexual relationships between men only (in addition to the general age of consent of 14 for heterosexuals, lesbians and gays alike), as set forth in article Art. 209 of the Criminal Code. Nearly all associations of the homosexual movement, but also general organizations are members of the Platform, like AIDS-help-organisations, the Ombudspersons for Children and Adolescents of the States of Vienna and Tyrol, the Austrian National Student Union, the National Association of Probation, the Austrian Society for Sexual Research, and many others more. After the repeal of Art. 209 the Platform works for the release of all prisoners, for the deletion of all verdicts from criminal records and for just satisfaction of all victims of Art. 209. In addition it monitors the enforcement of the new Art. 209-substitute-provision, Art. 207b Criminal Code.

Press release by the European Court of Human Rights:  
<http://www.echr.coe.int/Eng/Press/2003/jan/L&VvAustriaandSLvAustriajudse.htm>

The full text of the Court's judgments:  
<http://hudoc.echr.coe.int/Hudoc1doc2/HEJUD/200301/1.-v.%20v.%20austria%20-%2039392jv.ch1b%2009012003e.doc>  
<http://hudoc.echr.coe.int/Hudoc1doc2/HEJUD/200301/s.1.%20v.%20austria%20-%2045330jv.chb1%2009012003e.doc>

### **ILGA-EUROPE WELCOMES LANDMARK DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS ON DISCRIMINATORY AGE OF CONSENT LAWS**

Brussels, 9 January 2003

Today the European Court of Human Rights published its judgments in three cases challenging Austria's discriminatory age of consent for gay men, as set out in Article 209 of the Austrian penal code.

The Court found this provision to be in breach of the European Convention on Human Rights, and in particular of Article 14, the right to non-discrimination.

Article 209 was already repealed in July 2002 following a ruling of the Austrian Constitutional Court. The significance of today's judgments is therefore as much at the European as at the national level. The European Court of Human Rights established unequivocally that discriminatory age of consent laws are a violation of the European Convention on Human Rights. This, therefore, applies to all Council of Europe countries with age of consent laws discriminating on the grounds of sexual orientation.

The judgments follow a similar opinion in 1997 by the European Commission on Human Rights (*Sutherland vs. the United Kingdom*). However this ruling was advisory in nature, and did not carry the full weight of a judgment by the Court itself.

Nico Beger, ILGA-Europe co-delegate to the Council of Europe, commented: "these judgments mean there is no longer any excuse for those Council of Europe member states which still have discriminatory age of consent laws - Albania, Bulgaria, Greece, Ireland and Portugal. We call on them to honour their obligations under the European Convention on Human Rights and repeal these laws immediately".

Kurt Krickler, ILGA-Europe co-chair from Austria, added: "while the judgments are too late to affect the situation in Austria, they will come as some consolation to the 1,200 people who have, over the years, been unjustly prosecuted under Article 209. We congratulate the individuals who have had the courage to take these cases, and the organisations which have supported them."

Background:

Until 1998 cases taken under the European Convention on Human Rights were dealt with in two stages. They were reviewed first by the European Commission on Human Rights, which offered an advisory ruling. This sometimes led to a settlement between the parties, as in the case of *Sutherland vs. UK*. If not, the case proceeded to a hearing before the Court. In 1999 a single stage process was introduced, and the Commission was abolished.

See

<http://www.echr.coe.int/Eng/EDocs/HistoricalBackground.htm>

### **EU CONVENTION WORKING GROUPS**

*By Tomorrow Europe*

#### **Group II: Charter of Fundamental Rights, chaired by Mr Antonio Vitorino (discussion 29 October)**

*Final report of Working Group II, CONV 354/02, 22 October 2002*

The Group came out strongly in favour of recognising the binding nature of the Charter on the EU institutions and on the Member States when implementing EU acts: it is an essential "building block" in any constitutional text. There is no question of making amendments of substance to the articles on the various rights, so as to avoid reopening the debate concluded at the previous Convention.

The Group was virtually unanimous in calling for the full text of the Charter to be incorporated into the Constitutional Treaty. Its report reveals members' unanimous support for the introduction of a Treaty clause authorising the Union to accede to the ECHR.

In addition, a majority of members of the Group concurred on the need for amendments to the so-called "horizontal" articles concerning the scope of rights, because in their opinion these amendments would facilitate incorporation of the Charter into the Constitution.

It seems that, by the end of the discussions, agreement had been reached on making the Charter binding and incorporating it into the Treaty, either directly or by reference. The Convention will need to decide at a later stage on the manner of its incorporation. Discussion in the plenary broadly supported the introduction into the Constitutional Treaty of a clause authorising the Union to accede to the ECHR.

**Group X: Freedom, Security and Justice, chaired by Mr John Bruton (discussion on 6 December)**

*Final report of Working Group X on Freedom, Security and Justice, CONV 426, 2 December 2002*

The Group's mandate is to investigate what improvements should be made to the Treaties, in particular concerning the need for institutional changes in the fields of immigration, asylum, visas and the external borders, as well as judicial co-operation in civil matters, with a view to promoting the establishment of a real area of freedom, security and justice.

The report proposes:

- ?? grouping together all provisions relating to the European area of freedom, security and justice in a single Treaty title, with a breakdown of the EU procedures which may vary depending on the action envisaged at Union level;
- ?? applying the codecision procedure with QMV in the fields of visa policy, external border management, asylum and immigration;
- ?? extending judicial control by the Court of Justice to all JHA fields;
- ?? adopting Community acts (directives and regulations) in all JHA fields and abolishing Conventions;
- ?? building the principle of solidarity into the Treaty (for the fields of external borders, immigration and asylum), and likewise the principle of mutual recognition (for the field of judicial co-operation);
- ?? strengthening the approximation of substantive and procedural criminal law.

The report nevertheless advocates that the right of initiative should, as now, be shared between the Commission and Member States for judicial co-operation in criminal matters and police co-operation.

It recommends a review of the tasks of Europol and Eu-

rojust, and giving these two bodies a legal basis so as to facilitate future developments. External border management could be organised through an integrated system and administered by a European surveillance corps. The Court of Justice could be endowed with additional powers in these fields.

Some members of the Working Group called for the creation of a European Public Prosecutor; others opposed the creation of any such body; others still argued in favour of a fully-fledged European Public Prosecutor's Office based on Eurojust. No conclusion was reached.

The report was positively received on the whole, implying that the third pillar is likely to be abolished. In his conclusion, the Chairman of the Convention stated that the report had in the main been approved by the Convention and that the third pillar would disappear. He considered that Eurojust should be strengthened. He detected some opposition to a future European Public Prosecutor's Office, but deemed this to be a minority view. He stated that the future European Constitution would include the principle of mutual recognition of judicial decisions in criminal and civil matters, together with a list of crimes falling within European competence as a result of their seriousness and their cross-border nature. Mr Bruton added that national parliaments should play a more active role in scrutinising these matters, in particular by means of better information flows and more frequent meetings of national MPs at European level.

## **BRITAIN PLANS PARTNERSHIP LAW**

*By Rex Wockner*

The British government has announced plans to give same-sex couples marriage rights.

"I do think society has moved on, and I think that we recognize that there are very many people in gay relationships who are in very loving relationships ... but their partnership has no recognition in law," Barbara Roche, minister for social exclusion and equalities, told the BBC.

"You have people who have shared their lives, shared their homes, whose lives are entwined with each other. Why shouldn't their relationship be recognized as the loving and secure relationship that it is?"

"We are not talking about marriage here," Roche said. "What we are talking about is the signing of a register."

Areas that could be covered by a partnership law include inheritance, pensions, tenancy, taxes, property and immigration.

London Mayor Ken Livingstone welcomed the announcement.

"I am delighted the government has recognized the gross inequalities," he said.

Political parties expressed support across the board.

"Whilst we attach a huge importance to the institution of marriage, we do recognize that gay couples suffer from some serious particular grievances," said Oliver Letwin, the Tory spokesman on domestic issues.

The law, should it pass the House of Commons and the House of Lords, would apply in England and Wales. Scotland would consider the proposal separately.

## **BRITAIN PLANS TRANSEXUAL RIGHTS**

*By Rex Wockner*

People who change their gender are set to have greater rights in Britain.

The government said Dec. 10 it will introduce legislation allowing transsexuals to revise the gender listed on their birth certificates and then marry someone of the opposite sex.

The moves are a response to a ruling by the European Court of Human Rights in the case of a British transsexual bus driver who wanted to be legally recognized as a woman in order to obtain her retirement pension at an earlier age.

British women can get their pensions at age 60 while men must wait till age 65.

## **SWEDEN: GAY COUPLES CAN BE EXAMINED AS ADOPTIVE PARENTS FROM 1 FEBRUARY 2003**

*By RFSL*

The Government decided 16 December 2002 that the legislative amendments required to implement the Riksdag's decision to give gays the same parenthood rights as heterosexuals will enter into force on 1 February 2003.

The amendments will make it possible for two registered partners to be jointly examined as adoptive parents. This means that two partners will be able to jointly adopt a child and that one of the partners may adopt the child of the other. The amendments will also make it possible to designate registered partners and same sex cohabitants as specially appointed custodians to exercise joint custody of a child.

On 13 June, the Swedish Government decided to implement the legislative amendments on homosexuals and children decided by the Riksdag on 5 June. On 3 July, the Government withdrew from the 1967 European Convention on the Adoption of Children. The Convention will thus cease to apply six months after this date.

"The amendments mean that only the best interests of the child will determine when an adoption will take place, not the sexual orientation of the parents. Nobody has automatic rights to adoption, but homosexuals will now have the right to be examined as adoptive parents. Applications for adoption will, in other words, continue to be examined on their own merits", says Minister for Justice, Thomas Bodström.

## **HATE CRIMES CRIMINALISED IN SWEDEN**

The Swedish Riksdag has adopted a change to the Swedish Constitution criminalizing hate crimes against homosexuals.

The new provision came into force January 1<sup>st</sup> 2003.

## **EURO GAY RIGHTS SCOREBOARD**

*By Hein Verkerk*

The updated Eurogayrights scoreboard has moved to another URL being

<http://members.chello.nl/h.verkerk2/Hearingintergroup/>

## **RECOMMENDATION TO EXTEND THE TERMS OF REFERENCE OF THE EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE (ECRI) TO COVER HOMOPHOBIA FOUNDED ON SEXUAL ORIENTATION**

*By 2<sup>nd</sup> Round Table with National Human Rights Institutions / 4<sup>th</sup> European Meeting of National Institutions*

The participants in this Round Table take note of the following:

Recommendation 1474 (2000) of the Parliamentary Assembly of the Council of Europe on the situation of lesbians and gays in Council of Europe member states and of the report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly leading up to that Recommendation. In the Recommendation, the Parliamentary Assembly recommended that the Committee of Ministers extend the terms of reference of the European Commission against Racism and Intolerance (ECRI) to cover homophobia founded on sexual orientation.

Opinion No. 216 (2000) of the Parliamentary Assembly of the Council of Europe on draft Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, in which it recommended that the Committee of Ministers include sexual orientation among the expressly forbidden grounds for discrimination in Article 14 of the Convention, considering it to be one of the most odious forms of discrimination.

The case law of the European Court of Human Rights, in particular its judgements in the cases of *Dudgeon v. United Kingdom* (judgment of 22 October 1981), *Lustig-Prean & Beckett v. United Kingdom*, *Smith & Grady v. United Kingdom* (judgment of 27 September 1999) and *Salgueiro Da Silva Mouta v. Portugal* (judgment of 21 December 1999), in which the Court has consistently upheld a strict justification test for differences in treatment based on an individual's sexual orientation not to be considered a violation of the Convention.

Article 21 of the Charter of Fundamental Rights of the European Union, according to which any discrimination based on sexual orientation shall be prohibited.

Council directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, according to which discrimination on grounds of sexual orientation is prohibited.

As the Parliamentary Assembly noted in its Recommendation 1474 (2000), gays, lesbians and bisexuals are still all too often subjected to discrimination and violence, e.g. at work, in schools or in the street. Homophobia is sometimes even propagated by certain politicians or religious leaders, in order to justify the continued existence of discriminatory laws and, above all, aggressive or contemptuous attitudes.

The participants in this Round Table therefore recommend that the Committee of Ministers of the Council of Europe extend the terms of reference of the European Commission against Racism and Intolerance (ECRI) to cover homophobia founded on sexual orientation, as recommended by the Parliamentary Assembly of the Council of Europe in its recommendation 1474 (2000). Member states are urged to allocate adequate funding for ECRI in order to ensure that it be able to carry out its mandate effectively.

## **CHALLENGING DISCRIMINATION IN MALTA**

*By Malta Gay Rights Movement (MGRM)*

On the 16<sup>th</sup> of November the Malta Gay Rights Movement (MGRM) held its first annual national conference entitled "*Challenging Discrimination: Facts, Figures and New Frontiers*". The conference was organised in collaboration with the Malta-EU Information Centre (MIC) and was attended by an encouraging number of participants.

During the conference the extent of discrimination, harassment and violence against gay men, lesbians and bisexuals in Malta was discussed with reference to the survey conducted by MGRM over the past year documenting the same. The findings of the said survey were in fact made public locally for the first time during the conference.

The participants were addressed by a number of speakers who gave presentations on various subjects related to the theme of the conference. The main speaker was Mr. Michael Cashman, MEP and member of the EP's Intergroup on gay and lesbian rights. Mr. Cashman gave those present a strong message of support and encouragement and also spoke about EU action so far in the candidate countries regarding LGBT rights. He spoke about opportunities for NGO's under EU programmes, including the YOUTH Programme and the action programme to combat discrimination. The following Monday, during a plenary session on enlargement at the EP, Mr. Cashman referred to the inadequate implementation of Directive 2000/78/EC in Malta.

Ever since the national debate on EU membership began in Malta, the rights of sexual minorities have very conveniently been used by both sides of the debate as a political tool with which to reassure or scaremonger the voters that "traditional" Maltese Catholic values are, or are not, threatened by Malta's membership in the EU. The anti-EU lobby has claimed, on several occasions, that should Malta join the EU, same-sex marriages would

have to be introduced. The pro-EU lobby, on the other hand, often claimed that the EU has no competence in protecting gay and lesbian rights. As MGRM has on many previous occasions pointed out, neither of these statements is correct. One of the aims of the conference was, in fact, to give the real picture regarding the question of the impact that Malta's possible membership of the European Union might have on the rights of the Maltese LGBT community, and to single out the facts from the myriad of truths, half-truths, lies and propaganda that the Maltese LGBT community and the general public have been bombarded with over the past couple of years. It was for this reason that the conference was held in collaboration with the Malta-EU Information Centre and that a speaker on behalf of the centre gave a presentation on LGBT rights and the EU; a presentation that was both informative as well as very factual.

Another legal expert was also present at the conference and delivered a presentation on the provisions of the European Convention on Human Rights that are relevant to LGBT rights, and on the European Court of Human Rights' judgements vis-à-vis the rights of sexual minorities. The EU candidate countries are expected to be in compliance with these judgements prior to their accession to the EU.

In the afternoon two separate workshops were held. One of them re-examined EU Council Directive 2000/78/EC and delved into more detail regarding its requirements as to LGBT rights at the workplace, whereas the other one involved an open discussion regarding the MGRM and where it should be heading. Participants in both workshops took an active role and later expressed their satisfaction and support for our cause.

The conference was supported financially by the Malta-EU Information Centre.

## **FINAL APPROVAL OF BELGIAN ANTI-DISCRIMINATION LAW**

Brussels, December 12th 2002

*By Anke Hintjens, spokeswoman for the Holebifederatie*

### **1. History of the anti-discrimination law**

*(See also article (in Dutch) in the magazine "Zizo", May-June 2002 for a more detailed overview)*

The anti-discrimination law has a long history. A first proposal, limited to sexual orientation discrimination, was put forward in 1985 and resubmitted on several occasions (1989, 1992). Only in 1996 was this proposal debated in the justice committee of the federal Chamber of

Deputies where it met with fierce opposition from both right wing (Christian Democrats, Liberals) and extreme right wing (ultra-nationalistic) parties. The proposal failed to pass.

The Holebifederatie together with several MP's wrote a new proposal for a general antidiscrimination law in 1998, banning discrimination on a large number of grounds, including all those specified in § 13 of the treaty of Amsterdam. Parliamentary elections in June 1999 resulted in a new government, which, thanks to lobbying of the Holebifederatie, quickly moved to support the introduction of a general anti-discrimination law. The approval of the Framework directive in November 2000 acted as a timely reminder for the Belgian government. In December 2001, the proposal was approved in the Belgian Senate and on the 12th of December 2002 it got definitive approval from the federal Chamber of Deputies.

### **2. Summary**

The new anti-discrimination law bans any direct or indirect discrimination in the provision of goods and services, labour relations or in the execution of any other regular economic, social, cultural or political activity. Grounds of discrimination covered by the anti-discrimination law are sex, so called race, complexion, ancestry, nationality, ethnic origin, sexual orientation, marital status, birth, age, religion, philosophy of life, present or future state of health, physical ability or quality.

Incitation to discrimination, hate or violence and discrimination by a public servant are liable to punishment under criminal law. Discrimination between citizens is dealt with under civil law. The court can, among others, order a discriminatory act to be ceased immediately, impose damages on a daily basis in case of non-compliance and force the perpetrator to publish the courts' verdict.

The treatment of discrimination under civil law allows for the reversal of the burden of proof. If a reasonable presumption of discrimination can be established, possibly using statistical data or field-tests, it is up to the alleged perpetrator to prove the absence of discrimination.

The presence of a hate motive when committing crimes such as failure to provide assistance to a person in distress, (indecent) assault, rape, abduction, manslaughter, desecration of a grave etc. is considered an aggravating circumstance, which the court has to consider when passing judgment.

The anti-discrimination law also broadens the objectives of the Equal Opportunities Centre (Centrum voor gelijkheid van kansen) to combat discrimination on all

grounds specified in the law, except for discrimination on the basis of sex, for which a separate institute will be established. The anti-discrimination law allows the Equal Opportunities Centre and interest groups to represent victims of discrimination in court.

## **ARMENIA LEGALIZES GAYS**

*By Rex Wockner*

The former Soviet republic of Armenia legalized gays Jan. 9.

The National Assembly repealed criminal code article 116 which punished sex between males with up to five years in prison.

At least 15 men had been jailed in recent years for the crime of consensual adult sex.

The law change likely was related to the Council of Europe's demand that countries hoping to join the 44-nation organization decriminalize homosexuality.

## **NEW STUDY ON CHILDREN BORN IN LESBIAN FAMILIES USING ARTIFICIAL FERTILITY TECHNIQUES FINDS NO NEGATIVE LONG TERM EFFECTS**

*By [anke.hintjens@fwh.be](mailto:anke.hintjens@fwh.be)*

### 1. Introduction

Since the 1980's, the VUB (Vrije Universiteit Brussel – Free University of Brussels) has provided artificial fertility treatment to lesbian families, which sparked a lot of criticism from many corners of society. Most criticism focused on possible negative effects on the psychological development of children born in lesbian families. Dr. Katrien Vanfraussen recently promoted on a follow-up study interviewing 37 children and their mothers, in both heterosexual and lesbian families. The children are between the age of 7 and 17 and were all born through the use of IVF. She has found that growing up in a lesbian family has no negative effects on the overall psychological development of children.

### 2. Summary of findings

The study focused on the following areas:

- ?? impact of the use of an anonymous donor on the children
- ?? impact of living in a non-traditional family on overall well-being of children
- ?? reaction of peer-group and teachers

### ?? incidence of bullying

The study found no difference between the emotional and behavioural development of children in heterosexual and children in lesbian families. Teachers however, reported more problems with children growing up in lesbian families. This could be explained by a higher degree of watchfulness by teachers.

More than half of the children interviewed report being curious about the anonymous donor. Girls are curious about the donor's character and appearance, whereas boys would like to meet the donor in person in order to know more about him and themselves. These findings contrast strongly with the attitude of the children's mothers who are not interested in information about the donor. Their concern is mainly the protection of the privacy of their family.

Children growing up in lesbian families do not hide the non-traditional nature of their family but only inform the outside world selectively, telling their close friends. More distant acquaintances are only informed when they explicitly inform about the family situation.

Children in heterosexual and lesbian families experience the same degree of bullying. Bullying is mainly related to typical aspects (appearance, intelligence) but about 25% of children have also experienced incidences of bullying related to the nature of their family, such as the homosexuality of their mothers.