Human Rights Violations On Grounds of Sexual Orientation

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Unlike than in large other parts of the world throughout history, since the Middle Ages in the whole of Europe and Northern America, and in their colonies, up to the 18th century sexual contacts between persons of the same sex have been a capital offence which regularly has been sanctioned with burning alive.

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 and respected universally.

But is that so?

The French Revolution led to the repeal of criminal bans on homosexuality but that did not mean that same-sex relations have become tolerated or even accepted. Illness substituted crime. Perpetrators became patients, jail changed into psychiatry, and prisoners turned into lunatics.

It was not before the second half of the 20th century that this attitude changed.

And the law followed even more slow.

It is true that today in Europe there seems to be no jurisdiction anymore with a total criminal ban on homosexuality, but in all the other continents a very large number of states, nearly 100, still do criminalize homosexual relations. In many of those states homosexual contacts even do incur capital punishment and in many more extra judicial killings of lesbians, gays and bisexuals are widespread.

And even among those jurisdictions which abolished the total bans quite a number still have discriminatory criminal laws, i.e. as regards the age of consent, sexual acts in public, pornography, prostitution and sexual violence and abuse. Certain sexual contacts either are illegal and criminal only when homosexual, or the maximum and minimum sanctions set by the law are much harder for homosexual offences than for equivalent heterosexual offences. In addition criminal laws often are enforced much stricter when it comes to same-sex contacts.

Even when the criminal law discrimination ends, that does not necessarily end discrimination experienced by homo- and bisexual women and men. Then the state does not persecute himself anymore, but violence, harassment, discrimination and other injuries inflicted upon homo- and bisexual people in society do not end automatically.

Under international human rights law states not only have to refrain from persecution and discrimination themselves. They also have an obligation to positively protect people against persecution, violence, harassment, discrimination and other injuries and damage inflicted on

individuals by other individuals. Be it in the area of employment, of housing, of social security, of supply with goods and services or whatever field of every-day-live.

Quite a number of jurisdictions in fact have enacted anti-discrimination laws combating such individual-to-individual discrimination. But in the great majority of states homo- and bisexual people are still deprived of such a protection against discrimination which comes, not from the state, but from other individuals.

The third issue, after decriminalization and protection against discrimination, is legal recognition of partnerships.

Traditionally same-sex couples are strangers before the law with often dramatic consequences.

The surviving partner can be evicted from the rented house after the death of the partner. Very often binational couples have no way whatsoever to (legally) live a joint life. Visitation rights in hospital are often denied. Most often there are no statutory inheritance rights in the absence of a will what leads to the whole estate going to far relatives or to the state, thus not seldom leaving the surviving partner with nothing. Even if the partner inheritates he or she – due to being treated like a stranger - often has to pay confiscatory amounts of inheritance tax. Same-sex couples have no access to public housing and other social benefit schemes, and many many more such examples could be enumerated.

More and more jurisdictions now are recognizing same-sex couples, some even made civil marriage available to them and allow joint adoption of children, but in the vast majority of states world-wide same-sex partners still are strangers before the law.

Many things have been achieved however.

The European Court of Human Rights not only held that total bans on homosexual contacts are violating the right to respect for private life, also when more than two persons take part in those contacts, but also declared discriminatory age of consent provisions as violating fundamental human rights. It declared the exclusion of gay men from the armed forces as unacceptable as unequal treatment in the area of custody for children. The Court explicitly

considers discrimination on the basis of sexual orientation as serious as discrimination on the basis of race, colour, religion and sex. For distinctions on the basis of sexual orientation to be justified the Court requires particularly serious reasons. Predisposed bias on the part of a heterosexual majority against a homosexual minority cannot, as the Court repeatedly expressly held, amount to sufficient justification for the interferences 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. Repeatedly the Court obliged discriminating states to pay considerable sums of compensation to homo- and bisexuals whose fundamental rights have been violated.

Also the United Nations Human Rights Committee decided that a total ban of homosexual acts does violate international human rights law. In addition it asked for the repeal of discriminatory age of consent laws, as did the UN-Committee on the Rights of the Child. A study commissioned by the UN-Human Rights Commission's Sub-Commission on Prevention of Discrimination and Protection of Minorities called not only for decriminalization and equal ages of consent but also suggested to make discrimination against an individual because of sexual proclivity to be made punishable by law.

A number of national Supreme and Constitutional Courts even went further and recognized the fundamental rights of same-sex couples to be treated on an equal footing with opposite-sex couples, even as it comes to civil marriage and to joint adoption of children.

The Council of Europe and the European Union made the termination of criminal law discrimination of homo- und bisexuals one of the prerequisites for states in joining those organizations. And the Parliamentary Assembly of the Council of Europe repeatedly condemned discrimination on the basis of sexual orientation as being "especially odious".

Those successes in litigation on the one hand and through work for law reform at the parliamentary level on the other would not be possible without knowing discrimination and its extent, given that conviction is widespread in our societies that homo- and bisexual women and men do not suffer relevant discrimination anymore.

Homosexuals, as the Parliamentary Assembly of the Council of Europe put it in 1981, have been suffering from century old prejudice.

Knowledge is the first enemy of prejudice.

And that is why events, as this one, are so important. That, despite considerable achievement in some parts of the world, we will never forget how many lesbian, gay and bisexual women and men still have to suffer throughout large parts of our planet.