Sexual Consent & Human Rights

Comments to presentations at session 8:
Cross-Disciplinary Perspectives on Age and Sexual Consent,
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The central idea of human rights is *uniqueness and autonomy of the individual*. Or as the German Constitutional Court (BVerfGE 7, 198; 48, 127 [163]; 49, 286 [298]) 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 human 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* on the one hand and the right to be free and protected from *unwanted sexuality,* from sexual abuse and sexual violence on the other. 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. If you further one side over the other you are violating human rights.

It is the task of lawmakers and of legal practitioners to find a *reasonable balance between these two sides of the coin "sexual autonomy"*. This task is sensible and difficult. It is as noble as overwhelmingly important, i.e. in respect to young people to whom we have to pass on the ideals and values of respect for dignity and autonomy.

This is not only what I am saying. This is what the *European Court of Human Rights (ECtHR)* (http://www.echr.coe.int) is saying. It is exactly that conception of sexual rights which appears in the case-law of the ECtHR. It finds an obligation for legislatures to employ the criminal law, as the ultimate and strongest weapon a state has, where this is necessary for effective deterrence of violence and abuse (*X. & Y. vs. NL* 1985; *Stubbings & Others vs. UK* 1996). And it finds a right to being effectively protected by state agencies against violations of sexual integrity (*Z. & Others vs. UK* 2001; *E. & Others vs. UK* 2002; *M.G. vs. UK* 2002). At the same time the Court makes it utterly clear that the individual has a fundamental right to sexual autonomy, to sexual self-determination (*L. & V. v. Austria* 2003; *S.L. v. Austria* 2003; *Dudgeon vs. UK* 1981; *Norris vs. Ireland* 1988; *Modinos vs. Cyprus* 1993; *Laskey, Brown & Jaggard sv. UK* 1997; *Lustig-Prean & Beckett vs. UK* 1999; *Smith & Grady vs. UK* 1999; *A.D.T. vs. UK* 2000; *Fretté vs. France* 2002). And this right is *not restricted to adults.* The Court awarded an adolescent 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) (*S. L. vs Austria* 2003, par. 52).

In striving for the right balance between the two sides of sexual autonomy *European states* set the minimum age limit ("age of consent") for sexual relations *between 12 and 16 years of age* (with the only exception of Northern Ireland with an age limit of 17, which the British Medical Association repeatedly has been calling for to be reduced to 16), most of them establishing an age of 14 or 15 (Graupner 2004). In nearly 1/2 of the European jurisdictions

consensual sexual relations of/with 14 year old adolescents are legal; in almost 2/3 of/with 15 year olds (Graupner 2004). If you look at those countries which have a high limit of 16 the characteristics of these is that they have a flexible system with ample opportunities for screening out love-relationships and other non-harming consensual contacts while the jurisdictions with a limit of 12 or 14 tend to be those having a strict law enforcement policy with little power of discretion on the part of law enforcement agencies and with little attention to the will of "victim" (Graupner 2004).

The European Convention of Human Rights allows inferences with private life, including sexual life, only if it is *necessary in a democratic society* (Art. 8). Given the European consensus in this area it seems that states enjoy a margin of appreciation in setting the minimum age limits for sexual relations; a margin between 12 and 16.

No age limit or one under 12 years of age would appear as a human-rights violation for lack of protection against abuse and unwanted sex.

A general minimum age-limit for sexual relations *as high as 16* seems to be compatible with human rights only if it allows for screening out of love-relationships and other non-harming consensual contacts. In that respect it has to be born in mind, what the German Federal Constitutional Court stresses, namely that the right to self-determined decisions of young people do increase in as much as their ability to self-determination surmounts their need to education (BVerfGE 47, 46 (74) = NJW 1978, 807). A principle which also expresses the Convention on the Rights of the Child, which stipulates: "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." (Art. 12).

A general minimum age-limit for sexual relations *higher than 16* seems excessive, and with due regard to European consensus, as not necessary in a democratic society.

To be clear: what I have said above refers to general minimum age limits for sexual conduct only. It does not refer to contacts in relations of authority and it does not refer to pornography and prostitution.

One very crucial element of justice is that laws are sound and consistent (ECtHR: *X. & Y. vs. NL* 1985; *B. & L. vs. UK* 2005). This means in the area discussed here that a minimum age limit for sexual contacts ("age of consent"), wherever it may be fixed, should be the same as (or at least not higher than) the *age of criminal responsibility*.

If you punish an adolescent for raping a woman you cannot on the other hand say that he is too immature to consent to wanted sex with the same woman. Or if you consider an adolescent not to know (enough) what sex is about, so if you are therefore considering a woman abusing him if she engages in consensual sex with him: how could you hold him liable for raping the same woman if she does not consent to sex with him?

If, for instance, the age for criminal responsibility is set at 14 and at the same time the minimum age limit for sexual contacts ("age of consent") at 15 (or even higher) that would have the effect that two 14-year-olds having consensual sex with each other would both be sex offenders and, at the same time, both be victims of the other; both would be *perpetrators and victims vis a vis each other (!) at the same time.*

This can hardly be considered a fair balance. It is unreasonable, it is absurd and it is unjust. It is a serious violation of human rights.

The vast majority of European jurisdictions set the age of consent for sexual relations not higher then the age responsibility, most set the same age for both (Graupner 1997).

When we are striving for a fair balance between both sides of sexual autonomy we have to take care of one important rule which follows from dignity, uniqueness and autonomy of the individual and which is repeatedly stressed in the case-law of the European Court of Human Rights (*L. & V. v. Austria* 2003; *S.L. v. Austria* 2003; *Dudgeon vs. UK* 1981; *Norris vs. Ireland* 1988; *Modinos vs. Cyprus* 1993; *Lustig-Prean & Beckett vs. UK* 1999; *Smith & Grady vs. UK* 1999; *A.D.T. vs. UK* 2000; *Fretté vs. France* 2002; *Christine Goodwin vs. UK* 2002; *I. vs. UK* 2002).

Moral convictions alone are no reason for restricting the sex lives of others. No matter how strong others disapprove of your behaviour. This, in itself, is no legitimate ground for state intervention. Not if it is a majority which holds these moral convictions. And not if even all other people are holding these convictions.

We have to protect people from being degraded to objects of abuse and violence. And we have to protect them from being degraded to objects of moral convictions of others. If we succeed in achieving both of these objectives we will have made an important contribution to the pursuit of happiness of all of us (children, adolescents, adults), also in our sexual lives.

For more detailed discussion see:

Graupner, Helmut (1997). *Sexualität, Jugendschutz & Menschenrechte - Über das Recht von Kindern und Jugendlichen auf sexuelle Selbstbestimmung (Sexuality, Youth Protection & Human Rights – On the Right of Children and Adolescents to Sexual Self-Determination),* 2 Volumes, Peter Lang: Frankfurt,M/Berlin/Bern/New York/Paris/Vienna.

Graupner, Helmut (2004), *Sexual Consent – The Criminal Law in Europe and Outside of Europe*, in: Helmut Graupner & Vern Bullough (ed.), *Adolescence, Sexuality, and the Criminal Law: Multidisciplinary Perspectives* (p. 111-164), co-published simultaneously as Journal of Psychology & Human Sexuality, Vol. 16, No. 2/3 2004.

Graupner, Helmut (2005), *Sexuality and Human Rights in Europe*, in: Helmut Graupner & Phillip Tahmidjis (ed.), *Sexuality and Human Rights – A Global Overview* (p. 107-139), co-published simultaneously as Journal of Homosexuality, Vol. 48, No. 3/4 2005.