

2004

# Love without frontiers

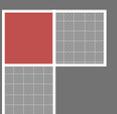
EU Asylum/Immigration Policies and  
the LGBT Population

Université d'Été Euro-Méditerranéenne des Homosexualités, Marseille,  
France, 17 July.

Miguel Vale de Almeida

MIGUELVALEDEALMEIDA.NET

2004



*Love without frontiers: EU asylum / immigration policies, and the LGBT population.*

Miguel VALE DE ALMEIDA

Article II-18 ('Right to asylum') of the *Draft Treaty Establishing a Constitution for Europe*<sup>1</sup> states that 'the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Constitution'. Also, Article III-167 states that '... the Union shall develop a common policy on asylum and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*<sup>2</sup>. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties'. A few dozen pages before, the Draft Treaty also states – in Article II-21 ('Non-discrimination') – that 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'.

Since the draft treaty is the synthesis (and, in some aspects the sum total) of previous EU treaties and laws, it is wise to say that EU law abides by the major international conventions, treaties and agreements that have been signed ever since WW II – as part of a wider process of defining Human Rights as the basis for national and international codes. According to the 1951 Convention above-mentioned, the term 'refugee' is applied to a person who 'owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his (/her) nationality and is unable or, owing to such fear, is unwilling to avail himself (/herself) of the protection of his (/her) country...'<sup>3</sup>

---

<sup>1</sup> <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> (2 July 2004)

<sup>2</sup> This is the principle that protects refugees from being returned to places where their lives or freedoms could be threatened.

<sup>3</sup> <http://www.unhcr.ch/cgi-bin/texis/vtx/home/> (2 July 2004)

The UNHCR (United Nations High Commission for Refugees) states that ‘homosexuals may be eligible for refugee status on the basis of persecution because of their membership of a particular social group’. In the UNHCR site one can further read that ‘It is the policy of UNHCR that persons facing attack, inhumane treatment, or serious discrimination because of their homosexuality, and whose governments are unable or unwilling to protect them, should be recognized as refugees’.

Of course, the universality of human rights, especially regarding refuge and asylum, is under constant threat, especially when one considers the degree and amount of resistance against sexual orientation rights in many countries. Amnesty International, in its site<sup>4</sup>, states that not signing the *Brazilian Resolution*<sup>5</sup> draft at the UN Commission on Human Rights will mean a refusal to acknowledge discrimination on the basis of sexual orientation as a breach in human rights: ‘Millions of people across the globe face imprisonment, torture, violence and discrimination because of their sexual orientation or gender identity’ (and the example of the recent sentencing of 21 men to three years in prison in Egypt is presented). As a matter of fact, and as an example of extreme persecution, (as well as evidence of the uneven globalization of human rights), there are countries where homosexuality is punishable with the death penalty: Sudan, Saudi Arabia, Yemen, Iran, and Afghanistan; and 67 others (out of 191 member countries in the UN) where it is punishable with anything from prison to death penalty<sup>6</sup> (see map)

But AI says something that takes us beyond (and behind) sheer legality. Non institutionalized homophobia, especially of the cultural-hegemonic kind, threatens even those who are granted asylum on the basis of fearing abuse for reasons of their sexual orientation: ‘In some countries of asylum, people risk facing the same or similar persecution that they fled if their sexual orientation were to become known. In other countries of asylum, their claims are often wrongly denied. In cases where they may not have expressed their sexual orientation openly in the past, decision-makers say that they

---

<sup>4</sup> <http://www.amnesty.org/> (2 July 2004)

<sup>5</sup> <http://www.brazilianresolution.com/>

<sup>6</sup> Morocco, Algeria, Tunisia, Libia, Senegal, Guinea, Sierra Leone, Liberia, Ghana, Togo, Benin, Angola, Namibia, Botswana, Zimbabwe, Malawi, Mozambique, Somalia, Djibuti, Ethiopia, Nigeria, Zambia, Tanzania, Kenya, Uganda, Burundi, Seychelles, Mauritius, Oman, United Arab Emirates, Qatar, Bahrein, Koweit, Syria, Lebanon, Uzbekistan, Pakistan, India, Nepal, Sri Lanka, Maldives, Bhutan, Bangladesh, Burma, Malasia, Singapore, Brunei, 12 of the small island nations of the Pacific, Guyana, Cape Verde, Nicaragua, Jamaica, Trinidad and Tobago, Barbados, St Lucia, and Grenada.

should be able to keep their sexual orientation from the attention of those authorities and private individuals from whom they otherwise would be at risk’.

It is situations like this, that have to do with homosexuality’s ‘invisibility / invisibilization’ and ‘silence / silencing’ (as well as with the unwillingness to acknowledge the intimate-to-public-and-back continuum of the homosexual experience) that led the European Council (note: *not* the Union) to issue ‘Recommendation 1470 (2000)’: ‘The assembly is concerned by the fact that immigration policies in most Council of Europe member states discriminate against lesbians and gays. In particular, the majority of them do not recognise persecution for sexual orientation as a valid ground for granting asylum, nor do they provide any form of residence rights to the foreign partner in a bi-national same-sex partnership. Furthermore, the rules concerning family reunion and social benefits usually do not apply to same-sex partnerships’<sup>7</sup>.

As a matter of fact, the 2003 EU Directive on family reunification for third country nationals, with specific criteria for refugees, says that legally resident foreigners can bring their spouse, under-age children and the children of their spouse to the country of residence. Further on the Directive says that member states may authorise the entry of unmarried partners, ascendants and adult dependant children. Polygamy is specifically not recognised. This was followed by a series of new EU legislative measures on asylum matters, including Council Regulation 343/2003, known as Dublin II Regulation, that determines the state responsible for processing an asylum application where an application is made in more than one member state. ILGA Europe<sup>8</sup> had drafted a position paper in 2002 demanding a couple of amendments and has also been lobbying the European Parliament. The proposed amendment to the anti-discrimination clause was not accepted. The anti-discrimination clause proposed by the Commission itself was deleted and replaced by a general reference to the EU Charter of Fundamental Rights in the preamble. The definition of the family proposed by ILGA was also not accepted. Instead a previous formula is used, recognising ‘an unmarried partner in a stable relationship’ only ‘where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its laws relating to aliens’. This, of course, strongly limits the scope of any European anti-

---

<sup>7</sup> <http://assembly.coe.int/Documents/AdoptedText/TA00/EREC1474.htm> (2 July 2004)

<sup>8</sup> <http://www.ilga-europe.org/docs/newsletters/2003-2/Asylum.htm> (2 July 2004)

homophobic stance, since nation-states tend to be more obedient to local homophobic interest groups such as the Catholic Church. To sum up, ILGA's struggle is for the recognition of two aspects: 'To ensure that persecution on grounds of sexual orientation and gender identity is recognised; the extension of the definition of family members – unmarried partners in a stable relationship, irrespective of sex, are already included' (ILGA's site). It is the latter aspect that seems to face stronger resistance. But before going into the issue of partnerships and/or marriage, let me sum up some aspects regarding refuge, asylum and immigration.

Refuge/asylum, and economic immigration are, of course, different things, at least from a formal point of view. From an anthropological and sociological point of view, however, the dividing line is not so neat: people's 'motivations' (and the socio-cultural push-and-pull factors they are subject to) often are blurred and hybrid; seeking political or cultural freedom and seeking economic opportunities may well go hand in hand (as neoliberals themselves should acknowledge, considering how much they place economic 'freedom' at the core of their political philosophy...). Along this line, one should stress that LGBT immigration and/or asylum may be motivated by an array of reasons and causes. LGBT immigration may be motivated by any of the reasons present in any other group, regardless of the sexual orientation of its members; particular LGBT people may immigrate or seek asylum for reasons not related to their sexual orientation; and this reason may be, in some cases, the central motivation.

We seem to have two central issues at stake regarding the LGBT population in this discussion: on the one hand, persecution on the basis of sexual orientation as a reason for refuge/asylum; and family/partnership reunification, whether we are talking of refugees/asylum seekers or immigrants. These issues are symbolic markers in the definition of a democratic project for Europe, as much as, for instance, the issues of gay marriage in the US today.

Four conflicting principles in the political and social making of Europe seem to concur to the centrality (and "revolutionary" character) of those issues: The first concerns the notions of citizenship and its relation to the nation-state; the second concerns the notion of human rights as both personal and collective; the third concerns what has become known as the politics of identity around issues of classification, categorization,

discrimination and emancipation regarding race, culture, ethnicity, nationality, religion...; the fourth, although part of the third point, is specific in and of itself: sexual orientation as a hinge between the body, personal identity and collective rules in the social contract.

Citizenship was, in the aftermath of Modern European and American revolutions, a male privilege. Expansion of citizenship to women allowed for gender to enter discussions of political eligibility and legitimacy, whereas the constitution of nation states and national economies allowed for the constitution of polities based on territory, state and the unifying power of languages. Nation-states were also anchored in a rhetoric that connected the reproductive heterosexual family to the level of the ethnic and the national. The colonial endeavour of Europe helped to further demarcate the frontiers of belonging as racial frontiers while defining types of people in a hierarchical scale of power.

With the collapse of fascism and ‘scientific’ racism, with decolonization, and with the growth of the welfare state as a result of the workers’ movement, the post WWII Western world saw the emergence of the notion of human rights as both individual and collective, i.e., as rights of people belonging to identity categories in systems of classification that placed them at the bottom, the margins, or the lesser side of an asymmetry. Forms of both political and economic integration at the world level led to discussions on the universality of Human Rights and the status of both cultural relativism and multiculturalism (of which I shall talk more in the other conference).

The 1960s saw the development of the politics of identity, based on the decline of the nation-state, the rise in globalization and localization, ethnic strife, civil rights for Blacks and women, as well as the early gay and lesbian movement. The dual system composed of the individual system and the ethnic/national collective was disrupted: the individual is now seen as an elusive entity with flexible identities in flux, and the ethnic/national collective is not the only collective identification available (or the most relevant).

Sexual orientation – specifically homosexuality – was outside the scope of the modern project of the citizen; it was a threat to the ‘health’, ‘masculinity’ and ‘reproduction’ of

the nation-state; it was not allowed into the early project of human rights since it was seen as a private matter (see Amnesty International's example: people are told that they should have concealed their sexuality if they knew they were going to be persecuted for it!). It has however become a constitutive part of the politics of identity; it is, in its cultural and social movement components, deeply engaged in and by globalization; and it is becoming a focal point of changes in the way the intimate, the private, the public and the political intertwine in the making of identities and politics (see the importance of the debates on gay marriage in the US and, increasingly so, in Europe). The LGBT movement promoted sexual orientation rights into the category of human rights too.

But LGBT rights have been until recently seen as awkwardly Western and as something that has to be dealt with by nation-states, depending on the local strength of specific LGBT communities. Immigration, a major social process of globalization, identity politics, and power unbalance, created in the post colonial and post industrial world a problem in the definition of the frontiers of belonging and exclusion, sameness and otherness. Racism, thought to be a taboo left behind in the aftermath of WWII, 'returns' as cultural fundamentalism and xenophobia, stressing the ethnocentric vision that cultures are incommensurable and cannot communicate (extendable to, of course, religions and, again, races...). Laws protecting nationality, as well as immigration and asylum laws, clash with the reality of immigrants' identities at the ports of entry, with the dynamic of the diasporas and with the increasing unevenness in the distribution of the world's wealth, resources and labour. 'We need them inside, but not *inside*'.

In this situation, sexual orientation cuts across cultures and frontiers. Seen as a perversion, as a disease or 'simply' as hedonistic misbehaviour in the West, it is seen in many places as a sin and a crime – if not as a Western import. Specific people who are gay and lesbian are part and parcel of migratory populations, of refugee groups and of nationals. The point of intersection between such different positions can be, of course, the erotic, sexual, and/or love relationship. In the present situation neither the countries and cultures of emigration nor most of those of immigration have 'solved' the issue of the civil and cultural recognition of gay and lesbian partnerships, much less marriage, thus placing LGBT people in a legal and political void. This is enhanced if one is in a migratory or asylum situation, where both legal status as non-national and legitimacy as non-member of the in-group are still problematic and a source of conflict. Similarly to

women who are victims of sexual aggressions, gays and lesbians (and the latter doubly so) in the migratory or simply trans-national fluxes (e.g., a Dutchman and a Portuguese man won't have their partnership recognised in Portugal, but they would in the Netherlands, and this inside the same "Union"...) live in a cultural and political limbo: they are not recognised as sexual or *intimate* citizens (see Ken Plummer<sup>9</sup>, or Jeffrey Weeks) and they are not recognised as full and straight members of their culture by the hegemonic notions of gender, sexuality, family, marriage and reproduction within the metaphorical sequence that links these practices and institutions to the nation-state and legitimate citizenship.

That is why not only the issues of sexual orientation, marginal as they may seem to be to many, end up being central (as symbolic detonators) in the global and trans-national struggles around the free movement and settlement of people as full members of societies. Much more so in Europe, since the acknowledgment of sexual orientation as an identity marker and citizenship descriptor is central in defining both the national and the European social contract. Who can seek refuge for what reasons? Who can marry/live with whom? Who can join whom across frontiers?

Place the sexual orientation variable in the equation of these questions and you will have a major starting point for questioning the coherence between discourse and practice in contemporary notions of individual freedom, social equality, and the promotion of diversity in the local and global levels, as well as in what lies in between as constant flux and movement of people.

---

<sup>9</sup> 'Plummer focuses especially on the overlap of public and private. Increasingly, our most private decisions are bound up with public institutions such as legal codes, the medical system, or the media. What impact, Plummer asks, does the public character of personal life have on our sense of ourselves and on how we view our intimate choices? To navigate our way through a world in which people's private lives are so often subject to public scrutiny and debate, and in which the public sphere is more and more pluralized and contested, we must, Plummer argues, broaden our understanding of what it means to be a citizen and entertain new approaches to "doing" citizenship. We must learn to be "intimate citizens," who, like citizens of the more familiar sort, are able to participate in public discussion and in social or political movements that represent our concerns'. (from <http://www.powells.com/cgi-bin/biblio?show=Trade%20Paper:Sale:0295983310:14.95>).