
By Daniel J. Kane  
Member of the Class of 1988

I. INTRODUCTION

In 1982 the European Court of Human Rights ruled in Dudgeon v. United Kingdom (Dudgeon II) that member states of the Council of Europe that criminalized adult consensual homosexual acts violated the European Convention on Human Rights (Convention). Numerous cases have been brought, both before and after Dudgeon II, challenging various criminalizations and acts of state stigmatization of homosexuality. These cases, however, have not established breaches under the Convention.

The various cases challenging member states laws regarding homosexuality have incongruous rulings. In the thirty years since the first case challenged the criminalization of homosexuality, the bodies empowered to hear complaints under the Convention have refused to hear all but two cases. Of the two cases heard, one was Dudgeon II. The other was a decision reinforcing the notion that homosexuality is inherently immoral and therefore subject to limited state regulation through criminal laws.

The Dudgeon II ruling was a laudable step forward in the recognition of human rights. It does not provide, however, the necessary framework on which the natural and proper extension of those human rights

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2. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter Convention]. The Convention came into force on Sept. 3, 1953, after 10 nations had ratified it. The first ten signatories were the United Kingdom, Norway, Sweden, the Federal Republic of Germany, Malta, Ireland, Greece, Denmark, Iceland, and Luxembourg. Subsequently, Turkey, the Netherlands, Belgium, Austria, Cyprus, France, and Switzerland ratified the Convention. See A. ROBERTSON, HUMAN RIGHTS IN EUROPE 310 (1977).
can be built. The *Dudgeon II* Court based its ruling on the Convention’s right of privacy. This premise is fundamentally flawed as a tool for achieving the Convention’s goal of the “further realisation [sic] of Human Rights and Fundamental Freedoms” with regards to homosexual persons. This flaw in the rationale underlying *Dudgeon II*, whether accidental or intentional, is because of the Court’s sole reliance on the right of privacy. This right of privacy, however, is not the means through which homosexual persons can achieve true equality under the law. The right of privacy premise does not call into question, and may even give subtle credence to, the notion that homosexuality is inherently immoral. As long as homosexuality is seen as immoral, homosexual persons will not be accorded the basic human dignity due them. Their human rights will continue to be denied.7

First this Note will discuss the case law relating to homosexuality under the Convention. Next, it will show that the notion that homosexuality is immoral, a basic assumption in the case law, is inimical to achieving recognition of the human rights of homosexual persons. Third, this Note will illustrate how the right of privacy rationale reinforces the notion that homosexuality is inherently immoral. Finally, this Note will draw upon both the basic theories of democracy underlying the Convention and the findings of the Parliamentary Assembly of the Council of Europe to recommend that sexual self-determination be established as a fundamental freedom. If sexual self-determination were a fundamental freedom, homosexual persons would be accorded the basic human rights guaranteed in the Convention.

II. THE CONVENTION

The Convention was a Western European response to the horrors of

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6. This Note will consistently refer to “homosexual persons” as those people whose legal and social position is determined by the laws regulating homosexuality. In the United States, the term “homosexual” is often perceived as derogatory and homosexual persons prefer the terms “gay” and “lesbian.” The European legal materials, however, do not utilize these terms. Thus, the use of the terms “gay” and “lesbian” in analyzing European law on the subject would be inappropriate. The word “persons” is used in conjunction with “homosexual” because homosexual persons should not be referred to merely as “homosexuals,” which would define them exclusively by their sexual orientation. Homosexual persons are just that; foremost they are individual persons, who can then be amorphously classified by their sexual orientation for this legal analysis.

Nazism. Many of the delegates to the Convention acted out of a desire to protect the rights and freedoms already enjoyed in their countries from the threat of future totalitarianism. The Convention has, however, long since transcended its original purpose and now serves to protect human rights and fundamental freedoms as measured by contemporary attitudes. This purpose is most evident in the rulings of modern cases under the Convention that do not necessarily depend on the original intentions of the Convention’s authors. Furthermore, neither the courts nor the Commission is bound by precedent in reaching their decisions.

The Convention establishes an elaborate enforcement mechanism to address complaints of alleged violations of the Convention’s principles. Article 25 of the Convention creates the right of individual petition. It is under this provision that all individual cases challenging the regulation of homosexuality arise. The Convention recognizes this right of petition since individuals are the real parties in interest regarding this international guarantee of human rights. Individuals who can establish that they are a “victim” of an alleged breach of the rights guaranteed under the Convention may seek redress through Article 25.

A. The Application Process

Applications alleging violations of the Convention go first to the European Commission of Human Rights [hereinafter the Commission]. The Commission screens the applications to determine whether they meet the complex procedural requirements under Articles 25 through

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9. Id.
10. Id.
11. Id.
12. Id. at 285.
13. The principle rights guaranteed in the Convention are contained in Articles 1 through 13. These rights include the following: a member state’s general obligation to abide by the Convention; the right to life; freedom from inhuman or degrading treatment; freedom from slavery or servitude; the right to liberty and security; the right to a fair trial; protection against retroactivity in the criminal law; the right of privacy; freedom of thought, conscience, and religion; freedom of expression and information; freedom of assembly and association; the right to marry and found a family; and the right to an effective remedy before a national authority. See generally A. Robertson, supra note 2, at 294-98.
14. A. Robertson, supra note 2, at 149.
15. The “victim” requirement means that an individual has the right to petition under the Convention when she has actually been harmed by the alleged breach. This requirement is similar to the standing requirement for constitutional challenges in the United States court systems. The right of individual petition has been accepted by 13 signatories to the Convention. A. Robertson, supra note 2, at 151.
27. The Commission then determines if the alleged breach is within the scope of the Convention. By making this determination, the Commission plays a significant role in reaching decisions on the merits of each application. In certain instances, the Commission refers cases to the European Court on Human Rights [hereinafter the Court]. The Court is the ultimate arbiter of disputes and renders the final and most binding interpretations of the Convention.

In determining the justiciability of individual applications, the Commission screens all the applications and rules as to the admissibility of each application. The "admissibility" function serves to filter the glut of applications that inevitably arises from an individual and free application process. The Commission has relied on this filtering process to screen out all but two applications challenging various aspects of the criminalization of homosexuality. Even though the Commission has given full consideration to only two cases, it has rendered quasi-substantive opinions in most of the subject applications. These opinions constitute case law of a sort since the Commission ruled them inadmissible as "manifestly ill-founded." In determining whether an application is "manifestly ill-founded," the Commission ascertains whether or not it, on the facts presented, states a prima facie violation of the Convention. Additionally, the Commission and the parties often in subsequent cases cite to these rulings on admissibility in their reports and arguments.

There are two articles of the Convention that are most pertinent to this discussion. Article 8 states that "[e]veryone has the right to re-

17. Id. Article 26 generally requires that the applicant exhaust all effective remedies and that he file the application within six months of the date of the final domestic decision in her case. Id. at 40-53. Article 27 sets out five further conditions which mandate a ruling of inadmissibility. A. Robertson, supra note 2, at 159. Hence, Articles 26 and 27 establish "seven hurdles which the applicant has to jump" before an application will be deemed admissible. Id.
19. Id.
20. Id.
21. Id.
23. Id.
24. Id.; See, e.g., supra note 4.
25. F. Jacobs, supra note 22, at 243-46.
spect for his private . . . life."28 This right to privacy is qualified, however, by paragraph 2 which permits interference by state authorities when the measure: (1) is in accordance with the law, (2) is necessary in a democratic society, and (3) serves to protect specific enumerated interests of the state, such as the protection of health or morals or the protection of the rights of others.29 Article 14 states in part that "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex . . . or other status."30 Article 14 holds the most promise for achieving equal treatment under the law for homosexual persons.

B. Early Convention Case Law

The first application challenging the criminalization of homosexual relations was lodged by a German citizen against the Federal Republic of Germany.31 The applicant challenged Article 175 of the German Penal Code under which he had been convicted for homosexual offenses.32 He challenged the criminal provision as a violation of Articles 8 and 14 of the Convention in that the law banned only male homosexual acts and not female homosexual acts.33 Application 104/55 was declared inadmissible by the Commission on December 17, 1955.34

The Commission found that the criminal provision was justified under paragraph 2 of Article 8 as necessary in a democratic society "for the protection of health or morals."35 Additionally, the Commission held that treating male and female homosexuals differently did not violate Article 14 since it was reasonably calculated to protect health or morals.36

Over the next twenty years, the Commission ruled inadmissible as "manifestly ill-founded" several additional applications challenging either the German ban on male homosexual relations and convictions under that law, or harsh sentences imposed subsequent to those convictions.37 The Commission acknowledged in all cases that the criminal proscription was an interference with the right of privacy. However, it

28. Convention, supra note 2, at 230.
29. Id.
30. Id. at 232 (emphasis added).
32. Id.
33. Id.
34. Id.
35. Id.
36. Id.
37. See 3 DIGEST OF STRASBOURG CASE-LAW RELATING TO THE EUROPEAN CONVEN-
justified the interference as necessary for the protection of health or morals.\textsuperscript{38}

Despite very challenging arguments that the German Penal Code provision violated the Convention, the Commission consistently ruled the applications inadmissible on one ground or another. Thus, the Commission did not need to respond to the specific arguments raised by each application.\textsuperscript{39}

For example, in \textit{Application 530/59} a German court sentenced the applicant to preventive custody of an indefinite duration for repeated violations of the German Penal Code provision banning homosexual relations.\textsuperscript{40} The applicant challenged both the sentence and the law itself as violations of the Convention’s Article 3 prohibition of inhuman or degrading punishment.\textsuperscript{41} The Commission held that the application was filed beyond the six month time limit prescribed for individual petitions, despite the fact that the applicant had lodged his appeal within six months prior to the filing of the application.\textsuperscript{42} The Commission focused on the prior convictions which had occurred beyond the six month time period.\textsuperscript{43} Even though the Commission relied on procedural grounds to rule the application inadmissible, it reiterated the firmly established rule that homosexual relations could be proscribed by criminal sanctions under Article 8.\textsuperscript{44}

In \textit{Application 704/60}, the applicant had written a letter to the German Penal Law Commission requesting that the criminal prohibition on all homosexual relations be abolished because “homosexuality is an inherent factor in the personality of certain individuals for which they cannot be blamed or punished.”\textsuperscript{45} The applicant included an extract from a

\textsuperscript{38} \textit{Strasbourg Case-Law}, supra note 37, at 308. Although all of these applications challenged the same provision of the German Penal Code, Germany was not the only member state that criminalized homosexual relations during this time. See, e.g., Application No. 530/59, 1960 Y.B. Eur. Conv. on Hum. Rts. 184; Application No. 704/60, 3 Eur. Comm’r H.R. 1 (1960). Germany did, however, enforce the most severe punishments under its penal code.


\textsuperscript{40} Application No. 530/59, 1960 Y.B. Eur. Conv. on Hum. Rts. 188.

\textsuperscript{41} Id. at 188-89.

\textsuperscript{42} Id. at 192-93.

\textsuperscript{43} Id.

\textsuperscript{44} Id. at 193.

\textsuperscript{45} Application No. 704/60, 3 Eur. Comm’n H.R. 1, 4-5 (1960). Charged with fraud and homosexual offenses, the applicant had been sentenced to twelve years imprisonment and subsequent preventive custody. Id. at 3.
medical textbook to substantiate his request.\textsuperscript{46} The Commission avoided this difficult issue by stating that "[i]t does not appear clearly whether the Applicant raises this question before the Commission."\textsuperscript{47} The Commission did, however, again reiterate its firm conviction that the German Penal Code provision interfered with the Article 8 right of privacy.\textsuperscript{48} But because this interference was justified in the interest of health and morals, it was therefore a legitimate interference with the right of privacy under paragraph 2 of Article 8.\textsuperscript{49}

In 1962 the Commission ruled inadmissible an application that sought the Commission’s support to have the applicant’s criminal record expunged of a conviction for homosexual relations.\textsuperscript{50} The German courts ruled the conviction invalid because it had been obtained beyond the applicable statute of limitations.\textsuperscript{51} The German courts did however uphold the local authorities’ maintenance of criminal files including photographs and fingerprints of the applicant.\textsuperscript{52} The Commission found no violation of the Convention by the maintenance of these records. The Commission cited the German courts’ rulings that the records were necessary for the prevention of crime, particularly homosexual relations which is a crime with a high rate of recidivism.\textsuperscript{53}

The applicant was an attorney who had been disbarred following his conviction.\textsuperscript{54} He sought reinstatement on the grounds that the conviction was invalid and that this measure constituted a violation of the Convention’s Article 3 prohibition of inhuman or degrading punishment.\textsuperscript{55} The Commission refused to accede to his request for reinstatement and failed to fully address the alleged violation of the ban on inhuman or degrading punishment.\textsuperscript{56} Instead, it relied upon the firmly established rule that punishment of homosexual relations did not violate the Convention.\textsuperscript{57}

In 1975, the Commission reached a significant turning point in its evaluation of individual petitions challenging the criminal regulation of

\textsuperscript{46} Id. at 4-5.
\textsuperscript{47} Id. at 5.
\textsuperscript{48} Id. at 7.
\textsuperscript{49} Id.
\textsuperscript{50} Application No. 1307/61, 1962 Y.B. EUR. CONV. ON HUM. RTS. 230.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 323-34.
\textsuperscript{54} Id. at 230.
\textsuperscript{55} Id.
\textsuperscript{56} See id. at 234.
\textsuperscript{57} Id.
homosexuality. For the first time, the Commission sought the input of the respondent government in determining the admissibility of an application alleging a violation of the Convention by the criminalization of homosexual relations. Application 5935/72 challenged the recently amended German Penal Code's prohibition of homosexual relations between a male over the age of 18 and one under the age of 21. The German Penal Code was amended in 1969 to otherwise decriminalize male homosexuality between consenting adults. The German government, however, retained the legal dichotomy of regulating male homosexuality without regulating lesbianism. The applicant alleged that the law violated the Convention's Article 8 right of privacy by proscribing male homosexual relations between males under the age of 21, and also the Article 14 prohibition of gender discrimination.

In seeking the German government's input on the alleged violations, the Commission stated the issue as: "On the assumption that the legislation punishing masculine homosexuality is compatible with the provisions of Article 8 (2) as a measure necessary in a democratic society for the protection of the rights of others, is it not nevertheless contrary to Article 14 taken in conjunction with Article 8?" The German government responded that the differential treatment based on gender was not arbitrary because the deterrent effect served by the criminal sanctions applied to male homosexuals was not necessary for lesbians. In support of its position, the government submitted that "young men are much more exposed to the risk of homosexual relations with adults than girls." The government then adduced a flurry of age-old stereotypical notions to substantiate the law: there are few lesbians as compared to male homosexuals; lesbians are more stable because they seek partners their own age and remain longer in relationships with partners; male homosexuals prey upon the young and frequently change partners; and the exhibitionism of male homosexual couples threatens to expose adolescents to social isolation and conflicts with society.

In declaring the Application 5935/72 inadmissible, the Commission held that the impugned law was necessary in a democratic society for the

59. Id.
60. Id. at 54.
61. Id.
62. Id. at 54-55.
63. Id. at 52.
64. Id. at 53.
65. Id.
66. Id.
protection of the rights of others. The law operated “to prevent homosexual acts with adults having an unfortunate influence on the development of heterosexual tendencies in minors.” The Commission noted further that “on account of the social reprobation with which homosexuality is still frequently regarded a minor involved in homosexual relationships with an adult might in fact be cut off from society and seriously affected in his psychological development.” Ironically, the Commission ruled that the law was designed to enable adolescents to “achieve true autonomy in sexual matters.”

On the issue of gender discrimination, the Commission found the differential treatment justified because the German authorities limited the invasion of privacy affected by the law solely to the group posing the greatest threat to adolescents—male homosexuals. The Commission accepted the government’s assertions that lesbianism was very limited, more stable, less prone to the proselytization of adolescents, and generally less harmful to society.

Application 5935/72 heralded the beginning of a new era in the Commission’s consideration of homosexuality. The Commission made its landmark decision that “[a] person’s sexual life is undoubtedly part of his private life of which it constitutes an important aspect.” The importance of this case is exemplified by the fact that both the parties and the Commission have relied heavily on the basic notions underlying this decision in subsequent cases. Interestingly, this decision also foreshadowed the future direction of the Commission’s decision making process regarding the criminalization of homosexuality: superficial acceptance of respondent governments’ stereotypical rationales underlying the challenged criminal laws.

C. The Case of X

In 1978 the Commission first declared admissible an individual application challenging the criminalization of homosexual relations. In the Case of X, the applicant challenged British law criminalizing consensual homosexual acts between one male over the age of 21 and one under

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67. Id. at 54.
68. Id.
69. Id.
70. Id. at 55.
71. Id.
72. Id. at 55-56.
73. Id. at 54.
75. Id.
the age of 21. His challenge rested on three points: a violation of the Article 8 right of privacy because he was prosecuted and sentenced to imprisonment for private sexual behavior; a violation of the Article 14 prohibition on discrimination in the enjoyment of rights and freedoms under the Convention because heterosexuals and female homosexuals are legally permitted sexual relations at the age of 16; and a violation of the Article 10 right of free expression because while in prison the applicant was denied the ability to express his feelings of love to other men.  

In 1974 the applicant had been convicted, at age 26, and sentenced to two and one-half years in prison. The British court convicted the applicant of two counts of buggery with two males aged eighteen. The applicant argued that the majority of European countries recognizes ages of consent as eighteen or lower for homosexual relations. Therefore, prohibition of homosexual relations between adults (those aged 18 to 21) could not be sustained as necessary in a democratic society. Additionally, he cited numerous medical and professional studies which indicated that homosexuality is not a disease and that exposure to homosexual relationships can be "of positive help to the young person with homosexual tendencies in so far as they might reduce or even eliminate sensations of stress and frustration." In his Article 14 challenge, the applicant urged that the government could not sustain its burden of proving that the disparity in the regulation of heterosexual and lesbian sex between persons 18 to 21 (none) and male homosexuals was "a reasonable relationship of proportionality between the means employed and the aims sought to be realised [sic]."

The government acknowledged that the law did affect an interference with the right of privacy but this interference was necessary to protect males in the 18 to 21 year old age group "from the attentions and pressures of an undesirable kind." The government noted that sixteen states in the Council of Europe had laws regulating homosexual activity in one form or another and accordingly, laws of this sort are indeed nec-

76. Id.
78. Id.
79. Id. at 15.
80. Id.
81. Id. at 19.
82. Id. at 22. This burden of proof, placed upon governments whose laws have been challenged as unjustifiably discriminatory under Article 14, was established in an earlier case brought before the Court. Id.
necessary in a democratic society. The government quoted extensively from the Commission's decision in Application 5935/72.

The government argued that a young man "involved in homosexual relationships with an adult might in fact be cut off from society and seriously affected in his psychological development." The government also argued that "masculine homosexuals often constitute a distinct socio-cultural group with a clear tendency to proselytise adolescents and that the social isolation in which it involves the latter is particularly marked." Following the lead of the German government, the British government urged that the law was "clearly inspired by the need to protect the rights of children and adolescents and enable them to attain true autonomy in sexual matters."

The Commission defined the issue as whether the criminal prosecution in this case could be justified as a warranted intrusion into the applicant's privacy. Hence, the inquiry was directed to whether the interference met the requirements of Article 8 paragraph 2. Namely, was it in accordance with the law, made for the purposes of protecting health or morals or the rights of others, and was it necessary in a democratic society. Clearly the interference was in accordance with the law since it was a provision of that law. Based on the particular facts of this case, the Commission ruled that the prosecution was justified as a protection of the rights of others (a basis on which most sexual offenses are premised). Finally, the Commission held that the law was necessary in a democratic society because, like all criminal laws, it "provide[s] safeguards in order to protect individuals from harm, particularly those who are specially vulnerable because of their age." By a divided vote, the Commission found no violation of Article 8 because the law was necessary in a democratic society for the protection of the rights of others.

In making its determination, the Commission noted that there had been "a constant evolution of opinion" regarding the regulation of ho-

84. Id. at 29.
87. Id.
88. Id. at 31.
89. Id. at 39.
90. Id. at 40.
91. Id.
92. Id. at 41.
93. Id. at 42.
94. Id. at 46.
95. Id. at 44.
mososexual acts. The Commission also noted that each law "must be examined on its own merits and in the context of the society for which it is considered appropriate."\textsuperscript{96} Furthermore, it found that "the current trends throughout Europe in relation to private consensual homosexual behaviour [sic] tend to emphasise [sic] tolerance and understanding as opposed to the use of criminal sanctions."\textsuperscript{97} The Commission took great heed of the fact that despite these trends, proposals to lower the age of consent had been rejected by the British Parliament.\textsuperscript{98} The Commission held that because the law was justified as necessary in a democratic society for the protection of the rights of others under paragraph 2 of Article 8, it need not consider whether the law was necessary or justified for the protection of morals.\textsuperscript{99} Ostensibly then, the Commission did not make a value judgment as to the morality of homosexuality in reaching its decision under the Article 8 challenge.

Without even considering the Article 14 violation, the Commission held that because the law was justified under Article 8 paragraph 2, it was also justified under Article 14.\textsuperscript{100} The Commission relied on its finding in Application 5935/72 to uphold the disparity in treatment between male and female homosexuals based on the idea that male homosexuals pose a greater threat to adolescents and society than female homosexuals.\textsuperscript{101}

The Commission summarily rejected the Article 10 freedom of expression complaint, stating that the freedom of expression guaranteed in the Convention relates solely to the expression of ideas and opinions.\textsuperscript{102} Hence, the complainant's deprivation of freedom to express his love for men while imprisoned did not constitute a deprivation of rights under Article 10 of the Convention.\textsuperscript{103}

The significance of the Case of X lies not so much in its ultimate decision, as in the rationale underlying that decision and the fact that the application itself was ruled admissible. The Commission's opinion reflects a more sympathetic approach towards individual challenges to the criminalization of homosexuality. In addition, the opinion recognizes that long held beliefs about homosexuality are changing. It acknowledges the problematic nature of resting challenges to the criminalization

\textsuperscript{96} \textit{Id.}
\textsuperscript{97} \textit{Id. at 45.}
\textsuperscript{98} \textit{Id.}
\textsuperscript{99} \textit{Id. at 46.}
\textsuperscript{100} \textit{Id.}
\textsuperscript{101} \textit{Id. at 47-48.}
\textsuperscript{102} \textit{Id. at 48-49.}
\textsuperscript{103} \textit{Id.}
of homosexuality on the right of privacy. Thus the opinion presages what was to come in the Dudgeon II case. The Commission, purporting to avoid any decision on the morality of homosexuality, actually relies on the notion that homosexuality is harmful, and thus immoral, in reaching its decision.

D. Dudgeon v. United Kingdom

The first and only case challenging the criminalization of homosexual relations to reach the Court is the Dudgeon II case. After declaring the application admissible and finding a violation of the Article 8 right of privacy, the Commission referred the case to the Court. The applicant challenged three criminal provisions in Northern Ireland carrying severe penalties for homosexual acts, including one which provided for life imprisonment. The provisions operated to criminalize all male homosexual relations. Dudgeon challenged the laws on the basis of: 1) an Article 8 violation of the right to respect for private life; 2) an Article 8 paragraph 2 violation as not necessary for the protection of morals or the rights of others; and 3) an Article 14 violation of the prohibition against gender, national origin, and place of residence discrimination because male homosexuals in England, Wales, and Scotland were not regulated by such laws and female homosexuals were not subject to such criminal sanctions.

The Commission declared the application admissible and sought submissions from the parties as to their positions on the alleged violations of the Convention. The Commission proceeded to find that the existence of the laws in question, regarding private consensual homosexual relations between adults, was a breach of the Article 8 right of pri-

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104. Id. at 49a (separate opinion of Mr. Opsahl). Mr. Opsahl noted the difficulty of judging this type of case under the right of privacy rationale. Id. The challenged law involved relations between two people but the right of privacy encompasses only an individual's freedom. Id. He stated that the applicant's ability to engage in homosexual relations was circumscribed only to the extent that he could legally engage in such relations with partners over the age of 21. Id. The other party, however, had a stronger claim because he was barred from such relations altogether. Id. This opinion may hold some promise for a more reflective decision by the Commission on the necessity of "protecting" young males from their own sexuality, should a homosexual person in the proscribed age group challenge such a law.


106. Id.

107. Id. at 6.

108. Id. at 8.


110. Id. at 2.
vacy. The laws could not be justified as necessary in a democratic society for the protection of morals. Relying on its earlier determinations in Application 5935/72 and the Case of X, the Commission found that the laws applicable to males below the age of 21, did not violate the Convention. The Commission found it unnecessary to make a determination on Dudgeon’s Article 14 discrimination complaint since it had already ruled that the laws were in breach of Article 8.

In a separate opinion, one member of the Commission dissented from the Commission’s finding of no violation under Article 14. He advocated protection of homosexual persons under Article 14 stating, “since the prohibition of homosexual acts in private is contrary to Art. 8, there cannot be an objective and reasonable justification for the difference in treatment between homosexual and heterosexual persons.” The refusal of the Commission to find an Article 14 violation significantly limited the scope of protection to be given homosexual persons by the Court in its Dudgeon II decision.

On July 18, 1980, the Commission referred the case to the Court for its decision on whether the facts disclosed a breach of the Convention under Article 8, either alone or in conjunction with Article 14. In its first action on the case, the Court ruled unanimously to convene a plenary session of all judges to consider the “serious questions” presented by the case. Accordingly, a panel of nineteen judges decided the case. On all of the issues, the Court ruled in substantially the same manner as the Commission had in its decision.

The Court first considered the proposals for reform of the impugned laws that the government had recently contemplated but failed to enact. These proposals had fallen into desuetude after the British government had sought public opinion on the decriminalization of adult homosexual relations. The government had determined that the general popula-

111. Id. at 36.
112. Id.
113. Id. at 32-36.
114. Id. at 38.
115. Id. at 40 (separate opinion of Mr. Polak).
116. Id.
118. Id. Normally the Court hears cases with a panel of seven judges, however, “[w]here a case pending before a Chamber raises a serious question affecting the interpretation of the Convention, the Chamber may, at any time, relinquish jurisdiction in favour [sic] of a plenary court.” A. Robertson, supra note 2, at 203 (quoting Rule 48 of the Rules of Court).
120. Id. at 14.

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tion of Northern Ireland was evenly divided on the issue. The more conservative elements of Northern Irish society were, however, quite vocal in their opposition to any reform. Despite the fact that the Church of Ireland, social agencies, and the Standing Advisory Commission on Human Rights supported the measure, no individual member of Parliament representing Northern Ireland would introduce the reform as a proposed bill. Hence although the government considered reforming the law to conform to the law as it stood in the rest of Great Britain at the time (i.e., consensual homosexual relations between males over the age of 21 generally not subject to criminal sanctions), the reform measure was never brought before Parliament.

The absolute ban on all male homosexual relations was not lifted. The government however argued that since 1972, no one in Northern Ireland had been prosecuted under the law for any act that would not have been an offense under the prevailing law in the remainder of the United Kingdom, where homosexual relations between consenting adults over age 21 are generally not proscribed. The Court noted, however, that there was no stated policy not to prosecute alleged violations under the law and that a policy to prosecute violations that were in the “public interest” did in fact exist. Additionally, these laws provided a means by which private individuals could initiate prosecutions of alleged violations. Thus the government could not argue that the laws were without force and not a real basis on which Dudgeon could claim a breach of the Convention.

The Court agreed with the Commission that the laws constituted a continuing interference with Dudgeon’s right of privacy under the Convention. Also the Court noted that Dudgeon was inherently predisposed to commit the proscribed sexual acts due to his homosexuality. Hence the laws required him to refrain from any sexual expression at all or else become liable to criminal prosecution.

The government advanced two grounds under Article 8 paragraph 2

121. Id.
122. Id. at 13-14.
123. Id.
124. Id. at 14-15.
125. Id. at 15.
126. Id. at 14. A private individual may commence a prosecution for homosexual offenses, subject to the Director of Public Prosecution’s power to assume control of the prosecution and to drop the charges in his discretion. Id.
127. Id. at 18.
128. Id.
129. Id.
to justify the interference. First, the government argued that the laws protected the moral ethos of Northern Irish society, especially in light of the vocal opposition who feared that any penal reform would seriously threaten the moral fabric of that society. Second, the government contended that the laws, as applied to males under the age of 21, were necessary for the protection of the rights of others, namely those in the proscribed age group. The Court held that any purported distinction between these two grounds was "somewhat artificial" in that the "protection" under the second ground was based on societal notions of morality. The Court did, however, hold that criminal regulation of homosexuality could be justified on both grounds. The decision then turned on what bounds the criminal law could operate within and still be considered as necessary in a democratic society.

In determining the proper bounds within which the criminal proscription of consensual homosexual relations could democratically operate, the Court stated that "the view taken . . . of the requirements of morals varies from time to time and place to place." Hence national authorities were better suited to gauge a particular society's moral requirements. The Court noted, however, that the impugned laws affected "a most intimate aspect of private life." Thus, "there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate." The legitimacy of the interferences is measured by whether it could be said that they are necessary in a democratic society characterized by "tolerance and broadmindedness." Summarily stated, the interference must be proportionate to a legitimate aim.

The Court ruled that the restriction imposed on Dudgeon, and consenting males over 21, was "by reason of its breadth and absolute character . . . disproportionate to the aims sought to be achieved." The Court determined the aim of the restriction to be the protection of the

130. Id. at 19.
131. Id. at 21.
132. Id. at 20.
133. Id.
134. Id. at 20-21.
135. Id. at 21.
136. Id. (quoting Handyside Case, 24 Eur. Ct. H.R. (ser. A) 22 (1976)).
137. Id.
138. Id.
139. Id.
140. Id.
141. Id. at 21-22.
142. Id. at 24.
moral ethos of Northern Ireland.\textsuperscript{143} This aim could not justify the degree of interference imposed on adult male homosexual persons.\textsuperscript{144} It noted that the government had refrained from prosecuting the impugned laws with respect to males over the age of 21.\textsuperscript{145} Furthermore the moral standards of Northern Ireland had not suffered, nor had there been a public outcry for enforcement of the laws.\textsuperscript{146} The Court did, however, give a fair measure of sway to public opinion in ascertaining the legitimacy of intrusive governmental actions taken in the name of protecting morals.\textsuperscript{147} Nonetheless, the Court stated that “[a]lthough members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.”\textsuperscript{148}

Regarding the impugned laws as applied to males under the age of 21, the Court ruled that the criminal prohibitions were justified for the protection of the rights of others.\textsuperscript{149} Presumably, based on the Court’s earlier discussion of the interplay between this ground and the protection of morals, the Court tacitly sanctioned the protection of morals as a legitimate aim of the challenged laws.\textsuperscript{150} The Court reiterated its prior recognition of the fact that there exists a legitimate necessity for some degree of control over homosexuality, even in a democratic society.\textsuperscript{151}

The Court, like the Commission before it, declined to rule on Dudgeon’s Article 14 discrimination complaint because it perceived that complaint to be essentially the same as the one lodged under Article 8, but merely “seen from a different angle.”\textsuperscript{152} The Court did note, however, that an Article 14 complaint might possibly lie for a homosexual person who was subject to a law requiring a comparatively high age of consent.\textsuperscript{153} Northern Ireland would first have to establish an age of consent.\textsuperscript{154}

The Dudgeon II Court clearly stated: “[t]he Court is not concerned with making any value-judgment as to the morality of homosexual rela-

\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.} at 22-23.
\textsuperscript{148} \textit{Id.} at 24.
\textsuperscript{149} \textit{Id.} at 25 (emphasis added).
\textsuperscript{150} \textit{Id.} at 20-21.
\textsuperscript{151} \textit{Id.} at 25.
\textsuperscript{152} \textit{Id.} at 26.
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Id.}
tions between adult males." In upholding their criminal prohibition, the Court did, however, make a value-judgment with respect to homosexual relations involving males under the age of 21. This ruling as to males under the age of 21 reflects an unequivocal judgment as to the immorality of homosexuality. More importantly the Court did not question the notion that homosexuality was inherently immoral, nor is there any evidence to substantiate that notion. The Court accepted the premise that homosexuality could be criminally regulated in some measure for the protection of societal morals. The Court devoted significant effort to outlining the paramount role of public opinion in measuring those morals.

The plenary Court assembled to decide Dudgeon II ruled fifteen to four in finding a breach of the Article 8 right of privacy. Regardless of the rationale underlying the decision or its qualifying language, it is certain that member states cannot now impose an absolute ban on all adult consensual homosexual relations without violating Article 8. The Court ruled fourteen to five in declining to consider the Article 14 discrimination complaint. Presumably, this clear majority portends a difficult struggle for those seeking Article 14 discrimination protection for homosexual persons under the Convention. Thus the Dudgeon II decision has limited utility for homosexual persons striving to achieve their human rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms. The potential for achieving those rights does exist, however, in the form of two declarations passed by the Parliamentary Assembly of the Council of Europe in 1981.

E. Parliamentary Declarations of 1981: Sexual Self-Determination

In 1981 the Parliamentary Assembly of the Council of Europe adopted two resolutions on homosexuality that far exceed the Commission’s and Court’s decisions recognizing homosexual persons as a legitimate and protected minority group. The Assembly is solely a

155. *Id.* at 22.
156. *Id.* at 27.
157. *Id.*
158. The dissenting opinions are not particularly noteworthy. Three of the five dissents decried the finding of a breach under Article 8, relying on the notion that homosexuality is inherently immoral and therefore clearly amenable to any form of criminal proscription. *Id.* at 29 (Dissenting Opinion of Judge Zekia); *Id.* at 33 (Dissenting Opinion of Judge Matscher); *Id.* at 39 (Partially Dissenting Opinion of Judge Walsh). A fourth dissent argued that Dudgeon was not a “victim” under the Convention since he had not been prosecuted under the impugned laws. *Id.* at 38 (Dissenting Opinion of Judge Pinheiro Farinha). Finally, one dissent argued that the Court erred in not fully considering Dudgeon’s Article 14 complaint, thereby excessively limiting the scope of protection given under Article 14. *Id.* at 32 (Dissenting Opinion of Judges Evrigenis and Garcia de Enterría).
deliberative organ which makes recommendations to the Committee of Ministers. The Assembly’s recommendations are not binding upon the Committee of Ministers. Resolution 756 called upon the World Health Organization to remove homosexuality from the international classification of diseases, noting that “the theory whereby homosexuality, whether male or female, is a form of mental disturbance has no sound scientific or medical basis, and has been refuted by recent research.” In formulating its request, the Assembly reiterated its commitment to fight against all forms of discrimination and oppression. More significantly, though, it declared that all individuals, once they had reached the legal age of consent in the country of their residence, should have the right of sexual self-determination. Recommendation 924 was addressed to member states of the Council of Europe through the Committee of Ministers, and was far more comprehensive in cataloging the forms of discrimination against homosexual persons that it sought to abolish. The Assembly again reiterated its commitment to the abolition of all forms of discrimination and took note of the fact that homosexual persons “continue to suffer from discrimination, and even, at times, from oppression.” The Assembly went on to state that, notwithstanding the value of traditional family life, discrimination against homosexual persons in modern pluralistic societies was motivated by the “survival of several centuries of prejudice.” The Assembly reaffirmed sexual self-determination, limited only by the relevant age of consent. It called upon those few member states that continued to criminalize homosexual relations to decriminalize them, acknowledging, of course, the state’s role in the protection of children. Specifically, the Assembly recommended the same age of consent for ho–

159. A. Roberton, supra note 2, at 10. Even so, the Assembly has been instrumental in setting the tone for the rights and freedoms guaranteed under the Convention. It was the organ that initiated and pressed for the right of individual petition, which is now the cornerstone of the Convention. Id. at 10-16.
160. Id. at 10. As the executive organ of the Council of Europe, the Committee of Ministers decides what action the Council takes to further its aims. Id. The Consultative Assembly, on the other hand, is the deliberative organ of the Council of Europe. The Consultative Assembly’s conclusions go to the Committee of Ministers as recommendations. Id.
161. 1981 Y.B. EUR. CONV. ON HUM. RTS. 82.
162. Id.
163. Id.
165. Id.
166. Id.
167. Id.
168. Id.

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mosexual persons as for heterosexuals, the abolition of any special records regarding homosexual persons, cessation of all compulsory medical action to alter the sexual orientation of adults, and equal child custody rights for homosexual parents. Finally, the Assembly sought "to assure the equality of treatment, no more no less, for homosexuals with regard to employment, pay and job security."  

These two pertinent declarations, adopted by the Assembly and based on the report of the Committee on Social and Health Questions, strive to achieve the recognition of homosexual persons as a legitimate minority group deserving of the state's protection rather than its moral stigmatization. While these declarations offer more to homosexual persons than do the decisions in the *Case of X* and *Dudgeon II*, one would not be possible without the other. Certainly, a criminal's social and political rights do not merit the high degree of protection advocated by Recommendation 924. More importantly, it is difficult to imagine the state striving to create social equality for those it stigmatizes with criminal sanctions. On the other hand, the fact that both resolutions are qualified by the language of the *Case of X* and *Dudgeon II* decisions is inescapable.

The Article 8 right of privacy is not the legal rationale for achieving the goals of the declarations. This is exemplified by the *Case of X* and *Dudgeon II*. It will take much more for the Convention or the Council of Europe to achieve fair and just treatment for homosexual persons by the member states. Most importantly, the Court and Commission must discredit the notion that homosexuality is inherently immoral and show it to be the anachronistic "survival of centuries of prejudice" that it is. Once the emotional reactionism is cleared away, it is readily apparent that homosexuals, although little known and barely understood, are merely another minority group adding to the richness and diversity of a pluralistic society.

II. RECOGNITION OF THE HUMAN RIGHTS OF HOMOSEXUAL PERSONS

A. The Right of Privacy Is Fundamentally Flawed

The right of privacy rationale is not useful in achieving legal equality for homosexual persons. Although this notion was the basis on which

169. *Id.*
170. *Id.*
171. *Id.* at 137.
172. *See supra* notes 156-60 and accompanying text.
the law banning adult consensual homosexual acts was struck down in *Dudgeon II*, it has only limited usefulness for achieving the admirable objectives (i.e., true equality) of the Assembly’s recommendation on discrimination against homosexual persons. The right of privacy rationale is ultimately inimical to the Assembly’s declarations. Sole reliance on the right of privacy rationale serves to perpetuate the notion that homosexuality is inherently immoral because it does not call into question the factors underlying antihomosexual sentiment; it merely circumscribes the action that the state may take in protecting societal morals. While the *Dudgeon II* decision discredited the notion that the state can absolutely ban all adult consensual homosexual acts, it did little to further the equality of treatment of homosexual persons under the law because it is based on the premise that homosexuality is inherently immoral. The Court accepted the legal dichotomy between heterosexuals and male homosexuals regarding the age of consent. It is true that the Court relied on the protection of the rights of others in reaching its decision, but only after explaining that this justification was truly premised on the protection of morals. There is no perceivable logical basis for this distinction. The dichotomy is merely a manifestation of the idea that homosexuality is immoral.

Use of the right of privacy to achieve equality of treatment for homosexual persons reinforces the notion that homosexuality is immoral. Adults can consent to remove the state’s moral protection by invoking the right of privacy. Young homosexual persons cannot, however, consent to remove the state’s moral protection and are subject to the criminalization of their sexuality. Hence, sole reliance on the right of privacy, as used by the *Dudgeon II* Court, actually serves to obstruct the goal of equal treatment under the law for homosexual persons.

The right of privacy looks only to one manifestation of intolerance without addressing the root of that prejudice. In analyzing whether the laws challenged in *Dudgeon II* constituted a breach of the right of privacy, the Court weighed the state’s interest in protecting society against the individual’s privacy interests to determine if it was sufficient to allow an absolute ban on adult consensual homosexual relations. The Court

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174. In considering the criminalization of homosexual expression, one United States court has noted, “[a]fter all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.” Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (homosexual persons cannot constitute a suspect or quasi-suspect class under the equal protection clause because states may constitutionally criminalize the conduct that defines homosexual persons as a class). Id. at 98.

concluded that the state’s interest could not outweigh the privacy interests of adult male homosexuals in having a legalized form of sexual expression. It nevertheless went on to rule that the state’s interest did outweigh the privacy interests of males under the age of 21. The compelling state interest was deemed to be the protection of those males from the immorality of homosexual relations. So while the right of privacy serves to limit the degree of state interference with sexual expression, it accepts that some degree of interference is warranted because of the perceived immorality of homosexuality. The right of privacy does not question the “survival of several centuries of prejudice” underlying the social and moral reprobation of homosexuality. Assembly Recommendation 924, calling for legal equality for homosexual persons is a hollow declaration as long as the law does not challenge the basic assumption underlying antihomosexual animus—that homosexuality is inherently immoral.

1. The Morality Issue

Under the right of privacy rationale, homosexuality is still viewed as immoral. The law does not even question the assumption. As long as homosexuality is viewed as immoral, the elimination of discrimination and oppression sought in the Assembly declarations is impossible.

a. The idea that homosexuality is immoral is a longheld belief with no modern basis in logic

Homosexuality is not inherently immoral, it is inherently misunderstood and feared. This misunderstanding and fear gravitate together to create a strong aversion and hostility towards homosexual persons. Combined with the ever present element of social conservatism, these are strong forces against which those seeking the legal protection of homosexual persons as a minority group must battle. The Assembly’s declarations acknowledge these forces and, in terms that are nonthreatening seek the advancement of homosexual persons as a minority group.

Essential to understanding that homosexuality is not immoral is the realization that modern religious educators, philosophers, and theologians are in accord in rejecting the interpretations of both old and new Biblical passages which condemn homosexuality. This perspective is,

176. Id.
177. Id.
of course, not universal. Certainly it has not yet filtered down to the grass roots level. Nonetheless, it is a meaningful force which must be reckoned with by those who advance the ungodliness of homosexuality.

Similarly, the arguments that homosexuals commit sex crimes (other than adult consensual sodomy when proscribed) or are a sexual threat to either minors or the mentally infirm, have been discredited in the Dudgeon II decision.\textsuperscript{180} The Court’s acceptance of these facts discredits the idea that homosexuality is inherently immoral.

b. \textit{The immorality notion is merely public opinion}

The "immorality" of homosexuality is really nothing more than uninformed public opinion. The Court, the Assembly, and most others recognize that the assumed immorality of homosexuality is truly just the guise in which people parade and propound their intolerance and ignorance regarding homosexual persons.\textsuperscript{181} It has been established that once people who vehemently object to homosexuality on moral and religious grounds become acquainted with a homosexual person, or discover that a family member or friend is a homosexual person, they significantly change their antihomosexual feelings.\textsuperscript{182} Furthermore, both the Court and Commission recognize the fact that the decriminalization of homosexual relations has not led to a decline in the moral standards of societies affecting such change.\textsuperscript{183} Together these facts vitiate the argument for criminalizing and stigmatizing homosexuality because of its inherent
	his development in religious interpretations. It is one of the strongest forces of social conservatism in this country and opposes individual liberties on all fronts. Arguably the Religious Right opposes the advancement of individual liberties because these liberties "threaten" the ideological framework of this movement, and hence lessen its political and economic strength.


\textsuperscript{181} Dudgeon II, 45 Eur. Ct. H.R. (ser. A) at 24. Indeed, one United States Court of Appeals has recognized that the perceived immorality of homosexuality is "no more than the prevailing mores of our society." Norton v. Macy, 417 F.2d 1161, 1165 (D.C. Cir. 1969) (quoting a letter from John W. Macy, Jr., Chairman, United States Civil Service Commission, to the Mattac Society of Washington, Feb. 25, 1966, p. 3).

\textsuperscript{182} See Herek, \textit{The Social Psychology of Homophobia: Toward a Practical Theory}, 14 N.Y.U. REV. L. & SOC. CHANGE 923, 930 (1986). Dr. Herek posits that this change in attitude is less likely to occur in individuals whose anti-homosexual animus is motivated by "defensive attitudes," i.e., an individual's repression of perceived homosexual tendencies. \textit{Id.} at 931-32. Significantly, this motivation leads to the most violent and rigid anti-homosexual sentiment. \textit{Id.}

immorality.184

The submissions by the parties in Dudgeon II expose the true nature of the immorality argument. The British government, after the suspension of Home Rule in Northern Ireland, had considered passing a law to decriminalize adult consensual homosexual relations. Due to the vocal opposition of conservative forces and despite the fact that social authorities and service agencies supported the reform, the government declined to introduce it in Parliament.185 The Commission acknowledged the argument behind the government’s rationale for failing to reform the law by stating that “a substantial section of Northern Irish society favours [sic] the maintenance in force of the current legislation and is opposed to the proposed reform. The Commission accepts that this opposition is based largely on religious and moral considerations.”186 To its credit, the Commission held that “[i]t would be quite contrary [to the right to respect for private life] to interpret Art. 8(2) as allowing a majority an unqualified right to impose its standards of private sexual morality on the whole of society.”187 The Commission made this statement in the narrow context of considering whether the challenged law was necessary for the protection of morals. This principle, if applied in the context of all arbitrary legislation or acts of discrimination affecting homosexual persons, could be the basis on which to achieve the basic human dignity due all homosexual persons. Simply put, homosexual persons can neither be stripped of their human dignity, nor of their political and civil rights because of the majority’s concepts of sexual morality.

c. Use of the right of privacy reinforces the belief that homosexuality is immoral

It is now established that the idea that homosexuality is somehow immoral is groundless and that its force comes not from the principles underlying that idea, but from the fact that it is accepted public opinion. It is clear that this debilitating notion must be eliminated. As long as homosexuality is seen as immoral, state criminalization and stigmatization of homosexuality will be sanctioned. Indeed it will be seen as a necessity. The idea that homosexuality is immoral is the major stumbling block to achieving the goals of Assembly Recommendation 924. By allowing state interference with the sexual expression of homosexual per-

186. Id. at 35.
187. Id.
sons to any degree greater than that permitted with heterosexual persons, homosexuality is necessarily assumed to be something from which the state must "protect" society. When homosexuality is so viewed, it precludes equality of treatment under the law for homosexual persons. These people are somehow less than similarly situated heterosexual persons. This idea is clearly manifest in the protection of adolescents rationale. The Court and Commission have relied upon this reasoning to uphold the legal dichotomy in the ages of consent between heterosexual and homosexual persons.

2. The Protection of Adolescents

The Court and Commission have been firm in their conviction that adolescents, particularly those between the ages of 18 and 21, need protection from the influence of an "undesirable kind." These laws which ostensibly protect adolescents, actually discriminate against young homosexual persons in that they criminalize their sexual development while stigmatizing their search for identity.

a. State coercion of sexuality

This Note does not advocate pederasty. Sexual abuse of children is an abhorrent evil that a penal code should properly seek to punish. This justification, however, does not substantiate significantly higher ages of consent for homosexual persons. This is particularly true when state authorities admit the purpose behind such laws is to coerce, by means of criminal sanctions, the development of "heterosexual tendencies" in young homosexual persons. This premise can be likened to the long-discredited attempts to force left-handed people to utilize their right hands. It serves only to blindly imitate the majority and to create a great dissonance in the individual. Further, these laws directly contravene Assembly Recommendation 924 and its admonition to member states to equalize the age of consent between heterosexual and homosexual persons.

b. The "protection" notion is irrational and discriminatory

The depth of the belief that adolescents must be "protected" from developing into what they innately are has been manifested by the delib-

190. Assembly Recommendation 924, supra note 164, at 138.
erations of the British Criminal Law Revision Committee. In 1980 the British considered, but then declined to recommend lowering the age of consent for homosexual relations. The British Committee could not reach a consensus on a lower age but settled on age 18 rather than age 16 in order to "protect these young men between 16 and 18 whose sexual orientation has not yet become firmly settled . . . ." 191 At the same time, it was content to consider decriminalizing incest between father and daughter and establishing the legal age of consent at 18. 192 Certainly the implications of legalized incest, with an age of consent lower than that for homosexual persons, perpetuates an ugly disparity in legal treatment of homosexual persons. 193 The committee acknowledged the "genetic risks" of incest. Further, it cannot be disputed that the power a father can hold over a daughter adds a questionable element to any notion of true consent. This debate illustrates that even when progressive elements consider legislation regulating homosexuality, "[p]rejudices . . . die hard." 194 Sadly, the individuals that the law purports to protect are truly harmed and alienated by that "protection." All that is "protected" is the "survival of several centuries of prejudice" to which homosexual persons have been subjected.

c. The Court's and Commission's findings do not support the rationale underlying the "protection" argument

The Commission recognized that the decriminalization of homosexual relations has not contributed to an appreciable rise in the number of homosexuals within that society. 195 Indeed, decriminalization only accomplishes the integration of homosexual persons into society by initiating the first step toward the recognition of homosexual persons as a legitimate minority group. In the Assembly's words, decriminalization "assure[s] equality of treatment, no more no less, for homosexuals . . . ." 196 This goal is fully compatible with the protection of adolescents, from both a moral perspective and under the notion of the protection of the rights of others.

By equalizing the age of consent for heterosexual and homosexual

193. Cf. maintaining age 21 as the age of consent for homosexual relations. See supra text accompanying note 175.
194. Id.; see also Hindley, supra note 191, at 598.
196. Assembly Recommendation 924, supra note 164, at 138.
persons, the state can create an environment in which adolescents can develop free of moral, social, and legal reprobation. The fact that the decriminalization of homosexual acts does not increase the number of homosexual persons in a society supports the proposition that homosexual persons are homosexual regardless of society's notions of sexual propriety. When the law works to alienate and stigmatize individuals as they develop into adults and full members of society, these individuals are harmed far more drastically than they would be by merely allowing them to develop into adults free of these moral, social, and legal recriminations.

3. The Right of Privacy Is Theoretically Flawed as a Vehicle for Achieving Equality Under the Law for Homosexual Persons

The right of privacy is theoretically flawed as the legal doctrine on which homosexual persons can base their struggle for equality under the law. The right of privacy limits the degree of state interference with homosexual persons' privacy. It does not, however, provide the legal framework on which to eliminate that interference. Thus far, the Court and Commission have not questioned the soundness of the reasons purporting to justify state interference. Instead, they have merely weighed and balanced these reasons with the privacy interests of homosexual persons. In performing the right of privacy analysis, the Court and Commission are not forced to pierce the veil of "several centuries of prejudice" which underlies the state's reasons purporting to justify the differential treatment of heterosexual and homosexual persons.

Furthermore, the right of privacy is a fluid, individual right. The definition of privacy under the Convention has been the subject of much debate. Certainly, the time may come when privacy is not seen as encompassing the right to engage in adult consensual homosexual relations. Because the right of privacy is an individual right, at least one

197. See Hindley, supra note 191, at 602-03.
198. Case of X, Application No. 7215/75, Eur. Comm'n H.R. 1, 18-19 (1980). The applicant, in the Case of X, cited to the 1969 report of the Speijer Committee, charged with studying the laws relating to homosexuality in the Netherlands, which found that "homosexual contacts could often be of help to the young person with homosexual tendencies in so far as they might reduce or even eliminate sensations of stress and frustration." Id. The Speijer Committee found that there was no real possibility that one could be "converted" to homosexuality through seduction after the age 16, because one's sexual orientation is firmly established by that age. Hindley, supra note 187, at 601.
200. See Doswald-Beck, supra note 8, at 287.
201. For instance, in the United States homosexual persons do not enjoy the right of pri-
member of the Commission questions whether the right of privacy affords any protection of homosexual relations between two persons. The legal protection afforded homosexual persons through the right of privacy is tenuous, at best.

The right of privacy has served a very helpful and necessary function under the Convention by supplying the basis on which to overturn laws criminalizing adult consensual homosexual relations. The rule under the right of privacy is, however, problematic. It argues that even though some members of society may consider homosexual relations immoral (or at least of questionable moral propriety), the state cannot interfere with consenting adults engaging in such relations. The right of privacy must now be abandoned and a new premise found upon which to achieve equal treatment under the law for homosexual persons. The potential for achieving this exists under the Convention. That potential must now be tapped in order to implement Assembly Recommendation 924.

III. SEXUAL SELF-DETERMINATION AS A FUNDAMENTAL FREEDOM

In order to eradicate the “survival of several centuries of prejudice” against homosexual persons, the state must recognize that homosexual persons are indeed equal to heterosexual persons under the law. This equality is not possible when homosexuality is viewed as immoral, and a force against which people must be protected. Instead, the Convention must recognize sexual self-determination as a fundamental freedom. Each individual may live his or her sexuality free of state interference or coercion. Indeed, this is a basic premise of democracy. The Court has acknowledged this idea in stating that democratic societies embody “two hallmarks . . . tolerance and broadmindedness . . .”

A. Fundamental Freedoms Are the Cornerstone of Democratic Systems

Democratic systems of government seek to establish a social order


203. See infra notes 225-45 and accompanying text.


205. See infra notes 207-11 and accompanying text.

in which human dignity assumes its highest potential. Nevertheless, we as participants in the democratic governing process lack comprehensive insight into what is truly right and just. One commentator defines democracy as “a procedural attempt to reconcile our existential uncertainty about right and justice with the need to form social structures by just means.” This system of government presupposes that the voices of many of its citizens are significant. The negative of this is that the clamor of established majorities may drown out the voice of certain minorities. This was exemplified by the British government’s decision not to reform the law regarding homosexuality due to ardent and vocal conservative opposition. Fundamental freedoms serve to protect minorities from the whims of the majority. With sexual self-determination as a fundamental freedom, the majority’s shock or offense at the existence of homosexuality would not suffice to proscribe it, even amongst those in the 18 to 21 age group.

The Convention recognizes the paramount importance of fundamental freedoms in a democratic system. The preamble states:

[r]eflecting their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend . . .

The structure of Article 8 of the Convention reflects the intricate balance of fundamental freedoms and democracy. The fundamental right of privacy is stated in Article 8, paragraph 1. Lawful state interferences which are “necessary in a democratic society” are a limitation on that right of privacy. Democratic systems of government are constantly evolving in an effort to achieve the highest potential for human dignity and the concomitant recognition of individual liberties. This evolution is seen in the Commission’s change in position on applications challenging the criminalization of homosexuality since 1955. Democracies must now recognize sexual self-determination as a fundamental freedom in order to reach their underlying goal of achieving basic human dignity.

Sexual self-determination can be a misleading term. It is not meant to imply that individuals select their sexuality from a choice of options.

209. Convention, supra note 2, at 222.
210. Id. at 230.
Rather, the individual can manifest his or her innate sexuality without the interference of the state.211 This is what Assembly Recommendation 924 acknowledges, and the term is borrowed from that declaration.212

Sexual self-determination as a fundamental freedom may seem outlandish at first. It is, however, well-founded on both the notions of individual liberty and, more significantly, basic human dignity. The stigmatization of the homosexual individual by the criminalization of his sexual expression is only a small measure of the harm and alienation that he feels at the hands of society. The Commission and the Court have now removed this criminal stigma for adults. It still exists, however, for those adolescents who reside in states that have higher ages of sexual consent for homosexual persons. More is affected than mere sexual expression. The Assembly succinctly stated it in Recommendation 924, "homosexuals . . . continue to suffer from discrimination and even, at times, from oppression . . . ."213 The arbitrarily higher age of consent for homosexual persons is a prime example of this discrimination and oppression. While establishing sexual self-determination as a fundamental freedom will not alter societal and religious prejudices against homosexual persons, it will be a first step. More importantly, it can provide a means by which those homosexual persons who are victims of such discrimination can seek legal redress. Recognition of sexual self-determination as a fundamental freedom could establish the equality of homosexual persons under the law. This equality would prevent state discrimination against homosexual persons and begin the long process of encouraging societal acceptance of homosexual persons.

B. Protection of Homosexual Persons as a Class

The twin evils of prejudice and ignorance are the foundation of anti-homosexual sentiment. The Case of X illustrates their pervasive influence. The British government argued that a higher age of consent for homosexual adolescents was necessary in order to protect these men from the attentions of an "undesirable kind."214 The Commission accepted the British government's justification of protecting the health and morals of adolescents between the ages of 18 and 21 by criminalizing

211. See Application No. 704/60, 3 Eur. Comm'n H.R. Collection of Decisions 1, 136 (1960) (the Commission declined to consider a challenge to the criminalization of homosexuality based on the fact that homosexual persons are innately homosexual. As such, homosexual persons should not be held criminally liable for the sexual expression of their innate sexuality).
212. Assembly Recommendation 924, supra note 164.
213. Id.
their sexual expression. Yet, nowhere in the decision is there a definition of "undesirable kind."\textsuperscript{215} It was merely accepted that homosexuality itself was undesirable. This rationale was accepted as sufficient to inflict the stigma of criminality and the ensuing psychological pain and social alienation on these adolescents. The adolescents whose development is stunted under this regime, will inevitably embody what could be portrayed as antisocial or possibly even immoral behavior.\textsuperscript{216} These adolescents will then be the examples for those who decry the immorality of homosexuality. The cycle of prejudice is self-perpetuating. Only the intervention of the state can stop the cycle. Sexual self-determination as a fundamental freedom is the means by which this state intervention can be ensured.

Antihomosexual sentiment is no different from racism or anti-Semitism. It is a manifestation of fear and ignorance. This simple fact is often lost upon people because this prejudice has the weighty rhetoric of religion and morality ostensibly behind it. As discussed above, the religious and moral considerations that are used to bolster antihomosexual laws and sentiments are groundless. The words and arguments that vitiate the religious and moral objections to homosexuality, however, often fall upon deaf ears. Homosexual persons by their very nature are limited in fighting the social and moral reprobation. This is because homosexual persons represent a challenge to society's basic beliefs.\textsuperscript{217} One whose very existence challenges those basic beliefs is not in the most credible position to sway the believers. It requires more. It requires the intervention and the protection of the state.

The protection of the state, however, may still not overcome strong public opinion. One need only look to the plight of Blacks in the United States. After more than one hundred years of freedom from slavery and extensive legislative efforts to protect their rights, Blacks still suffer from the effects of racism. The racist can always cite facts to support the stereotypes by looking to those elements of Black America that are the most

\textsuperscript{215} Id.

\textsuperscript{216} See Hindley, supra note 191, at 603.

\textsuperscript{217} Herek, supra note 182 and accompanying text. The existence of homosexual persons challenges very fundamental notions of traditional family life, the idea that "for every boy there's a girl," and the value of procreation (particularly in relation to lesbians). The United States Court of Appeals for the Ninth Circuit recently recognized the political powerlessness of homosexual persons, due in part to the fact that homosexual persons are excluded from the mainstream of society. Watkins v. United States Army, 837 F.2d 1428, 1444-48 (9th Cir.), reh'g en banc granted, 847 F.2d 1362 (9th Cir. 1988) (homosexual persons cannot constitutionally be discharged from the armed services based solely on homosexual orientation, absent evidence of homosexual conduct).
oppressed. Yet, the racist fails to take into consideration the paralyzing impact of that oppression which alienates and ostracizes those Blacks from society.

The current resurgence of anti-Semitism in Western Europe is another example. People look upon this resurgence with consternation, particularly in light of the immeasurable horror that was perpetrated by anti-Semitism only four decades ago. There can be no logical explanation. Ignorance and irrationality control. The state cannot be a party to this phenomenon and indeed must counteract it by any appropriate means. Similarly, the state must take the first step toward recognizing homosexual persons as equal under the law. Otherwise, the state sanctions and indeed fosters the "survival of several centuries of prejudice" against homosexual persons.218

Sexual self-determination as a fundamental freedom would provide protection to homosexual persons as a class. By recognizing this freedom the state would rid itself of its prejudice and ignorance regarding homosexual persons. If the state recognizes homosexual persons as equal under the law, it can protect homosexual persons from the societal discrimination they face. Sexual self-determination as a fundamental freedom would not affect an immediate change in societal prejudice, just as laws banning discrimination on the basis of race and religion have not eradicated racism or anti-Semitism. It would, however, limit the deleterious effects of societal aversion and hostility toward homosexuality. It would guarantee "equality of treatment" under the law219 for homosexual persons and create an environment in which Assembly Recommendation 924 could take hold.

By providing protection for homosexual persons as a class, sexual self-determination as a fundamental freedom would further the equality of homosexual persons in a way that the right of privacy cannot. The fundamental freedom model would protect those in the 18 to 21 age group and those in the military.220 It is antihomosexual animus that supports governmental discrimination against homosexual persons whose privacy interests do not outweigh the state interference. This same antihomosexual animus is the source of societal discrimination against homosexual persons. In short, the state must guarantee more than free sexual expression for homosexual persons with compelling privacy inter-

218. See Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987).
219. See Assembly Recommendation 924, supra note 164, at 138.
220. See infra notes 226-38 and accompanying text.
ests. To be true to Assembly Recommendation 924, it must guarantee that sexual self-determination is a fundamental freedom.

C. The Structure Exists under the Convention to Implement Sexual Self-Determination as a Fundamental Freedom

The structure already exists within the Convention upon which this fundamental freedom could be built. Article 14 of the Convention states in part, "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex . . . or other status."221 Taken in conjunction with Article 3: "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment,"222 the framework exists upon which to secure the equal treatment under the law for homosexuals within member states.

Both the Commission and the Court have declined to extend the Article 14 protection against discrimination based on sex to homosexual persons.223 The potential for this protection exists, nonetheless, under the "other status" category. Article 14 protection for homosexuals is not a novel notion. It is supported in a separate dissenting opinion from the Commission's Report in Dudgeon I.224 The dissenting member of the Commission found a violation of Article 14 in Northern Ireland's prohibition of all homosexual relations:

[T]he prohibition . . . stigmatizes homosexuality . . . . By doing so the State, which has the duty to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention, supports and intensifies old and deep-seated sentiments of aversion and fear which have been proved to be unjustifiable and without factual ground . . . . By maintaining these provisions the State discriminates strongly against this group of the population in comparison with heterosexual adults . . . . This difference amounts to a clear inequality of treatment in the enjoyment of the right in question, which is a fundamental aspect of this case.225

The possibility exists that the majority of the Commission declined to find a violation of Article 14 in order to avoid extending such prote-

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221. Convention, supra note 2, at 232 (emphasis added).
222. Id. at 224.
225. Id.
tion to homosexual persons. It is also possible that a violation was held in check by those "old and deep-seated sentiments of aversion and fear."

The assertion of protection under Article 3 is simple. It bans "inhuman or degrading treatment." State sanctioned discrimination against homosexual persons is certainly degrading. The denial of sexual expression and the stigma of criminal sanctions on homosexual adolescents between the ages of 18 and 21 is discriminatory, particularly when heterosexuals are allowed sexual expression at a significantly earlier age. State attempts to coercively alter the sexuality of its citizens through the criminal law also constitute inhuman and degrading treatment.

Now that the Court and the Commission have taken the laudable step of holding that criminal laws which prohibit consensual homosexual relations between adults are in breach of the Convention's Article 8 right of privacy, they must take the more difficult and crucial step of affording Article 14 protection to homosexual persons as a class. Once sexual self-determination is deemed a fundamental freedom, the right of privacy can be abandoned and homosexual persons can rest secure in the protection that the Assembly advocates in Recommendation 924. Homosexual persons as a class will then be protected, through Article 14, from arbitrary discrimination. The state will thus disavow the "survival of several centuries of prejudice" upon which it has relied to criminalize and stigmatize homosexual persons. By doing so, the state will be moving towards a guarantee of equal treatment under the law for homosexual persons.

D. The Fundamental Freedom Notion Eliminates the Anomalies of the Right of Privacy Protection

Recognition of sexual self-determination as a fundamental freedom would permit the Commission and the Court to implement the spirit of Assembly Recommendation 924. The right of privacy does not provide this basis. Consider the challenge that was maintained in the Case of X. Under the fundamental freedom rationale the impugned law that dichotomized the age of sexual consent between heterosexuals and homosexual persons would certainly have been struck down as a violation of Article 14 in conjunction with Article 3 or Article 8. As previously shown, this would inure to the benefit of the subject age group and to British society as a whole.

226. Convention, supra note 2, at 224.
229. See supra note 198, and the reference therein to the Speijer Committee findings.
Under the case law as it now stands, there is the anomaly that homosexuality is immoral yet cannot be proscribed between consenting adults. However, the state may still regulate homosexuality by discriminating against homosexual persons under an arbitrarily prescribed age. This system of case law furthers neither the cause of homosexual persons, nor the Council of Europe's extensive and unparalleled efforts to eradicate discrimination, intolerance, and racism. Rather, it reinforces the idea that homosexuality is inherently immoral and the proper subject of state regulation through criminal sanctions.

1. Post-Dudgeon Decisions Reflect the Need for Sexual Self-Determination as a Fundamental Freedom

Two cases brought before the Commission since Dudgeon illustrate the ineffectiveness of the right of privacy in the effort to achieve equality under the law for homosexual persons. Application 9369/81 was declared inadmissible in 1983. In that case, two homosexual men, who had been in a relationship for several years, sought to have the deportation of one of the men stayed. The deportee was a Malaysian citizen who had resided in Great Britain with his partner since 1979. Apparently, the deportation had nothing to do with the Malaysian's homosexuality but resulted solely from the application of British immigration laws. The Commission refused to categorize the couple as protected by the right to respect for family life under Article 8. The Commission did, however, rule that the relationship was a matter of the applicants' private life, thus necessitating an inquiry into whether the deportation order constituted an unwarranted interference with the applicants' right of privacy. The Commission then looked to whether the deportation was an interference with that right of privacy by analogizing to the test used to determine whether immigration challenges constitute an interference with family life.

It is doubtful that a different decision would have been obtained had the Commission deemed the couple a "family" under Article 8. The inevitable question arises, however, as to whether the Commission took

232. Id. at 220-21.
233. Id. at 221.
234. Id.
235. Id.
236. Id.
237. Id.
this circuitous path merely to avoid legitimizing this homosexual relationship as family life. Hence, like earlier Commission decisions on homosexuality, the significance of this case lies not so much in the result as in the reasoning underlying the decision. The Commission took pains to note that the applicants had been in a "stable" homosexual relationship.238 One wonders how often the Commission inquires into the stability of family relationships that are protected under Article 8.

The second case to be considered was Application 9237/81.239 The Commission also declared this application inadmissible in 1983.240 Here, the applicant challenged his court-martial and dishonorable discharge from the British Armed Forces on account of his homosexuality.241 The Commission rendered a decision reminiscent of its earlier ones which had gratuitously upheld harsh and oppressive state sanctions against homosexual persons.

The government justified the court-martial as necessary to prevent the disruption of order in the Armed Forces.242 The disruption that the government invoked to justify its action, however, resulted from the government's own acts of prosecution and persecution against the applicant. The government then elaborated on the security risk of homosexual persons in the armed services because they are so vulnerable to blackmail.243 This argument, too, is utterly self-serving. Homosexual persons in the military are so vulnerable to blackmail because of the ruthless and vindictive treatment they receive at the hands of military authorities should their sexual orientation be exposed. Lastly, the government argued that homosexuals cannot be permitted in the military because they might use their rank to coerce sexual relations from those under their command.244 This sophistry is difficult to countenance from the same country that considered decriminalizing incest between fathers and consenting daughters over the age of 18.245 Regardless, the Commission concluded that forced sexual acts are better deterred by the discriminatory exclusion of an entire class of persons, rather than harsh criminal sanctions.

The Commission found that the court-martial did interfere with the applicant's right of privacy under Article 8.246 Since homosexuality

238. Id.
240. Id. at 73.
241. Id. at 69.
242. Id. at 70.
243. Id.
244. Id.
245. See Sexually Offensive?, supra note 191, at 1054.
could be regulated for the protection of morals under the Dudgeon I decision, and the morality factor coupled with the military justifications were so compelling in the government’s case, the interference was warranted under paragraph 2 of Article 8.247 The applicant had also alleged a violation under Article 14. The Commission once again refused to address this complaint since it had deemed the interference necessary in a democratic society under Article 8.248

2. Opposite Results Would Have Occurred if Sexual Self-Determination Were a Fundamental Freedom

These two cases would have been decided differently if sexual self-determination were a fundamental freedom. First, the Commission would not have had to perform the mental gymnastics in the deportation case to avoid the appearance of legitimizing the homosexual relationship by classifying it as family life under Article 8. One can take solace in the fact that the relationship was, at least, treated as family life. If the relationship had not been deemed “stable,” an entirely different result might have been obtained. The Commission clearly was not acting within the spirit of Assembly Recommendation 924. The decision on the military application is particularly disturbing. When sexual self-determination is recognized as a fundamental freedom, governments will not be permitted such latitude in acting upon antihomosexual prejudice. At a minimum, a government would be compelled to adduce substantial, non-circular, and specific reasons to justify such harsh and vindictive action. The Commission acted in complete contravention of the spirit and letter of Assembly Recommendation 924.249 Although the Commission is not bound by the Recommendation, there can be no hope for an improvement in societal attitudes towards homosexual persons when states themselves are still so steeped in the “survival of several centuries of prejudice.”

3. The Commission Is Looking Backward

In these two most recent decisions, the Commission seemed to look backward rather than forward to establish its perspective on homosexuality. Ironically, the decision in Application 9237/81, the military case, quoted extensively from Dudgeon I. It is hoped that this does not antici-
pate future decisions that rely on the darker side of Dudgeon I in unquestionably assuming homosexuality is *malum in se*. Since neither the Commission nor the Court is bound by precedent, the inroad made by Dudgeon I may soon be lost to the notions underlying Application 9237/81. In light of these more recent decisions, it is imperative that sexual self-determination be a fundamental freedom. Without this guarantee, the seed of progress made under Dudgeon I may wither and die. The fundamental freedom notion is essential both to protect the precedence of Dudgeon I and to begin the long trek down the road toward eliminating the overarching and fallacious belief that homosexuality is inherently immoral, thereby inching toward equal treatment under the law for homosexual persons.

E. The Fundamental Freedom Notion Provides a Model for All Democratic Systems

Just as the Dudgeon I decision was a major step forward, the Convention, through Recommendation 924 and Article 14, can lead democratic nations in guaranteeing equal treatment for all under the law. This eminence will not come from the Dudgeon I decision alone, but from utilizing the potential that exists under the Convention to establish sexual self-determination as a fundamental freedom. The Assembly declarations serve as an impetus to fulfill this potential. The Convention and its organs are leaders in the field of human rights. More than a few constitutions are modeled on the Convention.²⁵⁰ Moreover, the Convention is profoundly committed to the abolition of all forms of discrimination.²⁵¹ The Convention cannot be a world leader in the field of human rights if it permits prejudice to flourish in any form, regardless of the reasons purporting to support that prejudice.

The democratic system of government has survived a multitude of assaults in Western Europe. The Convention represents Western Europe's deep commitment to democracy. In keeping with this position, the Convention has established an unprecedented enforcement mechanism to protect human rights and fundamental freedoms. This mechanism is a hollow guarantee when it is unavailable to minority groups. The mechanism is not a model when it operates selectively or becomes stalled by the “survival of several centuries of prejudice.” Therefore, the Court and Commission must now look to Article 14 and Assembly Rec-

²⁵⁰ See Doswald-Beck, *supra* note 8, at 283.
ommendation 924 to guarantee the human rights of homosexual persons under the Convention.

IV. CONCLUSION

There has been a constant evolution of opinion in the Commission regarding the criminalization of homosexual relations. In the thirty years since its creation, it has come full circle; from acquiescing to any form of criminalization in the first twenty years, to finding a breach under the Convention in Northern Ireland's absolute ban on all homosexual relations in 1982. The Court, too, has played a role in its landmark decision upholding the Commission in Dudgeon II. In this change of position for homosexual persons under the Convention, there has been a major step forward in the advancement of human rights. Their position, however, is not secure in Dudgeon II. As already noted, the Court and Commission are not bound by precedent. This worked to the advantage of homosexual persons in Dudgeon II. The prospect for any further advancement of human rights with respect to homosexual persons under the Convention is, however, by no means assured. Both the Court and Commission still operate on the assumption that there is some implicit immorality in homosexuality. Accordingly, they are limited by their own prejudice rather than by the far-reaching bounds of the Convention in considering challenges to state regulation and stigmatization of homosexuality.

The right of privacy has served a helpful, albeit limited, purpose in providing the rationale on which the Court and Commission could premise their rulings in Dudgeon II. Reliance on the right of privacy is, however, at best problematic. The right of privacy does nothing to challenge the organs under the Convention to look beyond their own prejudices in assessing the position of homosexual persons under the Convention. Moreover, it serves to subtly reinforce the notion that homosexuality is inherently immoral. This meritless notion cannot be ensconced in Convention case law when the Convention conversely seeks to abolish all forms of discrimination, especially since this notion is nothing more than the "survival of several centuries of prejudice."

The tools do exist, however, with which this monolith of antihomosexual sentiment can be eroded. The Assembly declarations are the most potent. These declarations acknowledge the plight of the homosexual person in modern society and call for state intervention to redress that plight. The Convention has the framework upon which this protec-

252. See supra note 12, and accompanying text.
tion can be built. Article 14 in conjunction with Article 3 provides the
rule that homosexual persons cannot be treated inhumanly or degradi-
ingly in the enjoyment of the fundamental freedoms of the Convention.
Under this rule, sexual self-determination is a fundamental freedom. The
rule also allows the first step towards eliminating societal prejudice
against homosexual persons to be taken. The catalyst to this step must
be the Court and the Commission. The decisions since Dudgeon II are
not encouraging in this regard. It is hoped that these later decisions will
someday be nothing more than slight aberrations in the course of the
advancement of human rights for homosexual persons under the Con-
vention. The rights guaranteed under the Convention, and the enforce-
ment mechanism used to insure them, are unprecedented. The Council
of Europe's work towards the abolition of discrimination and intolerance
are unparalleled. It is, therefore, the institution on which homosexual
persons can place their hope for the realization of equal treatment under
the law.