

# Sexual Autonomy

## A Human Rights Issue

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We are talking a lot these days about sex offenders, sexual offending and sexual crimes. And regularly we are doing so on the basis of the decisions of law-makers. They are deciding what sexual acts are accepted as legal and which kind of sexual behaviour does determine a sexual crime.

We are discussing these decisions. Sometimes we are denouncing them. But have we ever considered them in the light of fundamental human rights? Have we ever put into question that the legislature, is free in its choice to, on the one hand, render certain sexual behaviour a criminal offence or, on the other hand, to leave certain sexual acts go unsanctioned?

We should do so. Because the legislature, the democratic majority, does not enjoy this freedom.

## ***HISTORY***

Enlightenment and the French Revolution gave birth to the idea of human rights. And it was the French Revolution which did away with all the prior criminal bans on consensual sexual relations. The “*Declaration of the Rights of Man and the Citizen*” of 1789 established the principle that “liberty consists in being able to do all that does not harm others” (Art. 4). Accordingly the offences, which in part were even capital offences, of “lewdness committed with one-self” (masturbation), “fornication” (non-marital cohabitation), “leading a lewd life”, intercourse between Christians and Non-Christians (often called a “particular abomination”), “lewdness against the order of nature” (anal and oral intercourse, hetero- and homosexual), prostitution, incest and adultery had been done away with. As a matter of course sexual violence and abuse of prepuberal children remained serious offences.

All the countries which took over the French Criminal Code (the “Code Napoléon”) or which modelled their Criminal Code after it did the same. And with time also other European countries followed suit, so that today in most of Europe - as a principle - consensual sexual relations, contacts and acts with consenting partners are no longer criminal offences.

Given this historic development and the common origin of the idea of human rights and sexual freedom one would expect that sexuality or “sexual rights”, as we can call it, are at the very core of human rights protection.

## ***SEXUAL RIGHTS***

What are sexual rights? Since “sexual rights” essentially are human rights in the field of sexuality and sexual behavior the answer can be found by referring to the central idea of human rights: uniqueness and autonomy of the individual. Or as the German Constitutional Court put it in the words of the German philosopher Immanuel Kant: a human being never has to be used as a means to an end, but always has to be the end in itself! An old Jewish saying is: if you are destroying a single person you are destroying a world and if you are saving a single person you are saving a world. That is exactly what human rights are about: human dignity, consisting in uniqueness, autonomy and self-determination of the individual.

Following that suit “sexual rights”, being fundamental rights in the area of sexuality, would be understood to guard human sexual dignity, as manifestations of a basic principle of sexual autonomy and sexual self-determination. This basic right to sexual self-determination does encompass two sides. Correctly understood it enshrines both the right to engage in wanted sexuality and the right to be free and protected from unwanted sexuality, from sexual abuse and sexual violence. Both sides of the “coin” have to be given due weight and neither one neglected. Only then can human sexual dignity be fully and comprehensively respected.

## ***CASE-LAW***

It is exactly that conception of sexual rights which appears in the case-law of the *European Court of Human Rights* (ECHR). According to the Court the very essence of the Convention is respect for human dignity and freedom, and the notion of personal autonomy is an important principle underlying the interpretation of the right to respect for private life. Safeguarding that respect has to be based upon present-day conditions and obligations arising from it have to be met at any time. Attitudes of former times therefore may not serve as justification for lack of such respect today; moreover, states have to actively remove the negative effects which may materialize today as a result of such former attitudes.

Analysis of European case-law in the area of sexuality and sexual rights demonstrates that the Court in fact does protect both aspects of sexual autonomy.

### ***Freedom from Sexual Abuse or Violence***

With regard to the right to freedom *from* unwanted sexual abuse and violence the Court's conception of the Convention rights is central. The Court construes those rights as not only

including the negative right to be left alone from state intervention but also the positive right to (active) protection of those rights, against the State as well as against other private individuals. In addition, the Court does not restrict the right to “respect for private life” (Art. 8 ECHR) to the classical right to do what you want, but sees this right as a comprehensive personality right, including the right to physical and moral (psychological) integrity and security.

On that basis the Court held that, under Art. 8 ECHR, a State has to offer adequate protection against sexual abuse and violence; and that in grave cases it is even under a human rights obligation to use the criminal law for the purpose of deterrence. The obligation under Article 6 ECHR to secure fair trial for persons accused of sexual abuse has to be balanced against the obligation to protect victims of abuse; defense rights may (and in some circumstances must) be reasonably limited in the interests of persons who are, or who are presumed to be, victims of sexual abuse. The duty to protect however does not bar states from establishing a reasonable time-limit for bringing criminal charges and civil claims on the basis of sexual abuse (prescription).

The obligation to protect extends not just to the criminal justice system but to the whole State, including the social welfare system. Measures should provide effective protection, in particular, of children and other vulnerable people. While acknowledging the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life, the Court obliges states to take reasonable and effective steps to prevent ill-treatment as soon as the authorities have or ought to have knowledge of the transgression. If authorities fail to do so, states are under a human rights obligation to acknowledge the failure and

to compensate the victims. Compensation should in principle include also redress for non-pecuniary damage. The positive obligation to protect a person's private life also requires social services to grant a person access to her/his personal files if this person suspects having been abused as a child, even if this person is considering the possibility of suing the authority.

Abuse reaching the intensity of cruel, inhuman or degrading treatment or even affecting life calls for particularly strong protection, as the Court classifies the rights to life and the prohibition of cruel, inhuman or degrading treatment as one of the most fundamental values of a democratic society and ranks Arts. 2 and 3 ECHR as the most fundamental provisions of the Convention. In addition the prohibition of cruel, inhuman or degrading treatment (Art. 3 ECHR) is absolute and does not allow for any exception. The test under Article 3 does not require it to be shown that "but for" the failure of the authorities ill-treatment would not have occurred; a failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State. If a condition of probation on a person convicted of sexual abuse of his child step-daughter is to cease to reside with the family, the Court has held that the social services authorities are under the obligation to monitor the offender's conduct, i.e. compliance with the order.

As States are under the obligation to secure the Convention rights in all their actions (Art. 1 ECHR), they are also barred under the Convention from deporting or extraditing someone to another country if there is a real risk that this person will be subjected there to treatment contrary to the Convention (such as sexual abuse)- be it by a foreign State or by private individuals against

whom this State does not afford adequate protection, even if that country is not bound by the Convention.

### ***Freedom to Engage in Sexual Activity***

With regard to the other side of the coin, the freedom *to* engage in consensual sexual activity, the case-law of the *European Court of Human Rights* and the former *European Commission of Human Rights* is based on the understanding that the right to respect for private life (Art. 8 ECHR) enshrines the right to personal development, to free expression and the development of one's personality, and to establish and develop relationships with other human beings especially in the emotional field for the development and fulfillment of one's own personality. The purpose of the protection of private life lies in safe-guarding an area for individuals in which they can develop and fulfill their personality, and in securing the right to choose the way in which to lead sexual life. Sexuality and sexual life for the Commission and the Court always has been at the core of private life and its protection.

State regulation of sexual behavior interferes with this right, and it accords with the Convention only if necessary in a democratic society for the achievement of a legitimate aim. And "necessary" in this context means a "pressing social need"; "usefulness" or "reasonableness" are not enough. Finally any regulation of sexual behaviour has to be proportionate to the aim

sought. For interferences with consensual sexual acts the Court requires "particularly serious reasons".

It is interesting to draw comparisons with the United States. It was there that courts for the first time used human rights law to secure sexual rights. At the beginning of the seventies several state courts invalidated the sodomy laws of their states. Based on privacy and equality arguments, they declared general bans on hetero- and/or homosexual oral and anal intercourse to be unconstitutional. This development suddenly stopped with the rise of the AIDS epidemic. Between 1983 and 1992 no sodomy statute has been declared unconstitutional by a court or repealed by the legislature. The courts started to act again not before 1992 and the legislatures not before 1993. As late as 1986 the US Supreme Court expressly decided that the states have a right to criminalize homosexual anal and oral intercourse since such a ban accorded with millennia of moral teaching. It took until 2003 that the Supreme Court changed this position and declared sodomy laws as well as special regulations for homosexual conduct unconstitutional

AIDS did not have such a devastating effect on sexual rights in Europe. The organs of the European Convention on Human Rights, while consistently declaring total bans of homosexual acts to be compatible with the Convention until then, changed their minds at the beginning of the eighties and hitherto repeatedly ruled that a total ban violates the right to respect for private life. In 1997 the European Commission on Human Rights declared higher age limits for homosexual contacts to be in violation of the Convention. And the Court did so in 2003. On the national level the Constitutional Courts of Austria and Hungary, in 2002, struck down higher minimum age

limits for homosexual contact as compared to heterosexual contact. While the Hungarian Constitutional Court based its decision on the view that the distinction between hetero- and homosexual conduct was not justified, the Austrian Constitutional Court struck down the law on a completely different basis. It did so on the ground that the offence was construed in a way that allowed for legal relationships (for instance between a 18 year old and a 16 year old) with time to turn into a criminal offence (so when the older partner turned 19); this the Austrian Constitutional Court considered unreasonable and therefore a violation of the right to equality.

Also in the area of age-of-consent laws a look over the Atlantic seems to be instructive. While in Canada in the nineties of the past century the courts also found the special higher age limit of 18 for anal intercourse as compared to 14 for all other sexual acts a violation of human rights, in the USA that issue is still more than controversial. The Florida Supreme Court in 1995 invalidated a statute criminalizing consensual sexual relations of adolescents of “previous chaste character” arguing that that law violated the right of young people to privacy. The California Court of Appeals in 1998 however ruled not only that such interferences are justified but also that minors do not “have a constitutionally protected interest in engaging in sexual intercourse” at all, thus exempting the legislature from the necessity of giving any reason for a ban on juvenile sexuality. In this case the Court thus confirmed the conviction of a 16 year old adolescent for engaging in consensual sexual intercourse with his 14 year old girl-friend. In 2003 the Supreme Court finally quashed the conviction of a 18-year-old to 17 years incarceration for engaging in consensual oral sex with a 14 year old.

In Europe no such human rights cases on general age-of-consent laws are known, most probably due to the fact that in Europe the general minimum age limits for sexual relations are much lower than in the USA. While in several US states minimum age limits for sexual contact often go as high as 17 or 18, in one-half of the European jurisdictions, consensual sexual relations of and with 14 year old adolescents are legal, and in three-quarters with 15 year olds. Just one European jurisdiction (Northern Ireland) outlaws consensual sexual relations of 16 year olds. In only one case the European Commission on Human Rights had to decide on the issue. In 1997 it upheld a general age of consent of 14 years. The Court recently acknowledged the right of adolescents over the age of 14 years to sexual self-determination. It awarded an applicant compensation for having been prevented, between the ages of 14 and 18, from entering into relations corresponding to his disposition (for homosexual contact with older, adult men).

In 2000 the Court issued a judgement dealing with group sexual activity. It held that the British ban on group sex including gay male sexual activity violates the Convention. What makes this judgment particularly remarkable is that the Court did not refer to the non-discrimination clause of the Convention (Art. 14) but to the right to respect for private life (Art. 8). Thus it established a fundamental right to consensual group sex, which now can not be banned anymore even if such a ban would cover heterosexual and homosexual group sex equally.

The Court today explicitly considers discrimination on the basis of sexual orientation as unacceptable and as serious as discrimination on the basis of race, colour, religion and sex. In the case of distinctions based upon sex or sexual orientation the margin of appreciation is narrow and

the Court requires particularly serious reasons for such distinctions to be justified. Measures involving a difference in treatment based upon sex or sexual orientation can only be justified if they are *necessary* for the fulfillment of a legitimate aim; mere reasonableness is not enough.

Predisposed bias on the part of a heterosexual majority against a homosexual minority cannot, as the Court has repeatedly held, amount to sufficient justification for interference with the rights of homo- and bisexual women and men, any more than similar negative attitudes towards those of a different race, origin or colour. Society could be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth “in accordance with the sexual identity chosen by them”.

Today not having discriminatory legislation against homosexuals, especially a criminal ban on homosexual relations, is a pre-condition for admission to the European Union and to the Council of Europe. The Parliamentary Assembly of the Council of Europe repeatedly condemned discrimination on the basis of sexual orientation as “especially odious” and “one of the most odious forms of discrimination”.

The Court recently issued two important decisions on the right of freedom of religion (Art. 9 ECHR) when balanced against sexuality and sexual freedom. In 2000 it ruled that parents cannot object to sex education lessons in public schools on religious grounds, if such sex education is aimed at giving the pupils objective and scientific information about human sexual behaviour, sexually-transmitted diseases and AIDS and if they were not a source of indoctrination in favour

of a specific form of sexual behaviour. In 2001 the Court held that pharmacists could not rely on their religious beliefs or impose them on others to justify refusing to sell contraceptive pills, which are legally available for sale and, by law, can only be sold on prescription in pharmacies; there were many ways in which the applicants could manifest their beliefs outside the professional sphere, the Court emphasized.

In the area of *sado-masochism (S & M)* the Court in 1997 held that states can outlaw even consensually inflicted injuries; but only if they are more than just transient and trifling. So also consensual S & M-sex enjoys human rights protection, if injuries remain transient and trifling.

With regard to *pornography* in 1993 the European Commission of Human Rights decided that the right to freedom of information (Art. 10 ECHR) includes the right of adults to view (gay) pornography in the backroom of a sex-shop where no one else can be annoyed.

*Prostitution* has been considered a human rights issue by the Federal Court of Switzerland. It held prostitution to fall under the basic right to pursue a profession and to make earnings; as a consequence the legislature can regulate, but not totally ban, prostitution. And the Constitutional Court of Austria does not allow the legislature to ban sexual acts for remuneration (which are not yet commercial). Finally the European Court of Justice of the European Union in 2001 ruled that also sex workers enjoy the basic right of freedom of movement between the (now) 25 member states.

Coming to an end I would like to address your attention to this. You will not be able to remember all the details presented here, but what you should take with you from this overview of human rights law and sexuality is that the legislature, the democratic majority, is not completely free in its decisions creating sexual offences. The fundamental right to sexual autonomy obliges it to adequate protection from unwanted sex, from violence and abuse and to sanction seriously injuring sexual behaviour. Sexual autonomy on the other side obliges law-makers to respect sexual freedom; a freedom which is neither limited to socially accepted sexual behaviour nor limited to adults, but a freedom which covers also areas like group-sex, S & M-sex as well as pornography; and a freedom which protects also the sexual choices of adolescents. These are the requirements of respect for human sexual dignity.

Further information in H. Graupner, *Sexuality and Human Rights in Europe*, in: H. Graupner & Ph. Tahmindjis (Ed.): *Sexuality and Human Rights – A Global Overview*, New York: Haworth Press (2005),

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