The Criminal Law:
Stale Ground or Still a Serious Battlefield?

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Ladies and Gentlemen!

The Criminal Law – Stale Ground or Still a Serious Battlefield? I have been inspired to this topic for my paper when recently I have been confronted with the opinion of an old and esteemed colleague in gay rights activism that the lesbian and gay movement today should concentrate its resources to breaking new ground rather than covering again the old ground of the criminal law.

I have been quite amazed by this view and I consider it to be wrong and, to be honest, not only wrong but fairly dangerous. With this paper I gonna try to explain why.

Just slightly more than 200 years ago sexual relations between persons of the same gender could and in fact have been punished with the severest penalties. From the late antiquity until the French Revolution homosexual behavior was a criminal offence all over Europe in most cases liable to death by burning alive.

Three revolutions brought the change.

The exponents of the Enlightenment did not consider homosexuality as equal to heterosexuality, not even as approvable, but they opposed criminal persecution as violating innate individual human rights. Homosexual relations have been viewed as a vice or a mental illness but not anymore as a crime.

This new thinking has first been implemented in Austria where emperor Joseph II in 1787 removed capital punishment for homosexual contacts and lowered the sanction to a maximum of one month imprisonment. He did however not decriminalize homosexuality.

That was the feat of the *French Revolution* which did away with all criminal sanctions for homosexual behavior. Napoleon then disseminated this law reform over large parts of the continent. All countries which took over the Napoleonic Criminal Code (Code Napoléon) did lift the ban on homosexual relations in the course of the 19th century with the effect that homosexuality has not been mentioned in the criminal law anymore, that homo- and heterosexual contacts have been treated completely equal. Special laws or offences for homosexual contacts whatsoever, such as higher minimum age limits, a ban on homosexual prostitution only or stiffer penalties for homosexual acts in public or homosexual violence did not exist. And the minimum age limits (equal for hetero- and homosexual relations) have been set remarkably low, in most of these countries between 11 and 14.

In those countries however not having come under the influence of French (Napoleonic) penal law homosexuality remained a criminal offence. Decriminalisation in the 19th century thus was limited to the Roman law countries and their sphere of influence.

The 20th century then in its first six decades has been marked by two inconsistent lines of development.

On the one side those countries, which decriminalized homosexuality during the 19th century, reintroduced discriminatory special criminal offences for homosexual behavior, in most cases higher minimum age limits. There are only two countries in Europe which decriminalized in the 19th century already and hitherto without reintroducing any discriminatory special provisions whatsoever have been treating homo- and heterosexual relations completely equal (as far as concerns their criminal law): Turkey and Italy. There where however also only four countries in Europe which turned all the way back to a total ban: Portugal (1912-1945), Spain (1928-32), Serbia (1929-1994) and Romania (1948-1996).

On the other side the *Russian Revolution* which led to the lift of the total ban in the USSR in 1918 triggered off a second wave of decriminalization in Europe this time affecting also jurisdictions outside the Roman law area: Denmark (1930), Poland (1932), Iceland (1940), the

German-speaking cantons of Switzerland (1942), Sweden (1944) and Greece (1950). But among these only the USSR and Poland did introduce full equality. All the others kept special provisions, mostly higher minimum age limits, for homosexual relations. Among the countries of this second wave only the USSR did take steps back from its reform: in 1934 Stalin reintroduced the total ban on homosexuality.

The third and most effective wave of decriminalization came with the *Sexual Revolution* in the sixties. After Czechoslovakia (1961) and Hungary (1961) and jurisdictions as important as the English (1967) and the German (GDR: 1967; FRG: 1969) lifted the ban ever more countries decriminalized homosexual relations, a process at the end of the past century speeded up by the dismantling of the Eastern bloc and the democratization of its former member countries. At the same time – beginning in the sixties - the Roman law countries again repealed the discriminatory special provisions reintroduced during the first half of the 20th century and returned to full equality. With time also most of the other European jurisdictions (outside the Roman law area) did away with special provisions for homosexual relations so that today no member state of the EU, only one in the COE and three jurisdictions all over Europe still have a total ban on homosexuality. Just five of the 15 EU-member states, 13 of the 41 members of the COE and just 24 of all 57 jurisdictions on the whole European continent have any discriminatory special criminal law provisions whatsoever. Table 1.

So the great majority of jurisdictions in Europe did establish full equality between hetero- and homosexual behaviour within in the Criminal Law Legislation. So is it true that the Criminal Law has become stale ground as regards lesbian and gay rights, that all problems in that area have been solved so that we can put it aside and concentrate on other issues? I do not think so.

The great majority treats homo- and heterosexuality alike but as you can see from the table distributed around there still remains a considerable minority of jurisdictions which do continue to keep discriminatory Criminal Law provisions; as bans on, solely same-sex, prostitution, bans on same-sex group sexual activity only, bans on solicitation, advertising, proselytising of same-sex sexual activity only and in most of these countries: higher minimum age limits for homosexual relations than for heterosexual contacts.

And in some of these countries these laws are strictly and vigorously enforced, even within the European Union. As an example my home-country detains about a dozen men in its

penitentiaries solely on the basis of the infamous anti-homosexual Art. 209 CC which makes consensual sexual relations with 14 to 18 year old young man a felony while heterosexual and lesbian relations with juveniles in the same age-bracket are completely legal. Some of these men even are detained in institutions for mentally abnormal offenders, potentially for life. All of these men are prisoners of conscience within the mandate of amnesty international and just one day before I left Vienna the case of a 26 year old young man who had been deprived of his driving licence for two years solely for having consensual sex with a 16 year old juvenile caused an outcry in Austrian media. In this case the police authority of first instance as well as – on appeal - the prime minister of the Austrian province of Lower Austria explicitly did justify their decisions by saying that "a felony according to Art. 209 CC is at least as serious and abominable as the crimes of rape, sexual abuse of children and trafficking in humans". While such decisions now regularly are accompanied by public media outcries the government staunchly adheres to the discrimination.

Apart from these remaining areas of discrimination and persecution we can notice well established equality between hetero- and homosexual behaviour, but also relatively well established liberty in sexual affairs generally in Europe.

The French Revolution did away with 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. 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.

That is not a matter of course as becomes clear when we draw a comparison to the U.S..

It was 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 millenia 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 pre-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".

That sounds good, of course, but it seems not as good as it sounds.

Sexual autonomy and sexual self-determination of discerning people, while granted in most parts of Europe, still enjoys just limited protection by human rights law. Only total bans on homosexual behaviour, also if consisting in consensual group sex activity, have been declared unacceptable by the European Court of Human Rights. All other areas of the Criminal Law still are battlefields in the sense of human rights protection.

Of course there is the Sutherland-Case where the European Commission of Human Rights clearly ruled higher minimum age limits for homosexual activity than for heterosexual one to be in violation of Art .14 of the Convention. It is however a report by the Commission and not a (binding) judgment by the Court. And the Court generally does not seem to be very much impressed by the case-law of the Commission and does not in any way feel to be bound, in what way ever, by its decisions.

It is true that we can draw very strong arguments from the recent judgments of the Court in the British army cases and the Portuguese custody case but we should be more than cautious to draw the conclusion that the issue has already been settled. The Szivarvaný case of last year so painfully demonstrates that it clearly is not.

In 1996 the Hungarian Constitutional Court declared constitutional the ban on gay (rights) organisations which do not restrict membership to persons over 18. In its reasoning the Court spoke of adolescents as "children" (whereas no language in the world ever used the term "child" for persons after their early teens) and considers membership in gay or lesbian (rights) organisations to involve concrete risks endangering the development of the "child". The state had to protect the "child" from taking risks in connection with which, because of his/her age (presumed to correlate with physical, mental, moral and social maturity), he/she is not able get to know and evaluate either the possibilities or the consequences of his/her choices for his/her own personality, later life and social adaptation. Also lesbian, gay and bisexual adolescents would have to go along with the age limit "exactly in the interest of minors of the same age group which is to be protected". According to the Hungarian Constitutional Court the setting of an age limit for membership primarily protects the responsible and mature decision of those who will bear the consequences of their decision for their whole life.

The (potential) founders of the gay organisation involved applied to the European Court on Human Rights which delivered its decision on 12th May 2000 (Szivárvány, Juhász & Palfy vs. Hungary, appl. 35419/97). In this decision the Court declared the application as being manifestly ill-founded and therefore inadmissible. The reasoning of the Court confines itself to the statement that the ban of persons under 18 from membership in gay (rights) organizations was prescribed by law, pursued the legitimate aims of protection of morals and the rights and freedoms of others, and that the inference (the ban) was proportionate to the aim pursued and could, therefore, reasonably be regarded as necessary in a democratic society. Mere repetition of the criteria a law has to fulfil to be in conformity with the Convention. But no reasons why these criteria should be fulfilled. And moreover the Court even departed from its hitherto case-law (starting with the Handyside-Judgement 1976) which established that an inference for being qualified as being "necessary in a democratic society" there must be a "pressing social need" for the inference in questions and a relationship of proportionality between the means employed and the aims sought. In the current decision the

Court does away with the requirement of a “pressing social need” for the inference and lets a relationship of proportionality suffice.

The decision is not only deplorable in its core area, the right of association (Art. 11 ECHR)) (e.g. l/g/b youth groups can now be banned by law!!), but also is bad news for the age of consent cases currently pending before the Court. It seems not clear if the applicants, besides the Art. 8 argument, made an equality argument (Art. 14) as well but nevertheless this decision lets fear for the age of consent cases since on the one hand the Court does not feel itself to be bound by the legal qualifications of the parties and on the other hand the reasoning of the Hungarian Constitutional Court, upheld by the European Court of Human Rights, painfully reminds of the traditional justifications put forward to defend discriminatory age of consent regulations: that homosexuality were the result of a decision, that such a decision involved concrete risks for personality, later life and social adaptation, that it had consequences which had to be borne for the whole remainder of one’s life and that therefore minors have to be banned from taking such potentially dangerous decisions …

I am nevertheless hopeful for the pending age-of-consent cases and I expect the Court to find a violation of the Convention. I am just warning to think that all would have been done already.

Even more problematic than equality cases seem to be other gay rights issues in the field of Criminal Law.

Gay rights are not just equality rights. The central idea of human rights is the uniqueness and the 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 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 lesbian and gay rights, as being fundamental rights in the area of lesbian and gay life, would be understood as the guards of human sexual dignity of gays, lesbians and bisexuals, as manifestions 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.

The European Court of Human Rights, in its case-law under Art. 8, basically acknowledges that basic right to sexual autonomy and sexual self-determination. Besides the clearly decided cases of total bans of couple- or groupsex activity the exact construction of this fundamental right by the Court however still remains unclear. There are no judgments yet on the area of public cruising, on solicitation, on pornography or prostitution.

In the area of S/M the Court even already issued a negative judgment. In the Laskey, Brown & Jaggard judgment of 1997 it did not find a violation of the Convention despite the fact that the adult plaintiffs had 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 even did not at all address the equality arguments, also not in relation to sportsevents regularly inflicting more than transient injuries as for instance boxing …. .

The leading judgments of the Court in favor of sexual equality and autonomy, sometimes even expressly, are 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. And if it comes to areas where still is less public acceptance, to the "hot cases", the Court seems to be cautious.

Thus however it runs the risk to protect sexual rights only in a few points and predominantly in areas where it resembles public attitudes and follows social developments. That however would mean to follow the attitudes of the majority rather 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 by 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.

While it might be that under a system of international human rights protection it has to be the way to secure general acceptance of the system by the member states it definitely need not to be so on the national level. Apart from the Swiss Federal Court, which put prostitution under the protection of the right to pursue a profession, and the Austrian Constitutional Court, which put sexual acts against remuneration (not amounting to prostitution) under the protection of the right to respect for private life, I do not know of any decision of a final national court granting fundamental law protection to sexual autonomy and self-determination.

Recent developments however highlight that such protection would strongly be needed.

Sweden recriminalized prostitution in 1999 thereby – as regards homosexual acts – being the first country in Europe since 1948 which recriminalized (some kinds of) homosexual acts between consenting adults.

Another example is the recent Proposal of the EU-Commission for a Council Framework Decision on combating the sexual exploitation of children and child pornography (O.J. C 62 E/327, 27.02.2001). While inspired by the most noble task to protect the most vulnerable members of our society against abuse and violence the proposal conflicts with both sides of the right to sexual autonomy, to sexual self-determination. It does not adequately and effectively protect the impuberal child against sexual abuse since it does not prescribe minimum age limits for sexual contacts at all thus letting it open to the member states to even basically legalize sex with impuberal children (even by adults). On the other hand however it prescribes unacceptably strong restrictions to consensual sexual activity of adolescents.

The draft framework decision labels all persons up to the age of 18 (!) as “children” (!) and obliges member states to criminalize (a) to “induce” such a “child” into sexual contact and (b) not only to grant money or other items of economic value” for sex with such a “child” but also any “other form of (non-economic) remuneration” what ever “non-economic remuneration” might be. It seems evident, that such offences conflict with the right to sexual-self-determination. They seem to be nothing else than a reintroduction of old “seduction” and “corruption”-provisions of former times which not only incomprehensively punished the setting of an initiative to a sexual relation but also led to moralistic enforcement. And offences so vaguely termed as “non-economic remuneration” put every, also consensual sexual contact under suspicion. It has to be noted that the proposal of the Commission even obliges the States to make those offences also applicable for sexual contacts between adolescents. So a 15 year old boy would be made a sexual offender if he “induces” a 17 year old girl to have sex with him!

No national law in Europe goes so far.

Also in the area of “child”-pornography the Commission goes to far. It prescribes a general criminal ban on the depiction of nudity of legal intimate partners up to the age of 18 (!), 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 for fun.

While the offences proposed, if they really become law, would infringe the sexual autonomy and self-determination of adolescents and their partners, it is moreover not hard to imagine how in many states such offences would be enforced in the case of heterosexual relations, and how they would be enforced in the case of homosexual relations ….

So coming back to the title of my paper I would answer that question that the Criminal Law still is a serious battlefield. It is so for three reasons.

First because there is still considerable persecution under discriminatory criminal laws in some areas in Europe.

Second because there is not yet well established comprehensive human rights protection against infringements of sexual autonomy, self-determination and equality by the Criminal Law.

And third, despite the relative freedom and tolerance as regards sexual life in large parts of Europe there is no guarantee against backlashes to old moralistic criminal law legislation in new clothes.

Given that current human rights protection seems to be especially week against gender and sexual orientation neutral restrictions of sexual autonomy we should be watchful that we won't end in equality in constraint.

Equality in liberty is what each human being deserves. It would be a mere shadow of lesbian and gay rights if we would construe them solely around equality rights. It would mean that same-sex marriage would have to be allowed while sex outside marriage could be made a criminal offence.

But the suffering of lesbians, gays and bisexuals can not be acceptable out of the reason that heterosexuals might suffer as well.

To sum it up: we have to continue keeping an eye on the Criminal Law unless we might end up with a society allowing socially conforming same-sex couples to marry while sending the Oscar Wilds of our days to jail.

Helmut Graupner
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Table 1

Homosexuality in the Criminal Law

General Ban	(Other) Discriminatory Provisions	Equality
Bosnia-Herzegovina	*Albania*	***Finland***
Georgia	***Austria***	Monaco
Cosovo	*Bulgaria*	*Latvia*
	Belorus	***Sweden***
	Cyprus	*Malta*
	Estonia	*Russia*
	Färöer	*Ucraine*
	Gibraltar	*Czech Republic*
	Greece	*Slovak Republic*
	Guernsey	***Italy***
	Hungary	***Luxemburg***
	Ireland	Montenegro
	Isle of Man	***Spain***
	Jersey	*Turkey*
	England & Wales	*Norway*
	Serbia	
	Scotland	***Denmark***
	Moldova	***Germany***
	Northern Ireland	*Switzerland*
	Portugal	*Andorra*
	Romania	***France***
		Netherlands
		Belgium
		Slovenia
		Poland
		Greenland
		Iceland
		Vatican
		San Marino
		Vojvodina
		Macedonia
		Croatia
		Liechtenstein (1)
		Lithuania (2)

Italics: Members of the Council of Europe
Bold: Members of the European Union
(1) Passed by Parliament, not yet in force pending publication
(2) Passed by Parliament, not yet in force pending implementation legislation