

SUBSIDIARITY V. PAN-EUROPEANISM: LGBTQ AND TRANSGENDER RIGHTS IN THE EU AND UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS

David SCHULTZ¹

Abstract: *The European Union and the Council of Europe were supposed to create continent-wide standards and rule for governance, commerce, and human rights. Yet subsidiarity remains an important principle respecting state-specific policy. Occasionally Pan-Europeanism and subsidiarity conflict and this is the case with LGBTQ and transgender rights. This Article examines the legal tensions surrounding the protection of human rights as it addresses transgender individuals and members of the LGBTQ community. It argues that the current framework of law supporting subsidiarity is inconsistent with the broader goals of non-discrimination at the heart of the values of both the European Union and the Council of Europe.*

Key words: *Europe; European Union; Transgender; Human Rights; Subsidiarity.*

1. Introduction

A central goal of post-World War II Europe was the promotion of pan-continental values in order to secure peace and encourage integration. Universalism was seen as the key to both prosperity and peace. Critical to these goals were two institutions, the European Union (EU) and the Council of Europe (COE). Both were supposed to create continent-wide standards and rule for governance, commerce, and human rights. But balanced against this universalism was another principle— subsidiarity or a respect for local decision making and institutions. Subsidiarity remains an important principle respecting state-specific policy. Occasionally Pan-Europeanism and subsidiarity conflict, and this is true in the case of human rights. While in general pan-Europeanism has won over when it comes to racial, ethnic, and even gender discrimination, it has lagged behind when it comes to LGBTQ and especially transgender rights. This Article examines the legal tensions surrounding the protection of human rights as it addresses transgender individuals and members of the LGBTQ community. It argues that the current framework of law supporting subsidiarity is inconsistent with the broader goals

¹ Hamline University and the University of Minnesota, dschultz@hamline.edu , corresponding author.

of non-discrimination at the heart of the values of both the European Union and the Council of Europe. It also argues that the European-wide institutions such as the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) have largely failed to lead when it comes to protecting the rights of transgender individuals.

2. The Origins of Post-WWII Pan-Europeanism: The European Union

The story of modern Europe from the Treaties of Westphalia in 1648 until World War II was one of state-based conflict versus a quest for universalism. The rise of nation states and a state-centric European order for nearly 300 years was one of repeated conflict over religion, land, riches, and the quest for power and domination. The Napoleonic Wars of the nineteenth century and the 1915 Council of Vienna represent one aspect of this universalism v state nationalism, while the philosopher Immanuel Kant's call for universalism or the French Revolution's demand for *Liberté, égalité, fraternité* were other expressions of Pan-Europeanism. However, the culmination of pan-Europeanism versus nationalism conflict came to a head with WW I and WWII. In an effort to promote peace after WW II, a new effort was made to integrate Europe. Among the goals of EU from the early days of the European Coal and Steel Community, the European Economic Community, and though to the Lisbon Treaty was to create a single seamless common market and reduce trade barriers. Four freedoms have been center to this integration project; Free movement of goods; Free movement of capital; Freedom to establish and provide services; and the Free movement of people.

For example, Article Two of the 1957 Treaty of Rome states:

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

Initially the European Coal and Steel Community and the Treaty of Rome were about economics. But European integration or pan-Europeanism has evolved over time to move beyond economic to becoming more about culture, democracy, and human rights values. The preambles both to the Treaty of the European Union and the Lisbon Treaty capture the evolution to move beyond economics and into more cultural, reflecting respect for human rights and the promotion of democracy.

Treaty of the European Union

preamble

Resolved to mark a new stage in the process of European integration undertaken with the establishment of the European Communities, DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which

have developed the universal values of the inviolable and inalienable rights of the human person,
freedom, democracy, equality and the rule of law,
RECALLING the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe,
CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law...

Lisbon Treaty

Preamble

DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law,';

Article 1A

'Article 1a

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

In both the Treaty of the European Union and the Lisbon Treaty values such as liberty, equality, and non-discrimination appear along with how such principles aim to overcome the divides on the continent. In effect, peace is achieved through respect for universal or at least Pan-European respect for human rights.

But while the evolving goals of the EU have aimed at integration, they have always been balanced against another principle—subsidiarity. According to Article V of the Treaty of the European Union (TEU):

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol. 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiary and proportionality.

Protocol 2 refines and clarifies Article 5. It only applies to areas which do not fall within the exclusive competence of the Community, yet we have no clear answer regarding this dividing line (Craig and DeBurca 125). For Craig and DeBurca, there are three principles to subsidiarity: The community acts only if the objectives of that action cannot be sufficiently achieved by the Member States; The action can therefore be better achieved by the community because the scale or effects of the proposed measure; and if the community is to act it should not go beyond what is necessary to achieve the objectives of the treaty.

Within the EU, the concept of subsidiarity assigns decision making or the conceptualization of democracy “in terms of electoral representation at the (lowest possible) territorial level.” It is a vertical concept in terms of territories. (Smismans 2004: 6). Subsidiarity was central to the Maastricht treaty and negotiations (Craig and DeBurca 1998: 124). Similarly, according to the 1993 Inter-institutional Agreement on Procedures for Implementing the Principle of Subsidiarity, the ECJ will not lightly overturn Community action on the ground that it does not comply with Article (Weatherill and Beaumont 1999: 27),

The Protocol requires all institutions to follow it. However, there are not too many cases that address this issue (Weatherill and Beaumont 1999: 28; Hartley 1998: 111-113). Among the more important cases addressing the issue of what subsidiarity means, is *Germany v European Parliament and Council [1997] ECR I-2405*. According to the Court:

16 As the Court has repeatedly stated, in the absence of coordination at Community level, Member States may, under certain conditions, adopt national measures which pursue a legitimate aim compatible with the Treaty and which are justified by overriding reasons in the general interest, including consumer protection (see, inter alia, judgment of December 4, 1986 in the case 205/84, *Kommission/Deutschland*, Slg. 1986, 3755).

18 The directive provides for compulsory membership of all credit institutions in deposit guarantee schemes which ensure that all deposits of the same depositor with a credit institution are covered up to an amount of ECU 20 000 in the event of unavailability of deposits. In addition, deposit guarantee schemes established in a Member State in accordance with Article 3(1) of the Directive also protect depositors of branches established by credit institutions in other Member States.

In general according to this decision, the ECJ will not lightly overturn Community action on the ground that it does not comply with Article 5 (Craig and DeBurca 1998: 129). For the Court, the presumption is that EU-wide directives are valid, enforceable, and binding upon individual states and their courts. The presumption here is even for human rights issues.

3. Pan-Europeanism and the Council of Europe

In addition to the EU, the other pan-European institution is the Council of Europe. Its mission is to “promote democracy, human rights and the rule of law across Europe and beyond.” Central to its mission is the European Convention of Human Rights (ECHR), where Article I declares that among its members there is an obligation to respect human rights. Specifically Article I says: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

Subsidiarity also exists as a value within the COE. However, its application is slightly different. For the COE in general and the European Court of Human Rights (ECtHR), subsidiarity for ECHR means lower national courts decide first (Ovey and White 2006: 18). The application of the ECHR requires that state courts according to their procedures apply and adjudicate human rights complaints first, applying the standards set by the ECHR.

Overall, both within the EU and the COE there is a tension. A tension that mandates European-wide standards aimed at economic integration and open borders. The idea here is that integrated economics promote peace and collective prosperity. In addition, standards respecting human rights too assure uniformity and guarantee common treatment of individuals across the continent. But the principle of subsidiarity gives deference first to local state institutions to enforce European-wide standards, or at the very least gives states the first chance and duty to act to apply these standards before EU institutions such as the ECJ or the COE’s ECtHR acts. While in theory such an approach may make sense as a compromise within a state-centric system that brings many languages and customs to Europe, the question is how it has worked when it comes to human rights, more specifically transgender discrimination.

4. The Evolution of Discrimination Law and Human Rights

The principle of subsidiarity has delegated to the respective EU states of Council of Europe States the issue of social legislation when it comes to transgender and LGBTQ+ rights. Generally, EU/COE has addressed other forms of discrimination forcefully such as race, religion, gender, and ethnicity. Unfortunately, there has been a blind spot when it comes to LGBTQ issues, but most especially transgender discrimination. Here the ECJ and the ECtHR have more often than not been followers and not leaders. Part of the problem has been rooted in the subsidiarity principle.

As early as 1994 the European Parliament argued for equal treatment of homosexuals with regard to employment and pay but also called on the member states and the European Commission to end barring lesbians and homosexual couples from marriage or from an equivalent framework. However, such a demand was limited by subsidiarity rules. According to Toggenburg (2009), the EU has not taken an aggressive or leadership role when it comes to LGBTQ issues. He argues that despite an EU freedom that called for the free movement of individuals, a person and another person travel according to the rules of the host member state (Belavusau 2021). Matters of family law, including issues of sexuality, remain basically state issues. This means even if a same-sex couple is

legally married or has rights in one country, the rights they enjoy when they travel is determined by the domestic laws of the state where they are physically located in.

EU Council Directive 2000/78/EC sought to address discrimination within the EU. It was set up to combat discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the member states the principle of equal treatment. The European Court of Justice has released only a handful of judgments interpreting the substance of the Framework Directive, and none of these dealt with the issue of sexual orientation.

Briefly and for example, in *Lisa Jacqueline Grant v. South-West Trains Ltd.* (1998) the ECJ ruled that an employee of a rail company was not discriminated on the basis of sex when she was denied compensation or benefits for her female comparison to accompany here even though an opposite-sex couple would have received such benefits. The Court's reasoning was that that a male seeking travel benefits for his male partner also would have been denied these benefits and therefore no sex discrimination occurred. The comparison to determination discrimination was to another same sex couple, not to an opposite sex couple.

Second, in *D and Kingdom of Sweden v. Council of the European Union* (2001) the Court ruled that life partners of the same sex may be excluded from marriage-related benefits. Here the Court stated that benefits may be reserved to traditional concepts of marriage as defined by the host state.

Third, in *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* (2008) the Court ruled that only once a national legal systems set spouses and same-sex partners in a comparable legal situation, do antidiscrimination rules apply. In effect, state rules or the principle of subsidiarity determines benefits, notwithstanding EU policy.

Over time, though, the ECJ has improved in its approach to discrimination against gays and lesbians. For example, in *J.K. v TP S.A.*, ECLI:EU:C:2023:9, the Court issued an opinion indicating that dismissing someone from a job, even if that person is classified as an independent contractor, because of their sexual orientation, violated EU rules even if the state permitted such discrimination. Here the Court stated: "Directive 2000/78 ... seeks to eliminate, on grounds relating to social and public interest, all discriminatory obstacles to access to livelihoods and to the capacity to contribute to society through work, irrespective of the legal form in which it is provided." Furthermore, the Court stated: Directive 2000/78 must be interpreted as precluding national legislation which has the effect of excluding, on the basis of the freedom of choice of contracting parties, from the protection against discrimination to be conferred by that directive, the refusal, based on the sexual orientation of a person."

At least by 2023, the EU and its courts had come to tip Pan-European anti-discrimination laws in favor to subsidiary, at least when it came to gays and lesbians. Yet the same cannot be said for transgender.

In *P. v. S. and Cornwall County Council* (1996) the ECJ ruled that the prohibition to discriminate on the basis of sex extends to transgender. However, subsequently the ECJ has been less charitable. As pointed out above in *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* the Court has not been as an aggressive a leader when it comes to transgender issues, deferring more to subsidiarity.

4.1. Council of Europe

The Council of Europe adopted Recommendation CM/Rec (2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity. The European Court of Human Rights (the Court) has issued judgments with regard to the recognition of a transgender person's gender identity.

Early on the Court was less than sympathetic or support of transgender rights. For example, the Court in *I. v. the United Kingdom*, No. 25680/94 (2002) ruled that a state's failure to alter the birth certificate of a person who has undergone gender reassignment, and to recognize the "new" gender, constitutes a *B. v. France* violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR). The Court found, in, No. 13343/87 (1992) and *Goodwin v. the United Kingdom*, No. 28957/95 (2002) that the refusal by a state to legally recognize a completed sexual reassignment constituted a violation of Article 8.3 (Council of Europe 2015). Conversely in *P.V. v. Spain* (2010) the ECtHR did recognize gender identity as a form of discrimination, even though in this case it did not support the rights of a transgender person.

However all these cases were of mixed blessing for transgender individuals. In *Goodwin* the Court declared that while a member state of the COE could not totally bar a transgender individuals from marrying, it remained up to the state "to determine inter alia the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages."

4.2. Transgender Rights Remain State Issue

In general the ECJ and the ECtHR have taken an important lead or role in addressing discrimination when it comes to race, ethnicity, age, and physical abilities (Cardoso 2023). In addition both the EU and the COE have acted to address transgender discrimination. In June 2010 the Council of the European Union adopted a non-binding toolkit to help address discrimination against transgender individuals (Council of the European Union 2015). The Parliamentary Assembly of the Council of Europe (2015) also issued a resolution seeking to end discrimination against transgender individuals in employment, health care, and in other matters. However, even the Parliamentary Assembly resolution noted that changes in discrimination law were being driven more so at the member-state and pan-European level.

Given this, one would think that the ECK and the ECtHR would have set important precedents to address transgender discrimination (Berger 2000). However, these courts have generally lagged as opposed to leading when it comes to address such discrimination, especially when one compares it to other EU or COE institutions (Swiebel 2009). Countries "such as Hungary, Poland, Czech Republic, Slovenia and Bulgaria have continuously fought back the advancement of trans rights" (Cardoso 2023: 56). While some of the EU institutions such as the Commission or Council have taken aggressive

action to address this form of discrimination, the judiciary has been more hesitant, deferring to states under subsidiarity principles.

According to Vallier and Carron (2020): “Since the 2000s, the European Union has taken measures against discrimination faced by transgender people. Although the main EU treaties (TEU, TFEU, Charter of Fundamental Rights, Treaty of Lisbon, etc.) do not mention gender identity as a specific ground of discrimination.” These authors note that state policy more so than European-wide policy, especially by the ECJ and ECtHR, have taken the lead when it comes to addressing the rights of transgender individuals.

Moreover, according to a Council of Europe report (2015): “The situation is very diverse in Council of Europe member states as regards the rights of transgender persons seeking legal gender recognition. Most countries do not have procedures in place for legal gender recognition.” Confusion over whether to address transgender discrimination issues as matters of sex or gender discrimination have been part of the confusion (Cardoso 2023).

There are other confusions too. These include a range of rights over marriage and who one gets to marry after surgery, rules for gender recognition, and other aspects of life regarding privacy and protection of personal information as a result of gender reassignment. While transgender individuals are making legal and political progress, respect for their rights lags behind others and the pan-European judicial bodies seem slow to change, in part as a result of subsidiarity when it comes to family law matters.

5. Conclusions

There is mixed evidence that ECJ/ECtHR decisions have pushed states to protect or support transgender rights. Instead, domestic family law is the driver of what rights are given to transgender individuals and it has been the drive from some states that has led to pan-European bodies to act to protect transgender rights. While the ECJ and the ECtHR have taken lead roles in enforcing human rights and protecting against discrimination, even when it comes to gays and lesbians, it has been more deferential when it comes to trans rights. Generally, ECJ/ECtHR deferred to subsidiarity and only acted when domestic family law of a state has recognized such rights. In effect, subsidiarity has undermined the ability to promote universal values and the flow of individuals across the borders of Europe.

Future research on this topic needs to measure or examine the relationship between state-specific protections for transgender policies and how they interact with EU and COE action, including by the ECJ and the ECtHR. It may be possible to map out a relationship among all of these institutions to see specifically what type of dialogue or conversation state v. European-wide institutions have when it comes to protecting transgender rights.

Acknowledgements

Thanks go to all those who attended the TRANSILVANIA INTERNATIONAL LAW CONFERENCE – 2023, “Current Issues within EU and EU Member States: Converging and

Diverging Legal Trends” and provided comments on my presentation.

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