

Europäischer Gerichtshof für Menschenrechte: § 209 öStGB Stellungnahme der Bundesregierung ohne Bundesregierung

Der Europäische Gerichtshof für Menschenrechte hat den beiden Beschwerdeführern in den wegen des antihomosexuellen Sonderstrafgesetzes § 209 StGB anhängigen Verfahren (*G.L. vs. Austria* (Appl. 39392/98) & *A.V. vs. Austria* (Appl. 39829/98)) heute die Stellungnahme der Regierung übermittelt. Die österreichische Bundesregierung hat jedoch diese in ihrem Namen abgegebene Stellungnahme niemals gesehen. Im Gegensatz zu Gesetzes- und Verordnungsprüfungsverfahren vor dem Verfassungsgerichtshof, in denen die Regierung sich das Recht vorbehalten hat, jede in Ihrem Namen übermittelte Stellungnahme auch tatsächlich beschlußmäßig zu verabschieden, hat sie dem von ihr bestellten Prozessvertreter vor dem Europäischen Menschenrechtsgerichtshof, einem Beamten im Außenministerium, volle Handlungsfreiheit hinsichtlich der Stellungnahmen im Namen der Republik erteilt ohne irgendeine Verpflichtung, die Bundesregierung hinsichtlich der in ihrem Namen gegenüber dem Gerichtshof eingenommenen Positionen zu konsultieren.

Somit hat der Prozeßvertreter auch in den beiden Verfahren wegen § 209 für die Republik eine Stellungnahme samt Verteidigung des § 209 und Bestreitung jeder Menschenrechtsverletzung übermittelt ohne dass die Bundesregierung diese Stellungnahme jemals zu Gesicht bekam, geschweige denn beschlußmäßig als die ihre verabschiedete. Ein solcher Beschluß erscheint auch höchst unwahrscheinlich angesichts des Umstandes, dass nur eine der Regierungsparteien (die konservative ÖVP) das geltende Gesetz verteidigt während die andere (FPÖ) selbst parlamentarische Abänderungsanträge (Senkung der Altersgrenze von 18 auf 16 Jahre) eingebracht hatte und prominente Vertreter die ersatzlose Streichung befürworteten, darunter der freiheitliche Justizsprecher und frühere Justizminister Dr. Harald Ofner sowie die Parteiobfrau und Vizekanzlerin der Republik Dr. Susanne Riess-Passer, die ihre Ablehnung von Diskriminierung auf Grund sexueller Orientierung durch ihren vor vier Jahren getätigten Beitritt zum Kuratorium der LesBiSchwulen Bürgerrechtsorganisation Rechtskomitee LAMBDA (RKL) bekundete.

Was den Inhalt der Stellungnahme betrifft, so verweist der Prozessvertreter, abgesehen von der Zitierung der mittlerweile überholten Judikatur der Europäischen Kommission für Menschenrechte vor ihrer Entscheidung im Fall *Sutherland* (1997), lediglich auf den Umstand, dass im Gegensatz zur früheren englischen Rechtslage in Österreich sich der jugendliche Partner selbst nicht strafbar macht und behauptet, dass die Kriminalisierung des erwachsenen Partners einen „sachlich gerechtfertigten“ Eingriff in das Recht auf Achtung des Privatlebens unter Art. 8 EMRK darstelle. Der Prozessvertreter gibt keinerlei Begründung für diese Behauptung, die im klaren Gegensatz zur Judikatur des Menschenrechtsgerichtshofs steht, der es nicht genügen lässt, daß Eingriffe in das Privatleben „sachlich, zweckmäßig oder wünschenswert“ sind sondern fordert, dass sie auf einem „dringenden sozialen Bedürfnis“ nach dem entsprechenden Eingriff beruhen.

Hinsichtlich der Sonderbehandlung männlich-homosexueller Beziehungen durch § 209 bringt der Prozessvertreter überhaupt keine Rechtfertigung unter Art. 14 EMRK vor. Stattdessen verweist er (lediglich) darauf, dass 1998 gleichgeschlechtliche Lebensgemeinschaften im gesamten Straf- und Strafprozessrecht den verschiedengeschlechtlichen Lebensgemeinschaften umfassend und vollständig gleichgestellt wurden, mit der einzig verbleibenden Ausnahme des § 209. Gerade dieser Hinweis verdeutlicht aber geradezu exemplarisch die Absurdität und den Anachronismus des § 209.

Auch die Verwertung der tagebuchartigen Kalenderaufzeichnungen eines der Beschwerdeführer im Strafverfahren verteidigt der Prozessvertreter mit der bloßen Behauptung, dass dies ein notwendiger Eingriff in die Privatleben gewesen sei, weil er der Verhinderung strafbarer Handlungen und dem Schutz der Rechte und Freiheiten anderer diene. Eine Begründung für diese Behauptung bleibt er schuldig.

Der Menschenrechtsgerichtshof gewährte den Beschwerdeführern eine Frist zur Gegenäußerung bis 2. Juli 2001.

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European Court of Human Rights: Austrian Age of Consent Cases Government Observations the Government never Observed

Today the European Court of Human Rights in two of the age-of-consent cases regarding Art. 209 of the Austrian Criminal Code (*G.L. vs. Austria* (Appl. 39392/98) & *A.V. vs. Austria* (Appl. 39829/98)) submitted to the applicants the so called observations of the respondent government. The Austrian government however never saw these observations delivered in its name. As opposed to proceedings before the Austrian Constitutional Court, where the government in all cases concerning constitutionality of statutes and decrees reserved the right to take a formal decision on all observations delivered in its name, the Austrian government did grant the agent appointed by it to represent the Republic of Austria before the European Court of Human Rights, a civil servant in the Ministry for Foreign Affairs, full power of discretion regarding this representation without any obligation to consult the government on the positions taken in its name before the Court.

So also in these cases the agent did submit observations on behalf of the Austrian government defending the anti-homosexual criminal statute Art. 209 CC and denying any human rights violation while the government in fact never saw these observations, let alone did adopt them by a formal decision. Such a decision would have been highly unlikely given the fact that Austrian constitutional practice requires unanimity of government decisions and only one of the two coalition parties (the conservative ÖVP) defends the law as it stands while the other (FPÖ) itself tabled parliamentary proposals for an amendment of the statute in question (lowering of the age from 18 to 16) with several of its prominent representatives favouring the complete repeal of the law, among them the party's spokesman for judicial affairs, former Minister of Justice Dr. Harald Ofner, and the party-chairwoman and Vice-Chancellor of the Republic, Dr. Susanne Riess-Passer, herself voicing a firm stand against discrimination on the ground of sexual orientation by joining the Advisory Board of the Austrian lesbian and gay civil rights organisation Rechtskomitee LAMBDA (RKL) four years ago.

As regards the content of the observations the government agent besides citing the stale pre-Sutherland case-law of the European Commission of Human Rights merely referred to the fact that as opposed to prior English legislation under Austrian law the adolescent partner himself is not liable to prosecution and that the criminalization of the adult partner constituted a reasonably justified interference with the right to respect for private life under Art. 8 par. 2 ECHR. The agent gives no reasoning for this assertion whose very essence contradicts the Court's case-law which requires restrictions not only to be "reasonable, useful or desirable" but to be based on the existence of a "pressing social need" for the interference in question.

As regards the question of sole criminalization of male-male contacts the agent even submitted no justification under Art. 14 ECHR at all. Instead he pointed to the 1998 enacted complete equalization of the legal position of same-sex partnerships and opposite-sex partnerships in the whole area of Austrian criminal law and law on criminal procedure with the sole remaining exception of Art. 209 CC. This referral however even highlights the absurdity and the anachronism of Art. 209.

Also the use of the diary of the applicant the agent just asserted to be necessary for the prevention of crime and for the protection of the rights and freedoms of others without giving any reasons for that assertion.

The Court invited the applicants to submit observations in reply until 2 July 2001.

The Background of the Cases

a. The Facts

Both applicants are Austrian nationals born in 1967 and 1968 respectively.

G.L. has been convicted by the Vienna Regional Criminal Court under Art. 209 CC of homosexual acts with adolescents and sentenced to one year imprisonment. During the trial the applicant was questioned in particular in respect of a calendar, which had been seized at his home, and in which he had made diary-like entries about his sexual encounters, usually noting the first name of his partner, his approximate age, the kind of sexual acts performed as well as his sensations and feelings. This diary has been read out in court. No witnesses were heard. On this basis the Court found it established that, between 1989 and 1994, the applicant had, in Austria and in a number of other countries, had homosexual contacts either by way of oral sex or masturbation with numerous persons between fourteen and eighteen years of age, whose identity could not be established. On 5th November 1996 the Supreme Court, upon the applicant's plea of nullity, quashed the judgment as far as offences committed abroad were concerned. The applicant had also complained about the use of his calendar-diary, claiming that such use would only be justified in case of a very serious crime but not to provide proof of an offence under Art. 209 CC which itself lacked any justification. In this respect, the Supreme Court found that the Code of Criminal Procedure did not contain any prohibition on using a calendar as evidence - even if it contained diary-like entries - provided that it had been read out at the trial. A diary fell into the category of documents which had to be read out in accordance with Art. 252 (2) CCP. In any case, as the applicant had not objected to the reading out of the calendar, he could not complain about its use as evidence. On 29 January 1997 the Vienna Regional Criminal Court, in renewed proceedings which had been discontinued as far as the offences committed abroad were concerned, fixed the sentence for the offences committed in Austria at eleven months' imprisonment suspended on probation. On 27 May 1997 the Supreme Court dismissed the applicant's plea of nullity. On 31 July 1997 the Vienna Court of Appeal, upon the first applicant's appeal, reduced the sentence to eight month imprisonment suspended on probation. In 1998 the Austrian Minister of Justice refused to recommend to the President of the Republic the pardoning of the applicant.

A.V. has been convicted by the Vienna Regional Criminal Court on 21 February 1997 under Art. 209 of homosexual acts with adolescents, and one minor count of misappropriation, and sentenced him to six month imprisonment suspended on probation. The Court found it established that on one occasion the applicant had had oral sex with a fifteen year old boy. On 22 May 1997 the Vienna Court of Appeal dismissed the second applicant's appeal on points of law, in which he had complained that Art. 209 CC was discriminatory and violated his right to respect for private life. It also dismissed his appeal against sentence.

b. Austrian law and practice

Any sexual acts with persons under fourteen years of age are punishable under Art. 206 and 207 CC.

Art. 209 CC reads as follows: "A person of the male sex who, after completion of his 19th year, engages in same-sex lewdness with a person, who has completed his 14th but not yet his 18th year shall be sentenced to six months to five years imprisonment."

This provision is aimed at consensual homosexual acts, as any sexual acts of adults with persons of up to 19 years are punishable under Art. 212 CC if the adult abuses a position of authority (parent, employer, teacher, doctor etc.).

Consensual heterosexual or lesbian acts between adults and persons over 14 years of age are not punishable.

Offences under Art. 209 CC are regularly prosecuted, an average of sixty criminal proceedings being opened per year, out of which a third result in a conviction. As regards the penalties applied, a term of imprisonment usually exceeding three months is imposed in 65 to 75% of the cases, out of which 15 to 25% are not suspended on probation.

c. Complaints

The applicants complain under Art. 8 of the Convention, taken alone and in conjunction with Art. 14, about Art. 209 of the Criminal Code, penalising homosexual acts between adult men and consenting adolescents between fourteen and eighteen years of age and their respective convictions. The applicants point out in particular that in Austria, as in the majority of European countries, heterosexual and lesbian relations between adults and consenting adolescents over fourteen years of age are not punishable. They submit that there is nothing to indicate that adolescents need more protection against consensual homosexual relations with adults than against such heterosexual or lesbian relations. While not being necessary for protecting male adolescents in general, section 209 of the Criminal Code hampers homosexual adolescents in their development by attaching a social stigma to their relations with adult men and to their sexual orientation in general.

G.L. also complains under Art. 6 & 8 ECHR that, in the criminal proceedings against him, his diary was used as evidence. He submits that this use amounted to an obligation to incriminate himself. Moreover, it was an interference with the most intimate sphere of his private life, which was not necessary to prosecute, as the offence itself was contrary to the Convention.

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