

Sexuality and Human Rights in Europe

Paper presented at the International Bar Association 2000 Conference

(Amsterdam September 17th-22nd 2000)

"Human Rights and Sexuality: help or hindrance?", Monday, September 2000

(Joint Session of Committee 11 (Discrimination and Gender Equality) and Committee 19 (Human Rights))

by Helmut GRAUPNER, JD

(www.graupner.at)

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 Human and Citizen Rights" of 1789 established the principle that "liberty consists in being able to do all what does not harm others" (.....). And 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 have 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 that suite so that today in most of Europe – as a principle – consensual sexual relations, contacts and acts with discerning partners are no criminal offence anymore.

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. But are they?

Written human rights law is scanty as it comes to sexuality. There is nothing on sexuality or on sexual rights in the Universal Declaration on Human Rights of the year 1948. The same is true of the big regional human rights treaties elaborated on the basis of this Declaration, the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human Rights. The same can be said of other conventions. Only the Convention on the Rights of the Child of 1989 contains a – however also limited - reference to sexual rights when it obliges states to combat sexual exploitation.

Not different is the situation on the national level. At least until recently since three state constitutions in Germany, as do South-Africa, Ecuador and Fiji outside Europe, now expressly do ban discrimination and inequality on the basis of “sexual orientation” or “sexual identity”. And the new Swiss constitution of last year bans discrimination on the basis one’s “form of life” which is intended to include sexual life. Since last year Art. 13 EC-Treaty as amended by the Treaty of Amsterdam also expressly empowers the Council of Ministers of the Union to act against discrimination on the basis of “sexual orientation”, and 11 states in Europe now have included “sexual orientation” as a protected category into their (non-constitutional) anti-discrimination legislation. All these new references to sexual rights however are rather narrow and limited. The term “sexual orientation” just means homo- and heterosexual orientation and those references are made in the context of equality-rights only. That means that these constitutional provisions guarantee equal treatment of homo- and heterosexual persons and behavior but it does not say anything on what regulations of sexuality and sexual behavior can legitimately be made. In other words: those rights do not protect against undue inferences with sexual life as such, they just guarantee that such inferences burden hetero- and homosexuals alike.

This scantiness of written human rights law however does not mean that it excludes from its protection the sexual sphere. As a matter of course fundamental rights do cover also the sexual life of the people. The fact is that just it is not expressly emphasized. But the general right to privacy and respect for private life, the right to equality, the right to freedom of expression, the right to assemble and to form associations and, not least the right not to be treated cruelly, inhuman and degrading, can also be used to protect sexuality and sexual rights.

But are they in fact used in that way by the bodies called to enforce human rights? To give an answer to that question it has first to be made clear what sexual rights are. 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: the uniqueness and autonomy 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 it is 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 of the individual, its autonomy and self-determination.

Following that suite “sexual rights”, as being fundamental rights in the area of sexuality, would be understood as the guards of human sexual dignity, as manifestations of the one basic principle of sexual autonomy and sexual self-determination. Whereby 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 none neglected. Only then human sexual dignity will be fully and comprehensively respected.

In determining the successes and failures of human rights law in Europe in safe-guarding that sexual dignity I can just give you a short overview in the remaining part of my contribution but no in-depth-analysis of the European human rights case-law. Moreover since there is no uniform development discernible I can only present major examples but no uniform and coherent historic line of jurisprudence.

As regards the right to protection against unwanted sexuality, abuse and violence as far as I know only the European Court on Human Rights expressly rooted such a sexual right in the context of human rights. It held that a state violates the Convention’s right to privacy if it does not offer adequate protection, and in grave cases of abuse it has even to use the criminal law for the purpose of deterrence. This decision dates from 1985 and was repeated by the Court in 1996.

As regards the other side of the coin, the right to sexuality, it seems to be of interest to draw a comparison to the U.S.. It there when courts for the first time used human rights law for securing 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 neither been declared unconstitutional by a court or repealed by the legislature. The courts started to act again in 1992 but the legislatures remained inactive until today. And in 1986 the US-Supreme Court even expressly decided that the states have a right

to criminalize homosexual anal and oral intercourse since such bans resembled millennia of moral teaching.

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 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. They changed their minds according to changing public opinion throughout Europe and according to the changing state of the law in the several member states. Fewer and fewer states criminalized homosexuality what the European Court on Human Rights indeed named as being decisive for its decision to depart from the prior case-law of the Commission. And today not having a criminal ban on homosexual relations is even a condition for admission to the European Union and to the Council of Europe and the Parliamentary Assembly of the Council of Europe calls discrimination on the basis of “sexual orientation” “especially odious”.

The Convention organs constantly in their case-law referred to the legal consensus among the member states. So it is not surprising that it took them a lot more time to find a violation in regulations that do not generally ban homosexual relations but “only” establish a higher minimum age limit for them than for heterosexual acts. It was not before 1997 that the European Commission on Human Rights declared such unequal age limits to be in violation of the Convention. Also in this area 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 (only) as compared to 14 for all other sexual acts in violation of human rights, in the US that issue still is 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 while the California Court of Appeals in 1998 ruled not only that interferences are justified but even that minors do not “have a constitutionally protected interest in engaging in sexual intercourse” at all thus exempting the legislature from the necessity of even 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 girlfriend.

In Europe no such human rights cases are known. Most probably due to the fact that here the general minimum age limits for sexual relations are much lower than in the US. In one-half of the European jurisdictions, consensual sexual relations of and with 14 year old adolescents are legal, in three-quarters with 15 year olds. Just one jurisdiction, namely 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 in spite of the fact that in this country – as opposed to nearly all other jurisdictions in Europe – there was no power of discretion granted to the authorities or any other means which would enable the screening out of cases where the age limit was violated but where it is established that there was no abuse in the specific case.

Only some weeks ago the European Court on Human Rights issued a judgement on group sexual activity. It held that the British ban on group sex including gay male sexual activity violates the Convention. The Court thereby referred not to the non-discrimination clause of the Convention (Art. 14) but to the right to respect for private life (Art. 8) thus establishing a fundamental right to consensual (non-public) group sex, which can not be banned even if such a ban would cover heterosexual and homosexual group sex equally.

In the case of homosexuality human-rights case-law in the meanwhile even steps beyond the area of criminal law. In November 1998 the European Commission on Human Rights and the old European Court on Human Rights have been replaced by a new permanent European Court on Human Rights. This new Court hitherto has already issued two major gay-rights decisions. In September of last year it declared an exclusion of lesbians and gays from the armed forces as being in violation of the right to respect for private life. And in December it ruled custody decisions based on the homosexuality of one parent constituting unjustified discrimination on the basis of “sexual orientation”.

So as regards homosexuality there has occurred remarkable progress in human rights case-law. After constant rejection in the fifties, sixties and seventies, now human rights claims of homosexuals are more and more heard by the courts. And, as we heard, not just in Europe. In 1994 the UN-Human Rights on a global level on the basis of the International Covenant for Civil and Political Rights declared a total ban of homosexual contacts in violation of the right to privacy and in 1998 the Committee in its review of the report of Austria under the

Covenant called for the repeal of the discriminatory higher age of consent of 18 for gay men as compared to 14 for heterosexuals and lesbians.

That progress however, sometimes even expressly, is based upon changing public attitudes towards the sexual behavior in question. In the case of a total ban of homosexual relations for instance it took the repeal of it in nearly all European states, triggered by three revolutions, the French, the Russian and the Sexual, before the Convention organs declared it as a human rights violation, when just a handful of countries still kept such a ban. If we look to areas where still is less public acceptance the evidence seems much poorer.

In the case of Transsexualism for instance the European Court on Human Rights ruled in 1992 that the Convention affords that a state issues personal id documents resembling the new sex of the person but it decided as late as 1997 that a state need not change the birth certificate in spite of the fact that nearly all European states allow for such a change. In this case the Court disregarded its own often practised referral to a legal consensus in the member states of the Council of Europe.

Even more striking is the situatio in the area of S & M where the European Court on Human Rights in a case of 1997 did not find a violation of the Convention despite the fact that the plaintiffs have been convicted for totally consensual homosexual SM-acts without lasting negative effects or woundings while the courts in their home country have declared heterosexual SM-acts legal even when they involved acts as grave as branding of the buttocks. The court merely referred to the legitimacy to outlaw even consensually inflicted injuries if they are more than just transient, and did not at all address the equality arguments, also not in relation to sportsevents regularly inflicting more than transient injuries as for instance boxing
.....

As regards pornography there is only one case where the European Commission on Human Rights found a violation. In 1992 it decided that the right to freedom of information includes the right of adults to view (gay) pornography in the backroom of a sexshop where no one else can be annoyed. Also this case, and it is the only one so far to my knowledge, is rather narrow: it confines the right to view and show pornography to a very limited sphere. Adults in a backroom where noone else has access. This decision seems to resemble the concept of sexuality that is tolerable only if kept behing thick doors.

Prostitution has, as far as I can see, been considered a human (or basic) rights issue by the Swiss Federal Court only. It held prostitution to fall under the basic right to pursue a profession and to make earnings and as a consequence the legislature can regulate but not totally ban prostitution. The Austrian Constitutional Court did not follow that suite and considered professional sexual acts outside the scope of human rights protection but it did hold that sexual acts against remuneration (which are not yet commercial) do fall under the protection of the constitution (the right to respect for private life) and cannot be banned. No other courts however so far have recognized the right to sexual self-determination in the form of sex against remuneration.

Same-sex marriage constantly has been considered not to be a human rights issue, by the European Court on Human Rights in 1986 and by the national courts so addressed. The Dutch Supreme Court however and the German Supreme Court in their judgements of 1990 and 1993 emphasized that not to legally recognize same-sex partnerships in any way would violate human rights.

To sum it up, it can be said that human rights law in practice currently seems to protect sexual rights only in a few points and predominantly in areas where it resembles public attitudes and follows social developments. It seems that human rights tribunals more often follow the attitudes of the majority than the core task of human rights which there is to protect the individual and minorities against unjustified interferences by the majority, no matter – as John Stuart Mill put it – how big the majority and how strong its moral rejection and repulsion of the acts, attitudes and values of the minority or the individual might be. Interferences solely based on the views of the majority Mill called a “betrayal of the most fundamental values of the political theory of democracy”.

One could formulate it provocatively in saying that the most noble task of human rights, namely to protect the weak against the strong, minorities and the individual against the majority, is fulfilled only if an even bigger majority allows for it.

So while – as compared to other parts of the world, i.e. to the U.S. – there is relatively well established liberty and equality in sexual affairs in Europe (in the Netherlands the lower house of parliament these days even passed a law opening up civil marriage for same-sex partners),

human rights law seems to provide just limited protection of this freedom; and as can be seen from this overview nearly exclusively on the European, not the national level.

In that sense we can indeed be anxious for the decisions in the awaited human rights claims against last years's reintroduction of the total criminal ban on sex against remuneration in Sweden and against the upcoming general criminal ban on the depiction of nudity of legal intimate partners, even if this depiction is taken non-commercially and in the privacy of the home and not even intended for distribution, even if taken by adolescents themselves; a ban prescribed by the recent additional protocol to the International Convention on the Rights of the Child.