

Keynote: “2010 Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity – The way forward in Europe”, by *Ben Baks* – Independent Expert and former Secretariat of the European Governmental LGBTI Focal Points Network.

On the occasion of the German Council of Europe Presidency’ Digital Event: “Towards the full recognition of LGBTI rights across Europe – Strategic policy measures to implement the 2010 SOGI Recommendation”- 5 May 2021 – Berlin/Strasbourg.

CONTENT

- 1 What is the practical use of CoM Rec 2010(05) for Government Experts and Policy Advisers?
 - some examples of pay offs.
- 2 Where do we stand?
 - some achievements since adoption of Rec 2010(05)
 - refer to 1st panel for closer picture of the situation on the ground for LGBTI persons and political backsliding in the European region.
- 3 How can National Action Plans be drivers for change (and instrumental for application of Rec 2010(05)) and for moving forward?
 - refer to the commitment of CoE (and the EC) to support MS with National Action Plans and national roundtables.
 - some practical ‘food for thought’ when drafting/preparing a National Action Plan.
 - refer to 2nd panel for going deeper into how strategic goals can be achieved at national levels?

References & footnotes

Keynote/Paper

1 Intro

1.1 Opening remarks

- Thank you madam Chair for giving me the floor.
- Dear Europeans.....
- I like to thank the German Presidency for putting equal rights for LGBTI persons on the agenda, *twice!* Two events during one and the same CoE Presidency is unprecedented. I also thank the German Federal Government *for issuing an LGBTI Inclusion Strategy, focussing on foreign policy and development cooperation*, last March. This makes you Minister, Madam Giffey, leading by example.
- I also like to commend the SG, Madam Burić, for her commitment and contribution to *both* events. Your visibility and commitment is, compared to your predecessors, unprecedented!

- On a side line, I commend you both for your strong and clear statements on the Istanbul convention on combatting violence against women and the recent backsliding by some European countries in particular. That backsliding on gender equality and LGBTI equality makes me asking: *How much intolerance can Europe tolerate?*

1.2 Content of key note

- I will touch upon *three* topics:
 1. What is the practical use of CoM Rec 2010(05)?
 2. Where do we stand in Europe?
 3. How can we make National Action Plans drivers for further change?

1.3 Personal anecdote

- When I started as government expert on LGBTI-emancipation policies for the Dutch Government in 2003, the Christian Democratic State Secretary for Public Health, Social Welfare and Sports, asked me to draw a National Action Plan.
- That made me wondering if there were any examples from abroad, that I could learn from? Of course I knew about the previous Action Plans from my own country. But from abroad I only knew of few examples; Action Plans from the German State of Berlin, from North-Rhine Westphalia, from Flanders/Belgium and from Catalonia/Spain. It was like searching for the needle in the hay stack.
- The lack of good policy examples from elsewhere in Europe triggered the founding of the European Governmental LGBTI Focal Points Network (EFPN)¹ in 2004.
- Back to today!
- And move to the 1st question: what's the practical use of Rec 2010(05)?

2 What's the practical use of Rec 2010(05)?

2.1 An unprecedented benchmark

- The Rec 2010(05) covers *twelve* thematic topics with a total of 46 tangible sections. Since its adoption it has been reviewed *two* times. The Review is the strongest intergovernmental mechanism on LGBTI rights globally. A robust benchmark.
- What most people are not aware of, is that 'LGBTI equality rights' are one of the only human rights areas where *no global standards* exist. There is *no* UN Convention, like for the rights of disabled people or to combat violence against women;

2.2 How did Recommendation 2010(05) pay off?

- How practical has this Recommendation proven to be practical ?
- From experience I have noted *five* pay offs:
 - I. Its HR standard *provides a baseline* for shaping national policy measures.
 - II. Its wide scope *provides leverage* to Policy Advisors when they seek doing business with their fellows from other responsible government ministries, including the gender equality department.
 - III. Its ministerial approval *gives leverage* to cso's when they encounter government authorities.
 - IV. Its recognition of different stakeholders *creates a hook for hosting roundtables* and inviting other stakeholders to take their share.
 - V. Its stock of thematic topics *kicked off the demand-driven support of Member States by the CoE SOGI unit.*
- These *five* practical pay offs brings us to the 2nd question: where do we stand now?

¹ The 1st EFPN Roundtable was held in November 2004 on occasion of the Netherlands holding the Presidency of the Council of the European Union.

3 Where do we stand in Europe?

- Let's take the helicopter and make a picture of Europe from a distance; some encouraging observations:

3.1 further institutionalization

- we see a *further institutionalization* of the protection of HR for LGBTI people within the CoE²:
 - a. since 2020 we enjoy a Steering Committee on Anti-Discrimination, Diversity and Inclusion (*CDADI*) with a mandate on SOGI-matters been put in place at the Council of Europe,
 - b. although Rec 2010(05) only refers to LGBT people and does not mention human rights violations faced by intersex people, we have witnessed the CoE bio-ethics committee taking the physical integrity of intersex people on board, we see ECRI exercising an LGBTI-inclusive mandate³, and we noted the recent adoption of the *Roma Action Plan* indicating that Rec 2010(05) also applies to intersex persons,
 - c. since the summer of 2020 the *EFPN and its Secretariat* are firmly embedded within the CoE,
 - d. an LGBTI Equality Sub Group has been put in place by the European Commission,
 - e. an *LGBTI Equality Strategy 2020-2025* with 4 pillars⁴ has been set by the EC, and
 - f. the EC is actively "taking part in the work of the Council of Europe governmental LGBTI focal points network"⁵.

3.2 improved data infrastructure

- Alongside these examples of institutionalisation in Europe, we witness a *significant improvement of data collection*; it's an accomplishment that we have three different sets of data available:
 - a. the lived experiences of the LGBTI community⁶,
 - b. the legal situation for LGBTI people, in OECD and EU countries⁷, and
 - c. the social acceptance of LGBTI people by the general public⁸.
- These validated sets of data can help us holding ourselves and other Member States accountable!

² CDADI – Council of Europe 2020; EFPN Secretariat SOGI Unit – Council of Europe – September 2020 Strasbourg; Working Group on LGBTIQ Equality – European Commission – Brussels 2020; Equal Rights Coalition – Uruguay & the Netherlands – 2015; UN Independent Expert on SOGIESC – Geneva 2017; Explicit mandate ECRI from 5th cycle – Strasbourg.

³ See: 5th cycle country reports and the ongoing 6th cycle and the Factsheet on LGBTI Issues – March 2021.

⁴ Tackling discrimination against LGBTIQ people, Ensuring LGBTIQ people's safety, Building LGBTIQ inclusive societies, and Leading the call for LGBTIQ equality around the world.

⁵ European Commission LGBTI Equality Strategy 2020-2025.

⁶ LGBTI Surveys - Fundamental Rights Agency of the European Union - May 2013 The Hague & April 2020 Vienna; LGBTI Survey in the Western Balkan Region - World Bank 2019.

⁷ numerous publications by the FRA-EU; and OECD publication: 1st LGBTI Survey Over the Rainbow? The Road to LGBTI Inclusion – June 2020 Paris.

⁸ Eurobarometers; European Social Surveys.

3.3 growing sense of urgency

- Furthermore we witness *a growing appetite amongst CoE Presidencies* for putting the elimination of discrimination and violence on SOGIESC grounds prominently on their Presidencies' agenda.
 - we see *a rising number of government donors* supporting the work of various European LGBTI Network organizations, like ILGA Europe⁹ and *a firm willingness* to support the work of the SOGI Unit financially.
 - we see government ministers meet with CSO's on an annual base since the IDAHOT Forum 2013 in The Hague; this year's edition hoisted by the UK in London and next year by Cyprus government.
 - and last but not at least, we see *a closer alignment* and strategic cooperation between the CoE and the European Commission and intergovernmental cooperation within the EFPN.¹⁰
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- Since the adoption of Rec 2010(05) we have won a number of battles against discrimination on SOGIESC grounds¹¹, but the battle for a tolerant Europe is not over!
 - I trust the first panel to go deeper into the current situation in Europe and the roll back in parts of Europe.
 - Now let us move to the last question: how can National Action Plans can be drivers for progress?

4 National Action Plans

- It was 8 years ago, on the occasion of the 1st European IDAHOT FORUM in The Hague, May 2013, that ILGA-Europe issued a press release. I quote: "Member States should recognise the need to have LGBTI equality action plans that go beyond the law. National Action Plans complement legislation. (...) National Action Plans are drivers for greater LGBTI equality in Europe".
- Today, 8 years later, I am happy to see:
 - I. one third of 36 OECD MS have a National Action Plan¹² and
 - II. half of EU members have a National Action Plan¹³.
 - III. the Council of Europe - and also the European Commission – they both have made "the development of national action plans on LGBTIQ equality (...) a priority"¹⁴.
- Now let us have a closer look to national action plans;

⁹ Prague nov 2019; Eur. Donor Government meeting; European network organizations: ILGA-Europe, OII-Europe, IGLYO-Europe, Transgender-Europe.

¹⁰ European Commission: Union of Equality: LGBTIQ Equality Strategy 2020-2025– sections 4.1 & 5; Council of Europe – May 2020: CDADI - Terms of Reference – 10 September 2020.

¹¹ other accomplishments are: ECRI's LGBTI-equality recs of the 5th Cycle; Numerous recs and country visits of the CoE Commissioner for HR; Litigation (case-law) by the ECtHR; PACE-reports and resolutions on Intersex persons and transgender persons.

¹² Over the Rainbow? The Road to LGBTI Inclusion, June 2020 – Organisation for Economic Development and Development (OECD) – Paris.

¹³ 2015-2019 Final report list of actions to advance LGBTI equality, Spring 2020 – European Commission – Brussels; 13 out of 27 EU members have a national action plan; with UK and Norway the number is 15.

¹⁴ European Commission LGBTI Equality Strategy 2020-2025.

4.1 External, National and Regional/Local Action Plans

- From experience I know that National Action Plans have different shapes and content. It goes without saying that socio-economically, legally, culturally and politically Member States can be different from each other.
- And we should bear in mind that LGBTI equality policies are dealt with at different levels. Some countries have a federal system, others have devolved the competence to lower levels. Some MS even have policy plans at different levels.
- Some countries have just an external Action Plan or Strategy, like Germany. Others have an External and a National Plan and other countries have none of both!
- There is no such thing as a blueprint.
- Now we have the Rec2010(05) as a Human Rights benchmark, we know about the 'WHAT', but not necessarily about the 'HOW'.

4.2 Getting practical

- Before I end this Keynote, I like to share with you some food for thought on more practical matters in regard to drafting National Action Plans:
 - I. *First of all have I took notice of the SOGI Unit publication on National Action Plans, from June 2016?*
 - II. *What instruments can be put in place, beyond legislation? Is there a budget that allows my minister for granting projects, running pilots, commissioning surveys or research studies? Are there quick wins?*
 - III. *How is my gov't's relation with CSO's and other stakeholders? Have they ever been invited to the ministry for a roundtable? Are local governments included? What is their stake? How can my minister make a joint effort with them? Is concerted action needed?*
 - IV. *How can government track progress in society? Is there an existing thermometer, an indicator, that I can advise to be used as overarching policy target? For example: How performed my country in the recent Eurobarometer or according to the recent OECD Survey or FRA Survey?¹⁵ And what should be the threshold, the policy outcome in 3 or 4 years time? How ambitious is my government minister?*
 - V. *Have I checked country specific recommendations from ECRI, OECD, CEDAW and UPR? Which can my minister take on board?*
 - VI. *And how can I capitalize the good work done by many volunteers from within LGBTI communities in the policy plan?¹⁶*
 - VII. *Does government has a national and external foreign LGBTI equality policy? How coherent is government's internal and external approach?*
- Madam chair, dear Europeans,
- These were my thoughts and considerations for the way forward.
- I trust the second panel to go deeper into the way forward in Europe.
- I conclude....

¹⁵ For example: "in three or four years' time the social acceptance by the public will be better than it was according to the last Eurobarometer"; or "in three or four years' time from now the legal LGBTI inclusivity has improved compared to the figures of the OECD Survey"; or "in four years' time the lived experience of LGB, T and I persons will be better than it was in the 2nd LGBTI Survey of the FRA or the 1st Western Balkan LGBTI Survey".

¹⁶ Example: 'Gender & Sexuality Alliances' at schools are run by LGBTI-pupils and their friends at school. Peer-to-peer education by volunteers in the elderly care, at school, in sports. Counselling by peers at local level.

- At the beginning of my key note I said that the Review of Rec 2010(05) is the strongest intergovernmental mechanism on LGBTI rights globally.
- The next full 3rd Review report is expected in 2025.
- I have good reasons to trust future CoE Presidencies of Luxemburg and Malta for guiding that Review process to a good end in 2025.
- Before I end my keynote, I thank all progressive Member States for their financial support to the work of the SOGI Unit, their commitment to CDADI, the EFPN and their financial support to European and national LGBTI-civil society organizations!

- I thank you madam Chair for giving me the floor.

References

CoE Committee of Ministers Recommendation 2010(05) on combatting discrimination on the grounds of sexual orientation and gender identity – Council of Europe – 2010 – Strasbourg:

12 thematic areas:

1. Right to life, security and protection from violence
2. Freedom of association
3. Freedom of expression and peaceful assembly
4. Right to respect for private and family life
5. Employment
6. Education
7. Health
8. Housing
9. Sports
10. Right to seek asylum
11. National human rights structures Intersectionality:
12. Discrimination on multiple grounds [Merger of gender and sogi in one department]

European Commission – LGBTI Equality Strategy 2020-2025:

“4.1 As regards to candidate (...) and accession countries (...) the EC will press for LGBTIQ equality, (including) support for cso’s through the Instrument for Pre-accession Assistance (IPA). It will also support monitoring and data collection on the situation of LGBTIQ people in the region (...)” Page 20

“5. Beyond delivering on the key actions set out in this strategy, the Commission will set up an LGBTIQ equality subgroup under the High-Level Group on non-discrimination, equality and diversity to support and monitor progress in the Member States, including as regards the development of national action plans on LGBTIQ equality. It will organise regular meetings, at political and expert level, with civil society and the Member States, and will take part in the work of the Council of Europe governmental LGBTI focal points network. It will regularly monitor the implementation of the actions presented in this strategy and present a mid-term review in 2023.” Page 23

ILGA Europe Rainbow Index May 2020 - Key findings:

“There has been no positive change in 49% of countries.

For the second year in a row, countries are moving backwards on the Rainbow Index, as existing protections are disappearing.

Trans rights are where most of the current movement in terms of LGBTI equality is happening, for better or worse.

Other forward movement, although on a smaller scale, is in the inclusion of equality measures protecting intersex people against discrimination.

Regression is most visible where civil and political rights are eroded: LGBTI human rights defenders increasingly at risk, authorities taking active measures to undermine civil society associations, and attempts to ban public events.”

Calendar of Council of Europe Presidencies

- *Germany* November 2020 – May 2021
- *Hungary* May 2021 - November 2021
- *Italy* November 2021 – May 2022
- *Ireland* May 2022 – November 2022
- *Iceland* November 2022 – May 2023
- *Latvia* May 2023 – November 2023
- *Liechtenstein* Nov 2023 – May 2024
- *Lithuania* May 2024 – November 2024
- *Luxemburg* November 2024 – May 2025 [3rd full Review of Rec 2010(05)]
- *Malta* May 2025 – November 2025 [3rd full Review of Rec 2010(05)]

Calendar of IDAHOT FORUM

- 8th European IDAHOT FORUM – 18 May 2021 & 27th EFPN Roundtable – 19 May 2021 hosted by UK & Cyprus Governments
- 9th European IDAHOT FORUM – Nicosia & 29th EFPN Roundtable - hosted by UK & Cyprus Governments

Country specific case: national policy measures & time line depicted from The Netherlands

Step 1 Decriminalization of homosexuality

1971 Abolition of penalty on homosexuality

Step 2 Combating discrimination

> 1986 discrimination and hate crimes punishable in Criminal Law

1986 1st National Action Plan¹⁷ & Governmental interministerial working group

Step 3 Promoting equality – level playing field for all grounds

1994 General Equal Treatment Act + various Criminal Law changes

1998 Registered partnership – Family Law

2000 Adoption by single parents – Family Law

2001 Civil marriage – Family Law

Step 4 Bridging the gap between de jure and de facto equality & involving LGBTI equality policies to other - competent - governmental levels.

2007 Merger of Gender Equality and LGBTI Equality

2008 Adoption by same sex couples – Family Law

2008 Memorandum of Understanding National Government & Local Authorities (ongoing)

¹⁷ General measures and general provisions where possible, specific measures and group-specific provisions where needed (intersectionality, inclusion, diversity)

2011 Parenthood for lesbian couples – Family Law

Step 5 Sustaining diversity within the community

2011/2019 Transgender reassignment Act - Family Law

> 2008 Explicit and targeted policy measures in regard to transgender persons

> 2015 Explicit and targeted policy measures in regard to intersex persons

2018 Policy Paper to eradicate the unnecessary use of gender markers in public documents
and in private sector

2020 Policy Paper on Rainbow Families

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