



## European Commission on Human Rights / European Court of Human Rights

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The European Commission on Human Rights (ECHR), a now-defunct part of the Council of Europe, became the first major international human rights organization to condemn homophobia. In the 1980s, it called for the recognition and protection of the rights of gay men and lesbians in Europe. The European Court of Human Rights, which replaced the Commission, has also helped enforce glbtq rights.

### **The Council of Europe**

The Council of Europe is the oldest and largest union of nations on the continent. It formed in 1949, in the wake of World War II, as an effort to guarantee human rights and democratic freedoms among the nations of Europe. Begun with a membership of ten countries and headquartered in Strasbourg, France, it has now expanded to include 45 nations. The European Union is an entirely separate entity, although all of its members belong to the Council.

The ECHR began to form on November 4, 1950 when the Council approved the Convention for the Protection of Human Rights and Fundamental Freedoms. This document became the first international legal instrument to safeguard human rights.

The Convention contains articles that establish a right to life, a ban on torture, the outlawing of slavery, a right to liberty, minimum protections for those charged with a crime, a right to privacy, freedom of thought, freedom of expression, and freedom of association. Article 12 established the right to marry for men and women according to national laws.

These rights did not expressly include the freedom to be queer. However, several of the provisions, notably the right to privacy, have been interpreted in a manner that gives protection to gay men and lesbians.

### **The Commission**

To ensure the observance of the Convention, the member nations established the ECHR and a European Court of Human Rights on September 18, 1959. The ECHR received applications alleging violations of the Convention. Applications could come from nations, but most came from individuals unable to find satisfaction within their national legal systems.

The ECHR accepted cases only after all domestic remedies had been exhausted and within a period of six months from the date on which the final decision was taken. It charged no fees and did not require a plaintiff to hire an attorney.

The Commission either attempted to achieve a friendly settlement, issued an opinion on whether a breach of the Convention had taken place, or referred a case to the Court. Only the Court had the ability to reach judicial decisions.

The ECHR acted only when it received a petition. Throughout its history, it received relatively few requests for assistance. In the 1980s, queers became more aggressive about pursuing justice and the ECHR began to move.

In 1981, a gay man named Jeffrey Dudgeon asked the ECHR to decriminalize homosexual relationships in Northern Ireland. He charged that the Irish ban violated a person's right to privacy, contrary to the Convention. Dudgeon won. His victory forced the British government in Northern Ireland to legalize homosexuality in 1982.

The next successful gay rights ECHR case also involved the decriminalization of same-sex sodomy. In 1988, David Norris persuaded the ECHR to rule that the Republic of Ireland's prohibition of all homosexual acts was illegal.

Considering the strength of the Roman Catholic Church in Ireland, it is doubtful that homosexual relations would have become legal in that country without the intervention of the ECHR.

While it protected adult gays, the ECHR hesitated to allow minors the right to practice homosexuality. In 1983, British teenager Richard Desmond became the first person to take the United Kingdom to the ECHR over Britain's age of consent laws.

Unable to broker a compromise, the ECHR sent the Desmond case to the European Court of Human Rights. Desmond lost. The Court deferred to the right of each member state to fix its own minimum age for homosexual contact. It ruled that each nation was entitled to take into account the "moral interests and welfare of young people."

By 1997, the social climate in Europe had become friendlier to gays. Euan Sutherland, another British gay youth, attempted to use the ECHR to overturn the British age of consent.

Sutherland argued that the difference between the heterosexual and homosexual ages of consent affected his enjoyment of his human rights. He charged that Britain had violated the Convention with a discriminatory law that infringed upon his right to respect for a private life.

Sutherland won his case. The Commission became the first international body to recognize an adolescent male's homosexuality.

In its decision, the ECHR stated that it could not understand how the British practice of charging an adolescent with a criminal offense for engaging in homosexual relations served the purpose of protecting the youth. Despite the victory, Britain did not immediately reduce the age of consent.

While gays won significant victories, the ECHR also handed defeats to the queer community.

British citizen Mark Rees had been born Brenda Margaret Rees in 1942. He began the process of a sex change in 1970, began to live as a male in 1971, and completed his sex change in 1974. Rees obtained a British passport under his male name in 1974, but the government refused to issue a corrected birth certificate. Britain argued that a certificate change would permit Rees to marry a woman, thereby legalizing same-sex marriage.

The ECHR sent the case to the Court. On January 24, 1986, the Court declared that the right to marry in the Convention referred to the traditional marriage between persons of opposite biological sex. It ruled that Britain had the right to protect marriage as the basis of the family.

### **The End of the Commission**

By the 1990s, the Commission struggled to deal with a dramatic increase in the volume of petitions. The Court's workload told a similar story, with the number of cases referred from the Commission increasing from 7 in 1981 to 119 in 1997.

To solve this problem, the Council of Europe abolished the Commission and the Court. It created a single, expanded, full-time European Court of Human Rights that came into operation on November 1, 1998. The Council permitted the Commission to continue to function until October 31, 1999 to deal with cases it had declared admissible before November 1998.

The ECHR served as a place of last resort for queers refused protection by their home countries. With its pioneering rulings, it enabled European gays and lesbians to enjoy the same liberties accorded to heterosexuals with the exception of the right to marry.

### **European Court of Human Rights**

In 1999, the European Court of Human Rights handed the British glbtq community an important victory when it prohibited any member state from implementing bans on homosexuals in armed forces and struck down laws that allow gays to serve only if they kept their sexual orientation private.

The Court decision began with events in Great Britain. It was the only country in Europe that still expressly prohibited homosexuals from serving in its armed forces.

Duncan Lustig-Prean, a lieutenant commander in the British Royal Navy, reported an attempted blackmailing to the Military Police and found himself detained on suspicion of homosexuality. The blackmailer, well known to the police, was never prosecuted.

John Beckett, a weapons engineering mechanic in the Royal Navy, had an exemplary military record. Like Lustig-Prean, he also openly admitted his homosexuality. Naval authorities asked Beckett who was "butch" and who was "bitch" in his relationship with his partner.

Jeanette Smith, a nurse in the Royal Air Force, and Graeme Grady, a personnel administrator in the Royal Air Force, were also dismissed from military service because of their sexual orientations. Military authorities asked Smith whether she and her partner had a sexual relationship with their 16-year-old foster daughter.

After unsuccessful judicial review in British courts, in which they invoked English administrative law and European Community sex discrimination law, the four applicants took their cases to the Court.

They challenged both their discharges pursuant to the ban and the intrusive questioning to which they had been subjected. They argued that Britain had violated their right to private lives, guaranteed by Article 8 of the Convention on Human Rights. Additionally, all the applicants argued that they had been the subjects of discrimination, contrary to Article 14 of the Convention.

The Court found the investigations into the personal lives of the applicants to be "exceptionally intrusive." The investigations ensued after the applicants admitted their sexual orientation.

The British Ministry of Defense explained that it continued investigating because of an alleged need to verify admissions of homosexuality to prevent false claims by those who are seeking an easy way to be discharged administratively from the armed forces. The Court did not accept this argument since all the applicants wanted to remain in the military.

The Court next addressed the core argument of the British Government that the presence of homosexuals in the armed forces had substantial, negative impact on morale, fighting power, and operational

effectiveness. It found that this argument rested "solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation." It also noted that the gay ban had no particular, moral critique of homosexuality and that the work performance of the applicants was never the subject of doubt.

The Court concluded that the negative attitudes by heterosexuals failed to justify discrimination toward homosexuals. It found Britain in violation of Article 8.

Unlike Lusig-Prean and Beckett, Smith and Grady also argued that Britain's policy contradicted Article 3, which prohibits inhumane or "degrading treatment or punishment." They claimed that that Article 10, which provides for freedom of expression, was violated because the ban against gay service members limited "their right to give expression to their sexual identity." The third violation came under Article 13, which requires that a country provide "an effective remedy before a national assembly" for the applicants' complaints.

Smith and Grady lost the Article 3 complaint because the facts of their cases failed to reach the minimum level of severity needed. They lost the Article 10 charge because it was deemed unnecessary since they had won the Article 8 complaint. With Article 13, the Court found the minimum threshold of the rationality test in domestic courts to be so high as effectively to deprive the courts of the opportunity to consider whether the investigations and subsequent discharges of the applicants served the national security claims of the government.

With its decision, the Court became the first final appellate court in the world to invalidate a ban on lesbian, gay, and bisexual military personnel under a human rights treaty or constitution. The verdict could not force Britain to change its laws. However, pressure from the Court had a significant impact, particularly since Britain prides itself on its human rights record and its membership in the European community. Consequently, Britain ended its ban in 2000.

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