

5 Years Deletion of Art. 209

Supreme Court Severely Extends Protection of Human Rights, Except for Victims of Art. 209

RKL supports applications to the European Court of Human Rights

Today it is five years that the last anti-homosexual criminal statute has been deleted from the books. Exactly on the day of this anniversary the Supreme Court delivered a judgment as sensational for protection of human rights in general as it seems cynical for victims of Art. 209. While in future all victims of human rights violations by the judiciary will be entitled to address the Supreme Court directly, this still is not the case for Art. 209-victims. Their convictions remain registered in the nationwide Registry of Convictions stigmatising the victims for years to come. Rechtskomitee LAMBDA (RKL) supports applications to the European Court of Human Rights (ECHR).

Art. 209 Criminal Code, which established a higher minimum age for gay sex of 18 as compared to 14 for heterosexual and lesbian sex, had been repealed by 14.08.2002 (00:00). Exactly five years later the Supreme Court now delivered a judgment with an utmost cynical effect to the victims of Art. 209.

The applicant before the Supreme Court in 1997 had been convicted three times to imprisonment under the infamous Art. 209 Criminal Code (CC). One of these convictions he challenged in the European Court of Human Rights (ECHR). The ECHR (also in this case) found Art. 209 and the conviction based on it to constitute severe violations of human rights and condemned Austria (*G.B. & H.G. vs. Austria*, 02.06.2005). On the basis of this judgment the domestic proceedings had been reopened and the man has been acquitted. The other Art. 209-convictions however still are not just standing, but even in addition registered in the national Registry of Convictions. The Ministry of Justice refused a pardon.

The man therefore applied to the Minister of Interior which is the competent authority for matters of the national Registry of Convictions for, at least, a deletion of this Art. 209-conviction from the Registry. He by this explicitly did not ask to set aside the conviction or to eliminate it from jurisdiction. He just asked for an end to the continuing storage of the conviction by the police and the transfer of this data to the Courts and other authorities.

Nevertheless the Constitutional Court confirmed the negative decision of the Minister of Interior by saying that "it cannot be the business of the Registry's authorities to decide if and in how far certain convictions be eliminated from jurisdiction". Only a court could establish that a court-decision violated human rights (VfGH 04.10.2006, B 742/06).

Art. 209-victims achieve a historic judgment and are left over

The convict then applied to the Supreme Court for a renewal of the criminal proceedings, as the ECHR repeatedly held that Art. 209 and convictions based on it violated human rights. The Procurator General ("*Generalprokuratur*") opposed those applications because the man did not challenge his convictions before the ECHR.

The Supreme Court rejected that position of the Procurator General and basically agreed with the applicant. In its landmark judgment it held – thereby transcending the wording of the law – that victims of human rights violations by the judiciary can always apply to the Supreme Court for a renewal of their proceedings; even if they did not achieve a conviction of Austria by the ECHR, and even if there is not yet case-law of the ECHR on a specific issue (OGH 01.08.2007, 13 Os 135/06m).

So the victims of Art. 209 did achieve a historic extension of protection for all victims of human rights violations; nevertheless they themselves are left over. Because the Supreme Court excluded the new remedy for violations more than 6 months in the past.

So Art. 209-convictions remain registered in the nationwide Registry of Convictions stigmatising the victims for years to come. Just recently the Upper Regional Court of Vienna, confirmed heavier punishment due to a criminal record according to Art. 209 (03.05.2005, 19 Bs 117/05b) and refused parole on the basis of prior convictions under Art. 209 (13.06.2006, 20 Bs 155/06z), saying that Art. 209 might have violated the equality clause but “did not lack general moral understanding” (13.06.2006, 20 Bs 155/06z).

A first application to the ECHR against the continued storage of Art. 209 convictions in the nationwide Registry of Convictions has already been filed (*E.B. vs. Austria*, appl. 31913/07). Others will follow.

“It is really sad that the European Court of Human Rights again has to be confronted with still undead Austrian anti-homosexual criminal legislation”, says *Dr. Helmut Graupner*, president of the Austrian lesbian and gay rights organization *Rechtskomitee LAMBDA (RKL)* and counsel of the victims of Art. 209, “Federal parliament could prevent this repeated shame for our country but RKL-advisory-board’s member Terezija Stoisits’ bill for an Amnesty-, Rehabilitation- and Compensation Act still has not been dealt with there for two years now.”

Rechtskomitee LAMBDA (RKL), founded in 1991, on a supra-partisan and denominational level is working for the implementation of human rights for homo- and bisexual men and women. In its honorary board it convenes so prominent members as Prime Minister Dr. Alfred Gusenbauer, President of Federal Parliament Mag. Barbara Prammer, former Minister of Justice Mag. Karin Gastinger, former President of the Parliamentary Assembly of the Council of Europe Peter Schieder, Federal Ombudsman Mag. Terezija Stoisits, Director of Public Security Dr. Erik Buxbaum, the President of National Judges Association Dr. Barbara Helige, the Vice-President of the Vienna Bar-Association Dr. Elisabeth Rech, the President of D.A.S.-legal expenses insurance company Dr. Franz Kronsteiner, the President of Weisser Ring Dr. Udo Jesionek, the Secretary General of Amnesty International Austria Mag. Heinz Patzelt and the well-known human-rights experts Dr. Lilian Hofmeister and Univ.-Prof. Dr. Manfred Nowak, the constitutional law professors Univ.-Prof. Dr. Christian Brünner, Univ.-Prof. Dr. Bernd-Christian Funk, Univ.-Prof. Dr. Heinz Mayer and Univ.-Prof. Dr. Ewald Wiederin, famous child- and adolescent psychiatrist Univ.-Prof. Dr. Max Friedrich and the Vienna Child- and Youth-Ombudspersons DSA Monika Pinterits and Dr. Anton Schmid, sexologists Univ.-Prof. Dr. Josef Christian Aigner, Prof. Dr. Rotraud Perner and Mag. Johannes Wahala, theologian Univ.-Prof. Dr. Kurt Lüthi, Life-Ball-Organisor Gery Keszler, Entertainer Günter Tolar and many more. October 2nd, 2006, RKL’s 15 years anniversary has been celebrated in historic Ceremonial Act “Against Sexual Apartheid” in the lower chamber of Austrian federal parliament. This first honouring of an lgbt organisation in a national parliament worldwide took place in attendance of over 500 guests including highest representatives from the judiciary, administration and politics.

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