AS TO THE ADMISSIBILITY OF

Application No. 17279/90
by Walter ZUKRIGL
against Austria

The European Commission of Human Rights sitting in private on 13 May 1992, the following members being present:

MM. E. BUSUTTIL, Acting President of the First Chamber
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Sir Basil HALL
Mr. C.L. ROZAKIS
Mrs. J. LIDDY
MM. M. PELLONPÄÄ
B. MARXER

Mr. M. de SALVIA, Secretary to the First Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 31 July 1990 by Waler Zukrigl against Austria and registered on 10 October 1992 under file No. 17279/90;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen born in 1933. He is represented before the Commission by Mr. W. Dietrich, a lawyer practising in Vienna.

The facts of the application, as submitted by the applicant, may be summarised as follows.

The applicant is a homosexual, aware of his sexuality since his youth.

In early 1986 the applicant met and became friends with a boy who, at the time, was not yet 18 years old. The applicant's homosexual feelings towards the boy were reciprocated. Because of the provisions of Section 209 of the Criminal Code (Strafgesetzbuch) the applicant was not permitted to - and did not - have sexual relations with his friend.

The applicant introduced two constitutional complaints with the Constitutional Court (Verfassungsgerichtshof), one concerning the wording of Article 209 up to 31 December 1988, and one concerning the new wording which was in force from 1 January 1989.

The Constitutional Court rejected the first constitutional complaint(concerning the old wording of Section 209) on the grounds that the applicant no longer stood under any threat of being prosecuted under that provision as it was no longer in force. As to the second constitutional complaint, concerning the current wording of Section 209, the Constitutional Court, in its decision of 3 October 1989, found

that the applicant had locus standi to make the complaint as he was a person who was actually affected by the provision. Only a constitutional complaint could remedy the alleged interference with the applicant's rights.

The Constitutional Court continued:

(Translation)

> "The appellant especially sees a violation of equal rights in the passage of the law he challenges in its allegedly treating men and women differently, in a way that is not justified on any relevant grounds, with respect to homosexual activities with young people under 18. It is claimed that if the legislature has in mind the protection and the safeguarding of the undisturbed sexual development of young people, there is no difference at all between the development of male and female sexuality. It is also asserted that if in order to justify exemption from punishment for female homosexual acts involving under-age partners a position is taken up which is based on whether the effects of such acts are harmful, this standpoint cannot be given up when it comes to judging homosexual contacts with male under-age persons.
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> The Constitutional Court continues to hold the view it has consistently expressed in previous cases that the scope given to the ordinary legislature by the constitution with respect to the passing of legislation applies both to the aims it is seeking to achieve and to the choice of the methods serving to achieve those aims. The ordinary legislature is free to decide - while taking into account either desired side-effects or those it is prepared to accept - what instruments it considers suitable in order to achieve its aims and then actually applies in a given situation. In this connection it is only barred from exceeding the limits imposed by the constitution, for example by violating the requirement to be objective (which results from the principle that everyone must be treated equally) by choosing completely unsuitable means of achieving an aim or by choosing means which, although basically suitable, lead to a distinction being made for which no valid reasons can be given. The development of the criminal law in the last few decades has shown that the legislature is striving to apply the system of criminal justice in a significantly more restrictive way than before - in pursuance of the efforts it is undertaking in connection with its policy on the treatment of offenders, which have become known under the general heading of "decriminalisation". This means that it only leaves offences on the statute book or creates new offences if such punishment of behaviour harmful to society is still found absolutely necessary and indispensable after the strictest criteria have been applied. The criminal provision which has been challenged is included in that group of acts considered unlawful in order to protect - to an extent thought to be unavoidable - a young, maturing person from developing sexually in the wrong way ("Homosexual acts are only offences of relevance to the criminal law inasmuch as a dangerous strain must not be placed by homosexual experiences upon the sexual development of young males ..."). Seen in this light, it is the conviction of the Constitutional Court that from the point of view of the principle of equality contained in Article 7 para. 1 of the Federal Constitutional Law and Article 2 of the Basic Constitutional Act those legislating on the criminal law cannot reasonably be challenged for

taking the attitude, by reference to authoritative expert opinions coupled with experience gained, that homosexual influence endangers maturing males to a significantly greater extent than girls of the same age, and conclude that it is necessary to punish under the criminal law homosexual acts committed with young males, as provided for under s. 209 of the Penal Code. This conclusion was also based on their views of morality, which they wanted to impose while duly observing current policy on criminal justice, which aims at moderation and at restricting the punishment of offences (while carefully weighing up all the manifold advantages and disadvantages). Taking everything into account, we are dealing here with a distinction which is based on factual differences and therefore constitutionally admissible from the point of view of Article 7 para. 1 of the Federal Constitutional Law, in conjunction with Article 2 of the Basic Constitutional Act. The Constitutional Court thus endorses the legal view held by the Supreme Court, which did not raise any constitutional doubts concerning the legal rule contained in the earlier version of s. 209 of the Penal Code, the basic conception of which was comparable with respect to the different treatment of under-age males and females. This has already been demonstrated in several judgments (cf. OGH 15 September 1981, 9 Os 144/81 = EvBl. 1982 No. 35; 23 April 1986, 9 Os 38/86; see also OGH 10 September 1981, 13 Os 115/81 = EvBl 1982 No. 65m; 24 August 1982, 9 Os 114/82 = SSt. 53/50). The restriction contained in the Juvenile Court Law 1988 (Federal Law Gazette 599) of the group of offenders to (male) adults also raises no doubts with respect to the constitutional law. The Constitutional Court basically shares the view expressed by the Federal Government, the gist of which is that this is only an expression of the basic legal idea that the strict, rigorous means of punishment available under the criminal law must be handled sparingly and with proper restraint. Contrary to the appellant's view, the criminal provision which is challenged cannot violate Article 8 of the European Convention on Human Rights simply because the interference with private and family life, which it is claimed has taken place, is quite obviously a legislative measure for the protection of the rights of others which is admissible under Article 8 para. 2 of the Convention, namely the protection of the undisturbed development of persons affected by criminal acts.

It therefore follows that the application to annul s. 209 of the Penal Code (Federal Law Gazette 60/1974, as amended: Federal Law Gazette 599/1988) had to be dismissed as ill-founded."

(Original)

"Die Gleichheitswidrigkeit der angegriffenen Gesetzesstelle erblickt der Einschreiter insbesondere darin, daß sie Männer und Frauen in bezug auf homosexuelle Handlungen mit Jugendlichen in sachlich nicht gerechtfertigter Weise unterschiedlich behandle. Habe der Gesetzgeber den Schutz und die Sicherung der ungestörten sexuellen Entwicklung junger Menschen vor Augen, so bestehe kein Unterschied in der Entwicklung männlicher und weiblicher Sexualität überhaupt. Werde zur Rechtfertigung der Straflosigkeit weiblicher homosexueller Kontakte zu jüngeren Partnerinnen eine Position bezogen, die sich an schädigenden Wirkungen orientiere, könne dieser Standpunkt bei der Beurteilung homosexueller Kontakte zu männlichen jüngeren Personen nicht aufgegeben werden.

Der Verfassungsgerichtshof hält an seiner in ständiger Rechtsprechung vertretenen Auffassung fest, daß die dem einfachen Gesetzgeber verfassungsmäßig eingeräumte rechtspolitische Gestaltungsfreiheit sowohl für die angestrebten Ziele als auch für die Auswahl der zur Zielerreichung dienlichen Mittel gilt: Der einfache Gesetzgeber kann frei entscheiden, welche Instrumente er - under Berücksichtigung erwünschter oder in Kauf genommener Nebenwirkungen - in der jeweils gegebenen Situation zur Verwirklichung seiner Zielsetzungen geeignet erachtet und anwendet. Verwehrt ist ihm hiebei nur die Überschreitung der von Verfasssungs wegen gezogenen Schranken, so die Verletzung des aus dem Gleichheitssatz erfließenden Sachlichkeitsgebots, indem beispielsweise zur Zielerreichung völlig ungeeignete Mittel gewählt werden oder die vorgesehenen, an sich geeigneten zu einer sachlich unbegründbaren Differenzierung führen. Die Fortentwicklung der Strafrechtsordnung in den letzten Jahrzehnten zeigt nun, dass der Gesetzgeber das Justizstrafrecht - in Verfolgung seiner unter dem Überbegriff "Entkriminalisierung" bekannt gewordenen kriminalpolitischen Bestrebungen - deutlich restriktiver als zuvor einzusetzen trachtet, Straftatbestände also nur dann bestehen läßt oder neu schafft, wenn eine derartige Pönalisierung sozialschädlichen Verhaltens auch nach strengsten Kriterien unbedingt geboten und unerläßlich ist. Die angefochtene Strafnorm zählt zu jener Gruppe von Unrechtstatbeständen, die dem Schutz des heranreifenden jungen Menschen vor sexueller Fehlentwicklung - im unumgänglich befundenen Umfang - dient ["Homosexuelle Betätigung ist strafrechtlich nur insofern relevant, als die sexuelle Entwicklung männlicher Jugendlicher nicht durch homosexuelle Erlebnisse in gefährdender Weise belastet werden soll..."). So betrachtet kann dem Strafgesetzgeber aber nach Überzeugung des Verfassungsgerichtshofs unter dem Aspekt des Gleichbehandlungssatzes der Art. 7 Abs. 1 B-VG und 2 StGG nicht mit Grund entgegengetreten werden, wenn er - unter Berufung auf maßgebende Expertenmeinungen in Verbindung mit Erfahrungstatsachen den Standpunkt einnehmend, daß eine homosexuelle Einflußnahme männliche Heranreifende in signifikant höherem Grad gefährde als gleichaltrige Mädchen - auf dem Boden und in Durchsetzung seiner Wertvorstellungen mit Beachtung der eingeschränkten, maßhaltenden Ziele der vorherrschenden Strafrechtspolitik (bei sorgsamer Abwägung aller vielfältigen Vor- und Nachteile) ableitet, es sei mit einer strafrechtlichen Ahndung homosexueller Handlungen an jungen Menschen männlichen Geschlechts, wie in § 209 StGB festgelegt, das Auslangen zu finden. Denn es handelt sich hier - alles in allem genommen - um eine Differenzierung, die auf Unterschieden im Tatsachenbereich beruht und deswegen aus der Sicht des Art. 7 Abs. 1 B-VG iVm Art. 2 StGG verfassungsrechtlich zulässig ist. Der Verfassungsgerichtshof tritt damit im Ergebnis der Rechtsmeinung des Obersten Gerichtshofs bei, der - wie schon in mehreren Entscheidungen dargelegt (vgl. OGH 15.9.1981 9 Os 144/81 = EvBl. 1982 Nr. 35, 23.4.1986, 9 Os 38/86; s. auch OGH 10.9.1981 13 Os 115/81 = EvBl. 1982 Nr. 65m 24.84.1982 9 Os 114/82 = SSt. 53/50) - die in ihrer Grundkonzeption vergleichbare Strafnorm des § 209 StGB (frühere Fassung) aus dem Blickwinkel der unterschiedlichen Behandlung von männlichen und weiblichen Minderjährigen verfassungsrechtlich nicht in Zweifel zog. Doch auch die hier relevierte, mit dem Jugendgerichtsgesetz 1988, BGBl. 599, verfügte Einschränkung des Täterkreises auf

(männliche) Volljährige begegnet keinen verfassungs-
rechtlichen Bedenken. Der Verfassungsgerichtshof teilt
dazu im wesentlichen die Auffassung der Bundesregierung,
die (sinngemäß) zutreffend darauf hinweist, daß hierin nur
der rechtspolitische Grundgedanke zum Ausdruck komme, die
einschneidenden strengen Mittel des Kriminalrechts in
sachgerechter Weise zurückhaltend und sparsam zu handhaben.
Gegen Art. 8 EMRK wieder kann die angefochtene Stafnorm
entgegen der Meinung des Antragstellers allein schon
deshalb nicht verstoßen, weil der behauptete Eingriff in
das Privat- und Familienleben ganz offenkundig eine nach
Art. 8 Abs. 2 EMRK zulässige gesetzgeberische Maßnahme
zum Schutz der Rechte anderer ist, nämlich zum Schutz der
ungestörten Entwicklung der von den Straftaten betroffenen
Personen.

Daraus folgt aber, daß der Antrag, § 209 StGB, BGBl.
60/1974 idF BGBl. 599/1988, als verfassungswidrig
aufzuheben, als unbegründet abzuweisen war."

Relevant provisions of domestic law

Up to 31 December 1988:

(Translation)

s. 209. A male person who after attaining the age of
eighteen fornicates with a youth of the same sex shall be
sentenced to detention of between six months and five
years.

(Original)

§ 209. Eine Person männlichen Geschlechtes, die nach
Vollendung des achtzehnten Lebensjahres mit einer
jugendlichen Person gleichgeschlechtliche Unzucht treibt,
ist mit Freiheitsstrafe von sechs Monaten bis zu fünf
Jahren zu bestrafen.

From 1 January 1989:

(Translation)

s. 209. A male person who after attaining the age of
nineteen years fornicates with a person of the same sex who
has attained the age of fourteen years but not the age of
nineteen years shall be sentenced to detention of between
six months and five years.

(Original)

§ 209. Eine Person männlichen Geschlechtes, die nach
vollendung des neunzehnten Lebensjahres mit einer Person,
die das vierzehnte, aber noch nicht das achtzehnte
Lebensjahr vollendet hat, gleichgeschlechtliche Unzucht
treibt, ist mit Freiheitsstrafe von sechs Monaten bis zu
fünf Jahren zu bestrafen.

COMPLAINTS

The applicant alleges that the continued existence of Article 209 of the Criminal Code constitutes an unjustified interference with his right to respect for private life, as guaranteed by Article 8 of the Convention. He also considers that the fact that Article 209 only applies to relations between men, and not to relations between women, violates Article 14 in connection with Article 8 of the Convention.

THE LAW

1. The applicant alleges violation of Article 8 (art. 8) of the Convention by virtue of the existence of legislation which makes it a criminal offence for a man over the age of 19 to have homosexual relations with a boy between the ages of 14 and 18. Article 8 (Art. 8) of the Convention provides as follows:

> 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.

The applicant in the present case has not been prosecuted under the new version of Section 209 of the Criminal Code (Strafgesetzbuch). The Commission must accordingly consider whether he may claim to be "the victim of a violation" of Article 8 (Art. 8) within the meaning of Article 25 (Art. 25) of the Convention.

The Commission recalls that in its judgment in the Marckx case the European Court of Human Rights held the following:

> "Article 25 (Art. 25) of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it." (Eur. Court H.R., Marckx judgment of 13 June 1979, Series A no. 31, p. 13, para. 27).

The Commission has had regard to the jurisprudence of the Court according to which the very existence of legislation may continuously affect the exercise of a right under the Convention (cf. Eur. Court H.R., Dudgeon judgment of 22 October 1981, Series A no. 45, p. 18, para. 41) even in the absence of an individual measure of implementation (cf. Eur. Court H.R., Johnston and Others judgment of 18 December 1986, Series A no. 112, p. 21, para. 42) and even where the risk of such an implementation is minimal (cf. Eur. Court H.R., Norris judgment of 26 October 1988, Series A no. 142, p. 16, para. 33).

Moreover, the Constitutional Court (Verfassungsgerichtshof) found, for the purposes of Austrian law, that the current text of Section 209 of the Criminal Code (Strafgesetzbuch) affected the applicant in the enjoyment of his rights. Having regard to the above jurisprudence of the European Court of Human Rights, and to the finding of the Constitutional Court, the Commission finds that the applicant may claim to be a victim of a violation within the meaning of Article 25 (Art. 25) of the Convention.

To the extent that the applicant is required to exhaust domestic remedies in connection with a complaint concerning the effect of a provision on his right to respect for private life, the Commission finds that, by putting his complaint to the Constitutional Court, the applicant has exhausted domestic remedies according to the generally recognised rules of international law.

Having regard to the above-mentioned Dudgeon and Norris judgments of the Court, and to the Commission's Report in the case of Modinos v. Cyprus (No. 15070/89, Report 3.12.91), the Commission finds that the existence of Article 209 of the Criminal Code amounts to an interference with the applicant's right to respect for his private life

as guaranteed by Article 8 para. 1 (Art. 8-1) of the Convention, that the interference is "in accordance with the law", and that the aim of the interference is the "protection of the rights and freedoms of others" and the "protection of morals".

As to the question of necessity, the Commission recalls that the Convention organs have on three occasions considered the criminalisation of homosexual activities between consenting male adults as not "necessary in a democratic society" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention (Dudgeon and Norris judgments and Modinos case, referred to above). The present case, however, relates not to a prohibition on homosexual acts between consenting male adults, but rather to legislation fixing an age of consent to homosexual activities, with a separate age of criminal responsibility for the relevant offences (cf. No. 7215/75, Comm. Report 12.10.78, D.R. 19 p. 66, paras. 139-158).

It is, in the first place, for the domestic authorities to assess whether a pressing social need exists for an interference with the rights set out in Article 8 para. 1 (Art. 8-1) of the Convention, and that in making this assessment, a margin of appreciation is left to the States (cf. Norris judgment, referred to above, p. 20, para. 45 with further references).

The Commission recalls that it has 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 (No. 7215/75, referred to above, para. 154). In that case, the Commission found that the United Kingdom Government had not gone beyond its obligations under the Convention in attempting to strike a balance between the conflicting interests involved.

In the present case, the age of "consent" is lower than in the previous case concerning the United Kingdom, and the age at which criminal responsibility will be imputed for breach of the respective provisions is higher in Austria than in the United Kingdom. Although it appears from the extensive documents submitted by the applicant that attitudes in general may have evolved since 1978, the Commission finds nothing in the present case to distinguish it from Application No. 7215/75, save that the Austrian legislation is less restrictive.

The interference with the applicant's right to respect for his private life can therefore be considered "necessary in a democratic society" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also alleges a violation of Article 14 of the Convention in connection with Article 8 (Art. 14+8). He points out that Section 209 of the Criminal Code relates only to male homosexual behaviour, and considers that the fact that female homosexual behaviour is not included amounts to an unjustified distinction in the enjoyment of Article 8 (Art. 8) rights, contrary to Article 14 (Art. 14) of the Convention. Article 14 (Art. 14) of the Convention provides as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

This issue is also canvassed in the Commission's Report in Application No. 7215/75, (Comm. Report 12.10.78, D.R. 19 p. 66, paras. 166-170). In addition, in the present case, the Constitutional Court has discussed, in the context of the principle of equality before the law, whether a discrimination was involved. The Constitutional Court noted that the reason why female homosexuality had been excluded from the scope of Section 209 was because it was the policy of the legislator only to impose criminal sanctions in cases where such penalty was absolutely necessary, even using the strictest criteria. It further noted that the legislator had considered that there was considerably more danger of homosexual influence on adolescent males than girls of the same age. Accordingly, although there was a difference in treatment, the Constitutional Court found that the existence of Section 209 did not raise constitutional problems.

Bearing in mind both its previous Report in Application No. 7215/75 (referred to above) and the reasons set out in the Constitutional Court's decision of 3 October 1989, the Commission finds that the application of Section 209 of the Criminal Code to males but not to females does not constitute discrimination against the applicant within the meaning of Article 14 (Art. 14) of the Convention.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber Acting President of the First Chamber

(M. De SALVIA) (E. BUSUTTIL)