Human Rights for Human Sexuality

Success and Failure of Human Rights Law in Securing Sexual Rights

Paper presented at the 5th Congress of the European Federation of Sexology (Berlin June 29-July 2, 2000)

by Helmut GRAUPNER, JD
(www.graupner.at)

Human rights law consists of national law and international law. It is written into national constitutions and codified in international declarations and conventions. And it is case-law developped by courts and other judicial bodies in interpreting and enforcing these norms.

Written human rights law however 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 national constitutions now expressly do ban discrimination and unequality on the basis of "sexual orientation". South Africa was the first in 1996 and Ecuador and Fiji followed in 1998. Since last year one of the Europen Union treaties also expressly empowers the Council of Ministers of the Union to act against discrimination on the basis of "sexual orientation", and quite a big number of jurisdictions 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 guarantuee 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 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 "medal" 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 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 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 medal, the right to sexuality, it was in the US 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 change its mind. And today not having a ciminal ban on homosexual relations is even a condition for admission to the Council of Europe and the Parliamentary Assembly of the Council of Europes calls discrimination on the basis of "sexual orientation" "especially odious".

The Convention organs constantly in their case-law refer 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 a violation of the Convention. Also in Canada it was as late as in the nineties of the past century that the courts 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. And 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 this 14 year old girl-friend.

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, mostly at 14 or 15 years. 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 auhtorities or any other means which would enable the screening out of cases where it is established that there was no abuse (for instance due to a small age bracket).

In the case of homosexuality human rights case-law in the meanwhile even steps beyond the area of the criminal law. The European Court on Human Rights last year declared the exclusion of lesbians and gays from the army as being a violation of the right to repsect for private life and custody-decisions on the basis of the homosexuality of one parent as unjusitified discrimination on the basis of "sexual orientation". And while the Supreme Court of Hawaii and the Alaska Superior Court ruled that the state would have to show a compelling state interest for restricting marriage to couples of different gender but have been stopped by

amendments to the state-constitutions., the Vermont Supreme Court decision that the exclusion of lesbian and gay partnerships from the rights and obligations of marriage violates human rights lead to the introduction of registered partnership for same-sex couples with almost the same rights and obligations as marriage in that state. Also the Canada Supreme Court during the Nineties startes to rule that the Canadian Constitution obliges the provinces to outlaw discrimination the basis of sexual orientation and that same-sex couples deserve the same rights and safe-guards as unmarried different-sex couples.

So as regards homosexuality there has occurred remarkable progress in human rights case-law. After constant rejection in the fifites, sixties and seventies, now human rights claims of homosexuals are more and more heard by the courts. Not just in Europe and Northern America. Also the South African and the Ecuadorian Constitutional Court invalidated a total ban on homosexual behavior in 1996 resp. 1998. And in 1994 the UN-Human Rights Committee decided so on a globel level on the basis of the International Convenant for Civil and Political Rights. Finally the Colombian Supreme Court in 1998 decided the exclusion of gay students from a denominational school and the expulsion of a teacher on the basis of his homosexuality as constituting a violation of the constitution and the South African Constitutional Court last year held the denial of family reunification for same-sex partners in violation of the principle of equality .

That progress however, sometimes even expressly, is based upon changing public attitudes towards the sexual behavior in question. 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 most 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 againt 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.

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.

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.

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; as this ban is prescribed by the additional protocol to the International Convention on the Rights of the Child.