AUSTRIA: Quashing discrimination in age of consent laws

Summary

An activist lawyer working to advance LGBT rights in Austria brought a series of cases to the European Court of Human Rights (ECtHR) to eliminate discriminatory differences in the age sexual of consent for gay and heterosexual couples. After more than a decade of litigation, the offending article of the Penal Code was repealed, paving the way for further advances for LGBT people's rights in the country.

Background

Differing ages of sexual consent for people in same-sex relationships used to be common in Europe. This discrimination was rationalised due to an erroneous belief that gay men planned to "recruit" young people into becoming homosexual. The notion was debunked decades ago, but was still being used by Austria's parliament to justify discrimination until the early 2000s. The first notable challenge to this practice in Austria came in 1990, with a case before the European Commission of Human Rights.

The case concerned a man involved in a non-sexual relationship with a boy who had not yet turned 18, who lodged a constitutional complaint. The man claimed that, if the legislature was only concerned with protecting children, there was no need for differing ages of consent to sexual activity for males and females.

The man claimed that Article 209 of the Austrian penal code, which criminalised consensual sexual activity between males where one party was aged 19 and over and the other was between 14 and 18, discriminated on the basis of sex. He pointed to the fact that a woman in a relationship with a girl with the same age difference would not be subjected to the same treatment, despite the similarity of their relationships.

Similar arguments had been dismissed by Austria's Constitutional Court, which ruled that "homosexual influence endangers maturing males" significantly more than girls of the same age group. The European Commission broadly accepted these arguments in its decision on the case in 1992.

It noted that it had repeatedly ruled that the criminalisation of homosexual activities between consenting male adults was not "necessary in a democratic society", but recalled that it had already considered that "there was a realistic basis (in 1978) for the conclusion that young

men in the age-bracket 18-21 who are involved in homosexual relationships would be subject to substantial social pressures which could be harmful to their psychological development", and thus was within the State's power to legislate on for younger children as well.

Dr Helmut Graupner, now one of the most prominent LGBT rights campaigners in Austria, was a law student at the time. Graupner had been involved in the LGBT movement since 1985 and worked both on court cases and the lobbying of politicians to end legal discrimination against LGBT people.

He explained: "Every few weeks or months there was a new case. Again, a man in the courts, a 20-year-old, because of a relationship with a 16-year-old for instance. Or a person sent to an institution for 'mentally abnormal offenders', potentially for life, just on the basis of an offence which is no offence for heterosexuals".

Although he later brought a string of cases which forced the government to implement reform, Graupner revealed that they almost had a victory much earlier through the country's parliament. In the Spring of 1995 legislators from several parties brought motions in parliament to repeal Article 209. By October of that year a parliamentary committee heard evidence from eleven experts, nine of whom supported repeal wholeheartedly.

Eventually it was agreed that a vote would be held on repealing the offending article, and Graupner and his allies set to work convincing politicians from all sides to vote in favour of repeal. Graupner believed the Austrian population as a whole was relatively positive about LGBT rights, but some political parties refused to take on the issue for fear of alienating less progressive voters. The fact that the country criminalised same-sex relationships until 1971 was a testament to this reluctance to reform.

The day of the vote arrived in 1996 and it required a simple majority for the article to be repealed. So many parliamentarians had signalled their support to the campaigners in private that victory seemed certain. When the votes were cast the room was split down the middle, with 91 voting for repeal and 91 against, meaning the law would remain in place.

"That was really quite disappointing, because it was only one vote in parliament which made the difference," said Graupner, "Many conservative MPs who promised us to vote in favour or at least to walk outside the plenary room and abstain didn't do so, but voted against us".

A similar motion was brought before the parliament again in 1998, but was rejected 81 - 12, as many legislators considered the issue settled by the result of the previous vote.

Litigating against discrimination

Despite the loss in parliament, Graupner pushed ahead with two cases in the courts. Both could have been resolved nationally but Austria's constitutional court would not budge, and so both ended up before the European Court of Human Rights.

In December 1997 their first case was sent to the European Commission on Human Rights, but it was quickly returned with an explanatory note. Staff from the Commission reportedly attached copies of several related judgments from the 1970s in which the body had decided that similar laws had not constituted rights violations.

Graupner knew, as he suspected the Commission's staff did, that a complaint from the United Kingdom had been heard earlier in the year which went against those older decisions. He recalled being surprised by their response: "You would expect that the Commission would know its own case law, but that wasn't the case". He sent the application back, including a copy of the Sutherland v. United Kingdom report, and insisted he would persist with his cases.

It was also common knowledge at the time that the Commission was to be abolished in favour of all cases being handled by the European Court of Human Rights. Taking the case to a high profile court, combined with ongoing domestic political pressure was a cornerstone of their strategy, as it would give maximum exposure to the issue in Austria and throughout Europe.

Before Graupner's complaints were heard by the European Court, several of his cases were referred from a regional court in Innsbruck, which requested a review of the constitutionality of Article 209. While the first case was refused in 2001, a second case was allowed in 2002 and Article 209 was ruled to be unconstitutional.

The regional court argued that Article 209 of the Criminal Code violated the rights to private and family life and to non-discrimination as set out in the European Convention on Human Rights. It also argued that the law was incompatible with the principle of equality under Austria's own constitution and with Article 8 of the Convention, relating to the right to private and family life.

This was partly because a relationship between males aged between 14 and 19 was first legal, but became punishable as soon as one reached the age of 19, and then became legal again when the second person reached the age of 18, whereas no such rule applied for heterosexual couples.

With the courts against the government, it was forced to amend the Penal Code, repealing Article 209 less than a month after the decision. This was not the end of the road though, as while the law had been changed, a number of men had still been convicted under the discriminatory law without redress. Because there had been no remedy for the rights violations they had suffered, two of Graupner's cases proceeded to the European Court.

Outcome

The Court ruled in L. and V. v Austria in January 2003 that there had been a violation of the rights of these men. The judgment noted that the government had relied on previous cases where such discrimination was allowed but recalled that the Convention was "a living instrument" which needed to be interpreted in relation to modern circumstances. The judges added that in light of the Sutherland v. United Kingdom decision it was "opportune to reconsider its earlier case law in the light of these modern developments".

Pointing out that equal ages of consent had now been adopted by the majority of the States of the Council of Europe, the Court reiterated evidence heard by the Austrian Parliament in

1995 which supported an equal age of consent. The judges ruled that there had been a violation of Article 14 of the Convention, relating to freedom from discrimination, taken in conjunction with Article 8, but did not consider it necessary to rule on whether there had been a violation of Article 8 taken alone.

The Court also issued a decision on another of Graupner's cases, S.L. v Austria, handing down a similar judgment. The case did not deal with a person who had been convicted of a crime, but rather addressed the case of a man who, as a boy, had been unable to form a relationship with men for fear of their relationship resulting in a criminal sentence - a penalty which would not have existed for heterosexual couples.

Impact

With national courts and the ECtHR agreeing that there had been a violation of the European Convention and the Austrian Constitution it became clear that the law would need to be changed. The Austrian government, having already repealed Article 209, harmonised the ages of consent by February 2003 but refused to delete the convictions of the men tried under the unconstitutional rule.

Graupner took on these cases and again represented several men at the European Court of Human Rights. In their case, known as E.B. and others v. Austria, the European Court ruled against the government yet again. The judges stated that they could not see why the law on maintaining criminal record entries in relation to convictions under Article 209 was not also amended when that provision was repealed.

The Court found that because the Austrian Government had no justification for retaining the men's criminal records, there had been a violation of their right not to be discriminated against in conjunction with Article 8, as well as a violation of their right to an effective remedy.

In addition, Graupner's earlier victories had an effect on neighbouring countries . Cases related to discriminatory ages of consent had also been brought to the Hungarian Constitutional Court before the European Court's decision on the complaints against Austria, but had been left pending judgment. After the Austrian Constitutional Court decided Article 209 was unconstitutional it was only a few weeks before several Hungarian cases received judgments, also requiring the Hungarian government to do away with discriminatory higher ages of consent.

Graupner continues to head the LGBTI rights organisation Rechtskomitee LAMBDA which has since been honoured publicly in the Austrian Federal Parliament and the country moved to legalise same-sex marriages after years of campaigning in December 2017. In recognition of his work, Austria's president also awarded Graupner one of the country's highest honours, an outcome that he had never expected.

He explained: "When I started my activism in 1985 as a law student people were sent to jail on the basis of their sexual orientation, and I was 20 myself, so I was not far away from the

age of consent myself in those days. It was really part of your everyday life, feeling under threat, seeing your friends under threat and even seeing people go to jail."

"And it was finally a success. But you didn't know that from the start - you just know that you have a good case, you have injustice to fight. And even if you don't win… I felt I had an obligation to myself."

Further information

- Read CRIN's case summary of L. and V. v. Austria.
- Read CRIN's case summary of S.L. v. Austria.
- Find out more about strategic litigation.
- See CRIN's country page on Austria.
- Read CRIN's report on access to justice for children in Austria.

CRIN's collection of case studies illustrates how strategic litigation works in practice by asking the people involved about their experiences. By sharing these stories we hope to encourage advocates around the world to consider strategic litigation to challenge children's rights violations. For more information, please visit: https://www.crin.org/en/home/law/strategic-litigation/strategic-litigation-case-studies.
