

"Romanian Criminal Code"

International Commission of Jurists

16 March 1994.

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My dear President,

ROMANIAN CRIMINAL CODE, ARTICLE 200

The International Commission of Jurists (ICJ) has been made aware of the fact that, before the Court, is a proceeding which will be concerned with the provisions of the *Criminal Code* of Romania, art 200 which renders unlawful sexual conduct between persons of the same sex.

2. The ICJ is one of the oldest of the international human rights agencies. Its concerns are:

- the defence of the Rule of Law throughout the world;
- the advancement of human rights; and
- the protection of the independence of judges and lawyers.

3. The ICJ headquarters are in Geneva, Switzerland. It has been the recipient of the following international recognition:

- The European Human Rights Prize (1980)
- The Wateler Prize (1984)
- The Erasmus Prize (1989)
- The United Nations Human Rights Prize (1993).

4. The internal organisation of the ICJ is, by its *Statute*, committed to the Commission and, between its meetings, to the Executive Committee. The Commission at its last triennial meeting devoted part of a session to the issue of the human rights of persons who are penalised or stigmatised on the grounds of their sexual orientation (homosexuality). At its meeting in Geneva in May 1993, the Executive Committee resolved to add to the future human rights programme of the ICJ consideration of the rights of persons penalised or stigmatised on the grounds of their sexual orientation.

5. The ICJ is unaware of the facility provided by Romanian law to organisations and persons, other than the parties to litigation before the Court, to make representations or submissions to the Court upon issues before it. No disrespect to the Court, or to the parties, is intended by these submissions. The ICJ, as a defender of the independence, authority and integrity of the judiciary, has no desire to intrude irregularly into the deliberations of the Court. However, its intention in making this submission is to be of assistance to the Court in resolving the issue before it, according to law. The ICJ submits that the Court should endeavour to resolve the issue before the Court, so far as possible, in conformity with applicable international human rights law.

6. In two recent decisions of the European Court of Human Rights, which will be well known to the Court, it has been held that laws which provide criminal punishments for individuals who engage in sexual activity with people of the same sex at least where:

- The participants are adult; and
- The conduct occurs in private are contrary to applicable human rights requirements.

are contrary to binding requirements of fundamental human rights law. See *Dudgeon v The United Kingdom* (1981) 4 EHRR 149; and *Norris v Ireland* (1988) 13 EHRR 186.

7. The ICJ respectfully adopts and endorses the opinions of the European Court of Human Rights. Those decisions have been highly influential in Europe and beyond. The laws of the United Kingdom in Northern Ireland and of Ireland have been reformed to conform to the requirements of the *European Convention on Human Rights and Fundamental Freedoms*. "Private life" has been accepted as including sexual life - including the right to establish and develop relationships with other human beings especially in the emotional field, for the development and fulfilment of human personality. See *X v Iceland* 5 ECHR Decisions and Reports 86.

8. The decisions of the European Court of Human Rights now express what, it is submitted, is the standard so far as human rights of homosexual persons throughout the continent of Europe, are concerned. Their rights to equality of treatment in the law, and to personal privacy, are entitled to respect and protection by the law.

9. Romanian law should, it is submitted, conform to the foregoing statement as to basic human rights. As Romania abandons the features of an authoritarian legal system which was not always respectful of individual human rights, it is highly desirable that it should move to conformity with the European legal human rights standard. Cyprus, which has been held in breach of the Convention for its laws on this subject, has announced its intention to bring its criminal law into compliance with

the European standard as stated by the European Court of Human Rights. See *Modinas v Cyprus* (1993) Application # 15070/89.

10. The decisions of the European Court of Human Rights are not to be seen as isolated events. They reflect and have influenced world-wide moves to respect the human rights of homosexual and bisexual persons:

(i) Non-government Concern About Rights of Homosexuals

The Latin American NGO Preparatory Regional Human Rights Conference in Quito in 1993 called for 'an express condemnation of discrimination on the basis of sexual orientation and the establishment of United Nations mechanisms to combat such discrimination'.

The final statement of the subsequent World Non-Government Human Rights Conference in Vienna condemned discrimination on the grounds of sexual orientation. The Non-Government Organisations which explicitly endorsed comprehensive statements on gay and lesbian rights at this Conference included the International Federation of Social Workers, the Women's League for Peace and Freedom, the International Alliance of Women, the World Young Women's Christian Association, the Organising Committee for the People's Decade of Human Rights Education, the International Union of Students and the International Council of Jewish Women.

(ii) Government Concern

The governments which expressed support for the human rights of gays and lesbians at the subsequent World Conference on Human Rights in Vienna included the Netherlands, Canada, Austria, Germany and Australia. More governments have since shared this expressed concern.

(iii) Regional forums

In 1981 a report from the Social and Health Questions Committee of the Parliamentary Assembly of the Council of Europe called for a range of actions to secure the human rights of homosexual people. The recommendation of the Committee (No 924) was adopted by the Assembly. In 1984 and 1990, the European Parliament passed resolutions calling for the elimination of all forms of discrimination on the basis of sexual orientation. The Interregional European Human Rights Conference (in advance of the World Conference on

Human Rights) in Strasbourg in January 1993 supported the elimination of discrimination on the grounds of sexual orientation.

In February 1993 the Parliamentary Assembly of the Council of Europe considered a written declaration (No 227) 'On homosexual rights in the new democracies' which recognised that

'... the right of homosexual people not to be discriminated against within the legislative framework of the new democracies is a subject that should be given careful and attention'.

Romania's admission to the Council of Europe in October 1993 was conditional on the reform of its laws and practice towards gay men and lesbians. According to the relevant resolution, the Council

'expects that Romania will shortly change its legislation in such a way that Article 200 of the Penal Code will no longer consider as a criminal offence homosexual acts perpetrated in private between consenting adults'.

Another resolution urged 'the Romanian authorities to implement improvements in prison conditions and discontinue the punishment of homosexuals'.

At the end of 1993 the Final Statement of the First Implementation Meeting on Human Dimension Issues sponsored by the Conference on Security and Co-operation in Europe (CSCE) declared that

'CSCE commitments in the area of non-discrimination cover homosexuals as well. Discriminatory state policies against homosexuals, and criminalising legislation, should be eliminated'.

(iv) The United Nations

In his final report Mr Danilo Turk, Special Rapporteur on the Realisation of Economic, Social and Cultural Rights, supported the need for the UN to begin to

'devote increased attention to areas of discriminatory behaviour generally ignored at the international level, including discrimination on the grounds of sexual orientation' (E/CN.4/Sub.2/1992/16).

In 1993 the UN Economic and Social Council (ECOSOC) NGO Committee granted consultative (roster) status to the International Lesbian and Gay Association (ILGA). On July 30th ILGA's

accreditation to ECOSOC was confirmed by a full meeting of ECOSOC.

The States that voted in favour of ILGA were Argentina, Australia, Austria, Belarus, Belgium, Brazil, Canada, Chile, Cuba, Denmark, France, Germany, Italy, Japan, Mexico, Norway, Peru, the Russian Federation, Spain, Ukraine, the United Kingdom and the United States. Only four States - Malaysia, Swaziland, Syria and Togo - voted against ILGA's consultative status. Seventeen States, including China, Colombia, India and Nigeria, abstained.

(v) *Amnesty International*

Following the modification of its mandate to include people imprisoned because of their homosexuality as prisoners of conscience, Amnesty International wrote to the Tasmanian Government in Australia in July 1992 asking it to repeal Sections 122(a) and (c) and 123 of the Tasmanian Criminal Code (see below). In March 1993 Amnesty issued an External Paper warning that anyone arrested for consenting adult homosexual sex in private under these sections would be considered a 'prisoner of conscience'.

vi) *First Optional Protocol States*

What follows is a table showing the criminal status of male homosexual acts between consenting adults in private in those countries which have demonstrated their commitment to international human rights standards by acceding to the First Optional Protocol of the International Covenant on Civil and Political Rights.

This list clearly demonstrates that a majority of First Optional Protocol States do not criminalise male homosexual acts between consenting adults in private. Such acts are legal in 35 out of the 55 States listed below: they are illegal in 12 and there is no information for the remaining 8.

The list of countries represents those States which had acceded to the First Optional Protocol by June 1st 1990. The reference for the status of private consenting adult male homosexual acts is the *International Lesbian and Gay Association Pink Book*, 1993.

<u>Country</u>	<u>Status of Private Consenting Adult Male</u>
<u>Homosexual Sex</u>	

<i>Algeria</i>	<i>Illegal</i>
<i>Argentina</i>	<i>Legal</i>
<i>Australia</i>	<i>Legal (except Tasmania)</i>
<i>Austria</i>	<i>Legal</i>
<i>Barbados</i>	<i>Illegal</i>
<i>Bolivia</i>	<i>No information</i>
<i>Cameroon</i>	<i>Legal</i>
<i>Canada</i>	<i>Legal</i>
<i>Central African Republic</i>	<i>Legal</i>
<i>Columbia</i>	<i>Legal</i>
<i>Congo</i>	<i>Legal</i>
<i>Costa Rica</i>	<i>Legal</i>
<i>Cyprus</i>	<i>Illegal *</i>
<i>Denmark</i>	<i>Legal</i>
<i>Dominican Republic</i>	<i>Legal</i>
<i>Ecuador</i>	<i>Illegal</i>
<i>El Salvador</i>	<i>Legal</i>
<i>Equatorial Guinea</i>	<i>No information</i>
<i>Finland</i>	<i>Legal</i>
<i>France</i>	<i>Legal</i>
<i>Gambia</i>	<i>No information</i>
<i>Guinea</i>	<i>No information</i>
<i>Honduras</i>	<i>Legal</i>
<i>Hungary</i>	<i>Legal</i>
<i>Iceland</i>	<i>Legal</i>
<i>Ireland</i>	<i>Legal †</i>
<i>Italy</i>	<i>Legal</i>
<i>Jamaica</i>	<i>Illegal</i>
<i>Libya</i>	<i>Illegal</i>
<i>Luxemburg</i>	<i>Legal</i>
<i>Madagascar</i>	<i>Legal</i>
<i>Mauritius</i>	<i>Illegal</i>
<i>Netherlands</i>	<i>Legal</i>
<i>New Zealand</i>	<i>Legal</i>
<i>Nicaragua</i>	<i>Illegal</i>
<i>Niger</i>	<i>No information</i>
<i>Norway</i>	<i>Legal</i>
<i>Panama</i>	<i>Legal</i>
<i>Peru</i>	<i>Legal</i>
<i>Philippines</i>	<i>Legal</i>
<i>Portugal</i>	<i>Legal</i>
<i>Republic of Korea</i>	<i>No information</i>
<i>St Vincent & the Granadines</i>	<i>No information</i>
<i>San Marino</i>	<i>Legal</i>
<i>Senegal</i>	<i>Legal</i>

<i>Somalia</i>	<i>No information</i>
<i>Spain</i>	<i>Legal</i>
<i>Suriname</i>	<i>Legal</i>
<i>Sweden</i>	<i>Legal</i>
<i>Togo</i>	<i>Illegal</i>
<i>Trinidad and Tobago</i>	<i>Illegal</i>
<i>Uruguay</i>	<i>Legal</i>
<i>Venezuela</i>	<i>Legal</i>
<i>Zaire</i>	<i>Illegal</i>
<i>Zambia</i>	<i>Illegal</i>

* *The European Court of Human Rights has found Cypriot laws against male homosexual acts between consenting adults in private to be in breach of the European Convention on Human Rights.*

† *It is noteworthy that in 1993 saw Ireland, the Russian Federation and Lithuania repeal their laws against male homosexual acts between consenting adults in private. Homosexual law reform in Ireland was chiefly a response to a ruling by the European Court of Human Rights similar to the Cypriot ruling mentioned above.*

11. At the time of this submission, a relevant complaint under the First Optional Protocol to the *International Covenant on Civil and Political Rights* is before the Human Rights Committee of the United Nations. The complaint is made by Mr Nicholas Toonen on behalf of himself and other homosexual men in the State of Tasmania, Australia. In Australia, criminal laws penalising homosexual conduct between consenting adults have been repealed in all jurisdictions (States and Territories) except the State of Tasmania. Australia is a party to the *Covenant* and the *Protocol*. The Human Rights Committee is expected to determine the complaint later in 1994.

12. No civilised person will discriminate against another person upon the basis of his or her sexual orientation or private, adult, consensual manifestations of such orientation. Increasing scientific evidence suggests that sexual orientation is genetic in origin, or at least affected by genetic pre-disposition and learned behaviour during early life. It is not, at least in the overwhelming mass of cases, deliberate elective behaviour of an individual. In these circumstances it is just as wrong to punish people criminally for the manifestations of their inborn and deep-seated human emotions, directed to persons of the same sex, natural to them, as it is to punish people for their race, skin colour or on other like suspect basis.

13. National lawmakers and international bodies have taken much time to reach this conclusion. The process is continuing at this time. However, it is clear from this submission that the reform is well advanced; as is the insight of the human rights dimension of discrimination against homosexual and bisexual persons. In due course,

the wrongness of discriminating against, and punishing, such persons will be universally accepted. That has been the history of human rights advances in the decades since the *Universal Declaration of Human Rights*. It is most desirable that, without delay, Romania should reflect this increasing insight in its law. It should do so not simply because such is the European standard or because it is the price of Romania's joining the European systems of the Council of Europe etc. It should do so not only to signal the termination of the persecutions and arrest of homosexuals under the previous régime. It should not even do so because removal of stigmatisation against homosexual and bisexual men is an important feature of the initiatives advised by the World Health Organisation in the global effort to limit the spread of the HIV virus and ADS. The fundamental reason for reform of the *Criminal Code*, art 200 is that such reform as required by respect for basic human dignity required by international human rights norms.

14. It is respectfully submitted that the same reasons require reform of article 204 of the Romanian *Criminal Code* which penalises attempts at such conduct.

15. The ICJ requests the opportunity to present an *amicus curiae* brief to the Constitutional Court of Romania in further elaboration of this submission. It would be greatly appreciated if a time and place could be designated for the making of an *amicus curiae* submission to the Court.

Successor

Michael Kirby

(JUSTICE) MICHAEL KIRBY
CHAIRMAN

EXECUTIVE COMMITTEE
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