



From the SelectedWorks of Jakob Cornides

December 2010

Human Rights Pitted Against Man (II) – The Network Is Back

Contact
Author

Start Your Own
SelectedWorks

Notify Me
of New Work

Human Rights Pitted Against Man (II) – The Network Is Back

Abstract:

On the basis of a recently published Study on 'Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States', this paper discusses the way in which FRALEX, a group of independent experts on Fundamental Rights, provides 'expertise' to the newly established EU Fundamental Rights Agency (FRA) in Vienna. In addition to examining the Study itself, the paper informs about the close links existing between FRALEX, the (now defunct) 'EU Network of Independent Experts on Fundamental Rights', and certain radical lobby groups.

When, in January 2008, the International Journal of Human Rights published an article¹ in which I warned against the manipulation of human rights by certain 'advocacy groups' and 'experts', I did not expect that so soon I would have to write a sequel. Yet there are new developments that confirm my original suspicions: systematic attempts are made to use a false concept of 'human rights' to promote a radical² political agenda that is in fact adverse to humanity. The most recent example of such an attempt is the study on 'Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States' (the Study)³, published by Olivier de Schutter on behalf of the newly established EU Fundamental Rights Agency. The Study purports to find that international law *requires* Member States of the European Union to extend all legal benefits of marriage to 'married' or civilly registered homosexual couples or, where the law does not foresee same-sex 'marriage' or registered partnerships, to all same-sex couples.

Before commenting on some of the controversial findings of the Study, it is necessary to review the links between this Study and the controversial Legal Opinion issued by a 'EU Network of Independent Experts on Fundamental Rights' on 'the right to religious conscientious objection and the conclusion by EU Member States of Concordats with the Holy See'⁴ that precipitated my prior article.

¹ Jakob Cornides, *Human Rights Pitted Against Man*, International Journal of Human Rights Vol.12 (2008) No 1, 107-134

² In this paper, I use the term 'radical' for groups that, instead of acting out of a genuine concern for human rights as they are generally accepted, use the concept and language of 'human rights' only as a tool to promote their particular agendas, which remain highly controversial even in democratic societies. Litigation in international fora, especially the UN, to push 'novel interpretations' of broadly accepted human rights norms is a key element in their strategy.

³ Olivier de Schutter, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States, Part I – Legal Analysis*, Vienna: EU Agency for Fundamental Rights (2008)

⁴ CFR-CDF Opinion 4.2005, http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2005_4_en.pdf

The EU Network of Experts

As readers of the IJHR will recall, this 'EU Network of Experts', in its Legal Opinion, openly promoted the idea that, wherever abortion is not subject to criminal sanctions, women should be considered to have a (fundamental?) 'right to abortion', which obliges the State to provide access to abortion facilities (on the basis of so-called 'healthcare'), and which then supersedes the right to conscientious objection of medical practitioners not wishing to partake in abortions.

¶1140° Such a 'right to abortion' would substitute the most fundamental of all human rights, the *right to life*, with its antithesis: an *obligation* on doctors *to kill* innocent children. The Legal Opinion of the EU Network was therefore not only wrong, but must be seen as an audacious and deliberate attempt to use human rights against humanity. It is outside the scope of this paper to reiterate the intrinsic and axiomatic flaws in any argument that a 'right to abortion' exists, or that it is enshrined in any international agreement. By contrast, it is certainly worthwhile to recall the specific circumstances that raised significant and widespread doubts about the good faith of the authors of that 'expertise'. There was a clear bias in the reasoning of the Network, which systematically used a manipulative vocabulary, describing abortion as a 'health service' and pregnancy as an 'illness specific to women', and accusing doctors who acted in compliance with a law that prohibited abortion to have 'inflicted an inhuman and degrading treatment on women' (i.e., not providing the desired abortion). Any argument supportive of a 'right to abortion', no matter how absurdly far-fetched, was given widest consideration, whereas compelling counter-arguments were, at best, overlooked, at worst, decidedly ignored. The selective case law quoted by the Network related to cases that had nothing to do with any invocation of 'conscientious objection' by medical practitioners and were thus irrelevant to the subject of the Opinion. Even more of an indictment, the Network did not bother to acquaint itself with the positions of the Slovak Government or the Holy See, which, given that the Opinion concerned a clause in the (draft) Concordat then under negotiation between these two parties, would have been the minimum professional standard of care expected of 'experts' - at least of those wishing to guard their reputation of independence and fairness.

In short, the Opinion looked like a (clumsily drafted) position paper of a radical abortion lobby, rather than like the balanced analysis of serious-minded experts. And that precisely describes what it really was: for large portions of the Opinion's text were nothing other than direct quotes from a submission made by one of the most virulent pro-abortionist lobbies. This lobby group, the US-based 'Center for Reproductive Rights' (CRR), has so questionable a reputation⁵ that one must ask whether it could ever be suitable for any 'human rights expert' to maintain any professional ties with it, listen to its arguments or receive its written submissions - even if CRR were only one of a hundred organizations involved in a large-scale consultation process. Yet in the case of the Opinion, CRR was the *sole* advocacy group whose submission was received and considered.

The 'advocacy work' of CRR raised considerable public attention in 2003, when internal strategy papers were leaked to a member of the US Congress who immediately had them

⁵ Douglas A. Sylva/Susan Yoshihara, *Rights by Stealth*, C-Fam International Organizations Research Group, White Paper Series No. 8, New York (2007), p. 14 ff, aptly describe CRR as a "*well financed NGO*" whose "*strategy is revolutionary to the point of being a cabal*".

published in the Congressional Record⁶ in order to warn the public against *“the schemes of those who want to promote abortion here and abroad”*. Among other things, the leaked papers (from which all of the following quotations are taken) reveal that CRR maintains a consistent strategy to manipulate human rights. The goal of that strategy is *“to ensure that governments worldwide guarantee women’s reproductive rights out of an understanding that they are bound to do so”*. CRR itself, however, knows well that such an understanding is flawed – in fact entirely wrong - because *“there is no binding hard norm that recognizes women’s right to terminate a pregnancy”*. Given that *“the campaign for the adoption of a new international treaty would be an extremely involved, resource-intensive and long process”*, CRR’s efforts are now directed at *“developing a jurisprudence that pushes the general understanding of existing, broadly accepted human rights law to encompass reproductive rights”*. A key element in this strategy is to bring cases to international and regional adjudicative bodies (such as the UN, the European Court of Human Rights (ECtHR), or similar bodies) in order to promote novel, subjective interpretations of existing norms. In that context, it is certainly **°1141°** helpful that CRR has managed to recruit⁷ some prominent human rights lawyers for its ‘International Litigation Advisory Committee’ (ILAC), among them Paul Hunt, UN Special Rapporteur for the “right to health”, Philip Alston, UN Special Rapporteur on extrajudicial executions, and Martin Scheinin, who, besides serving as UN Special Rapporteur on protection of human rights while countering terrorism, was also a member of the Network. Is it not strange that the same individuals sitting on such an ‘Advisory Committee’ are allowed to hold themselves out as ‘independent experts’? It certainly provides explanation for some of their otherwise inexplicable findings.

⁶ Congressional Record, Extension of Remarks - E 2534-2547 of 8 December 2003

⁷ In the first draft of this paper, I wrote that Messrs. Hunt, Alston and Scheinin had been ‘hired’ by CRR as members of ILAC. Kay Goodall, in her reply to this paper, points out that it was inappropriate to use the word ‘hired’, given that this word carried the connotation of CRR paying a salary to these three persons, an assumption for which I was not providing any proof. Mrs. Goodall is right: I do not have any such proof. My source of information is CRR’s own website, on which the members of the ILAC are presented as part of CRR’s ‘leadership and staff’, but which does not reveal any further details on their remuneration; (see: <http://reproductiverights.org/en/about-us/leadership-and-staff>, last visited on 29 July 2009). In order to avoid unintended misrepresentations, I have therefore changed the text: it now says that the three ‘experts’ have been ‘recruited’ by CRR, leaving it to CRR and the three ‘experts’ to provide further clarifications. Whatever the situation may be, my view is that the question whether the ‘experts’ advocate abortion as a ‘right’ because they are paid for it or out of genuine conviction is only of secondary importance. I am not sure I share Mrs. Goodall’s view that a ‘conflict of interest’ exists only in the first case: with or without salary, if an ‘expert’ provides advice to a lobby group, he must be expected to do all he can to make the points of view of that lobby prevail wherever he is able to exert influence. In the case at hand, Messrs. Hunt, Alston and Scheinin give advice to an advocacy group that litigates before the very same quasi-judicial institutions in which they act as ‘independent experts’, or that has an interest in influencing the content of the very same reports they themselves are providing to the UN. Such a double role as advocates and judges would certainly not be possible in any normal judiciary procedure. In my view, there is a clear conflict between the interest of the UN or FRA to obtain unbiased and objective expertise and the interest of CRR to obtain support for their ‘advocacy’ work. It is unclear, which of these interests the three experts are actually serving. The fact that CRR in its internal communication candidly exhibits its intention to use ‘dirty’ strategies (cf. Congressional Record, supra note 6, E 2545: *“We have to fight harder, be a little dirtier...”*) should be further reason for any serious-minded person not to lend any support to that group, let alone to get involved in it either as ‘staff’ or ‘leadership’.

While a genuine international agreement on a 'right to abortion' can only ever be unrealistic and unattainable, this surreptitious attempt at the subversive re-interpretation of long-standing and universally accepted norms makes great strides. Both public debate and democratic decision-making on whether or not such a 'right' exists is avoided by pretending that this 'right' has already long since been implicitly agreed upon, and that States violate their international human rights obligations if they do not legalize abortion. The strategy has some efficacy because the label 'Human Rights' provides the findings of UN Committees and similar bodies with a relatively high degree of credibility; people tend to have confidence in 'experts', notwithstanding (or because?) they do not know them, and, more tellingly, are unaware of their links to certain lobby groups. Besides this, the gradual re-interpretation of human rights occurs subtly, in a way that usually does not attract significant or popular media coverage, and thus escapes public attention. CRR comments:

*"There are several advantages to relying primarily on interpretations of hard norms. As interpretations of norms acknowledging reproductive rights are repeated in international bodies, the legitimacy of these rights is reinforced. In addition, the gradual nature of this approach ensures that we are never in an 'all-or-nothing' situation, where we may risk a major setback. Further, it is a strategy that does not require a major, concentrated investment of resources, but rather it can be achieved over time with regular use of staff time and funds. Finally, **there is a stealth quality to the work**: we are achieving incremental recognition of values without a huge amount of scrutiny from the opposition. These lower profile victories will gradually put us in a strong position to assert a broad consensus around our assertions".⁸*

The Network's Opinion on 'the right to religious conscientious objection' certainly was one such 'victory', even if its profile was not quite as low or its media coverage quite as insignificant as the lobby might have perhaps hoped. Indeed, the case attracted considerable public attention especially when it transpired that there was in fact no 'broad consensus' on the Network's findings at all - not even among the members of the Network itself. After the publication of the Opinion, the Italian member of the Network, Prof. Bruno Nascimbene, made a public statement in which he expressed his 'dissent and perplexity' with regard to the Network's findings. He denounced the systemic bias underlying the Opinion, called its content 'preposterous', and said that 'no reasonable person' could be expected to agree to it.⁹ In addition to this, it was reported that the Opinion had in fact been drafted by Olivier de Schutter, the co-ordinator of the Network, almost exclusively, and that other Network members had had no real influence on its content.¹⁰

⁸ Congressional Record (supra note 6), E 2538

⁹ Centro Europeo di Studi su Popolazione, Ambiente e Sviluppo (CESPAS), Newsletter 12/2006: *Aborto: membri italiani attaccano Commissione di esperti sui diritti umani*; <http://www.cespas.org/newsletter/012.php>

¹⁰ Centro Europeo di Studi su Popolazione, Ambiente e Sviluppo (CESPAS), Newsletter 11/2006: *Chi c'è dietro gli esperti "indipendenti" della Commissione*; <http://www.cespas.org/newsletter/011.php>. Mrs. Goodall, when preparing her reply to my paper, has asked Mr. de Schutter to give his account of the events. She finds that account satisfactory and concludes that my "attacks on the credibility and the integrity of the Network, and the quality of its legal reasoning, are at best weak". In this regard, I would just point out that, when reading Mr. de Schutter's statement that "the Network adopted this Opinion, as its others, by consensus", one is left to wonder what exactly Mr. de Schutter understands by that

Given these embarrassing revelations, one was bound to question the value of the Opinion itself, and the personal credibility and integrity of its authors. In view of the general astonishment and severe criticism the Opinion aroused and the fact that the Network had abdicated its responsibility, one would think that neither the Network nor its individual members would be considered eligible for any further commissions, studies or legal opinions related to human rights.

Nonetheless, there was no need for a formal decision to dissolve the Network. Shortly after the publication of the controversial Opinion, the Network's limited 4-year mandate expired, and was not renewed.

°1142°

FRALEX

Whoever had expected or hoped not to hear from the ominous Network or other similarly constituted body ever again must have been unpleasantly surprised when the newly-created EU Fundamental Rights Agency (FRA)¹¹ published the result of its first major project, a study on 'Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States'. For that study, as it turned out, had to a large extent not been drafted by FRA's own staff, but represented a legal analysis based on background material collected and analysed by *"a group of senior experts contracted by the Agency to provide background material, information and analysis on legal issues"*.¹²

This legal experts group, called FRALEX (**F**undamental **R**ights **A**gency **L**egal **E**xperts), has been selected on the basis of *"an international Call for Tender in order to identify highly qualified legal experts in the field of human rights in each of the Member States of the European Union. Based on the outcome of this tender the Agency concluded framework*

term 'consensus': very clearly it appears that Mr. Nascimbene had *not* agreed to the draft, although the public had been told that all Members of the Network had agreed to it. It should also be noted that even Mr. de Schutter does not claim that Mr. Nascimbene explicitly agreed to his draft, or made any contribution to it. In the very best of cases, therefore, it must be concluded that Mr. de Schutter has failed to ascertain that his draft really was supported by all Members of the Network. At the same time, there is no good reason to assume Mr. Nascimbene's surprise and perplexity at the Opinion not to have been genuine (which is what Mrs. Goodall seems to suggest when she writes that *"Mr. de Schutter's version of the events is to be preferred"*). By making his public statement, Mr. Nascimbene exposed himself to some criticism that he had apparently not taken sufficient care to follow the drafting of the Opinion and influence it when it was time. Such criticism would indeed seem justified - but this self-exposure to criticism is precisely what makes Mr. Nascimbene's account of facts very credible, and at the same time could also be the reason why no other member of the Network has made a similar statement.

¹¹ The Agency is seated in Vienna and is stated to be the successor to the EUMC, the European Monitoring Centre on Racism and Xenophobia. It was established through Council Regulation (EC) No 168/2007 of 15 February 2007, and took up its functions on 1 March 2007. The Director of the Agency is Morten Kjaerum (Denmark). Prior to this appointment, he was a member of the controversial EU Network of Experts for Fundamental Rights. In a press interview following his appointment, Mr. Kjaerum stated that one of the main tasks of FRA under his aegis would be ... networking.

¹² FRALEX Study, (supra note 3) p.8, note 1

*contracts with selected contractors who will provide the Agency with legal studies and reports based on robust, scientific analyses of objective, reliable and comparable legal, but also social, quantitative and qualitative, data and information.*¹³

It is not my purpose here to comment on the specific circumstances of this Call for Tender¹⁴, nor to question why a specialized Fundamental Rights Agency, whose stated mission it is “to provide the relevant institutions... of the Community and its Member States ... with assistance and expertise relating to fundamental rights”¹⁵ found it necessary to outsource its key task, the ‘provision of expertise relating to fundamental rights’, to external experts. But one fact is certainly remarkable: FRALEX, the group of experts resulting from that Call for Tender, is conspicuously similar to the former ‘EU Network of Independent Experts on Fundamental Rights’. This concerns both the set-up of the group (one ‘expert’ from each EU Member State, plus one to provide an ‘overview’) as well as the names of the persons of which the group is composed. 13 of the 28 members of FRALEX were also members of the Network, including the Network’s co-ordinator Olivier de Schutter, who appears to have assumed a similar co-ordinating role in FRALEX. Further FRALEX experts who previously were members of the Network are Pavel Sturma (Czech Republic), Donncha O’Connell (Ireland), Teresa Freixes Sanjuan (Spain), Ilvija Pūce (Latvia), Edita Ziobiene (Lithuania), François Moyse (Luxembourg), Ian Refalo (Malta), Rick Lawson (Netherlands), Manfred Nowak (Austria), Arne-Marjan Mavcic (Slovenia), Martin Scheinin (Finland), and Maja K. Eriksson (Sweden).¹⁶ Conspicuously absent from the list of ‘senior experts’ is Bruno Nascimbene, who had expressed dissent with regard to the ominous Legal Opinion on conscientious objection.

The total volume of the framework contract concluded between FRA and FRALEX, which covers a 4-year period, is estimated at € 10 million. Depending on the available budget and the needs of the FRA this amount could be increased by up to 50 %. Given that each ‘senior expert’ is leading a small team of researchers from his/her respective country, the total

¹³ Quotation taken from the EU Fundamental Rights Agency’s website: http://fra.europa.eu/fra/index.php?fuseaction=content.dsp_cat_content&catid=4864fe5958042

¹⁴ The Call for Tender was published in OJ Nr. S 144/2007 of 28 July 2007 (2007/S 144-178109), and the Tender Award Notice in OJ Nr. S 23/2008 of 2 February 2008 (2008/S 23-029137). The procurement was divided into 28 lots (one per EU Member State, plus one for ‘Comparative and overview, European and international level deliverables’). The time-limit for receipt of tenders was set for 10 September 2007, which, in conformity with the applicable Community legislation, allowed a time period of more than 40 days for submitting tenders. According to the Tender Award Notice, 54 offers were received. It should be noted in this context that each offer for each of the 28 lots of the framework contract was counted as a separate offer, meaning that the offers submitted by one single tenderer, Human European Consultancy, for 25 lots count as 25 offers. On average, therefore, less than two offers were received per lot. 21 of the 28 lots were awarded to Human European Consultancy, a private consultancy firm seated at Hooghiemstraplein, 155, 3514 AZ Utrecht, Netherlands. The FRALEX experts were thus selected and proposed by the successful tenderers (mostly Human European Consultancy) as part of their submission.

¹⁵ Council Regulation (EC) No 168/2007 of 15 February 2007, Article 2

¹⁶ A list of the ‘senior experts’ has been published on the internet at: http://fra.europa.eu/fra/index.php?fuseaction=content.dsp_cat_content&contentid=48650315a0632&catid=486502a22214f&lang=EN

number of persons working for FRALEX can be estimated at more than 100. This exceeds by far the number of staff currently employed at FRA itself, which is below 50.

Through the framework contract, FRALEX is put in a unique and privileged position. It now enjoys a de facto monopoly on providing expertise related to fundamental rights issues to the FRA, which in turn provides such expertise to the EU and its Member States. Indirectly, therefore, FRALEX is now in an exclusive and very powerful position to feed its ideology into the law-making process of the EU and the Member States. It disposes of **€1143°** an important quantity of paid staff to prepare its studies and analyses, receives broad media coverage whenever such an analysis is published, and has unique access to political institutions. In short, FRALEX appears to be an upgraded version of the former 'EU Network of Independent Experts on Fundamental Rights': more money, more staff, more power.

This situation is concerning, given that it can be expected that FRALEX, like the former Network, will seek to use its position in order to impose a controversial social agenda, under the 'human rights' banner, on an unsuspecting society. In the case of the Network, it was clearly visible that there was a predominant bias in favour of promoting a so-called 'right to abortion'. The first project completed by FRALEX, the recently published Study on 'Homophobia and Discrimination' mentioned above, provides ample grounds to suspect that FRALEX is similarly biased. Its initial focus, however, is to promote the 'equivalence' of homosexual relations and, by consequence, radical concepts of 'marriage' and 'family'.

The FRALEX Study on Homophobia

Whose is the authorship?

In beginning this analysis, I should point out that it is not fully clear who is to be understood to bear responsibility for the Study, and to whom, by consequence, the critical remarks that follow should be addressed. The frontispiece of the Study mentions Mr. Olivier de Schutter as author; but it also mentions the FRA, leaving unclear whether the Agency is acting as editor, publisher, or co-author. In addition, it contains a disclaimer stating that *"this report was financed and prepared for the use of the FRA. Data and information were provided by FRALEX. The responsibility for conclusion and opinions lies with the FRA."* Further information is provided on page 8:

"The present report is a comparative legal analysis of the situation in the Member States of the European Union based on 27 national contributions by FRALEX drafted on the basis of detailed guidelines provided by the Agency."

This gives rise to some threshold questions: where does the border between 'data and information' and 'conclusion and analysis' lie? And what is the specific role of Mr. de Schutter? Is he alone the responsible author, or has the entire FRALEX team contributed?

Looking at the Study's table of contents, one finds that its last two sections bear the headings 'Conclusions' and 'Opinions'. Can one thus presume that it is only for these two sections that FRA is assuming responsibility? These two chapters, as it appears, are meant to contain the 'political' message of the Study, whereas the remaining parts, of which the authorship is attributable either to FRALEX or to Mr. de Schutter, purport to be 'scientific'. Since my purpose is not to comment on the policy of the FRA, I will limit my comments to some of the

‘scientific’ findings of the Study. In so doing, it suffices to consider only one or two of the Study’s main findings.

Bestowing the benefits of marriage on un-married homosexual couples

Perhaps the most surprising, and certainly the most audacious, of the Study’s statements is the following:

“International human rights law requires that same-sex couples either have access to an institution such as registered partnership which provides them with the same advantages as those they would be recognised if they had access to marriage; or that, failing such official ¶1144° recognition, the de facto durable relationships they enter into leads to extending to them such advantages. Indeed, where differences in treatment between married couples and unmarried couples have been recognised as legitimate, this has been justified by the reasoning that opposite-sex couples have made a deliberate choice not to marry. Since such reasoning does not apply to same-sex couples which, under the applicable national legislation, are prohibited from marrying, it follows a contrario that advantages recognised to married couples should be extended to unmarried same-sex couples either when these couples form a registered partnership, or when, in the absence of such an institution, the de facto relationship presents a sufficient degree of permanency: any refusal to thus extend the advantages benefiting married couples to same-sex couples should be treated as discriminatory.”¹⁷

In simpler words, FRALEX does not go as far as claiming that EU Member States are obliged to introduce same-sex ‘marriage’ or similar institutions. But if Member States do provide mechanisms for the legal recognition of same-sex relationships, they must, according to FRALEX, provide people in such relationships with the same advantages as men and women who are legally married. And if they don’t, they must extend these advantages (why only the advantages, and not the obligations?) to *all* same-sex couples that live in a partnership with ‘a sufficient degree of permanency’.

With due respect: it would be an understatement to call this statement ‘wrong’. It is manifestly absurd.

Firstly, it suffices to note that only four of 27 EU Member States¹⁸ foresee same-sex ‘marriage’, i.e. the possibility for same-sex couples to contract a ‘marriage’ that is identical to the marriage traditionally entered into by opposite-sex couples. Other Member States foresee ‘registered partnerships’ which explicitly differ from marriage in legal nature and effects.¹⁹ A majority of Member States has legislated for neither and thus grants no status at all to same-sex couples. *Not a single* Member State provides the same advantages to un-married (or un-registered) same-sex couples as for married opposite-sex couples.

¹⁷ FRALEX Study, (supra note 3) p.13

¹⁸ These Member States are the Netherlands (since 2001), Belgium (since 2003) and Spain (since 2005). Sweden has adopted a Law on same-sex marriages that will enter into force on 1 May 2009. Outside the EU, Norway foresees same-sex marriages since 1 January 2009.

¹⁹ ‘Registered Partnerships’ are available for same-sex couples in Austria, the Czech Republic, Denmark, France, Germany, Luxemburg, Slovenia, Sweden and the United Kingdom.

Secondly, to speak of 'International Human Rights Law', one must consider not only the legal situation in the EU, but also the relevant international human rights instruments, and the legal situation in non-European countries. Whoever extends his research beyond Europe's narrow borders will soon find out that:

- (1) *not a single* international instrument explicitly or implicitly foresees the equal treatment of un-married (or un-registered) same-sex couples with married opposite-sex couples²⁰, which FRALEX contends to be a requirement of International Law, nor does one single country in the world foresee such equal treatment in its domestic legislation;
- (2) outside Europe, only Canada, South Africa, and five US States (Connecticut, Massachusetts, New Hampshire, Vermont, Iowa) legislate for same-sex 'marriages'. The total number of States foreseeing same-sex 'marriages' is 7, and the total number of States recognizing 'registered partnerships' between homosexuals is 15;
- (3) even in those jurisdictions where same-sex 'marriages' or 'civil partnerships' are foreseen, they cannot be considered a long-established legal standard, given that they have been introduced ten years ago or less;
- (4) wherever, in a democratic country, same-sex 'marriage' was made the object of a popular vote, it was rejected by a clear majority of voters.²¹

²⁰ Concerning the International Covenant on Civil and Political Rights (ICCPR), see: UN Human Rights Committee, *Joslin v. New Zealand*, Communication n° 902/1999, decision of 30 July 2002 (UN doc. CCPR/C/75/D/902/1999). The Universal Declaration of Human Rights (UDHR) and the ECHR foresee a right to marry for "*men and women of marriageable age*". Given that these texts were adopted long before any country even thought of recognizing the right to marry to persons of the same sex, it is clear that these words cannot be construed to mean that the States signing up to them were going to be obliged to recognize same-sex marriage. What remains unclear is whether these provisions must not, in fact, be interpreted as *preventing* States from recognizing same-sex marriage. Cf. the decision adopted by the Federal Constitutional Court (BVerfG, 1 BvF 1/01 of 17.7.2002), which declared that the creation of specific 'Civil Partnerships' (which can be concluded *only* by persons of the same sex) is admissible under the German Grundgesetz, whereas opening the institution of marriage to same-sex couples would be unconstitutional. The dissenting opinions of judges Papier and Haas contain even stronger emphasis of the obligation of the State, under Article 6 of the Grundgesetz, to guarantee the uniqueness of marriage, concluding that 'civil partnerships' cannot be legislated in a way that would make them equal to marriage in everything but the name.

²¹ Recent examples were the votes held in California, Arizona, and Florida on 4 November 2008, through which the Constitutions of these three States were amended in order to explicitly rule out the recognition of same-sex marriages, bringing the number of US States having adopted such constitutional amendments to 30 out of 50. In addition, ten further States have adopted ordinary statutes foreseeing such a ban. By contrast, in those States where same sex-marriages are or were available (i.e. Massachusetts, Connecticut, and California, where the referendum of 4 November 2008 was held to abolish them), this situation was not the result of any democratic legislative process, but of highly controversial judicial decisions adopted by the Supreme Courts of these States, finding that the an obligation to recognize same-sex marriage was in some way already mandated by existing constitutional law, but failing to explain why the hidden sense of the constitutional provisions used for that purpose had never been discovered in the decades or centuries before. Only Vermont and Maine have actually adopted a bill to introduce same-sex marriages; but in both cases the bill was not subject to a popular vote. In Maine, the bill was repealed by a popular referendum on 4 November 2009.

In addition, it must be noted that, as a recent report has pointed out²², more than 80 States place homosexual relations between consenting adults under criminal sanctions, °1145° with 7 of them even foreseeing and applying the death penalty²³. It is self-evident that in *these* States there is absolutely no question of any 'legal recognition' of same-sex partnerships in whichever form, if we do not count the definition as a crime as one possible form of 'recognition'. And of course, none of these countries' laws provide to un-married (or un-registered) same-sex couples the same advantages as to married heterosexual couples. Indeed, there is *not a single* country on the surface of this planet, whether inside or outside the EU, where this kind of equal treatment, which FRALEX wants to be a 'requirement of international law', exists either in law or in reality.

Thirdly, FRALEX's findings are intrinsically flawed: if they were correct, the introduction of same-sex 'marriage' would actually curtail the rights of homosexuals rather than extend them, because it would (1) limit the number of homosexual couples to whom the advantages of marriage must be granted and (2) make these advantages depend on the willingness of those couples to accept some 'obligations'. By consequence, countries like Poland or Malta, where society is more skeptical of homosexual relations, would be well advised to introduce same-sex 'marriage' as quickly as legislative priorities will allow, whereas more 'progressive' countries like the Netherlands and Spain would urgently need to correct the 'error' they committed by inadvertently introducing same-sex 'marriages' and thus withdrawing from non-married same-sex couples from equal advantages they otherwise might be entitled to. Indeed, one would have to wonder why pressure groups like the International Gay and Lesbian Association (ILGA) advocate the introduction of formal same-sex 'marriage' in all Member States: do they, contrary to their mission statement, actually want to restrict the rights of certain (i.e., unmarried) homosexuals? Or have they just misunderstood the precepts of international law?

'This view gains support within human rights bodies'

Lallah and Scheinin: the avant-garde of anti-discrimination thought

The surprising findings of the FRALEX Study are mainly based on the following argument:

"...it might be argued that... any refusal to thus extend the advantages benefiting married couples to same-sex couples should be treated as discriminatory... This view is gaining support within human rights bodies. In the case of Joslin v. New Zealand,

²² Michael O'Flaherty/ John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, (2008) 2 Human Rights Law Review 207-248

²³ While the author of this paper does not approve of these laws, he nevertheless considers that they must be taken into account when determining the current state of international law. In his personal view, homosexual acts between consenting adults should not be placed under criminal sanctions. He considers that such acts, if they take place in the private sphere, may be seen as not threatening or endangering important societal interests to an extent that would justify such sanctions. However, such tolerance does not mean that homosexuality needs to be recognized and protected as a 'right', or that homosexual relations need in any way be considered 'equal' to the relationship of a married couple. The author considers it perfectly legitimate for LGBT groups to internationally campaign for the abolition of criminal laws against homosexuality; at the same time, he is not convinced that international human rights law prohibits any country from maintaining or introducing such criminal sanctions.

*two members of the Human Rights Committee, Messrs Lallah and Scheinin, underlined in their concurring opinion that differential treatment between married couples and same-sex couples not allowed under the law to marry, '... may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination.'*²⁴

As we can see, there is a striking discrepancy between the findings as presented in the Executive Summary of the Study, and the reasoning we find in the Study itself. In the Executive Summary, we read that “*international human rights law requires*” (in indicative form!) equal treatment between un-married homosexual and married heterosexual couples. In the Study itself, we read that “*it might be argued*” that there was such a requirement, and that this view “*is gaining support*”²⁵ among human rights bodies. But what does “*it might be argued*” really mean? Anyone may of course advance whatever argument he believes will help his cause – but the decisive question, one should believe, is not whether an argument might be made, but whether it is true (or at least, if absolute ‘truth’ is not what we are seeking, whether it has any plausibility). And what does it mean that a view “*is gaining support*”? At best, such a statement can only mean that today there is more support for such view now than there was before. But what if, five years ago, only one of fifteen experts °1146° supported this view, and today two? Would any increase in support, however negligible, transform a minority opinion into a requirement or norm of international law?

In this regard it is useful to revert to the Communication of the UN Human Rights Committee in the case of *Joslin v. New Zealand*²⁶, to which the FRALEX Study refers. The main conclusion of this Communication is brief. It reads:

“8.2 The authors' essential claim is that the Covenant obligates States parties to confer upon homosexual couples the capacity to marry and that by denying the authors this capacity the State party violates their rights under articles 16, 17, 23, paragraphs 1 and 2, and 26 of the Covenant. The Committee notes that article 23, paragraph 2, of the Covenant expressly addresses the issue of the right to marry.

Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term "men and women", rather than "every human being", "everyone" and "all persons". Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.

*8.3 In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, **the Committee cannot find that by mere refusal to provide for***

²⁴ FRALEX Study (supra note 3), p. 56

²⁵ FRALEX Study (supra note 3), p. 58

²⁶ Supra, note 20

marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant."

This is the opinion to which Scheinin²⁷ and Lallah concurred: the treaty obligation of States parties is to "*recognize as marriage only the union between a man and a woman wishing to marry each other*", and there is no obligation for a State to recognize any other kind of 'marriage'. By contrast, however, none of the remaining thirteen members of the Committee concurred to *Scheinin's and Lallah's* 'concurring opinion'. The reference to a 'concurring opinion' in the FRALEX Study is apt to create the wrong impression that Messrs. Scheinin and Lallah elaborated with more clarity upon some point on which the entire UN Committee agreed. But the fact is: a majority of 13 to 2 did not agree. In addition, the statement made by Scheinin and Lallah remains vague and cautious: differential treatment between married couples and same-sex couples not permitted under national law to marry *may* amount to prohibited discrimination, *depending on the circumstances of a concrete case*. Quite obviously, this statement is too vague to support the assertion made by FRALEX that such differential statement should in all circumstances be regarded as discriminatory.

Why do I go into so much detail? Because this is a particularly telling example of how an 'academic study' can attempt to manipulate international law by subtly overlooking some facts but brazenly overemphasizing others. The UN Human Rights Committee has made an unequivocal statement that there is no obligation on a State to provide for same-sex marriage; this is where the *real* consensus lies. At the same time, two members of the Committee made a vague argument, which failed to find the support of the other thirteen expert members and therefore did not make its way into the Committee's opinion. The FRALEX Study, however, does not at all mention the real consensus of the Committee; instead, *only* the defeated minority opinion is mentioned to suggest that *this* is the direction into which international law is (inevitably?) moving, or - even more audaciously - that this, and not the majority vote, represents the current state of the law. No mention is made of the fact that this minority statement was vague and hypothetical, and that it included a reference to specific circumstances in specific cases rather than a sweeping general principle. This is strikingly reminiscent of the tactics described in the strategy of °1147° CRR: to "*assert a broad consensus around our assertions*", so that governments adopt the proposed policy "*out of an understanding that they are bound to do so*". The FRALEX experts assert a broad consensus around the assertions made by two persons (one of them itself a member of FRALEX), to attempt to influence governments into thinking that they are bound by international law to act according to what this statement would suggest. In addition, this statement, which even in its vague and hypothetical drafting failed to win the support of 13 of the 15 members of the Committee, is now used as the cornerstone for an interpretation that is presented as if it were a certitude.

'Unavoidable Conclusions': FRALEX's interpretation of ECtHR Case-Law

The additional arguments used by FRALEX to support its finding that EU Member States must provide equal treatment between un-married homosexual and married heterosexual couples are of similar ilk. This is easily demonstrated when taking a closer look at the

²⁷ N.B.: this is the one and the same Mr. Scheinin who advises the discredited 'Center for Reproductive Rights', who was a member of the Network and, predictably, is now a member of FRALEX.

experts' attempt to draw support for their position from the European Convention on Human Rights (ECHR)²⁸:

"The same reasoning seems to be applicable under the European Convention on Human Rights. In Shackell, a woman which had cohabited with a man for 17 years until his death unsuccessfully complained that she was denied the widow's benefits she would have a right to had the couple been married. The European Court of Human Rights considered the application manifestly ill-founded in 2000,²⁹ and the validity of this view was recently reaffirmed.³⁰ The European Court of Human Rights found in Shackell that the situations of married and unmarried heterosexual cohabiting couples were not analogous for the purposes of survivors' benefits, since 'marriage remains an institution which is widely accepted as conferring a particular status on those who enter it'. On at least one occasion, the privileged status of marriage has been invoked by the Court to justify a difference in treatment between an unmarried same-sex couple and a married couple³¹"

One would assume that if *"marriage remains an institution which is widely accepted as conferring a particular status on those who enter it"*, this can only mean that there can be no obligation for a State to treat married and un-married couples alike. That, however, is not the conclusion FRALEX is seeking. The argument thus continues as follows:

"It is however noteworthy that, in Shackell, the couple had the choice whether or not to marry."

Certainly true. But that was not a criterion used by the ECtHR. The ECtHR made no hint that the decision would have been similar if the couple in question had not been allowed to marry. Shackell is a decision on an unmarried opposite-sex couple, not on the rights of same-sex couples. Yet FRALEX continues:

*"In the 2008 case of Burden, the Court expressly notes that 'there can be no analogy between married and Civil Partnership Act couples, on one hand, and heterosexual or homosexual couples **who choose to live together but not to become husband and wife or civil partners**' (para. 65, emphasis added)."*

Again, the ECtHR states that *"there can be no analogy"* between married couples and unmarried couples? Why, then, is this quotation used in an argument that apparently relies on analogy? This remains still unclear, as the argument is continued:

²⁸ FRALEX Study (supra note 3), p. 57. This and the four following blocks put between quotation marks represent one single quotation. In the original, there are no interjections.

²⁹ Eur. Ct. HR (1st sect.), Shackell v. the United Kingdom (dec.), Appl. no. 45851/99, 27 April 2000.

³⁰ Eur. Ct. HR (GC), Burden v. the United Kingdom, Appl. No. 13378/05, judgment of 29 April 2008, para.63.

³¹ Eur. Ct. HR (4th sect.), Mata Estevez v. Spain (Appl. No. 56501/00), dec. (inadmissibility) of 10 May 2001, Rep. 2001-IV. In this case, a same-sex couple was unable to benefit from the advantages (surviving spouse benefits) they would be recognised had they been married, which they could not under Spanish law at the time.

“In that case, the applicants were two sisters sharing a common household, who complained that when the first of them would die, the survivor would be required to pay inheritance tax on the ¶1148° dead sister's share of the family home, whereas the survivor of a married couple or a homosexual relationship registered under the Civil Partnership Act 2004, would be exempt from paying inheritance tax in these circumstances. The applicants argued that the very reason that they were not subject by law to the same corpus of legal rights and obligations as other couples was 'that they were prevented, on grounds of consanguinity, from entering into a civil partnership' (para. 53). But the Court rejects this argument on the grounds that 'the relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners' (para. 62).”

It should be remarked at this point that the ECtHR in this case actually emphasized the wide margin of discretion States have in deciding to whom tax benefits and similar advantages should be granted or not be granted. This is just the contrary of FRALEX's position, which denies that States have such a margin of discretion. As such, the judgment provides therefore no support at all for any demands for 'equal treatment'.

That said, it is self-evident that the relationship between two sisters is different from that between homosexual civil partners. Nevertheless, FRALEX, if it really were concerned over 'all forms of discrimination', would have had good reasons to question the position expressed by the ECtHR, which provides no satisfactory explanation why two sisters should not be allowed to enter into a 'Civil Partnership' and enjoy the rights and benefits associated with it, if a State makes such 'Civil Partnerships available to all other same-sex couples.³² But of course, the Study concerns only the discrimination of homosexuals, so that the discriminatory treatment of two elderly ladies who, as it seems, were not homosexual, must not be allowed to distract the authors from their task. FRALEX thus arrives at the surprising conclusion of the argument:

“Therefore, this judgment cannot be invoked to avoid the conclusion that non-married same-sex couples should not be treated on a par with married couples, where marriage is unavailable to same-sex couples: the 'qualitative difference' between a couple of two sisters results, in the view of the Court, from the fact of their consanguinity, which is an obstacle to marriage, and not merely from the existence of a legal obstacle to marriage.”

This conclusion is already wrong for purely linguistic reasons: there are too many negations in this sentence, which thus states something else than what apparently was intended. What the FRALEX experts really wanted to say was probably either that

³² Note, in this regard, the dissenting opinions of Judges Zupančič and Borrego Borrego. Arguably, the consanguinity of two sisters is simply of no relevance for the benefits at question. If the marriage between siblings (brother and sister) is taboo nearly everywhere in the world, the same is true of marriages between persons of the same sex, - and if modern society chooses to get rid of all taboos, then there is no good reason to maintain this single one taboo, by prohibiting siblings of the same sex from entering a 'Civil Partnership', while abolishing all the others. A second reason for prohibiting marriages between siblings is to prevent genetically impaired progeny – but that is certainly not a good reason for preventing two elderly sisters from 'marrying', or excluding them from benefits they could obtain if they were unrelated.

(a) ‘the Burden judgment cannot be invoked to support the conclusion that non-married same-sex couples should not be treated on a par with married couples...’,

or, more daringly, that

(b) ‘despite this judgment it is unavoidable to conclude that non-married same-sex couples should be treated on a par with married couples...’

Due to the inexact language, it is impossible to say which of these two statements FRALEX actually intended to make. The first one could be true (since Burden does not seem to disprove FRALEX’s position), whereas the second would clearly be mistaken (since the FRALEX position is certainly not ‘unavoidable’). But whatever meaning the obscure conclusion was intended to have, it suffices to remember that, in introducing the subject, it was affirmed that *“the same reasoning seems to be applicable under the ECHR”*³³; the ambition of FRALEX was thus to use the Shackell and Burden cases in order to demonstrate that the ECtHR *requires* States to give, at least in certain circumstances, the same treatment to non-married same-sex couples as to married couples. Yet there is, as we have seen, nothing in these two judgments cited by FRALEX that supports such a conclusion. ¶1149° It is impossible to draw the conclusion that ‘equal treatment must be granted’ from two decisions in which claims for equal treatment have been denied. It is therefore a serious misrepresentation to say that the ECtHR lends support to the findings of the Study. The truth is that it does not lend any support to these findings.

Some other findings of the Study

Free Movement for Same-Sex ‘Spouses’

The remaining findings of the Study suffer under similar scrutiny and analysis. For example, the section on ‘Free Movement of Persons’ suggests that under the Free Movement Directive (2004/58/EC), EU Member States which, in national legislation, provide no legal recognition or status to same-sex couples, are obliged to recognise the same-sex partner of an immigrant as his/her ‘spouse’ if the couple has contracted ‘marriage’ in a Member State that provides such status to same-sex couples³⁴. This bold assertion, for which there is a complete lack of any argument³⁵, is at the least questionable, given that the Directive neither contains a definition of the term ‘spouse’ nor sets out whether the term must be interpreted according to the law of the home country or the host country. In the absence of any such

³³ One notes the – very understandable – caution in this statement. The world of legal expertise is one where everything ‘seems to be’, and nothing ever ‘is’, the case.

³⁴ FRALEX Study (supra note 3), p. 62, Table 2.1.: *Obligations of host Member States under the Free Movement Directive*

³⁵ Indeed, in the text of the Study, p.61, the issue is addressed only in the form of a question: *“Should the same-sex married person be considered a ‘spouse’ for the purposes of the Free Movement Directive, by the host Member State? Or may the host Member State refuse to extend the definition of the ‘spouse’ to the married same-sex partner, and deny to that partner a right to join his or her partner in that State?”* But in Table 2.1, an obligation to extend the definition to same-sex couples is presented as an established certainty, and there is nowhere any trace of an argument that would allow the reader to understand how this certainty was reached. G. Toggenburg, „LGBT“ go Luxembourg, *European Law Reporter* 5/2008, 174, points out that the possibility of introducing a country-of-origin-principle into the Free Movement Directive was discussed, but deliberately rejected by the Council.

clarification in the Directive, there are compelling reasons to assert that ‘spouse’ can only mean what *all* Member States legislate by that term, i.e., a person of the opposite sex. Indeed, the interpretation given by FRALEX would seem to imply that one Member State alone, by introducing same-sex ‘marriage’, would be able to impose that political choice or legal determination on all other Member States, contrary to the principles of conferral and competence enshrined in the EU Treaties – an assumption that is, with due respect, more than temerarious. The Study, when interpreting the Directive, should have carefully weighted arguments and counter-arguments; instead, FRALEX presents its own controversial opinions as some kind of infallible truth, hoping that Member States and EU institutions will not dare to contradict it.

‘Fewer complaints do not mean less discrimination’

Yet more astounding is the way in which statistical evidence is interpreted. Certainly, the Study published in July 2008 is only a ‘Legal Analysis’. A second part, containing ‘Sociological Analysis’, was to follow.³⁶ Yet the Legal Analysis already anticipates that the statistical data collected by FRALEX will far from support the assumption that ‘discrimination on grounds of sexual orientation’ is a serious problem requiring urgent action by EC legislation or Member State parliaments. As FRA Director Morten Kjaerum writes in the foreword:

“It is striking to see how few official or even unofficial complaints data are currently available across the EU on discrimination on grounds of sexual orientation... This issue, however, will be scrutinized in the upcoming sociological analysis that forms the second part of this report.”³⁷

Thus it appears that the second part of the Study, rather than providing factual information, will provide explanations why such information cannot be provided. The ‘Legal Study’ already hints that:

“Finally, it should be noted that complaints statistics regarding discrimination on grounds of sexual discrimination with the equality bodies, collected by the FRALEX experts, do not offer an adequate basis for useful comparisons. Reasons for the paucity of statistical data ¶1150° can be sought either to the fact [sic!] that it is still early for the equality bodies examined to have received an adequate number of complaints; or to the fact that the powers of such bodies as regards discrimination on grounds of sexual orientation still remain little known to those most directly

³⁶ This second part has been published on 31 March 2009, and is available at http://fra.europa.eu/fraWebsite/products/publications_reports/pub_cr_homophobia_p2_0309_en.htm. Regrettably, it is characterized by the same manipulative approach as the first part: rather than on verifiable facts and figures, it appears to be mostly based interviews with, or written input from, a number of LGBT NGOs and similar ‘stakeholders’, representing the opinions and views of these groups as the result of ‘scientific’ research. An important proportion of the text is consecrated to the definition of pseudo-scientific neologisms such as ‘heteronormativity’ or ‘heterosexism’, which, as it appears, have been devised to become the newest key-words of political or judicial activism. However, given that this second report was prepared not by FRALEX, but by the Danish Institute for Human Rights and COWI A/S (a Danish consulting firm, to which this task had been contracted out), it is outside the scope of this article to further comment on it.

³⁷ FRALEX Study (supra note 3), p. 7

*concerned, namely the victims. In the area of sexual orientation discrimination perhaps more than in any other area (with the exception perhaps of certain invisible disabilities), it takes courage to present oneself to an authority in order to complain, since this in almost all cases means revealing one's sexual orientation, which the individual concerned may seek to hide.*³⁸

Thus, if the statistics do not offer any evidence for discrimination on grounds of sexual orientation being a problem frequently encountered, it must be that these statistics are at fault. But, as we have come to expect, FRALEX knows better than to rely on statistics:

*"Fewer registered complaints clearly does not mean that there is less discrimination."*³⁹

If fewer complaints do not mean less discrimination, would *more* complaints mean less discrimination? Or do fewer complaints mean more discrimination? Or is FRALEX' assessment of the gravity of the problem completely *unrelated* to the factual and statistical information it possesses? Are statistics of any relevance to the size or importance of the problem? Or are they only relevant when they confirm what the FRALEX experts have chosen to believe, and irrelevant when they seem to disprove their views?

The data collected by FRALEX does not suggest that there is a significant amount of discrimination which the victims do not dare to bring to the attention of the competent authorities, but, quite on the contrary, that of the (not at all numerous) cases brought to the attention of these authorities most are found not to have constituted discrimination. For example, the country report for Austria mentions that 148 complaints concerning the implementation of Employment Directive 2000/78/EC in relation to sexual orientation were filed between 2005 and 2007, of which only 2 led to a finding that there had indeed been discrimination⁴⁰: of the few complaints received, an overwhelming majority of 98,5% was (apparently) ill-founded. In other countries, the statistical evidence is similar: in the UK, 1324 complaints lead to 35 findings of discrimination in 2003-2006; in the Netherlands, 47 complaints led to 19 such findings between 2000 and 2007; in Romania, there were 6 findings of discrimination on the basis of 34 complaints from 2002 to 2007.

In view of this data, FRALEX's statement that there was "*underreporting of discrimination on grounds of sexual orientation, or(a) lack of reliable statistical data on this subject*", seems to have no basis at all. The truth is that the lack of reliable data affected only some Member States (for which no statistics were available), whereas for other Member States statistics were readily available and, no doubt, complete. If, for these Member States, a low number of complaints has been reported, this is due to the fact that a low number of complaints has been filed; the Study provides no argument to suspect that these complaints statistics are false or incomplete. In the same vein, if a large majority of complaints remained

³⁸ FRALEX Study (supra note 3), p. 40

³⁹ FRALEX Study (supra note 3), p. 40

⁴⁰ In order to bring these two known cases of 'discrimination on grounds of sexual orientation' in the three years between 2005 and 2007 into proportion with other societal problems, it seems worth noting that, according to statistics published by the Austrian Federal Ministry of the Interior, 605.272 crimes were brought to the attention of the public authorities in 2005, of which 86.091 were directed against the lives or bodily integrity of human persons. The figures for 2006 and 2007 are similar.

unsuccessful, it appears that the readiness to complain by far exceeds the real prevalence of discrimination on grounds of 'homophobia': there is no evidence to suggest that the complaints bodies treated complaints incorrectly. How, then, is FRALEX able to assert that there is significant *underreporting*? Does this gratuitous assertion not merely reflect the experts' pre-established assumptions? Is this not just a somewhat too obvious attempt to explain away the divergence between these assumptions and reality? The *mere absence* of data is used as 'proof' to evidence that 'homophobia' is a serious problem that requires the EU and its Member States to take action. But the available data rather suggests that the **°1151°** problem is not quite as serious as the 'experts' assert it to be. The high number of unsuccessful complaints indeed points at overreporting rather than underreporting. With all this I am not saying that homosexuals never suffer any discrimination or disadvantage. Of course, it still *is possible* that many cases of discrimination are not reported, or that the public authorities involved are not sufficiently 'sensitive' to LGBT issues and therefore tend to decide against the complainants where they should decide in their favour. The problem, however, is that the data provided by FRALEX do not at all seem to lend support to the alarmist message "*that this legal analysis presents a situation that calls for serious considerations*". One is thus left to wonder what the statistics would have to look like in order for FRALEX to conclude that 'homophobia' currently is *not* a major problem; but there is reason to suspect that no data and no statistics would ever be allowed to lead to that (unwelcome?) conclusion. From the way statistics are used in the FRALEX Study it can safely be concluded that the contemporary concern over 'homophobia' is unrelated to any verifiable facts and figures. Much of this homophobia talk results from an ideology that generates its own reality.

Solving the problem of 'underreporting'

Be that as it may, the experts recommend that specialized 'Equality Bodies' with far-reaching powers should be established in all Member States, to take action wherever there is the slightest suspicion of 'discrimination':

*"One partial solution to this problem of underreporting would be to allow equality bodies either to act on their own initiative, or to act on the basis of anonymous complaints, without the identity of the victim being revealed to the offender. Another solution could be to ensure that individuals alleging that they are victims of discrimination on grounds of sexual orientation are heard, within the equality body, by trained LGBT staff, in order to build up trust."*⁴¹

It is certainly unsuitable for senior fundamental rights experts to make such recommendations. There is a serious risk that, if this 'good practice' (as FRALEX calls it) were followed, 'discrimination on the ground of sexual orientation' would soon become a self-fulfilling prophecy: for the mere sake of justifying their own existence and filling their annual reports with 'achievements', such 'Equality Bodies' and 'trained LGBT staff' would find 'homophobia' wherever they search for it, in every grocery and under every gooseberry bush. This⁴² is an area where the creation of specialized agencies could be tantamount to creating,

⁴¹ FRALEX Study (supra note 3), p. 41

⁴² Some may ask whether I am opposed only against specialized agencies combating 'homophobia', or against any specialized agency combating human rights abuses. To such objections, I must reply that the idea of specialized agencies combating 'homophobia' raises particular concern, given (1) the very uncertain meaning of 'homophobia' and (2) the highly controversial character of the issue. My

or at least considerably inflating, the problem that such agencies purport to counter, and for which, so far, any evidence as to its magnitude or very existence is lacking. The suggestions made by FRALEX remind one of a new kind of Holy Inquisition, vehmic court or witch-hunt rather than of a democratic society under the rule of law.

These few examples suffice to reveal at best the hopelessly unscientific, at worst the manipulative and specious, character of the FRALEX Study – leaving aside the dangerous consequences that might follow from Member States agreeing to implement the Study's recommendations.

How everything is made 'equal'

This being a paper on FRALEX, not on LGBT rights, it is not my purpose here to discuss the subject of LGBT rights. The flaws in the legal arguments made in the FRALEX Study have already been exposed with sufficient clarity, and I dare suppose that even people °1152° supporting LGBT rights must agree that this kind of skewed 'expertise' is probably unhelpful to their cause. Nevertheless, my analysis would remain incomplete if it did not, albeit briefly, comment critically on some of the fundamental concepts underlying the FRALEX Study. For in addition to presenting a grossly mistaken legal analysis, the Study uses as a starting point a number of basic assumptions that are neither discussed, nor explained, but simply presented as some kind of self-evident, axiomatic truth. Yet far from being self-evident, these concepts do not seem to be based on a broad consensus, nor on a sound scientific argument.

'Equality' between 'Grounds of Discrimination'

The first of these assumptions is the strange idea that different 'grounds of discrimination' should be treated equally:

*"Under current EU law, the prohibition of discrimination on grounds of race and ethnic origin is stronger and more extended than the prohibition of discrimination on any of the other grounds ..., including sexual orientation, and with the exception of sex. However, while the establishment of such a 'hierarchy of grounds' is not per se incompatible with international human rights law, it is in contrast with the recognition of sexual orientation as a particularly suspect ground and appears increasingly difficult to justify."*⁴³

The affirmation according which the current legal situation is "difficult to justify", would itself require justification. But the FRALEX Study does not provide any argument or justification.

It is *persons* who are the victims of injustice and discrimination, and therefore it is *persons* who, in like circumstances, should receive like treatment. But why should there be equal 'treatment' for different abstract concepts, or equal solutions for different problems? Is it not simplistic, maybe purposefully so, to affirm that racial discrimination needs to be addressed in the same way as the practical problems facing a person depending on the use of a wheel-chair, or that the problem of social exclusion faced by ethnic or religious minorities could be

judgment might be different if the proposal concerned the powers of specific agencies for the protection of human rights that are universally accepted, and the meaning of which is less uncertain.

⁴³ FRALEX Study (supra note 3), p. 11

solved by the same laws that aim to help women seeking equal pay for equal work? Would it not make more sense to seek adequate solutions for each of these issues rather than insisting on a one-size-fits-all approach, even if the solutions may be as different from each other as the issues they must address?

If, for example, women have problems to get equal pay for equal work, it is not because there is any 'prejudice' or 'phobia' against them, but because many of them face the double charge of professional and family work, and are thus less available for (higher paid) management posts; in addition, the fact that women can get pregnant and take maternity leave is a disincentive for certain employers. If handicapped persons face social exclusion, it is not because the rest of society has a negative prejudice against them, but because the housing or labour market is not adapted to their specific needs (which, of course, vary according to the handicap in question). What is needed to combat these types of 'discrimination' is not the granting of 'equal rights', but, inasmuch as this seems appropriate, the adoption of policies that specifically enhance inclusion and/or social advancement. But these enhancements come at a cost that society must assume.

By contrast, the social exclusion of racial or ethnic minorities is, more than anything else, a consequence of negative prejudice or stereotypes. And while there is generally agreement that such prejudices are unjust and unfounded, they nevertheless persist in some quarters of society. The challenge here is to change attitudes and overcome prejudice, while at the same time avoiding exaggerated interference in the private sphere of free citizens.

Can so-called discriminations of persons with a 'different sexual orientation' be compared with, or even be put in the same basket **°1153°** as, racial or ethnic discrimination? There is a certain similarity in that negative moral judgments about homosexuality and other 'diverse orientations' are widespread. But is this really a mere 'prejudice', or is it not rather a moral judgment that is made in full knowledge of the cause, based on a consistent and well-established view that the primary purpose of sexuality is procreation and that a 'sexual orientation' that is not oriented towards procreation is, in a certain sense misdirected?⁴⁴

In order to speak of 'discrimination', it would be necessary to prove that the moral views that have been predominant throughout the history of civilization and that large parts of society continue adhering to, are just 'prejudice' and 'stereotype'. It would, in fact, require society to completely give up its established moral thinking and to replace it with a new set of moral values and attitudes with a questionable pedigree (see below). But even if the novel ethics underpinning the FRALEX Report were generally accepted, it would still be unclear why the means employed to combat 'discrimination on grounds of sexual orientation' should be the same as those used to address racial discrimination. While nobody can be asked to change

⁴⁴ Foreseeably, some supporters of the LGBT rights agenda will object that views on the primary purpose of sexuality are 'religious' and therefore have no place in a reasonable debate. Such objections would be absurd. If anything, the view that the primary purpose of sexuality must have to do with procreation is *materialistic*: undeniably, all human beings, and not only they, owe their very existence to the sexual act being open to procreation; if the sexual act did not have that purpose, we all would not be here. In the same vein, supporters of Darwinism must agree that no evolution can take place without sexuality being used as a means of procreation. By contrast, any statement linking sexuality to other purposes than procreation could itself very easily be described as expressing some kind of bigotry, given that reference is made to emotions, sentiments and opinions rather than to any tangible fact.

or conceal his or her race, everybody can be asked to refrain from exhibitionistic assertions of 'sexual orientations' or similar preferences.

Calling all differences in treatment 'discrimination', and treating all types of 'discrimination' alike would risk shifting the attention away from real to imagined problems and open the door to some peculiar, even specious, arguments. Maybe, there will soon be claims for 'ethnic', 'religious' or 'homosexual' quotas on the boards of public companies, following the example set by Norway, where rules foreseeing such quotas were adopted in 2005 to enhance the chances of women to get into top business jobs.⁴⁵ In the end, there is a risk that each and every group of self-proclaimed 'victims' could free-ride on the solutions used to address the problems of other 'victim groups', even if these problems may in fact be completely different⁴⁶.

The simplistic reasoning that all possible grounds of discrimination must be addressed by the same measures means that we are not any more dealing with the unequal treatment of persons *in comparable situations* on the ground of a specific criterion (e.g. men and women on the labour market), but that we are now comparing everything with everything. Under that approach, one might as well call it a 'discrimination' that the tax on heating oil is not the same as on diesel (both are fuels)⁴⁷, or that the enforcement mechanisms used to sanction patent violations are not the same as for copyright or trademark piracy⁴⁸ (all are intellectual property rights, between which no 'hierarchy' should be allowed to exist). . Without doubt, one would

⁴⁵ Cf. Reuters, 12 July 2007: "*Companies where women do not make up at least 40 percent of their boards as of Jan. 1, 2008 face the risk of closure, although the government has left open the option to impose fines instead.*"

⁴⁶ An example for such 'free-riding' was provided by the discourse of MEP Kathelijne Buitenweg when she presented her report on the Proposal for an EU Directive on Equal Treatment of all Persons in the European Parliament on 1 April 2009. Mrs Buitenweg is one of the most active members of the European Parliament's Intergroup on Gay and Lesbian Rights, which has been created to promote LGBT interests, and the Directive is of key interest for that group. Yet in her intervention, she justified the proposal by referring not to any discrimination faced by LGBT persons, but to the case of a physically handicapped woman whose application for enrolment in a university was refused on the grounds that the university considered itself unable to ensure the necessary care for her (it seems that it had no barrier-free access and no sanitary installations for persons in wheel chairs). Two remarks can be made in this regard: Firstly, when it comes to winning political support for 'antidiscrimination' measures, the situation of handicapped people is more likely to attract sympathies than the LGBT agenda, which probably is why Mrs Buitenweg mentioned the first, not the latter. Secondly, the problems of the two groups are, in fact, very different: handicapped persons are not the victims of a moral judgment or prejudice, but of a physical handicap, and the solution of their problems requires not a re-education of society, but the (oftentimes very expensive) allocation of resources to barrier-free accesses, special communication or teaching methods, etc. Handicapped persons do not need equal, but *privileged*, treatment. In that sense, it is also difficult to see how the proposed Directive would help in the case mentioned by Mrs. Buitenweg: the problem will not be solved by punishing the University, but by investing in the necessary equipment that would enable it to receive handicapped students.

⁴⁷ Diesel fuel is very similar to heating oil which is used in central heating. In Europe, the United States, and Canada, taxes on diesel fuel are higher than on heating oil due to the fuel tax, and in those areas, heating oil is marked with fuel dyes and trace chemicals to prevent and detect tax fraud.

⁴⁸ In many countries, violations of copyright and trademark rights are subject to criminal sanctions, whereas patent violations are not.

find such concerns over the ‘discrimination between fuels’ laughable. But FRALEX’s statements that it is ‘not justifiable’ to treat different discrimination problems differently, or that same-sex relations must be treated like the marriage between a man and a woman, are by no means less absurd: they rely on the same kind of false analogy.

The ‘equal treatment for all grounds of discrimination’ is not an argument, but a slogan.

Outlawing ‘Homophobia’

Yet another fundamental assumption of the Study that merits critical reflection is the use of term ‘homophobia’. While the Study suggests that ‘homophobia’ is something very evil that is worthy of the highest degree of condemnation and must be combated by criminal sanctions or other means of legal enforcement, it fails to provide any definition for it.

Given the absence of any definition in the Study itself, I shall assume that the concept used by FRALEX is similar to that used by the European Parliament (EP), which, in a ‘Resolution on Homophobia in Europe’, defined ‘homophobia’ as: **¶1154°**

“an irrational fear of and aversion to homosexuality and to lesbian, gay, bisexual and transgender (LGBT) people based on prejudice and similar to racism, xenophobia, anti-semitism and sexism”⁴⁹

But that is, of course, not the origin of the term, which, in fact, is said to have been coined by psychologist and gay activist George Weinberg in his book *Society and the Healthy Homosexual*⁵⁰. Weinberg described the concept as a medical phobia:

“a phobia about homosexuals....It was a fear of homosexuals which seemed to be associated with a fear of contagion, a fear of reducing the things one fought for — home and family. It was a religious fear and it had led to great brutality as fear always does”

Both definitions have thus in common that ‘homophobia’ is an irrational fear, a sentiment that appears unrelated to reality (it is thus implied that, objectively speaking, there is really no reason to be afraid of homosexuals). The parallel drawn in the EP definition to racism, anti-Semitism, etc., undoubtedly serves politically to mobilize the public against ‘homophobia’, yet is not really helpful in understanding this behavioural phenomenon. But even if that comparison is accepted as part of the definition, it does not answer the question why irrational fears and aversions like ‘homophobia’ should be punished with criminal sanctions. If ‘homophobia’, like all other phobias, is a mental disorder or illness, then the persons manifesting it should be regarded as its initial victims, not as criminals, and due care should be taken of their condition. Nobody, it must be supposed, *wants* to have irrational fears. Of those experiencing such fears, some may succumb to them too easily, whereas others might bravely try to overcome them. Nobody would consider it reasonable, responsible or just to threaten a person suffering from claustrophobia with criminal sanctions, or to impose on a person experiencing arachnophobia that he/she must stay in permanent close contact with spiders. If ‘homophobia’ really is a phobia, then it could in many respects be compared to homosexual orientation itself: in both cases, we speak of a condition which the persons

⁴⁹ European Parliament, ‘Resolution on Homophobia in Europe’ (18 January 2006), Recital A

⁵⁰ George Weinberg, *Society and the Healthy Homosexual*, New York: St. Martin’s (1972).

affected have not chosen for themselves, and which must be regarded as either immutable or (at least) very difficult to overcome⁵¹. Thus, if nobody should be exposed to sanctions for being homosexual, why should someone be sanctioned for suffering from homophobia? Since when do we punish people from suffering irrational anxieties, or, indeed, any other unhealthy or undesirable mental condition? Is it not generally understood that individuals should only be punished for their actions when they have shown true culpability, not for their thoughts, feelings, or irrational fears? And are, in this context, mental disorders or anxieties not to be considered as a mitigating rather than an aggravating circumstance?

It is self-evident that, in view of these questions, it is more than unfortunate to qualify anti-Semitism or racism as 'mental disorders', or to put them in the same basket as medically recognised phobias. Anti-Semitism and racism are immoral ideologies, which deprive certain categories of people of their natural human dignity. The same cannot be said of 'homophobia', if the above-mentioned definition as *irrational fear* holds true.

There is, however, an important difference between the two definitions quoted above. In Goldstein's definition, 'homophobia' is directed at *homosexuals*, whereas in the EP definition it is directed both at *homosexuality and homosexuals*. It is apparent that the latter approach, which considerably widens the meaning of 'homophobia', suffers from a certain lack of differentiation - as if it were not possible to draw a distinction between an action and the person committing it, a condition and the person affected by it, or an illness and the person suffering from it.⁵² Why would it be unconceivable or illegitimate °1155° to repudiate the

⁵¹ Given that opinions on homosexuality and 'homophobia' are quickly evolving these days, I should state here that I defend no particular opinion on either of these issues, except that I find that there is a remarkable absence of any real knowledge underpinning contemporary policies in this area. For centuries, homosexuality was regarded as sinful, and only in the 20th century did the view emerge that it must be seen as some kind of disease or mental disorder or genetically pre-determined inclination for which the persons affected must not be held responsible. Very recently, this view is repudiated and there is growing insistence that homosexuality must be regarded as 'normal', but it remains unclear which concept of 'normality' underpins these statements. Whichever of these doctrines is true, none of them explains why homosexuals should 'marry' each other, or should enjoy tax benefits that accrue to married couples. The theory of homosexuality being a mental disorder, which can be traced back to Sigmund Freud, certainly has got some scientific basis, given that there are numerous 'therapists' claiming to have developed therapies to change a person's sexual orientation, and several persons claiming to have successfully undergone such treatment. However, it should be noted that most of these therapeutic successes seem to have been very fragile and transient. Inversely, however, even the lack of success of any 'therapy' would not prove homosexuality not to be a mental disorder. The assumption of homosexuality being an unalterable sexual orientation appears to be, moreover, in contradiction with the feminist concept of gender roles and identities not being biologically determined, but the result of socially constructed ideas: if a person can select its gender identity, then all sexual identities and orientations must be interchangeable. Concerning 'homophobia', the picture is even less clear: the person having coined the term was a gay rights activist, and the term has maintained a rather political character ever since. The adoption of a definition of the term by the European parliament clearly was a political act, and represents no scientific insight. There is no serious scientific research about 'homophobia'.

⁵² One of the social groups under permanent suspicion of 'homophobia' are Catholics. Yet the Catechism of the Catholic Church (2357, 2358) makes a clear distinction: it condemns homosexuality, which it describes as "*intrinsically disordered*" and "*contrary to the natural law*"; at the same time, it calls "*to accept homosexual persons with respect, compassion, and sensitivity*".

practice of homosexuality while at the same time fully respecting homosexual persons and treating them with dignity, if it is possible to differentiate between an objective handicap (= undoubtedly a misfortune) and a handicapped person (= nevertheless a valuable member of society)?

The concept of 'homophobia' is problematic. On the one hand, it does not appear to have any valid claim to be scientific. This is to a large extent due to its ambiguity: it oscillates between medical diagnosis and moral condemnation, but it never becomes clear which of the two predominates. On the other hand, and as an unfortunate consequence of this complete lack of scientific foundation, the term 'homophobia' is today used in a way that could be called defamatory and totalitarian: it puts all persons not lending full support to the theory of equivalence between all 'sexual orientations' under a general suspicion of being either mentally disordered ('phobia') or intrinsically evil (i.e., comparable with racists or anti-Semites), and a priori excludes the possibility that their arguments might be reasonable and worth considering, or that they could be driven by anything but the worst intentions⁵³. In this way, the term 'homophobia' appears inapt to capture a complex phenomenon, but useful for demagogic purposes: a pseudo-scientific 'soundbite' that divides the world into 'friends' and 'foes', 'victims' and 'perpetrators', and that precludes the exchange of reasonable arguments.

The underlying concepts of 'marriage' and 'family'

This leads to a third assumption of the FRALEX Study, in relation to which not a single argument or justification is provided: that all 'sexual orientations' are somehow equal, and that, therefore, they must receive equal treatment.

It should be clear that the burden of proof for such assumptions lies with those making them: for it is the inequality or dissimilarity of diverse sexual orientations, not their equality, which appears self-evident on the face of things. Otherwise, why would we, including those clamoring for 'equality', speak of '*diverse*' sexual orientations? Comparing a married (heterosexual) couple and a homosexual couple living in a 'durable'⁵⁴ relationship, one finds that:

- (1) The heterosexual couple is by nature able to procreate, whereas the homosexual couple is not.

⁵³ Cf. the second part of the Study (supra note 36) at page 11, describing the phenomenon of so-called 'hate speech': „*In such statements, LGBT persons are often depicted as unnatural, diseased, deviant, linked to crime, immoral, or socially destabilising*“. If, in this sentence, the term 'LGBT persons' is replaced by 'persons opposing the LGBT agenda', one gets an exact description of the contemporary discourse on 'homophobia', which, as it is impossible not to notice, bears itself a strong resemblance to the 'hate speech' it pretends to be directed against...

⁵⁴ In this context, it should be noted that the FRALEX Study wants to make equal treatment for homosexual couples depend on the 'durability' of their relationship. For arguments sake, therefore, the comparison must be made between 'durable relationships', even if statistical evidence seems to suggest that homosexual partnerships are on average by far less durable than marriages between persons of a different sex. Yet the FRALEX Study provides no definition for 'durability': does it mean that the same-sex partner must have the *intention* for their relationship to be durable, or does it relate to any *real* duration?.

- (2) The heterosexual couple is therefore *naturally* able to found a family, whereas any 'family' founded by the homosexual couple would have to be created through adoption, i.e., *artificially*.
- (3) Through procreating and raising children, the heterosexual couple provides an important contribution to ensuring the future of society, from which the homosexual couple also benefits; it is, after all, the children of the married couple who will pay for the pensions of the same-sex couple. Inversely, the same-sex couple makes no comparable contribution for the benefit of society.
- (4) A couple raising children makes considerable economic sacrifices, as the partner occupied with child rearing usually faces limited possibilities of earning income, and thus economically depends on his/her spouse. The typical situation of married couples with children is: more spending, less income, greater mutual dependence. The same is not true of same-sex couples, which are sterile by nature: there is no compelling reason for one partner to give up his job and economically depend on the other; and if some same-sex couples do organize their lives in such a way (which undoubtedly is their right), there is still no valid argument why the rest of society should subsidize this particular life-style.

°1156° Without wishing to pass any moral judgment on homosexual relations: these differences between married (heterosexual) couples and homosexual couples seem sufficiently important to justify, and even to impose, differences in treatment. The case for equal treatment, far from being self-evident, remains yet to be made.

One reader of the first draft of this paper pointed out to me that homosexually oriented people, too, are capable of loving each other, and (provided, of course, that they be allowed to adopt children) of forming loving families. That may, or may not, be true: I am not going to judge. But I have to point out that the institution of 'marriage' does not have the purpose of 'rewarding' people for loving each other; for this reason, the argument that homosexually oriented people, too, are capable of 'loving', if it is true, is of no relevance. Besides that, love, being subjective, cannot be measured; the argument of homosexual 'love' being equal to that of married couples appears thus rather unscientific.

The argument of homosexual couples being capable of 'forming loving families' meets similar objections: who has measured and evaluated the 'love' in such (artificial) 'families'? It is only a short time ago that some countries have allowed such adoptions, and the long-term effects for the children that are raised and educated by same-sex couples remain yet to be studied: in the absence of any proof to the contrary, it must be supposed that the best for children would be to live with their natural mother and father, which is what nature foresees for them; arrangements involving two fathers or two mothers bear a certain resemblance to an experiment *in vivo*. Most of all, however, the argument on homosexual 'families' is circular: for it to become true, the meaning of the term 'family' must first be modified. In actual fact, therefore, the argument would have to run: *if* a 'family' could consist of two persons of the same sex and their adoptive children, *then* two persons of the same sex could found a 'family'. *If* the legal definition of 'marriage' allows for the marriage of two persons of the same sex, *then* two persons of the same sex can 'marry'. Which, of course, is true – but a tautology. Nowhere is this made clearer than in the document 'Yogyakarta Principles',

recently published on its own initiative by a group, once again, of human rights experts⁵⁵ in another attempt to promote ‘equality’. In these ‘Principles’, it is stated that “*families exist in diverse forms*” and that States should “*recognise the diversity of family forms, including those not defined by descent or marriage*”.⁵⁶

This begs the question: if ‘family’ is no more to be defined by descent or marriage between persons of the opposite sex, by which other criteria shall it then be defined? Created as a pre-requisite for same-sex ‘marriage’, the adoption of children by same-sex couples, etc., this new concept turns ‘family’ into something of an artificial construct, removed from biological reality: the arbitrary invention of a legislator, which at any time could be replaced through another arbitrary invention of another legislator as *mores* once again change. If this is accepted, a legislator’s imagination is limitless: every constellation of two or more persons could be styled a ‘marriage’ or ‘family’, and the traditional meaning of both terms would be undermined or even disappear altogether. Labeling all and sundry as ‘marriage’ and ‘family’ could be an efficient way of destroying the traditional and logical meaning – perhaps more efficient than abolishing it directly

Treating all ‘sexual orientations’ as equal presupposes a reductionist anthropology: everybody has a sexual urge which, no matter how, he must have the right to satisfy. This must be legally recognized, as of right, and treated as fundamental to one’s dignity. All sexual urges are ‘equal’, therefore all manners to satisfy them also are ‘equal’, i.e., to be accepted. The *tertium comparationis* that is used to make homosexual and heterosexual relations ‘equal’ is a mere sentiment: the ‘love’ of two people for each other (or maybe rather: the pleasure they experience when engaging in sexual intercourse). °1157° The objective and verifiable purpose of sexuality (to which until recently the sexual urge was believed to be subordinate), is discarded as completely irrelevant.

The dysfunctional, bizarre view of sexuality promoted by the FRALEX Study unavoidably reminds one of Aldous Huxley’s ‘*Brave New World*’, where all women are sterile, there is no marriage and no family any more, and having sex is merely a banal amusement to spend leisure time, devoid of any other purpose than experiencing ‘pleasure’, and without the love and responsibility that naturally accompanies the sexual act. If these assumptions are accepted, then (but only then!) all ‘sexual orientations’ become indeed ‘equivalent’, and there would be no reason for any difference in treatment. However, one should keep in mind that in ‘*Brave New World*’ even heterosexual couples do not marry; nor do they found families, nor do they adopt children. The reduction of sexuality to ‘pleasure-seeking’, if accepted, is bound to completely dissolve the traditional concept of marriage and family; even under such premises, therefore, it remains unclear why two persons of the same sex should be allowed, or need, to ‘marry’. The necessity of the institution marriage arises out of the need to create a stable environment for the upbringing of children. If sex were merely for pleasure, it would be more logical not to marry in order to preserve ‘flexibility’: If sex were merely for pleasure, it would be more logical not to marry in order to preserve ‘flexibility’: being legally bound to one partner would just be an unnecessary obstacle in the quest for pleasure.

⁵⁵ Notably (but perhaps not co-incidentally), the 29 authors of the Yogyakarta Principles include Manfred Nowak and Martin Scheinin, both members of the former Network and now of FRALEX.

⁵⁶ Yogyakarta Principle 24

Of course, the FRALEX Study does not openly profess that its findings are based on this reductionist and distorted view of sexuality, nor does it openly declare that it aims to impose a novel concept of 'family' on society. But these views and concepts are clearly implicit in the expert group's findings, and the fact that they are neither explained nor discussed makes the FRALEX Study even more insidious than any study in which these assumptions were to be stated openly. Indeed, it appears to be one of the main characteristics of this Study that novel theories are presented as if they were some kind of axiomatic and unquestionable truth that needed no further discussion, while the perennial insights of moral philosophy that were known to all human societies at all times and places are silently discarded as if there was not even necessary to disprove them through any argument.

It is thus regrettable – but nonetheless telling - that exclusively homosexual lobby groups, but not a single organization representing the interests, or benefits to society, of traditional families, were invited to a 'Round Table' meeting organized to discuss follow-up to the FRALEX Study⁵⁷. Discussing the hypothesis of same-sex 'marriages' and 'families not defined by descent or marriages' implies discussing a complete re-definition of 'marriage' and 'family'. It is astonishing that only homosexuals should be allowed to have a say on these matters, and the overwhelming majority of non-homosexuals remain excluded from the debate. This is unlikely to lead to balanced conclusions or to a policy that contributes to the common good. Is it 'paranoid' or 'homophobic' to draw a parallel between the exclusive involvement of the abortionist lobby CRR in the drafting of an Opinion on a 'right to abortion' by the former Network, and the monopolization of the debate on 'marriage' and 'family' by LGBT lobbies? No. There is a common theme: these radical yet marginal groups have privileged, if not exclusive, access to the institutions which tend to pontificate in the 'creation' and radical re-interpretation of so-called new 'fundamental rights' for European citizens, while the mainstream of society is, contrary to long-established democratic values, brazenly ignored and excluded.

Concluding remarks

It is incumbent upon me to reiterate what I wrote in my earlier article: human rights thinking is in deep crisis today. The issue is not the lack of concern for, or awareness of, human rights in society, but the uncritical attention and consideration afforded to radical groups posturing **°1158°** as 'human rights advocacy groups' in order to promote their self-serving agenda at the expense of the common good. The case of the FRALEX Study on 'homophobia' highlights yet again this agenda at work: a hermetic group of State-appointed 'experts', whose impartiality is much less certain than their skill in drafting purposefully skewed 'legal analyses', interacts with radical lobbies to promote the particular interests of marginal social groups that claim to be the 'victims' of 'discrimination'. In this way, controversial policies, which would stand no chance of being adopted in a democratic process, are to be imposed on sovereign countries. The strategy is to assert, against better knowledge, that these policies are already tacitly included in generally accepted international law, so as to prevent them from being made the object of a democratic political decision.

⁵⁷ A list of participants was published on the FRA website prior to that meeting, which was held in Riga on 14 November 2008. It included not less than 16 LGBT NGOs, but not a single organization representing 'real' families. A very prominent role is played by ILGA, the International Lesbian and Gay Association.

What is the antidote against this dangerous manipulation?

If the impostors' strategy relies on stealth, the best counter-strategy clearly is to reveal their schemes to the public, and to insist on transparency. The debate on human rights should involve not only an experts group with exclusive access to the corridors of political power, and the radical lobbies befriending them, but also the mainstream of legal and moral sentiment and, indeed, the mainstream of society. Secondly, the public needs to follow the work of human rights bodies and experts groups more critically, instead of remaining deferential whenever some lobby group preposterously invokes human rights in order to promote its self-serving agenda. Thirdly, and perhaps most importantly, we need to remind ourselves that human rights must be interpreted in accordance with natural law. Natural law is not a grouping of isolated and arbitrarily defined 'rights' of unclear origin. It is a single and organic law derived from human nature and experience, accessible to human reason, and which puts each 'right' into a context of purpose and duty. If this approach is respected, law will not become arbitrary, its development hostage to the ideology of a radical few.⁵⁸

As for FRALEX and its Study on 'homophobia', the question is: do we really want human rights to be 'made' by such 'experts', and with such methods? The Study would have no relevance, had it been published by one or more members of FRALEX on their own initiative and under their own responsibility; if it has any relevance, the reason is that it has an officious character, lending the aura of impartial 'expertise' to what in fact is a political project. The poor and unscholarly quality - indeed the systemic and entrenched bias - of the work provided (both in the current set-up as 'FRALEX' and by the previous 'EU Network of Experts', in which 13 members of FRALEX were involved), as well as the close involvement of some of the group's members in the advocacy work of radical pro-abortion and LGBT rights 'advocacy', suggest that there is a deep confusion between 'expertise' and 'advocacy', and that certain experts seek to play the roles of advocates and judges at the same time.

Postscriptum: Having read the manuscript of Kay Goodall's response to this article, I note that, despite her unconcealed support for the ideology underpinning the FRALEX Report, she nevertheless agrees with me on the essential point: *"The Report ... goes further than it should. We are not yet there"*. In other words: what FRALEX presents as current legal

⁵⁸ Without doubt, some might object here that 'various camps may have different interpretations of just what that natural law entails'. This is true, but trivial. The same could be said about any written law – the surprising interpretations the FRALEX experts give to certain instruments of International Law, which differ widely from what common sense would read in these texts, provide the best example. Of course, recognizing the fact that there is such a thing as natural law only opens room for discussing the content of that natural law. One might suppose, though, that the supporters of issues like same-sex marriage or a 'right to abortion', given that written law lends them so little support, must be keen to show that their agenda finds support in natural law. And indeed, they often call for *modifications* of written law (e.g. the explicit recognition of same-sex marriage) rather than for its application, invoking 'equality', 'self-determination', etc. as overarching moral principles. These arguments clearly are based on (a flawed concept of) natural law. If they remain unconvincing in academic debate, it is not because they invoke natural law, but opposing arguments, which are equally based in natural law, seem to enjoy stronger authority. Be that as it may: by rejecting natural law, gay rights advocates such as Nicholas Bamforth, (*Same-Sex Partnerships and Arguments of Justice*, in: R. Wintemute, Mads Adenas (eds.), *Legal Recognition of Same-sex Partnerships: A Study of National, European and International Law* (Hart Publishing, London 2001), p.53) destroy what appears to be the only available basis for their own argument.

situation is, in fact, a political agenda. The difference is that I find this agenda questionable, whereas she seems to sympathize with it.

Meanwhile, FRA Director Morten Kjaerum has written a letter to the European Parliament, announcing that the Report will be 'updated' in the course of 2010. With all due respect: I do not think that an 'update' of this discredited work **°1159°** can be of any use. It should be replaced by a different report, written by different authors.