

Sexuality and Human Rights in Europe

Helmut Graupner, JD

Austrian Society for Sex Research

Helmut Graupner (www.graupner.at), Doctor in Law (University of Vienna), is *Rechtsanwalt* (attorney-at-law), admitted to the bar in Austria and in the Czech Republic. He is Vice President of the Austrian Society for Sex Research (ÖGS) (www.oegs.net; www.courage-beratung.at) and President of the Austrian lesbian and gay rights organisation Rechtskomitee LAMBDA (RKL) (www.RKLambda.at); Vice President for Europe, International Lesbian and Gay Law Association (ILGLaw) (www.ILGLaw.org); Austrian member, European Group of Experts on Combating Sexual Orientation Discrimination working for the Commission of the European Union (<http://www.meijers.leidenuniv.nl/index.php3?m=10&c=98>); member, Scientific Committee of the Center for Research and Comparative Legal Studies on Sexual Orientation and Gender Identity (CERSGOSIC), Turin (www.cersgosig.informagay.it); member, Editorial Board of the Journal of Homosexuality (Haworth Press: New York, www.haworthpressinc.com); member, World Association for Sexology (WAS) (www.worldsexology.org); member, Expert Committee for the Revision of the Law on Sexual Offences, appointed by the Austrian Minister of Justice in 1996; 1996 & 2003, expert, Justice Committee of the Austrian Federal Parliament; 2002, lecturer, University of Innsbruck (“Sexuality & the Law”); 2001, Gay and Lesbian Award (G.A.L.A.) of the Austrian Lesbian and Gay Movement (http://www.hosilinz.at/presse/2001/011013_gala2001.html).

This essay is based upon a paper of same title presented at the *International Bar Association (IBA) 2000 Annual Conference* (Amsterdam, September 17th-22nd 2000). Last update: 11.01.2004.

Correspondence may be addressed: Rechtskomitee LAMBDA, Linke Wienzeile 102, A-1160 Vienna, Austria (E-mail: hg@graupner.at).

ABSTRACT. *Written human rights law in Europe is as scanty as in the rest of the world. Case-law however provides considerable protection of sexual rights. It guarantees comprehensive protection of autonomy in sexual life, also for minors, and provides protection against discrimination based on sexual orientation. Negative attitudes of a majority may not justify interferences with the sexual rights of a minority and society could be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them. Compensation for interference with sexual autonomy and freedom are awarded. This high-level protection (as compared to other parts of the world) is however limited. It seems to be granted only in areas where it corresponds with public attitudes and social developments. And it is seldom secured on the national level but nearly exclusively by the European Court of Human Rights, whose case-law is often weakened by inconsistency.*

KEYWORDS. *human rights, sexual rights, youth rights, sexual autonomy, sexuality, sexual freedom, sexual abuse, homosexuality, pornography, prostitution, marriage, sado-masochism, transsexuality, sex-education, European Court of Human Rights.*

HISTORY

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 the Rights of Man and the Citizen*” of 1789 established the principle that “liberty consists in being able to do all that does not harm others” (Art. 4).¹ 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 had been done away with. As a matter of course sexual violence and abuse of prepuberal children remained serious offences.²

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 suit, so that today in most of Europe – as a principle – consensual sexual relations, contacts and acts with consenting partners are no longer criminal offences.³

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. Are they?

WRITTEN LAW

Written human rights law is scanty when it comes to sexuality. There is nothing explicit on sexuality or sexual rights in the *Universal Declaration of Human Rights 1948*.⁴ The same is true of the global and regional human rights treaties elaborated on the basis of this Declaration, the *International Covenant on Civil and Political Rights*⁵ (ICCPR), the *International Covenant on Economic, Social and Cultural Rights*,⁶ the *European Convention on Human Rights (ECHR)*,⁷ the *American Convention on Human Rights* and the *African Charter on Human and Peoples' Rights*.⁸ Only the *Convention on the Rights of the Child of 1989*⁹ contains a limited reference to sexual rights when it obliges states to combat sexual exploitation.¹⁰

Until recently the situation at the national level was no different. Four state constitutions in *Germany* -- and *South-Africa*¹¹, *Ecuador*¹² and *Fiji*¹³ outside of Europe -- now expressly ban discrimination and inequality on the basis of “sexual orientation” or “sexual identity”.¹⁴ And the constitution of *Switzerland* of 1999 bans discrimination on the basis of a person’s “form of life”, which term is intended to include sexual life.¹⁵ Since 1998 Art. 13 of the *Treaty on the Foundation of the European Community (EC-Treaty)*, as amended by the Treaty of Amsterdam,¹⁶ expressly empowers the Council of Ministers of the European Union to act against discrimination on the basis of “sexual orientation”.¹⁷ In 2000 the Council of Ministers availed itself of this power by issuing a directive obliging the member states of the European Union to comprehensively ban sexual-orientation-based (direct and indirect) discrimination in employment and occupation.¹⁸ By now eighteen states in Europe have included “sexual orientation” as a protected category into their (non-constitutional) anti-discrimination legislation¹⁹ and also Art. 21 of the *Charter of Fundamental Rights of the European Union*, adopted in 2000, bans sexual orientation discrimination.²⁰

All these new references to sexual rights however are rather narrow and limited. The term “sexual orientation” or “sexual identity” usually is intended to refer to homo- and heterosexual orientation only.²¹ In addition those references are made in the context of equality-rights. That means that these constitutional provisions do guarantee equal treatment of homo- and heterosexual persons and behavior; but they do not say anything about the regulation of sexuality and sexual behavior that can legitimately be made in general. In other words: those rights do not protect against undue interference with sexual life as such, they just guarantee that such interferences burden heterosexuals and homosexuals alike and to the same degree. They usually also do not include gender identity issues.

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 sexual life. The fact is that this it is not expressly emphasized. But the general right to privacy and respect for private life,²² the right to equality and non-discrimination,²³ the right to freedom of expression and information,²⁴ the right to freely assemble and to form associations,²⁵ and, not least, the right to life²⁶ and the right not to be treated in a cruel, inhuman or degrading manner,²⁷ can also be used to protect sexuality and sexual rights.

SEXUAL RIGHTS

But are human rights in fact used to protect sexual life 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.²⁸ 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:

uniqueness and autonomy of the individual. Or as the German Constitutional Court²⁹ 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.³⁰

Following that suit “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 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 neither one neglected. Only then can human sexual dignity be fully and comprehensively respected.

CASE-LAW

It is exactly that conception of sexual rights which appears in the case-law of the *European Court of Human Rights* (ECHR).³¹ According to the Court the very essence of the Convention³² is respect for human dignity and freedom,³³ and the notion of personal autonomy is an important principle underlying the interpretation of the right to respect for private life.³⁴ Safe-guarding that respect has to be based upon present-day conditions and obligations arising from it have to be met at any time.³⁵ Attitudes of former times therefore may not serve as justification for lack of such respect today; moreover, states have to actively remove the negative effects which may materialize today as a result of such former attitudes.³⁶

Analysis of European case-law in the area of sexuality and sexual rights demonstrates that the Court in fact does protect both aspects of sexual autonomy; it also shows that such protection provided by national courts is poor.

Freedom from Sexual Abuse or Violence

With regard to the right to freedom *from* unwanted sexual abuse and violence the Court's conception of the Convention rights is central. The Court construes those rights as not only including the negative right to be left alone from state intervention but also the positive right to (active) protection of those rights, against the State as well as against other private individuals.³⁷ In addition, the Court does not restrict the right to "respect for private life" (Art. 8 ECHR) to the classical right to do what you want, but sees this right as a comprehensive personality right, including the right to physical and moral (psychological) integrity and security.³⁸

On that basis the Court held that, under Art. 8 ECHR, a State has to offer adequate protection against sexual abuse and violence; and that in grave cases it is even under a human rights obligation to use the criminal law for the purpose of deterrence.³⁹ The obligation under Article 6 ECHR to secure fair trial for persons accused of sexual abuse has to be balanced against the obligation to protect victims of abuse; defense rights may (and in some circumstances must) be reasonably limited in the interests of persons who are, or who are presumed to be, victims of sexual abuse.⁴⁰ The duty to protect however does not bar states from establishing a reasonable time-limit for bringing criminal charges and civil claims on the basis of sexual abuse (prescription).⁴¹

The obligation to protect extends not just to the criminal justice system but to the whole State, including the social welfare system. Measures should provide effective protection, in particular, of children and other vulnerable people. While acknowledging the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life, the Court obliges states to take reasonable and effective steps to prevent ill-treatment as soon as the authorities have or ought to have knowledge of the transgression.⁴² If authorities fail to do so, states are under a human rights obligation to acknowledge the failure and to compensate the victims. Compensation should in principle include redress for non-pecuniary damage.⁴³ The positive obligation to protect a person's private life also requires social services to grant a person access to her/his personal files if this person suspects having been abused as a child, even if this person is considering the possibility of suing the authority.⁴⁴

Abuse reaching the intensity of cruel, inhuman or degrading treatment⁴⁵ or even affecting life calls for particularly strong protection, as the Court classifies the rights to life and the prohibition of cruel, inhuman or degrading treatment as one of the most fundamental values of a democratic society⁴⁶ and ranks Arts. 2 and 3 ECHR as the most fundamental provisions of the Convention.⁴⁷ In addition the prohibition of cruel, inhuman or degrading treatment (Art. 3 ECHR) is absolute and does not allow for any exception. The test under Article 3 does not require it to be shown that "but for" the failure of the authorities ill-treatment would not have occurred; a failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.⁴⁸ If a condition of probation on a person convicted of sexual abuse of the child daughter of his cohabitee is to cease to reside with the family, the Court has held that the social services authorities are under the obligation to monitor the offender's conduct, i.e. compliance with the order.⁴⁹

As States are under the obligation to secure the Convention rights in all their actions (Art. 1 ECHR), they are barred under the Convention from deporting or extraditing someone to another country if there is a real risk that this person will be subjected there to treatment contrary to the Convention (such as sexual abuse)- be it by the foreign State or by private individuals against whom this State does not afford adequate protection, even if that country is not bound by the Convention.⁵⁰

Recently the Court rejected the notion that a person under the age of consent was always incapable of consent and that therefore sexual contact with such a person would be violent in each and every case.⁵¹ Not to equate sexual offences against children with crimes of violence in all circumstances does not deprive of protection of physical and moral integrity.⁵² The Court accepted that the applicant in question, at the age of 13 had been a willing, active participant in the sexual acts with a 53 year old man and sought to make money out of them. It was therefore not inconsistent with the acknowledgement of the applicant's vulnerable and damaged⁵³ character to find that he was not a victim of violence.⁵⁴

Freedom to Engage in Sexual Activity

With regard to the other side of the coin, the freedom *to* engage in consensual sexual activity, the case-law of the *European Court of Human Rights* and the *European Commission of Human Rights* is based on the understanding that the right to respect for private life (Art. 8 ECHR) enshrines the right to personal development,⁵⁵ to free expression and the development of one's personality,⁵⁶ and to establish and develop relationships with other human beings⁵⁷ especially in the emotional field for the development and fulfillment of one's own personality.⁵⁸ The purpose of the protection of private life lies in safe-guarding an area for

individuals in which they can develop and fulfill their personality,⁵⁹ and in securing the right to choose the way in which to lead sexual life.⁶⁰ Sexuality and sexual life for the Commission and the Court always has been at the core of private life and its protection.⁶¹ Also the *German Federal Constitutional Court* includes in the protection of the right to privacy the right of the individual to decide on his/her own views on sexuality.⁶²

State regulation of sexual behavior interferes with this right, and accord with the Convention only if justified under par. 2 of Art. 8 ECHR.⁶³ Also, regulations set by an employer are seen as such an interference if the State by its labour laws allows for such regulations.⁶⁴

The Court also indicated that public sexual behavior falls under the protection of par. 1 of Art. 8 ECHR.⁶⁵ This would be consistent with the concept of sexuality and sexual behavior as essentially private manifestations of personality. Sexuality is so central to one's personality that, as a general principle, it should come under the notion of "private life".⁶⁶ The decision whether private life is affected or not should not depend on whether the behavior takes place in public or in private. Examination of norms regulating sexual behavior in public, for instance to avoid annoyance, should always be done under par. 2 of Art. 8 ECHR, thereby avoiding major problems arising from the otherwise necessary decision of whether certain conduct in fact took place in private or in public.⁶⁷

Under the concept of positive obligations arising from the Convention rights⁶⁸ States must also protect against interferences from other private individuals. A State always comes under such an obligation when there is a direct and immediate link between the protection sought and private life. In the case of violence or abuse on the basis of someone's sexuality or sexual life this link is obvious. When it comes to refusal of access to premises, however, the

State, under Art. 8 ECHR, is under an obligation to act only if that lack of access interferes with the victim's right to personal development and the right to establish and maintain relations with other human beings.⁶⁹ So, if there are other places where the person discriminated against could turn to for the same purpose the state is not under a duty to act.⁷⁰ Applying these criteria in the area of employment would mean that if an employee is dismissed on the basis his/her sexuality, the State will have to act if the loss of employment seriously impairs the person in his/her intimate relations with other people (for instance as a result of lack of funds, or as a result of psychological problems); it will not be so if the measure has not such a detrimental effect.

The right to non-discrimination (Art. 14 ECHR)⁷¹ prohibits States, on non-objective and unreasonable grounds, to refuse social benefits on the basis of one's sexuality, particularly one's sexual orientation.⁷²

It is interesting to draw comparisons with the United States. It was there that courts for the first time used human rights law to secure 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 been declared unconstitutional by a court or repealed by the legislature. The courts started to act again in 1992 and the legislatures in 1993.⁷³ And in 1986 the US Supreme Court expressly decided that the states have a right to criminalize homosexual anal and oral intercourse since such a ban accorded with millennia of moral teaching.⁷⁴

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 to be compatible with the Convention until then,⁷⁵ 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.⁷⁶ 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 and the Court regarded this as decisive in its decision to depart from the earlier case law of the Commission.⁷⁷

As the Convention organs constantly in their case law refer to the legal consensus among the member States,⁷⁸ it is not surprising that it took them a lot more time to find a violation of human rights 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 until 1997 that the European Commission on Human Rights declared such unequal age limits to be in violation of the Convention,⁷⁹ and it took the Court until 2003 to do so.⁸⁰ On the national level the Constitutional Courts of Austria and Hungary, in 2002, struck down higher minimum age limits for homosexual contact as compared to heterosexual contact.⁸¹ While the Hungarian Constitutional Court based its decision on the view that the distinction between hetero- and homosexual conduct was not justified,⁸² the Austrian Constitutional Court struck down the law on a completely different basis. It did so on the ground that the offence was construed in a way that allowed for legal relationships (for instance between a 18 year old and a 16 year old) to become a criminal offence (for example, when the older partner turned 19), which the Court considered unreasonable and therefore a violation of the right to equality.⁸³

Also in the area of age-of-consent laws 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 as compared to 14 for all other sexual acts a violation of human rights,⁸⁴ in the USA that issue is still 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,⁸⁵ while the California Court of Appeals in 1998 ruled not only that such interferences are justified but also that minors do not “have a constitutionally protected interest in engaging in sexual intercourse” at all, thus exempting the legislature from the necessity of giving any reason for a ban on juvenile sexuality.⁸⁶ 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 girl-friend.⁸⁷

In Europe no such human rights cases on general age-of-consent laws are known,⁸⁸ most probably due to the fact that in Europe the general minimum age limits for sexual relations are much lower than in the USA. While in several US states minimum age limits for sexual contact often go as high as 17 or 18,⁸⁹ in one-half of the European jurisdictions, consensual sexual relations of and with 14 year old adolescents are legal, and in three-quarters with 15 year olds.⁹⁰ Just one European jurisdiction (Northern Ireland) outlaws consensual sexual relations of 16 year olds.⁹¹ 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,⁹² in spite of the fact that in the country in question – as opposed to nearly all other jurisdictions in Europe⁹³ – 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.⁹⁴ The Court however recently acknowledged the right of adolescents over the age of 14 years to sexual self-determination when it awarded an applicant 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).^{95 96}

It was not until recently that the Court issued a judgement dealing with group sexual activity. In 2000 it held that the British ban on group sex including gay male sexual activity violates the Convention.⁹⁷ What makes this judgment particularly remarkable is that the Court did not refer 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 group sex, which now can not be banned even if such a ban would cover heterosexual and homosexual group sex equally.

European human rights case law has also begun to step beyond the area of criminal law. In November 1998 the European Commission of Human Rights and the old European Court of Human Rights were replaced by a new permanent European Court of Human Rights.⁹⁸ This new Court has already issued major gay rights decisions beyond the criminal law. In September 1999 it declared the exclusion of lesbians and gays from armed forces to be in violation of the right to respect for private life.⁹⁹ And in December 1999 it ruled custody decisions (in part) based on the homosexuality of one parent constituted unjustified discrimination on the basis of “sexual orientation”.¹⁰⁰ In 2003 the Court declared unacceptable the eviction of a gay man from the flat he had shared with his deceased partner for years, while surviving partners of an opposite-sex couple enjoy a right of succession of the tenancy.¹⁰¹

So, with respect to homosexuality, remarkable progress has occurred in human rights case law. After constant rejection in the nineteen-fifties, -sixties and -seventies, human rights claims of homosexuals are now more and more heard by the courts. The Court today

explicitly considers discrimination on the basis of sexual orientation as unacceptable¹⁰² and as serious as discrimination on the basis of race, colour, religion and sex.¹⁰³ In the case of distinctions based upon sex or sexual orientation the margin of appreciation is narrow and the Court requires particularly serious reasons for such distinctions to be justified.¹⁰⁴ Measures involving a difference in treatment based upon sex or sexual orientation can only be justified if they are *necessary* for the fulfillment of a legitimate aim; mere reasonableness is not enough.¹⁰⁵

Predisposed bias on the part of a heterosexual majority against a homosexual minority cannot, as the Court has repeatedly held, amount to sufficient justification for interference 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.¹⁰⁶ Society could be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth “in accordance with the sexual identity chosen by them”.¹⁰⁷

Today not having discriminatory legislation against homosexuals, especially a criminal ban on homosexual relations, is a pre-condition for admission to the European Union¹⁰⁸ and to the Council of Europe.¹⁰⁹ The Parliamentary Assembly of the Council of Europe repeatedly condemned discrimination on the basis of sexual orientation as “especially odious” and “one of the most odious forms of discrimination”.^{110 111}

As States are under the obligation to secure the Convention rights in all their actions (Art. 1 ECHR), they also have to safe-guard those rights in deciding issues of deportation or extradition, even if the other country is not bound by the Convention.¹¹² If there is a real risk that the life of the person to be deported or extradited is endangered or that this person would be subjected to torture, or to inhuman or degrading treatment or punishment,¹¹³ deportation

and extradition are always inadmissible, because the rights to life (Art. 2 ECHR, Art. 1 Protocol No. 6) and the prohibition of torture and inhuman or degrading treatment or punishment (Art. 3 ECHR) do not allow for exceptions.¹¹⁴

If there is a real risk of treatment contrary to the Convention which does not reach such an intensity (as for instance simple imprisonment, limited in time, for consensual homosexual acts), and therefore such treatment “just” would affect other (not absolute) Convention rights, deportation and extradition is, in principle, also not admissible, but it could be justified. For such justification to be successfully invoked a government would have to show that all the conditions for dispense from the (negative or positive) obligations arising from the Convention right in question are met. In the case of threatening simple imprisonment, limited in time, for consensual homosexual acts (which interferes with the right to respect for private life, Art. 8 ECHR) for instance, justification affords that deportation or extradition, despite those conditions, is necessary for the achievement of one of the legitimate aims listed in par. 2 of Art. 8.¹¹⁵ Whereby “necessity” in this context is linked to a “democratic society”, whose hallmarks are “tolerance, pluralism, broadmindedness”,¹¹⁶ those hallmarks requiring that there is a pressing social need for the measure and that the measure is proportional to the aim sought to achieve.¹¹⁷ Unless a state could establish that deportation or extradition is so justified, for instance on public security grounds in the case of a seriously dangerous person, the threat of imprisonment for consensual homosexual acts should render deportation and extradition inadmissible.

The Court recently issued two important decisions on the right of freedom of religion (Art. 9 ECHR) when balanced against sexuality and sexual freedom. In 2000 it ruled that parents cannot object to sex education lessons in public schools on religious grounds, if such sex education is aimed at giving the pupils objective and scientific information about human

sexual behaviour, sexually-transmitted diseases and AIDS and if they were not a source of indoctrination in favour of a specific form of sexual behaviour.¹¹⁸ In 2001 the Court held that pharmacists could not rely on their religious beliefs or impose them on others to justify refusing to sell contraceptive pills, which are legally available for sale and, by law, can only be sold on prescription in pharmacies; there were many ways in which the applicants could manifest their beliefs outside the professional sphere, the Court emphasized.¹¹⁹

The Force of Public Opinion

Progress in human rights protection of the freedom to express one's sexuality, however, is based upon changing public attitudes towards the sexual behavior in question.¹²⁰ In the case of a total ban on homosexual relations, for instance, it took the repeal of laws in nearly all European states, triggered by three revolutions, the French, the Russian and the Sexual,¹²¹ before the Convention organs declared it a human rights violation; just a handful of countries still kept such a ban. The same is true for discriminatory age-of-consent regulations.¹²² If we consider areas involving less public acceptance, the situation seems much worse, with the case law less positive.

When it comes to *transsexualism*, for instance, the Court ruled in 1992 that under Art. 8 a State has to issue personal identification documents referring to the "new" sex of the person to protect that person's right to withhold from others the fact of gender reassignment.¹²³ But it constantly held that a State need not change the birth certificate itself, in spite of the fact that also this document also must often be presented to other persons and that nearly all European states allow(ed) for such alteration of the certificate.¹²⁴ The Court disregarded its own often practised referral to legal consensus in the member States of the Council of Europe. It took until 2003 for the Court¹²⁵ to acknowledge that, in the 21st century,

the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society could no longer be regarded as a matter of controversy requiring the further passage of time to cast clearer light on the issue. It obliged States to change birth certificates after gender-reassignment (under Art. 8 ECHR) and to allow for marriage with a person of the former sex (Art. 12 ECHR: right to marry).¹²⁶

Even more striking is the situation in the area of *sado-masochism* (*S & M*) where the Court 1997 did not find a violation of the Convention despite the fact that the plaintiffs have been convicted for totally consensual homosexual S&M acts without lasting negative effects or wounding, while the courts in their home country have declared heterosexual S&M acts legal, even when they involved acts as grave as branding of the buttocks. The Court, under Art. 8, merely referred to the legitimacy of outlawing even consensually inflicted injuries if they are more than just transient, and did not address the equality arguments under Art. 14, nor did it refer to sports events regularly inflicting more than transient injuries, such as boxing.¹²⁷

With regard to *pornography* there is only one case where the Convention organs found a violation. In 1993 the European Commission of Human Rights decided that the right to freedom of information (Art. 10 ECHR) includes the right of adults to view (gay) pornography in the backroom of a sex-shop where no one else can be annoyed.¹²⁸ However, this decision is rather narrow: it confines the right to view and show pornography in very limited circumstances: adults in a backroom where no-one else has access. This decision seems to endorse a concept of sexuality that is tolerable only if kept behind closed doors, and a view that sexually explicit material should be withheld even from sexually mature minors simply because they are a few months short of their majority.¹²⁹

Prostitution has been considered a human rights issue only by the Federal Court of Switzerland. It held prostitution to fall under the basic right to pursue a profession and to make earnings; as a consequence the legislature can regulate, but not totally ban, prostitution.¹³⁰ The Constitutional Court of Austria did not follow that approach and considered professional sexual acts outside the scope of human rights protection; but it did hold that sexual acts for remuneration (which are not yet commercial) do fall under the protection of the constitutional right to respect for private life and therefore cannot be banned.¹³¹ No other courts so far have recognized the right to sexual self-determination in the form of sex for remuneration.

The controversial issue of *adoption of minors by homo- or bisexual persons* was before the Court in 2002. All but two jurisdictions in Europe allowed single adoption by a homosexual person.¹³² Despite the fact that the applicant, who had been refused single adoption solely on the basis of his homosexuality, relied on that consensus, the Court alleged that domestic laws on adoption were very diverse and therefore States would enjoy a wide margin of appreciation, allowing them to ban single adoption by homo- and bisexual persons solely on the basis of their sexual orientation. That the question at issue before it was single adoption, and not other aspects of adoption. That there was the highest possible legal consensus among member States on that issue did not matter.¹³³

Same-sex marriage has constantly been considered not to be a human rights issue by the Court since 1986¹³⁴ and by the national courts so addressed.¹³⁵ Under Art. 12 ECHR “men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right”. So the right to marry is secured only “according to the national laws”; but this clause empowers States merely to establish the conditions and formalities for entering, and dissolution of, marriage. They are not allowed to

interfere with the very essence of the right, to bar people from marriage under any circumstances.¹³⁶ The Court did not see this essence of the right affected by a total ban on same-sex or transsexual marriage.¹³⁷ But recently it changed its position.

In 2002 the Court ruled the essence of the right to marry was impaired when a transsexual person, after gender reassignment, is not allowed to marry a member of her/his former sex.¹³⁸ The Court in this judgment acknowledged the human right to marry a person of biologically the same sex. It is only a very small step to also grant the right to marry a person who is not only biologically, but also genitally and socially, of the same sex, as the reasoning of the judgment equally applies to such cases as well.

The Court stressed the major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science;¹³⁹ and it rejected as artificial the argument that post-operative transsexuals had not been deprived of the right to marry because they remained able to marry a person of their former opposite sex. The Court emphasized that the applicant lived as a woman and would only wish to marry a man but had no possibility of doing so and could therefore claim that the very essence of her right to marry had been infringed.¹⁴⁰ Also as regards (fully) same-sex marriage, the institution of marriage has undergone major social changes and medicine and science have brought about dramatic changes. Equally artificial is the (often heard) argument that homosexuals are not deprived of the right to marry because they remain able to marry a person of the opposite sex. Homosexuals, using the line of argument established by the Court in the transsexual marriage cases, live with same sex partners and would only wish to marry a person of the same-sex; when they have no possibility of doing so, the very essence of their right to marry is infringed. The Court also stressed that the inability of any couple to conceive or be a parent to a child cannot be

regarded *per se* as removing their right to marry.¹⁴¹ Finally the Court noted that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women.¹⁴²

The Dutch Supreme Court and the German Supreme Court in their judgments of 1990 and 1993, while restricting the concept of marriage to opposite-sex couples, emphasized that not to recognize same-sex partnerships in any way in law would violate human rights.¹⁴³ As a result both States later introduced registered partnership for same-sex couples. The Netherlands in the meantime also opened up civil marriage for same-sex partners.¹⁴⁴

The Curse of Inconsistency

The protection the Court affords to sexual rights is considerably impaired by inconsistency in the Court's case law. Leading cases and constant case law are often ignored by the three-judges-committees ruling on *a limine* inadmissibility of an application.¹⁴⁵

Such a Committee in May 2000 *a limine* rejected the application of a *lesbian and gay association* which was *denied registration* on the basis that it did not exclude persons under 18 years of age from membership, while for heterosexual associations no such restriction was established. The Court denied examination of the application on the basis that the restriction was prescribed by law, pursued the legitimate aim of the protection of morals and the rights and freedoms of others and was proportionate to the aims pursued.¹⁴⁶ No more reasoning was provided despite the fact that the Commission three years before had found no justification for a minimum age limit of 18 for homosexual acts as opposed to 16 years for heterosexual

acts.¹⁴⁷ And this was despite the fact that the Court itself at that time had already found that discrimination on the basis of sexual orientation is unacceptable¹⁴⁸ and as serious as discrimination on the basis of race, colour, religion and sex,¹⁴⁹ and that predisposed bias on the part of a heterosexual majority against a homosexual minority cannot 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.¹⁵⁰ Shortly afterwards the Court declared admissible three complaints against a minimum age limit of 18 for homosexual acts as opposed to 14 years for heterosexual acts,¹⁵¹ found a violation¹⁵² and awarded an adolescent a considerable amount of 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.¹⁵³

In 2002 a Committee *a limine* rejected the application of a 16-year-old *gay adolescent*, who was diagnosed as sustaining a contusion of the head after he refused to name his sex partners during hours of interrogation by police detectives on the basis of an anti-homosexual criminal law.¹⁵⁴ The fact that the detention of the juvenile had been decided by a police official was also no problem for the Committee. According to the case law of the Court a human rights violation is established if someone incurs injuries while with the (police) authority, unless the authority provides a plausible different explanation for the injuries.¹⁵⁵ In addition the Court requires independent inquiries into such allegations and considers a lack of such independent inquiries to be a violation of the Convention as well.¹⁵⁶ The applicant proved that the contusion was sustained during his stay at the police department. Nevertheless the Committee decided not to deal with the application, merely stating that it did not find “any appearance” of a violation of the Convention.¹⁵⁷

Also in 2002 a Committee *a limine* rejected the case of a *gay man* who had proven his innocence regarding an anti-homosexual age of consent offence. Despite the proof of his innocence authorities refused to delete his data from the rogue's gallery (photos, finger prints, genetic data etc.) in the nation- and European-wide police databanks.¹⁵⁸ The man had been found sitting in a car chatting with two adolescents and therefore he would have to be considered a potentially "dangerous offender". The man complained to the Court in 1998 and before the Court dealt with the case, the data had been deleted due to the repeal of the anti-homosexual legislation in the home-country of the man. The Committee used this deletion (3 ½ years after the filing of the application and 7 years after storage of the data) to refuse to deal with the application. The applicant would already have been afforded relief on the domestic level, the Committee argued, so that he no longer could allege to be a victim of a violation of the Convention.¹⁵⁹

Again this decision goes against the constant case law of the Court, which established that a matter before the Court is only resolved (Art. 34, 37 par. 1 lit. b ECHR) when (a) the alleged violations of the Convention have been clearly acknowledged by the member State and (b) the victim has been afforded adequate redress for the violation.¹⁶⁰ If a matter can be resolved only on the basis that a human rights violation has ceased (here, by the deletion of the data), it would mean that an illegally detained person, for instance, could not file an application once s/he has been released; and a victim of torture could not complain because the torturer ceased to torture. The applicant expressly relied on the case law of the Court and the absurd consequences a different opinion would cause. He pointed to the fact that the member State never acknowledged that the storage of the data was in violation of the Convention and that he never received redress; even the costs and expenses of the applications to the national courts and to the Court he had to pay himself. Nevertheless the

Committee decided not to deal with the application without addressing the arguments of the applicant.

In 2003 a Committee again *a limine* rejected the application of a *gay man*. The man, under anti-homosexual legislation, had been sentenced to one year imprisonment for consensual caressing of the genitals of a 14-year-old male adolescent, conduct which was (and is) completely legal if the actions are heterosexual or lesbian. The man was referred to an institution for mentally abnormal offenders and had been released five months after the expiry of his one-year prison term. The national court, in 2001, released him upon 5 year probation, which period of probation was clearly prescribed by law. As the national court had no power of discretion, an appeal against the condition was futile. In addition, if the man appealed the decision, such an appeal would have had suspensive effect, causing him to spend even more months in the institution, solely due to his futile appeal. The applicant therefore decided not to appeal and applied to the Court complaining that he has not been released unconditionally. He relied on the consistent case law of the Court establishing the principle that remedies which have no prospect of success need not to be exhausted;¹⁶¹ he pointed out that the Court had held that the rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism and that it has further recognised that the rule is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case. This, according to the Court means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants.¹⁶² The applicant noted that according to the Court the Convention generally, as a treaty for the collective enforcement of human rights and fundamental freedoms, must be interpreted and applied so as to make its safeguards practical

and effective.¹⁶³ He also pointed out that the Court held that the burden of proof for non-exhaustion of domestic remedies is on the government.¹⁶⁴ The Committee nevertheless, without addressing his arguments, rejected his application, merely stating that he failed to exhaust domestic remedies, without any further explanation.¹⁶⁵

In a further decision of 2003 a Committee *a limine* again rejected a gay rights application in contradiction to the case law of the Court. The applicant had been arrested and prosecuted under the discriminatory age of consent law in Austria, later held to be in violation of the Convention by the Court.¹⁶⁶ He had finally been acquitted on the basis of having thought that his partner was already 18. The Court repeatedly has decided that an acquittal, without acknowledgment of the violation and adequate redress, does not resolve a matter.¹⁶⁷ Both never took place in the case of the applicant. The applicant stressed that the violation has never been acknowledged and that he never got redress, and he expressly relied on the case law of the Court. Nevertheless the Committee rejected the application, merely stating that the application of the man, who had been arrested and prosecuted under the anti-homosexual statute already found to be in violation of the Convention by the Court at that time, did not disclose any appearance of a violation.¹⁶⁸

Protection by the Court of victims of human rights violations is also remarkably weakened by the fact that the Court regularly does not award to (successful) applicants all of the *costs and expenses* the application procedure incurred.¹⁶⁹ In the leading cases on discriminatory age of consent regulations for gay sex, for instance, the Court awarded EUR 10.000,-- and EUR 5.000,-- for legal costs in the procedure before it, while the applicants, according to their national tariffs for attorney-fees, had to pay EUR 58.302,28 and EUR 30.305,34.¹⁷⁰ It seems obvious that victims who are not wealthy can be seriously barred from

applying to the Court if, even in the case of success, they have to pay such considerable amounts by themselves.

CONCLUSION

To sum it up, human rights law in practice currently seems to protect sexual rights to a considerable degree; but, when it comes to freedom *to express one's* sexuality, the protection arises predominantly in areas where it accords with public attitudes and does not exceed social developments. It seems that human rights tribunals more often follow the attitudes of the majority rather than apply the core task of human rights which is to protect the individual and minorities against unjustified interference by the majority, no matter – as John Stuart Mill put it¹⁷¹ – 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.”¹⁷² 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 a majority, is fulfilled only if an even bigger majority of member States is perceived by the Court to regard restrictions imposed on sexual minorities as being contrary to human rights . And even then not it does not do so consistently.

While, as compared to other parts of the world, there is relatively well established liberty and equality in sexual affairs in Europe, human rights law seems to provide limited protection of this freedom; and as can be seen from this overview this protection is nearly exclusively on the European, not the national, level.

In that sense one may indeed be anxious about developments in future case law in this area. The controversial issues are manifold.

Sweden in 1999 reintroduced the total criminal ban on *sex for remuneration* (this time not punishing the sex-workers but their clients),¹⁷³ and upcoming EC-legislation¹⁷⁴ obliges all member States of the European Union to create extensive offences of “*child*”-*pornography* and “*child*”-*prostitution*,¹⁷⁵ defining as “child” every person under 18, without differentiating between five-year-old children and 17-year-old juveniles. These offences go far beyond combating child pornography and child prostitution, thus making a wide variety of adolescent sexual behaviour, hitherto completely legal in the overwhelming majority of jurisdictions in Europe, serious crimes. For instance: pictures made by a 16-year-old girl of herself in “lascivious” poses, which this girl shows to her 17-year-old boyfriend; photographs of a 17-year-old girl in her bikinis “lasciviously” exposing her pubic area, taken by her 15 year-old boyfriend (for his bedside table); standard pornography involving younger looking 20-year-old adults; “lascivious” pictures of one’s own spouse which is under 18 or even (just) looks younger than 18; a virtual animation showing a 17-year-old beauty “lasciviously” posing created by a 14-year-old boy on his home-computer, if he does not protect the file with a password; or “webcam-sex” between adolescents, who legally could have “real” sex with each other. The heavy criticism this equation of adolescents with children caused among experts highlights the major human rights problems these offences will cause.^{176 177}

In December 2002 the Court declared admissible the application of an HIV-positive man who has been held in isolation detention for years on the basis of prevention of spreading disease.¹⁷⁸ The Court has also held that medical treatment without consent of the person treated violates the right to respect for private life,¹⁷⁹ which should also outlaw HIV-testing without the consent of the person tested.¹⁸⁰

In Austria the discriminatory age of consent for gay men has been substituted in 2002 by a general offence criminalizing sexual contacts with adolescents under certain circumstances.¹⁸¹ This new, gender-neutral, provision however is used disproportionate with respect to male homosexual relations.¹⁸² Such (indirect) discrimination comes into conflict with the right to non-discrimination¹⁸³ and the European Parliament already has called on Austria to end this discrimination in enforcement.¹⁸⁴

Finally in 2001 the Court ruled that television authorities cannot refuse to broadcast advertisements of political NGOs.¹⁸⁵ This indicates that also sexual minorities have a human right to adequate media presentation of their political agenda.

NOTES

¹ The French constitution of 1795 in its preamble called this principle “by nature engraved in all hearts”.

² For details see Helmut Graupner, *Sexualität, Jugendschutz und Menschenrechte: Über das Recht von Kindern und Jugendlichen auf sexuelle Selbstbestimmung* (Frankfurt/M., Peter Lang, 1997a), Vol. 1, 126ff, Vol. 2, 361ff; Helmut Graupner, "Von 'Widernatürlicher Unzucht' zu 'Sexueller Orientierung': Homosexualität und Recht" in Hey, Pallier & Roth (eds.), *Que(e)rdenken: Weibliche/männliche Homosexualität und Wissenschaft* (Innsbruck, Studienverlag, 1997b) 198ff.

³ For details see Graupner (1997a), *supra*, Vol. 1, 126ff, Vol. 2, 361ff; Graupner (1997b), *supra*, 198ff

⁴ UNGAOR 962 (1948), Res. 217 III (C), www.unhchr.ch

⁵ (1966) UNTS Vol.999 p.171, www.unhchr.ch

⁶ (1966) UNTS Vol. 993 p.3, www.unhchr.ch

⁷ (1950) ETS No. 005, <http://conventions.coe.int>

⁸ See for further details the chapter of Phillip Tahmindjis in this book.

⁹ (1989), www.unhchr.ch

¹⁰ Art. 34: “States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.”

On the basis of this in 2000 an optional protocol “on the sale of children, child prostitution and child pornography” has been elaborated (www.unhchr.ch). It is striking that this protocol on sexual exploitation is much stricter than the optional protocol “on the involvement of children in armed conflicts” adopted by the General Assembly the same day (www.unhchr.ch). While the age limit for pornography and prostitution has been set at 18, without any exception, the age limit for recruitment into the armed forces can be as low as 15; only participation in hostile conflicts and compulsory recruitment are banned under the age of 18. In addition states must ban child pornography and child prostitution by criminal law, whereas with respect to child soldiers they are only obliged to “take all feasible measures to ensure” that persons under 18 do not participate in armed conflicts and are not subjected to compulsory recruitment; they are not under a duty to criminalize such practices. And only the optional protocol “on the sale of children, child prostitution and child pornography” obliges states to make breaches both criminal and grounds for extradition; the optional protocol “on the involvement of children in armed conflicts” does not contain such obligations.

¹¹ Sec. 9 Bill of Rights („sexual orientation“); for details see Helmut Graupner, *Keine Liebe zweiter Klasse – Diskriminierungsschutz & Partnerschaft für gleichgeschlechtlich Lebende*, (Rechtskomitee LAMBDA, Vienna, 2002), 36, www.RKLambda.at (Publikationen).

¹² Art. Art. 23 (“orientación sexual”); for details see Graupner (2002), *supra*, 40.

¹³ Art. Art. 38 (“sexual orientation”); for details see Graupner (2002), *supra*, 38.

¹⁴ Berlin (Art. 10: “sexuelle Identität”), Bremen (Art. 2: “sexuelle Identität”), Brandenburg (Art. 12: “sexuelle Identität”), Thuringia (Art. 2: “sexuelle Orientierung”), for details see see Graupner (2002), *supra*, 32.

¹⁵ Art. 8 (“Lebensform”), for details see Graupner (2002), *supra*, 32.

¹⁶ CONF/4005/97 ADD 2, <http://europa.eu.int/eur-lex>

¹⁷ Art. 13 par. 1 EC: “Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

¹⁸ Directive 2000/78/EC, <http://europa.eu.int/eur-lex>. The directive has to be implemented in all member states until December 2nd, 2003 at the latest (Art. 18).

¹⁹ Austria (just a ministerial decree on the federal level; statutory protection in the state of Vienna only); Belgium, Czech Republic, Denmark, Finland, France, Germany, Iceland, Ireland, Lithuania, Luxemburg, Malta, Netherlands, Norway, Romania, Slovenia, Spain, Sweden. For details including full text of the laws see Graupner (2004), *supra*, 32ff; see also the map at www.RKLambda.at (Rechtsvergleich)

²⁰ OJ C 364/1-22 (18.12.2000), <http://europa.eu.int/eur-lex>; The Charter is not binding but it is used in interpretation of binding EU-law (see Court of First Instance, Case T-54/99 *max.mobil Telekommunikation Service GmbH*, 31.01.2002, par. 48)

²¹ The Dutch and the Swedish laws expressly so state, see Graupner (2002), *supra*.

²² See for instance Art. 8 ECHR

²³ See for instance Art. 14 ECHR; Art. 1 Protocol No. 12 (not yet in force)

²⁴ See for instance Art. 10 ECHR

²⁵ See for instance Art. 11 ECHR

²⁶ See for instance Art. 2 ECHR, Art. 1 Protocol No. 6 (ban on death penalty)

²⁷ See for instance Art. 3 ECHR

²⁸ For a charter of sexual rights see World Association of Sexology (WAS), Declaration of Sexual Rights (26.08.1999), http://www.worldsexology.org/english/about_sexualrights.html

²⁹ BVerfGE 7, 198; 48, 127 [163]; 49, 286 [298]; Graupner (1997a), *supra*, Vol. 1, 39 (notes 11, 12), 55 (note 61).

³⁰ For a further and detailed discussion of this concept see Graupner (1997a), *supra*, Vol. 1, 44ff.

³¹ <http://www.echr.coe.int>

³² The *European Convention of Human Right (ECHR)*

³³ *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC] (par. 90); *I. vs. UK* (25680/94), judg. 11.07.2002 [GC] (par. 70)

³⁴ *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC] (par. 90); *I. vs. UK* (25680/94), judg. 11.07.2002 [GC] (par. 70)

³⁵ See for instance *L. & V. vs. Austria* (39392/98, 39829/98), judg. 09.01.2003 (par. 47); *S.L. vs. Austria* (45330/99), judg. 09.01.2003 (par. 39); *Wessels-Bergervoet vs. NL* (34462/97), judg. 04.06.2002 (par. 52f); for an analysis of the respective case-law of the *Court* see Graupner (1997a), *supra*, Vol. 1, 75ff.

³⁶ *Wessels-Bergervoet vs. NL* (34462/97), judg. 04.06.2002 (par. 52f)

³⁷ *Z. & Others vs. UK* (29392/95), judg. 10.05.2001 [GC] (par. 73); *E. & Others vs. UK* (33218/96), judg. 26.11.2002 (par. 88)

³⁸ *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC] (par. 90: « physical and moral security »); *I. vs. UK* (25680/94), judg. 11.07.2002 [GC] (par. 70 : « physical and moral security»); *D.P. & J.C. vs. UK* (38719/97), judg. 10.10.2001 [GC] (par. 118: “physical and moral integrity”); *X. & Y. vs. NL* (8978/80), 26.03.1985 (par. 22: “physical and moral integrity”); *Ilaria Salvetti vs. Italy* (42197/98), dec. 09.07.2002 (“physical and psychological integrity”)

³⁹ If effective deterrence, in a case where fundamental values and essential aspects of private life are at stake, cannot be achieved otherwise: *X. & Y. vs. NL* (8978/80), 26.03.1985 (par. 27); In *Carl Wade August vs. UK* (36505/02), judg. 21.01.2003, the Court held that the provision of an *ex gratia* award by the State to victims of abuse does not form part of the deterrent framework to protect children effectively against adult abusers (par. The Law, par. 1).

⁴⁰ *S.N. vs. Sweden* (34209/96), judg. 02.07.2002 (par. 47); *Owen Oysten vs. UK* (42011/98), dec. 22.01.2002

⁴¹ *Stubbings & Others vs. UK* (22083/93 ; 22095/93), judg. 22.10.1996 (par. 66, 74)

⁴² *Z. & Others vs. UK* (29392/95), judg. 10.05.2001 [GC] (par. 73); *E. & Others vs. UK* (33218/96), judg. 26.11.2002 (par. 88)

⁴³ *Z. & Others vs. UK* (29392/95), judg. 10.05.2001 [GC] (par. 109); *E. & Others vs. UK* (33218/96), judg. 26.11.2002 (par. 110)

⁴⁴ *M.G. vs. UK* (39393/98), judg. 24.09.2002

⁴⁵ In *E. & Others vs. UK* (33218/96), judg. 26.11.2002, the Court held that sexual and physical abuse on a regular basis over years in childhood, including (attempted) rape , “no doubt” qualifies as inhuman and degrading (par. 89).

⁴⁶ *Z. & Others vs. UK* (29392/95), judg. 10.05.2001 [GC] (par. 73)

⁴⁷ *Z. & Others vs. UK* (29392/95), judg. 10.05.2001 [GC] (par. 109)

⁴⁸ *E. & Others vs. UK* (33218/96), judg. 26.11.2002 (par. 99)

⁴⁹ *E. & Others vs. UK* (33218/96), judg. 26.11.2002 (par. 96); if there is a real and immediate risk of serious reoffending the *Court*, under Art. 2 ECHR (right to life), established the obligation of authorities not to grant prison leave if they know or should know of the risk: *Mastromatteo vs Italy* (37703/97), judg. 24.10.2002 [GC] (par. 68, 74)

⁵⁰ *Ramdane Ammari vs. Sweden* (60959/00), dec. 22.10.2002 (The Law, B.)

⁵¹ *Carl Wade August vs. UK* (36505/02), judg. 21.01.2003

⁵² *Carl Wade August vs. UK* (36505/02), judg. 21.01.2003 (The Law, par. 1)

⁵³ The applicant at the time of the contacts was placed in residential care on the basis of being a “disturbed child”. His partner was not affiliated with the residential institution or in another way exercising authority over him.

⁵⁴ *Carl Wade August vs. UK* (36505/02), judg. 21.01.2003 (The Law, B.); The man was imprisoned for infringing the age of consent and the applicant later on sought *ex gratia* award from the state on the basis of his being a victim of a violent offence. UK law provided for *ex gratia* awards by the State only to victims of violent offences and the applicant complained against the decision of the national courts that – on the basis of his willingness and active part in the sexual contacts – he was not the victim of *violent* offence. In 1979 a study of the British Home Office said: “Consent to a course of action does not imply a mature understanding of the consequences of that course of action but merely a willingness that it should take place” (R. Walmsley & K. White, *Sexual Offences, Consent and Sentencing*, Home Office Research Study 54 (London 1979). For a discussion of this problem see Graupner (1997a), Vol. 1, 253ff.

⁵⁵ *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC] (par. 90); *I. vs. UK* (25680/94), judg. 11.07.2002 [GC] (par. 70); *Zehmalová & Zehnal vs. CZ* (38621/97), dec. 14.05.2002

⁵⁶ *Fretté vs. France* (36515/97), judg. 26.02.2002 (par. 32)

⁵⁷ The right does not extend to relations with animals: European Commission of Human Rights, *X. vs. Iceland* (6825/74), dec. 18.05.1976

⁵⁸ *Zehmalová & Zehnal vs. CZ* (38621/97), dec. 14.05.2002; European Commission of Human Rights, *X. vs. Iceland* (6825/74), dec. 18.05.1976

⁵⁹ European Commission of Human Rights, *Brüggemann & Scheuten vs. Germany* (6959/75), report 12.07.1977

⁶⁰ *Fretté vs. France* (36515/97), judg. 26.02.2002 (par. 32)

⁶¹ *L. & V. v. Austria* (39392/98, 39829/98), judg. 09.01.2003, par. 36 (« most intimate aspect of private life »); *S.L. v. Austria* (45330/99), judg. 09.01.2003, par. 29 (« most intimate aspect of private life »); European Commission of Human Rights: *Sutherland vs. UK* 1997 (25185/94), dec. 01.07.1997 (par. 57: "most intimate aspect of effected individuals 'private life'", also par. 36: "private life (which includes his sexual life)"; so also the Court in: *Dudgeon vs. UK* (7525/76), judg. 22.10.1981, par. 41, 52; *Norris vs. Ireland* (10581/83), judg. 26.10.1988 (par. 35ff); *Modinos vs. Cyprus* (15070/89), judg. 22.04.1993 (par. 17ff); *Laskey, Brown & Jaggard sv. UK* (21627/93; 21826/93; 21974/93) 19.02.1997, par. 36; *Lustig-Prean & Beckett vs. UK* (31417/96; 32377/96) (par. 82), 27.09. 1999; *Smith & Grady vs. UK* (33985/96; 33986/96), judg. 27.09.1999 (par. 90); *A.D.T. vs. UK* (35765/97), judg. 31.07.2000 (par. 21ff); *Fretté vs. France* (36515/97), judg. 26.02.2002 (par. 32)

⁶² BverfGE 47, 46 [73]

⁶³ Art. 8 ECHR: (1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

⁶⁴ *Madsen vs DK* (58341/00), dec. 07.11.2002 (urine testing)

⁶⁵ *Dudgeon vs. UK* (7525/76), judg. 22.10.1981 (par. 49)

⁶⁶ For that concept see Graupner (1997a), Vol. 1, 85f.

⁶⁷ This problem arises for instance in the case of semi-public contacts, such as at publicly accessible places (beaches, parks) where no one is present who could perceive the acts (e.g. in the middle of the night); or in a locked and closed cubicle in a public lavatory. In *England & Wales* even sexual acts in a locked hotel room or in a sleeping train compartment have not been deemed “in private” as staff regularly have access with their keys.

⁶⁸ For that concept see Graupner (1997a), Vol. 1, 85f

⁶⁹ See *Zehmalová & Zehnal vs. CZ* (38621/97), dec. 14.05.2002

⁷⁰ See *Zehmalová & Zehnal vs. CZ* (38621/97), dec. 14.05.2002;

⁷¹ In connection with Art. 1 of the Protocol No. 1 to Convention (right to protection of property) .

⁷² See *mutatis mutandis Willis vs. UK* (36042/97), judg. 11.06.2002 (par. 29ff)

⁷³ For details see Graupner (1997a), Vol. 2, 324ff)M; Helmut Graupner, *Sexual Consent - The Criminal Law in Europe and Overseas*, *Archives of Sexual Behavior*, Vol. 29, No. 5, 415-461 (NY, Kluwer Academic/Plenum 2000); Helmut Graupner, *Sexual Consent- The Criminal Law in Europe and Overseas*, Keynote-Lecture at the 7th International Conference of the International Association for the Treatment of Sexual Offenders (IATSO) "Sexual Abuse and Sexual Violence - From Understanding to Protection and Prevention" (Vienna, September 11th-14th 2002), Friday, 13th September 2002, <http://members.aon.at/graupner/documents/Graupner-paper-kn-ofN.pdf>

⁷⁴ *Hardwick vs. Bowers*, 106 S.Ct. 2841 (1986); This ruling has been overturned by the Supreme Court not before 2003 (*Lawrence et. al. vs. Texas*, 02-102, dec. 26.06.2003, www.supremecourtus.gov)

⁷⁵ See Graupner (1997a), Vol. 1, 476 (note 3)

⁷⁶ *Dudgeon vs. UK* (7525/76), judg. 22.10.1981; *Norris vs. Ireland* (10581/83), judg. 26.10.1988; *Modinos vs. Cyprus* (15070/89), judg. 22.04.1993 ; European Commission of Human Rights, *Marangos vs. Cyprus* (31106/96), report 03.12.1997

⁷⁷ *Dudgeon vs. UK* (7525/76), judg. 22.10.1981

⁷⁸ for details see Graupner (1997a), Vol. 1, 75ff

⁷⁹ European Commission of Human Rights: *Sutherland vs. UK 1997* (25185/94), dec. 01.07.1997

⁸⁰ *L. & V. vs. Austria* (39392,98, 39829/98), judg. 09.01.2003; *S.L. vs. Austria* (45330/99), judg. 09.01.2003

⁸¹ In both countries the cases concerned age limits of 18 (Art. 209 Austrian Criminal Code, Art. 199 Hungarian Criminal Code), while the general age of consent for heterosexual contact is 14. In Hungary the discriminatory age of consent did cover also lesbian relations (Art. 199 CC).

⁸² Judg. 03.09.2002 (1040/B/1993/23), www.mkab.hu

⁸³ Judg. 21.06.2002 (06/02). Under Austrian constitutional law the right to equality, as a general principle, prohibits the legislature from passing seriously unreasonable legislation (for details see Graupner, 1997a, Vol. 1, 104ff).

⁸⁴ Federal Court of Canada, *Henry Halm vs. The Minister of Employment and Immigration*, dec. 24.02.1995; Ontario Court of Appeal, *R. v. C. M.*, dec. 24.05.1995; Quebec Court of Appeal, *R. v. Roy*, Decision 15.04.1998

⁸⁵ *B.B. v. State* (1995)

⁸⁶ *The People v. T.A.J.* (1998); see also *People v. Scott* [Cal. SC 1994]

⁸⁷ *The People v. T.A.J.* (1998)

⁸⁸ In the seventies the *European Commission of Human Rights* had to decide on the forcible return to their families of 14 year old girls who had run away to live with their partners. The *Commission* decided that it fell within the states margin of appreciation to bring back the girls but that they were not under a positive obligation to do so (*X & Y vs. NL*, 6753/74; *X vs. DK*, 6854/74). The sexual relations of the girls with their partners and state interference with them, i.e. criminal liability of their partners, was not an issue before the *Commission*.

⁸⁹ See Graupner (1997a), *supra*, Vol. 2, 324ff; Helmut Graupner, Sexual Consent - The Criminal Law in Europe and Overseas, *Archives of Sexual Behavior*, Vol. 29, No. 5, 415-461 (NY, Kluwer Academic/Plenum 2000); Helmut Graupner, *Sexual Consent- The Criminal Law in Europe and Overseas*, Keynote-Lecture at the 7th International Conference of the International Association for the Treatment of Sexual Offenders (IATSO) "Sexual Abuse and Sexual Violence - From Understanding to Protection and Prevention" (Vienna, September 11th-14th 2002), Friday, 13th September 2002, <http://members.aon.at/graupner/documents/Graupner-paper-kn-oFN.pdf>; In February 2002 the *Kansas Court of Appeals* confirmed a sentence of 17 years imprisonment for an 18 year old male who had consensual oral sex with a male school mate aged 14 years and 11 months; in addition the maximum sentence would have been 15 months if the couple would have been male-female. The *Kansas High Court* denied review and the case has been brought before the *Supreme Court* (*State v. Limon*, 41 P.3d 303, 2002 Kan. App. LEXIS 104, <http://www.geocities.com/WestHollywood/4810/Queerlaw/Limon.html> (Feb. 1, 2002), review denied (June 13, 2002), petition for certiorari filed, 71 U.S.L.W.3319 (Oct. 10, 2002) (No. 02-583), http://archive.aclu.org/court/limon_cert.pdf). The *Supreme Court* on 27.06.2003 vacated the appeals court judgment and remanded the case to the Court of Appeals of Kansas for further consideration in light of *Lawrence v. Texas* (*Limon, Matthew R. v. Kansas*, 02.583, 27.06.2003).

⁹⁰ *ibid*

⁹¹ *ibid*

⁹² *M.K. vs Austria* (28867/95), dec. 02.07.1997

⁹³ See Graupner (1997a), *supra*, Vol. 2, 245ff; Helmut Graupner, Sexual Consent - The Criminal Law in Europe and Overseas, *Archives of Sexual Behavior*, Vol. 29, No. 5, 415-461 (NY, Kluwer Academic/Plenum 2000); Helmut Graupner, *Sexual Consent- The Criminal Law in Europe and Overseas*, Keynote-Lecture at the 7th International Conference of the International Association for the Treatment of Sexual Offenders (IATSO) "Sexual Abuse and Sexual Violence - From Understanding to Protection and Prevention" (Vienna, September 11th-14th 2002), Friday, 13th September 2002, <http://members.aon.at/graupner/documents/Graupner-paper-kn-oFN.pdf>;

⁹⁴ For a further discussion of this problem see See Graupner (1997a), *supra*, Vol. 1, 315ff; Helmut Graupner, Love vs. Abuse - Crossgenerational Sexual Relations of Minors: A Gay Rights Issue?, *Journal of Homosexuality*, Vol. 37 (4) 23-56, (NY, Haworth Press, 1999)

⁹⁵ *S. L. vs Austria* (par. 52); The applicant, who submitted the application at the age of 17, began to be aware of his sexual orientation about the age of eleven or twelve. While other boys were attracted by women, he

realised that he was emotionally and sexually attracted by men, in particular by men who are older than himself. At the age of fifteen he was sure of his homosexuality. He submitted that he lives in a rural area where homosexuality is still taboo. He suffered from the fact that he could not live his homosexuality openly and - until he reached the age of eighteen - could not enter into any fulfilling sexual relationship with an adult partner for fear of exposing that person to criminal prosecution under Article 209 of the Criminal Code (*Strafgesetzbuch*) (which criminalized male homosexual contacts of persons over the age of 19 with persons between 14 and 18). He asserted that he was hampered in his sexual development. He reiterated that he felt particularly attracted by men older than himself but that Article 209 of the Criminal Code made any consensual sexual relationship with men over nineteen years of age an offence. Moreover, Article 209 generally stigmatised his sexual orientation as being contemptible and immoral. Thus, he suffered feelings of distress and humiliation during all of his adolescence. The *Court* held that it “attaches weight to the fact that the applicant was prevented from entering into relations corresponding to his disposition until he reached the age of eighteen” and awarded the applicant EUR 5.000,- for non-pecuniary damage (par. 9f, 49, 52).

⁹⁶ While the *European Commission of Human Rights* constantly has been reluctant in the area of sexuality it, already in the seventies, felt inclined to acknowledge the right of adolescents to self-determination and the legal force of their consent in another area. A 15- and a 16-year-old adolescent who had voluntarily recruited into the British army wanted to leave the armed forces arguing that their obligations interfered with their family-lives (Art. 8 ECHR). The *Commission* held that the British army had the right to refuse the leave, on the basis that also minors could not set aside voluntarily entered obligations of military service (YB XI, 562f).

⁹⁷ *A.D.T. vs. UK* (35765/97), judg. 31.07.2000. Contrast *Laskey, Brown & Jaggard v UK* (21627/93; 21826/93; 21974/93), judg. 19.02.97 where convictions for group sado-masochistic sex involving injury were held not to violate the Convention.

⁹⁸ Protocol No. 11; See <http://www.echr.coe.int>

⁹⁹ *Lustig-Prean & Beckett vs. UK* (31417/96; 32377/96), judg. 27.09.1999, 25.07.2000; *Smith & Grady vs. UK* (33985/96; 33986/96), judg. 27.09.1999, 25.07.2000; See also *Perkins & R. vs. UK*, (43208/98, 44875/98), judg. 22.10.2002; *Beck, Copp & Bazeley vs. UK* (48535/99, N° 48536/99 and N° 48537/99), judg. 22.10.2002

¹⁰⁰ *Salgueiro da Silva Mouta vs. Portugal* (33290/96), judg. 21.12.1999. Cases concerning statutory exclusion of homosexuals from blood donations has been struck off the list after the law has been changed and the ban lifted (*Tosto vs. Italy* (49821/99), dec. 15.10.2002; *Crescimone vs. Italy*, 49824/99, dec. 15.10.2002; *Faranda vs. Italy*, 51467/99, dec. 15.10.2002)

¹⁰¹ *Karner vs. Austria* (40016/98), judg. 24.07.2003. Since the applicant himself had died after the filing of his application the *Court* had to decide whether to strike the case off its list or to continue the examination of the application; it continued examination qualifying the issue as an “important question of general interest not only for Austria but also for other Member States” (par. 27). The *Karner* case is about unequal treatment of non-married same-sex couples in relation to non-married opposite-sex couples. In *Saucedo Gomez v. Spain* (Appl. 37784/97), dec. 26.01.1999, and in *Nylynd v. Finland* (Application No. 27110/95), dec. 29.06.1999, the *Court* found unequal treatment of married vs. unmarried opposite-sex couples within the states’ margin of appreciation. Still in 2001 the *Court* found even unequal treatment of same-sex couples in respect to those unmarried opposite-sex couples within the states’ discretion, who (like same-sex couples) could not marry (*Mata Estevez vs. Spain*, Appl. 56501/00, dec. 10.05.2001).

¹⁰² *Salgueiro da Silva Mouta vs. Portugal* (33290/96), judg. 21.12.1999 (par. 36)

¹⁰³ *Lustig-Prean & Beckett vs. UK* (31417/96; 32377/96), judg. 27.09.1999 (par. 90); *Smith & Grady vs. UK* (33985/96; 33986/96), judg. 27.09.1999 (par. 97); *Salgueiro da Silva Mouta vs. Portugal* (33290/96), judg. 21.12.1999 (par. 36); *L. & V. v. Austria* (39392/98, 39829/98), judg. 09.01.2003 (par. 45, 52); *S.L. v. Austria* (45330/99), judg. 09.01.2003 (par. 37, 44)

¹⁰⁴ *L. & V. v. Austria* (39392/98, 39829/98), judg. 09.01.2003 (par. 45); *S.L. v. Austria* (45330/99), judg. 09.01.2003 (par. 37); *Karner vs. Austria* (40016/98), judg. 24.07.2003 (par. 37)

¹⁰⁵ *Karner vs. Austria* (40016/98), judg. 24.07.2003 (par. 41)

¹⁰⁶ *Lustig-Prean & Beckett vs. UK* (31417/96; 32377/96), judg. 27.09.1999 (par. 90); *Smith & Grady vs. UK* (33985/96; 33986/96), judg. 27.09.1999 (par. 97); *L. & V. v. Austria* (39392/98, 39829/98), judg. 09.01.2003 (par. 52); *S.L. v. Austria* (45330/99), judg. 09.01.2003 (par. 44)

¹⁰⁷ *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC] (par. 91); *I. vs. UK* (25680/94), judg. 11.07.2002 [GC] (par. 71)

¹⁰⁸ See *European Parliament*: Urgency Resolution on the Rights of Lesbians and Gays in the European Union (B4-0824, 0852/98; par. J), 17.09.1998; Resolution on the Respect of Human Rights within the European Union in 1997 ((A4-0468/98; par. 10), 17.12.1998; Resolution on the Respect of Human Rights within the European Union in 1998/99 (A5-0050/00; par. 76, 77), 16.03.2000; http://www.europarl.eu.int/plenary/default_en.htm

¹⁰⁹ See *Parliamentary Assembly of the Council of Europe*: Written Declaration No. 227, Febr. 1993; Halonen-Resolution (Order 488 [1993]); Opinion No. 176 (1993); Opinion 221 (2000); <http://assembly.coe.int>
¹¹⁰ Opinion 216 (2000); Rec. 1474 (2000) (par. 7) ; In September 2001 the *Committee of Ministers of the Council of Europe* assured the Assembly “that it will continue to follow the issue of discrimination based on sexual orientation with close attention” (Doc 9217, 21.09.2001).

¹¹¹ In 1994 the *UN-Human Rights Committee*, 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 (*Toonen vs. Australia*, CCPR/C50/D/488/1992, 31.03.1994). 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 (CPR/C/79/Add.103, 19.11.1998). The *Committee on the Rights of the Child* repeatedly called for the repeal of higher ages of consent for homosexual conduct (CRC/C/15/Add.134, 16.10.2000; CRC/C/15/Add.135, 16.10.2000) and expressed its concern “that homosexual and transsexual young people do not have access to the appropriate information, support and necessary protection to enable them to live their sexual orientation” (CRC/C/15/Add. 188, 09.10.2002); www.unhcr.ch

¹¹² see for many others *Ramdane Ammari vs. Sweden* (60959/00), dec. 22.10.2002 (The Law, B.)

¹¹³ which includes life imprisonment without possibility of release (*Nivette vs. France*, 44190/98, dec. 03.07.2001; *Einhorn vs. France*, 71555/01, dec. 16.10.2001)

¹¹⁴ The exceptions contained in Art. 2 ECHR are not relevant in extradition cases. The exception of times of war (or imminent threat of war) in Art. 2 of Protocol No. 6 seems to exempt the extraditing state from the prohibition of the death penalty only if itself is at war (or imminent threat of war) but not if the state to where a person shall be extradited is at war.

¹¹⁵ For the text of Art. 8 EVHR see above

¹¹⁶ *Dudgeon vs. UK* (7525/76), judg. 22.10.1981, par. 53; *Norris vs. Ireland* (10581/83), judg. 26.10.1988 (par. 44); *Modinos vs. Cyprus* (15070/89), judg. 22.04.1993 (par. 25); *Lustig-Prean & Beckett vs. UK* (31417/96; 32377/96) (par. 80), 27.09. 1999; *Smith & Grady vs. UK* (33985/96; 33986/96), judg. 27.09.1999 (par. 87)

¹¹⁷ *Dudgeon vs. UK* (7525/76), judg. 22.10.1981, par. 51; *Norris vs. Ireland* (10581/83), judg. 26.10.1988 (par. 41f); *Modinos vs. Cyprus* (15070/89), judg. 22.04.1993 (par. 25); *A.D.T. vs. UK* (35765/97), judg. 31.07.2000 (par. 32f); For a detailed discussion of the requirements for interferences being justified according to Art. 8 par. 2 ECHR see Graupner (1997a), *supra*, Vol. 1, 86ff

¹¹⁸ *Jimenez Alonso & Jimenez Merino vs. Spain* (51188/99), dec. 25.05.2000

¹¹⁹ *Pichon & Sajous vs. France* (49853/99), dec. 04.10.2001

¹²⁰ Thereby the requirements on the finding of a legal consensus are stricter here than in other areas. While the Court in the 1980’s let suffice mere legal trends in the member states of the Council of Europe when it decided issues regarding the status of illegitimate children or discrimination on the basis of sex (*Marckx vs. Belgium* (6833/74), judg. 13.06.1979, par. 41; *Abdulaziz & Others vs. UK*, (9214/80 et. al.), judg. 28.05.1985, par. 78; *Inze vs. Austria* (8695/79), judg. 28.10.1987, par. 41), it took until 2003 for the Court for the first time to let a mere legal trend suffice in the sexual area (*Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC], par. 85; *I. vs. UK* (25680/94), judg. 11.07.2002 [GC], par. 65).

¹²¹ For the effects of those three revolutions on the decriminalization of homosexuality see Graupner (1997b), *supra*.

¹²² When the Court issued its judgments in *L. & V. vs. Austria* and *S.L. vs. Austria* only seven of the 46 jurisdictions on the territory of the Council of Europe still kept higher minimum age limits for homosexual relations (see Helmut Graupner, *Sexual Consent- The Criminal Law in Europe and Overseas*, Keynote-Lecture at the 7th International Conference of the International Association for the Treatment of Sexual Offenders (IATSO) "Sexual Abuse and Sexual Violence - From Understanding to Protection and Prevention" (Vienna, September 11th-14th 2002), Friday, 13th September 2002, <http://members.aon.at/graupner/documents/Graupner-paper-kn-oFN.pdf> (Table II))

¹²³ *B vs. France* (13343/87), judg. 25.03.1992

¹²⁴ *Sheffield & Horsham vs. UK* (22985/93, 23390/94), judg. 30.07.1998; See also *Rees vs. UK* (9532/81), judg. 17.10.1986;

¹²⁵ The Commission in 1978 decided in favour of transsexuals (including the right to marry a member of the former sex), but the Court refused to follow that approach and declared the application inadmissible on formal grounds (*Van Oosterwijck vs. Belgium*, 7654/76, judg. 06.11.1980)

¹²⁶ *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC] (par. 91); *I. vs. UK* (25680/94), judg. 11.07.2002 [GC] (par. 70); The *European Court of Justice* based its prohibition of discrimination of transsexuals in employment and occupation not on human rights arguments but on statutory interpretation of EC-legislation (*P. vs. S. & Cornwall County Council*, Case C-13/94, 1996; <http://europa.eu.int/eur-lex>).

¹²⁷ *Laskey, Brown & Jaggard vs. UK* (21627/93; 21826/93; 21974/93) 19.02.1997,

- ¹²⁸ *Scherer vs. CH* (17116/90), dec. 14.01.1993; The Court, due to the death of the applicant, later struck the case off the list (judg. 25.03.1994)
- ¹²⁹ The Court elaborates this concept also in *Mueller vs. Switzerland* (10737/84), judg. 24.05.1988
- ¹³⁰ BGE 101 Ia (1975); EuGRZ 1976, 202
- ¹³¹ VfSlg. 8272/78; 8907/80; 11926/88
- ¹³² Joint adoption by a same-sex couple was not the issue before the Court.
- ¹³³ *Fretté vs. France* (36515/97), judg. 26.02.2002. The significance of this judgment however is limited because it mirrors the opinion of only one of the seven judges on the panel. Four of the judges were of the opinion that there was no violation, but three of them (solely) on the basis that the application were not admissible on formal grounds.
- ¹³⁴ *Rees vs. UK* (9532/81), judg. 17.10.1986; *Cossey vs. UK* (10843/84), judg. 27.09.1990; *Sheffield & Horsham vs. UK* (22985/93 ; 23390/94), judg. 30.07.1998
- ¹³⁵ *German Constitutional Court* (BVerfGE 640/93), judg. 13.10.1993; *Supreme Court of the Netherlands* (Hoge Raad, RvdW 1990, 176), judg. 19.10.1990
- ¹³⁶ *Rees vs. UK* (9532/81), judg. 17.10.1986; *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC] (par. 91); *I. vs. UK* (25680/94), judg. 11.07.2002 [GC]
- ¹³⁷ *Rees vs. UK* (9532/81), judg. 17.10.1986 (par. 50); *Cossey vs. UK* (10843/84), judg. 27.09.1990 (par. 43ff); *Sheffield & Horsham vs. UK* (22985/93 ; 23390/94), judg. 30.07.1998 (par. 66)
- ¹³⁸ *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC]; *I. vs. UK* (25680/94), judg. 11.07.2002 [GC]
- ¹³⁹ *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC] (par. 100); *I. vs. UK* (25680/94), judg. 11.07.2002 [GC] (par. 80)
- ¹⁴⁰ *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC] (par. 101); *I. vs. UK* (25680/94), judg. 11.07.2002 [GC] (par. 81)
- ¹⁴¹ *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC] (par. 100); *I. vs. UK* (25680/94), judg. 11.07.2002 [GC] (par. 80)
- ¹⁴² *Christine Goodwin vs. UK* (28957/95), judg. 11.07.2002 [GC] (par. 98); *I. vs. UK* (25680/94), judg. 11.07.2002 [GC] (par. 78)
- ¹⁴³ *German Constitutional Court* (BVerfGE 640/93), judg. 13.10.1993; *Supreme Court of the Netherlands* (Hoge Raad, RvdW 1990, 176), judg. 19.10.1990
- ¹⁴⁴ See Graupner (2002), *supra*.
- ¹⁴⁵ Art. 27f ECHR
- ¹⁴⁶ *SZIVÁRVANY Társulas a Melegek Jogaiért, Géza JUHÁSZ & Balázs PALFY vs. Hungary* (35419/97), dec. 12.05.2000
- ¹⁴⁷ European Commission of Human Rights: *Sutherland vs. UK 1997* (25185/94), dec. 01.07.1997
- ¹⁴⁸ *Salgueiro da Silva Mouta vs. Portugal* (33290/96), judg. 21.12.1999 (par. 36)
- ¹⁴⁹ *Lustig-Prean & Beckett vs. UK* (31417/96; 32377/96), judg. 27.09.1999 (par. 90); *Smith & Grady vs. UK* (33985/96; 33986/96), judg. 27.09.1999 (par. 97); *Salgueiro da Silva Mouta vs. Portugal* (33290/96), judg. 21.12.1999 (par. 36)
- ¹⁵⁰ *Lustig-Prean & Beckett vs. UK* (31417/96; 32377/96), judg. 27.09.1999 (par. 90); *Smith & Grady vs. UK* (33985/96; 33986/96), judg. 27.09.1999 (par. 97)
- ¹⁵¹ *L. & V. vs. Austria* (39392,98, 39829/98), dec. 22.11.2001; *S.L. vs. Austria* (45330/99), dec. 22.11.2001
- ¹⁵² *L. & V. vs. Austria* (39392,98, 39829/98), judg. 09.01.2003; *S.L. vs. Austria* (45330/99), judg. 09.01.2003
- ¹⁵³ *S.L. vs. Austria* (45330/99), judg. 09.01.2003
- ¹⁵⁴ For details see <http://www.rklambda.at/dokumente/news/News-PA-en-misshandlung-020805.pdf>
- ¹⁵⁵ See for many others *Ribitsch vs. Austria* (18896/91), 04.12.1995; *Hugh Jordan vs. UK* (24746/94), *McKerr vs. UK* (28883/95), *Kelly and others vs UK* (30054/96) and *Shanaghan vs. UK* (37715/97), 04.05.2001; *Altay vs. Turkey* (22279/93), 22.05.2001; *Abdurrahman vs. Turkey* (31889/96), 14.02.2002
- ¹⁵⁶ See for many others *Hugh Jordan vs. UK* (24746/94), *McKerr vs. UK* (28883/95), *Kelly and others vs UK* (30054/96) and *Shanaghan vs. UK* (37715/97), 04.05.2001
- ¹⁵⁷ *R.R. vs. Austria* (Appl. 46608/99), dec. 28.06.2002; for details see <http://www.rklambda.at/dokumente/news/News-PA-020805-Antwort.pdf> and <http://www.rklambda.at/dokumente/news/News-PA-020805-Beschwerde.pdf>
- ¹⁵⁸ For details see <http://www.rklambda.at/dokumente/news/News-PA-021221.pdf>
- ¹⁵⁹ *G.T. vs. Austria* (Appl. 46611/99), dec. 29.11.2002, <http://www.rklambda.at/dokumente/news/News-PA-021221-EGMR.pdf>
- ¹⁶⁰ See e.g. the decisions of the Court in *Mouisel vs. France* (67263/01), dec. 21.03.2002 (“une décision ou une mesure favorable au requérant ne suffit en principe à lui retirer la qualité de « victime » que si les

autorités nationales ont reconnu, explicitement ou en substance, puis réparé la violation de la Convention ... reconnaissance explicite d'une prétendue violation ... au cours de la période dénoncée par le requérant ... Par ailleurs, cette décision ne fournit pas une réparation adéquate); *Wejrup vs. Denmark* (49126/99), judg. 07.03.2002 (The Law, B.: „when ... national authorities ... acknowledged in a sufficiently clear way the failure ... and have afforded redress“); *Association Ekin vs. France* (39288/98), judg. 17.07.2001 (par. 37f), dec. 18.01.2000 („reconnu, explicitement ou en substance, puis réparé la violation de la Convention“); *Ilascu and Others vs. Moldova & the Russian Federation* [GC] (48787/99), dec. 04.07.2001 (The Law, III. : “a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a ‘victim’ unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention ... firstly, ... the applicant’s conviction is still in existence ... Furthermore, the Court has not been informed of any pardon or amnesty ... secondly, ... the applicant complained not only of his ... sentence but also ... of his detention, ... of the proceedings which led to his conviction“); *Ihasniouan vs. Spain* (50755/99), dec. 28.06.2001 („effacé les conséquences du grief“); *Constantinescu vs. Romania* (28871/95), dec. 27.06.2000 (par. 40: “a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a ‘victim’ unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention”; even an acquittal, without acknowledgment of the violation and adequate redress, does not resolve a matter: par. 42ff!); *Beck vs. Norway* (26390/95), judg. 26.06.2001 (par. 27f: „acknowledged in a sufficiently clear way the failure“, „adequate redress“); *Guisset vs. France* (33933/96), judg. 26.09.2000 (par. 66: „applicants will only cease to have standing as victims within the meaning of Article 34 of the Convention if the national authorities have acknowledged the alleged violations either expressly or in substance and then afforded redress“, again the Court holds that even an acquittal, without acknowledgment of the violation and adequate redress, does not resolve a matter: par. 68ff); *Rotaru vs. Romania* [GC] (28341/95), judg. 04.05.2000 (par. 35f: “a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a ‘victim’ unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention ... Lastly, the ... Court of Appeal ... did not rule on the applicant’s claim for compensation for non-pecuniary damage and for costs and expenses”); *Dalban vs. Romania* [GC] (28114/95), judg. 28.09.1999 (par. 44: “a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a ‘victim’ unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention”; again the Court holds that even an acquittal, without acknowledgment of the violation and adequate redress, does not resolve a matter); *Amuur vs. France* (19776/92), judg. 25.06.1996 (par. 36: “a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a ‘victim’ unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention”); *Heaney & Mc Guinness vs. Ireland* (34720/97), judg. 21.12.2000, (par. 45); *Quinn vs. Ireland* (36887/97), judg. 21.12.2000 (par. 45).

In that sense the Court in *Rotaru vs. Romania* declared that the standing as a victim did not cease with the deletion of the data, because (a) the domestic court did not give an opinion whether the storage was in violation of fundamental rights and (b) the applicant got no redress for non-pecuniary damage, pecuniary damage and his costs and expenses (*Rotaru vs. Romania* [GC], 04.05.2000, par. 36).

In *Paul and Audrey Edwards vs. UK* the Court held within the context of Art. 13 that the mere fact that a violation ceased to take effect pro futuro (there: the inability to use an effective remedy against violations) did not alter the fact that violations have been committed in the past (*Paul and Audrey Edwards vs. UK* (46477/99), judg. 14.03.2002, par. 99). Also in this context the Court stresses the importance of adequate redress for violations of the Convention (par. 99ff).

In *Pisano vs. Italy* [GC] (36732/97), judg. 24.10.2002, the Court again held that even an acquittal, without acknowledgment of the violation and adequate redress, does not resolve a matter.

¹⁶¹ See *A.D.T. vs. UK* (35765/97), judg. 31.07.2000 (par. 11); *Cerin vs. Croatia* (54727/00), dec. 08.03.2001; *Dallos vs. Hungary* (29082/95), judg. 01.03.2001 (par. 39); *Vodenicarov vs. SK* (24530/94), judg. 21.12.2000 (par. 40, 42f); *Sabeur Ben Ali vs. Malta* (35892/97), 29.06.2000 (par. 38-40)

¹⁶² *Cerin vs. Croatia* (54727/00), dec. 08.03.2001; *Ilhan vs. Turkey* (22277/93), judg. 27.06.2000 (par. 51)

¹⁶³ *Ilhan vs. Turkey* (22277/93), judg. 27.06.2000 (par. 51)

¹⁶⁴ *Cerin vs. Croatia* (54727/00), dec. 08.03.2001;

¹⁶⁵ *August Sulzer vs. Austria* (72165/01), dec. 29.04.2003

¹⁶⁶ *L. & V. vs. Austria* (39392,98, 39829/98), judg. 09.01.2003; *S.L. vs. Austria* (45330/99), judg. 09.01.2003

¹⁶⁷ *Dalban vs. Romania* [GC], 28.09.1999 (par. 44); *Constantinescu vs. Romania*, 27.06.2000 (par. 40, 42ff); *Guisset vs. France* 26.09.2000 (par. 66, 68ff); *Pisano vs. Italy* [GC] (36732/97), judg. 24.10.2002

¹⁶⁸ *F.J. vs. Austria* (Appl. 76600/01), dec. 16.05.2003; Only four months later another Committee did not *a limine* reject the application in a very similar case, where a gay man prosecuted under the same law as F.J.

has been acquitted solely on the formal ground that the Constitutional Court had struck down the law before a final verdict in the case has been taken. Austria never acknowledged a violation of the applicant's human rights and never granted redress for pecuniary and non-pecuniary damage. The Court communicated the application to the Austrian government on 22.09.2003 (*Wolfmeyer v. Austria*, appl. 5263/03).

¹⁶⁹ For criticism of this practice see Jochen Frowein & Wolfgang Peukert, *Europäische Menschenrechtskonvention, EMRK-Kommentar* (Kehl, N. P. Engel, 1996) (Art. 50 Rz 64 „bedenkliche Tendenz“)

¹⁷⁰ In other leading gay rights cases the *Court* awarded much higher sums for costs and expenses in proceedings before it: see *Lustig-Prean & Beckett vs. UK*, 31417/96; 32377/96, judg. 25.07.2000 (par. 39: EUR 31.000,--) and (*Smith & Grady vs. UK*, 33985/96; 33986/96, judg. 25.07.2000 (par. 32: EUR 32.000,--)

¹⁷¹ J. S. Mill, *On Liberty*

¹⁷² J. S. Mill, *On Liberty*

¹⁷³ Chap. 35 § 1 Criminal Code (as amended by law 98:393) (fine or jail up to six months). For the negative consequences of this legislation on the situation of sex-workers see Reinhard Wolff, Weniger Straßenstrich, mehr Elend, *tageszeitung (taz)*, (Berlin, January 2002).

¹⁷⁴ “Framework-Directive on combating sexual exploitation of children and child-pornography” (COM [2000] 854, OJ C 62 E/327-330),

http://europa.eu.int/prelex/detail_dossier_real.cfm?CL=de&DosId=161008#311962, www.RKLambda.at (News)

¹⁷⁵ The original proposal by the Commission even obliged to criminalize “inducement” of “children” (under 18) into sexual contact. That would even have made it a criminal offence to proposition 17 ½ year-old young men and women. In later versions this offence has been dropped (see www.RKLambda.at [News], <http://register.consilium.eu.int/scripts/utfregisterDir/WebDriver.exe?MIval=simple&MIlang=EN>).

¹⁷⁶ For detailed criticism and the opinions of several sexological associations see www.RKLambda.at (News) and Helmut Graupner, *The 17-year-old Child - An Absurdity of the Late 20th Century*, Paper presented at the 7th International Conference of the International Association for the Treatment of Sexual Offenders (IATSO) - “Sexual Abuse and Sexual Violence - From Understanding to Protection and Prevention”, (Vienna, September 11th – 14th 2002), Symposium “*Sexuality, Adolescence & the Criminal Law*”, Friday, 13th September 2002, <http://members.aon.at/graupner/documents/Graupner-paper-symp.pdf>; In 2002 the U.S. Supreme Court held a ban on virtual child pornography, not involving images of real persons under 18, as violating the right to freedom of speech (*Ashcroft vs. Free Speech Coalition*, opinion 16.04.2002, 535 U.S., No. 00-795; www.supremecourtus.gov).

¹⁷⁷ The *Court* has already held that states can not set aside their obligations under the Convention by transferring competencies to supra-national bodies. So the *Court* claims its supervising power to also extend to acts of the European Union (or the EC) and to acts of member states determined by Union (or EC) law (see for instance *Matthews vs. UK* (24833/94), judg. 18.02.1999; *Segi & Others and Gestoras pro Amnistia & Others vs. 15 member states of the European Union*, 6422/02, 9916/02, dec. 23.05.2002).

¹⁷⁸ *Enhorn vs. Sweden* (56529/00), dec. 10.12.2002

¹⁷⁹ *Salvetti vs. Italy* (42197/98), dec. 09.07.2002

¹⁸⁰ Mandatory testing for years now has been rejected by the Council of Europe and the World Health Organization (see *Committee of Ministers of the Council of Europe*, Rec. R [87] 25, 26.11.1987; *45th World Health Assembly*, resolution WHA 45.35, 14.05.1992; *Global Programme on Aids*, Statement from the Consultation on Testing and Counselling for Hiv-Infection, Geneva 16-18 November 1992)

¹⁸¹ The new Art. 207b Criminal Code contains three offences. *Paragraph 1* makes it an offence to engage in sexual contact with a person under 16 who for certain reasons is not mature enough to understand the meaning of what is going on or to act in accordance with such understanding provided that the offender practices upon the person's lacking maturity and his own superiority based on age. *Paragraph 2* makes it an offence to engage in sexual contact with a person under 16 by practicing on a position of constraint. *Paragraph 3* makes it an offence to immediately induce a person under 18 against remuneration.

¹⁸² Reply of *Minister of Justice Dr. Dieter Böhmendorfer* to a parliamentary inquiry (2003), AB XXII. GP.-NR 91/AB, 03.04.2003 (100% of all court cases), http://www.parlament.gv.at/pd/pm/XXII/AB/his/000/AB00091_.html; Reply of *Minister of Justice Dr. Dieter Böhmendorfer* to a parliamentary inquiry (2003), AB XXII. GP.-NR 660/AB, 02.09.2003 (44,4% of all court cases, 100% of all incarcerations), http://www.parlament.gv.at/pd/pm/XXII/AB/his/006/AB00660_.html.

¹⁸³ *Mc Shane vs. UK* (43290/98), judg. 28.05.2002 (par. 135)

¹⁸⁴ *European Parliament*, Resolution on the Fundamental Rights in the EU (2002), A5-0281/2003 04.09.2003 (par. 79), www.europarl.eu.int.

¹⁸⁵ *VgT Verein gegen Tierfabriken vs. Switzerland* (24699/94), 28.06.2001. The case concerned an animal protection NGO. In *Demuth vs. Switzerland* (38743/97), judg. 05.11.2002, the Court held that the states' margin of appreciation is wider in the case of commercial broadcasting and narrower in the case of political broadcasting (par. 42).