

**'Against Sexual Apartheid':  
A ceremonial act to celebrate 15 years of  
Rechtskomitee Lambda**

Federal Parliament, Republic of Austria  
Monday 2 October 2006, 16h00-19h00

**Keynote: *'Sexual orientation and the law: a test case for human rights'***

by

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1. Dear Vice-President of the Federal Parliament, dear Speaker, dear dignitaries, judicial colleagues and friends: it is a great honour for me to be part of this occasion. I bring you greetings and congratulations from my own country, the Republic of South Africa. I am honoured to have been asked, as a South African, to give the keynote address on this happy and festive, but also solemn, occasion. Tonight we mark fifteen years of courageous, principled struggle on the part of RKLambda, and its director, Mr Helmut Graupner. I pay particular tribute to Helmut's indefatigable work.
2. It was Helmut who suggested the title of my lecture this evening: *'sexual orientation and the law – a test case for human rights'*. That title was taken from a university lecture that I delivered in

South Africa in 1992, fourteen years ago. It was a delicate point in the negotiations that preceded my country's transition. It was a time of great hope and expectation. The African National Congress – the voice of the majority of South Africa's people – had recently been unbanned, and the apartheid government was negotiating with it and other parties for a peaceful transition to a democratic constitutional state.

3. It was a heady time, as we resolved to turn our backs on the indignities and inhumanities of racial oppression. But the vision of our national future went far beyond race: it was broad and all-inclusive. South Africans vowed to reject every form of discrimination that had disfigured our society under apartheid – principally racial and gender discrimination, but – significantly – also discrimination against gays and lesbians.
4. Under apartheid, gays and lesbians had been persecuted and oppressed. Now the new Constitution vowed to include them, equally, in the benefits of dignity and equality under law. The momentous phrase, 'sexual orientation', was included, along with other conditions (such as race, sex, gender, culture, disability and age), in the Constitution's equality clause. Unfair discrimination

against gays and lesbians was expressly prohibited, and a new era had started.

5. It was a remarkable first for any country in the world. At that time, a standing decision of the Supreme Court of the United States of America still licensed criminal penalties against private adult consensual same-sex conduct.<sup>1</sup> Yet twenty five years after the Stonewall riots in New York City, it was Africa that achieved this historic first. Nowhere in the world were gays and lesbians received so amply and inclusively into the bosom of civic equality.
6. Twelve years of constitutionalism in South Africa, fifteen years of dedicated labour by RKLambda in Austria: we have come a very long way since the early 1990s. These last years have given us much cause to celebrate. In Western Europe and North America, and in my own country, gays and lesbians and bisexual, transgendered and intersexed people (LGBTI) have emerged from the fringes and shadows of polite society, to claim their place at the heart of it.
7. But not all is celebration. We also have much, too much, still to mourn. In most countries across the world – in most parts of

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<sup>1</sup> *Bowers v Hardwick* 478 US 186 (1986), later overruled by *Lawrence v Texas* 539 US 558 (2003).

Africa, in the Arab world, in the Orient, in many Latin American countries, gays and lesbians are still rejected, despised, persecuted and oppressed. And the sobering fact is that 80% of the gays and lesbians, trans-gendered, bisexual and inter-sexed people of the world live in Africa, Asia, the Arab world and Latin America. So the overwhelming majority of gay and lesbian people still live under conditions of acute oppression, which deny them elementary dignity and security.

8. We therefore celebrate the achievements of RKLambda tonight with a sense of humility and fragility: for no one of us can rest secure in our freedoms until all unfreedoms are banished. The oppression of gays and lesbians anywhere constitutes a rebuke to any temptation we might feel to complacency.
9. There is therefore a delicate and appropriate irony in Helmut's suggestion that the title of my talk tonight should be the same as it was in 1992; for my thesis, too is the same, though depicted more broadly: that dignity and equality for gays and lesbians, in every society in the world, is a test case of human rights protection – and it is a test that tonight we must re-commit ourselves to making sure every part of the world will truly surmount.

10. For homosexuality and other non-abusive forms of sexual variance test the fundamental core of human rights philosophy. A society that aspires to respect human rights cannot disrespect people because of sexual orientation. It is easy to endorse rights like free speech and dignity and socio-economic benefits in the abstract: more difficult is to actualise equality and dignity by according marginalised groups like gays and lesbians the full protection and benefit of the law. And if a society fails that test, it fails the test of elementary human rights protection.
11. Why does sexual orientation equality continue to constitute such a critical test for the protection of human dignity? There seem to me to be three, inter-related reasons. Each involves particular difficulties that protecting gays and lesbians raises for the practice of democracy: the fact that gays and lesbians are, immutably, a minority in society; that the defining criterion of their status is sexuality, which is still fraught with complexity for many humans; and that gay and lesbian rights seem to conflict with many religious principles and tenets.

*Minorities, diversity and democracy*

12. First, gay and lesbian equality tests the principle of diversity in democracy. Unavoidably, gays and lesbians are a minority in society. They must be, since they depend on heterosexual majority procreation for their own perpetuation. But in the collectivity, the effects are perilous, for unlike blacks in South Africa, or women in most societies, gays and lesbians can never hope to command an electoral majority to vindicate their elementary civic rights. Brute electoral force offers no way to secure their rights.
13. This means that if they cannot persuade the majority to endorse their cause, they must rely on counter-majoritarian principles for their protection. In this they are not unique. For many minority groups, this is a truism. In South Africa, no single linguistic, ethnic or cultural group commands a majority. Each of the major indigenous ethnic groupings (Xhosa-, Zulu-, Sotho-, Afrikaans-speakers) constitutes a minority. The same is true of Europe; and indeed of most countries. Our societies are collectivities of minorities: the question is whether our commitment to constitutional value and principle can afford us a means of brokering our differing interests.

14. Our common future therefore depends on the capacity of majoritarian politics to accommodate minorities; and gays and lesbians bring this acutely to the fore. They constitute no more than 3-5% of any society, and yet the progress of their cause is invariably bitterly contested. Hence, how society deals with their rights and interests is likely to be emblematic of how it deals with other minorities. It is no surprise that many societies that cruelly oppress gays and lesbians also subject other minority ethnic and cultural groupings to persecution and injustice.
15. Gays and lesbians, a definitional minority, are a potent challenge in realising the principle of diversity, and vindicating its claims over the sterilising demands of uniformity.

*Distaste, repugnance and democracy*

16. This is particularly so because of the second reason. Gay and lesbian equality tests the principle of distaste: it raises the question whether we are willing to afford equal rights to those we dislike or fear, or whose lifestyles we feel are repugnant? This is because sexual orientation is defined by reference not to physiological

characteristics like skin colour or gender, but to erotic attraction and affiliation.

17. When we think of gays and lesbians we therefore have to think of how they have sex – and for many in the majority this is a painful challenge. For many societies, sexuality remains a fraught issue. The difficulties we have had in Africa in managing the effects of the AIDS epidemic attest to this. The disease is enormously stigmatised, and shrouded in silence – with an agonising cost in life and suffering – largely because it is sexually transmitted.
18. But everywhere, not only in Africa, blame, condemnation, moralism and heavy-handed prescription still predominate in attitudes to private consensual adult sexual expression.
19. For gays and lesbians this has an often devastating effect. They are the only significant social interest group defined by reference to sexual functioning. This brings taboos, inhibitions, anxieties, repressions, jealousies and even envy to the fore.
20. Yet our responses to sex are emblematic of our other visceral reactions. And so the plight of gays and lesbians in this respect only accentuates an issue that manifests in many other ways too:



do people wearing yarmulkes, or headscarves, or yashmaks, excite our distaste or fear or disapproval? The test of sexual orientation is the test of rationality and humaneness over visceral disfavour. For if society disqualifies gays and lesbians because of discomfort or fear, few other minority groups will be able to rest safe. Gay and lesbian equality therefore tests our capacity to commit ourselves to rational and humane principles of co-existence as human beings.

*Religious intolerance, secularism and democracy*

21. There is a third reason why gay and lesbian equality tests our democratic practices so elementally. It brings to the fore perhaps our civilization's largest challenge: that of secularism. This raises the question whether the world's devout religious believers are willing to co-exist in society with those who do not subscribe to their faith or to the tenets of their beliefs.
22. Gay and lesbian equality brings this issue acutely to the fore because orthodox interpretations of three of the world's most prominent religions – Judaism, Christianity and Islam – hold that they condemn and even outlaw homosexual conduct. Indeed,

religious believers are often the most virulent opponents of dignity and legal protection for gays and lesbians.

23. If orthodox religious beliefs do indeed proscribe same-sex conduct, the question is not whether gays and lesbians are willing to live peacefully with orthodox religious adherents – for they undoubtedly are – but whether orthodox adherents are willing to live peacefully with gays and lesbians. The question is whether adherents of these religions are willing to reciprocate the tolerance and good will that gays and lesbians are willing to extend to them – and the challenge to those faiths is whether they can manifest humane tolerance along with devout belief.
24. For society itself, gay and lesbian equality offers a profound test of our commitment to building and living in secular community, without subordinating ourselves to the particular religious tenets of any faith. This is a question that is as acute for Baptists in the south of America as it is for some devout Catholics and for the Muslim world.
25. Religiously inspired intolerance is today one of the world's most frightening problems. It offers a sure means of halting progress and of stoking all-obliterating hatred and violence. The gay and

lesbian question tests whether we can commit ourselves to better, for if gay and lesbian equality can be accepted, a broader commitment to rationality and humane principles of secularism will always follow.

*Conclusion: against sexual apartheid, against rights apartheid*

26. The question of gay and lesbian equality therefore brings to the fore three pivotal challenges for the world's social institutions. It asks whether we are willing to afford all people dignity in a diverse, tolerant society, free of public policy determined by visceral repugnancies and religious bigotry.
27. For most gays and lesbians in most parts of the world, such a society is still very far away. As we celebrate tonight, we recall that the issues that affect the overwhelming majority of the world's gay and lesbian population are very far from the issues of equal protection and dignity in relation to partnership, marriage and job security. The predominant issue for the majority remains survival, for their intimate consensual adult conduct is still criminalised, and they suffer daily violent attacks when they behave in ways natural to themselves. (A painful paradox is that in many parts of Africa

and in India, those criminal prohibitions are a product of 19<sup>th</sup> century Western attitudes to homosexuality that were imported during colonisation. These attitudes and laws have now been appropriated by governments to justify the opprobrium they choose to direct to gays and lesbians.) In these parts, the very subject of homosexual conduct is still treated as Unspeakable.

28. But the analysis I have offered shows that it would be wrong to think that the fact that different issues are being addressed in Western Europe and North America from Africa and Asia means that Western societies have achieved some sort of linear progression that puts them morally ahead of the rest of the world.
29. There is no straight line in the long and painful march to gay and lesbian equality. There are only spires and gyres and circles, and more spires. And in all parts of the world the resistance to gay and lesbian dignity springs from the same opposition to diversity, the same visceral irrationality, and the same religious bigotries.
30. The enemies of gay and lesbian marriage in Austria and Europe and North America are the same enemies who wish to prohibit a group of gay men in Yaoundé, Cameroun, from gathering unhindered. They are the same enemies who subject

lesbian women in South Africa's townships to the horror of 'corrective rape'. These enemies are united in their opposition to a diverse, inclusive society: a society that protects minorities, a society that does not privilege one set of religious tenets, a society that disqualifies subjective emotive responses as a basis of public policy.

31. Gays and lesbians the world over thus face the same hatreds, the same bigotries, the same prescriptive and exclusionary moralism. The opposition to our lives springs from the same source, and the effect of its hostility on our dignity is essentially similar.
32. The seeming gulf between what has been attained in some parts of the world, and what remains to be addressed elsewhere, can be a source of incapacitating despondency. We may allow ourselves to 'write off' too many struggles in too many places in the world as too big to tackle, as unattainable, as already lost. We might be tempted to console ourselves with the progress we have made in other places.
33. Yet this would be wrong. It is not possible or desirable for us in this marvellous celebration tonight to separate the world into those

places where the project of equality has been satisfactorily fulfilled, and those where the situation seems hopeless.

34. That is unacceptable in principle, and it constitutes bad strategy. We live in one world. Gays and lesbians in resource-poor countries are fighting battles which in the nature of their objectives and the character of their opponents are in essence identical to the struggles in the resource-rich world. Our strategies and our commitments must incorporate that fact, since everywhere our fight is for the same sort of tolerant and humane society.
35. Tonight we joyfully celebrate the successes and achievements of a brave European organisation. But our focus and commitments remain universal. Our struggle is truly encompassing, truly global, and its enemies are not only the drive for uniformity, religious intolerance and visceralism, but our own complacency and self-preoccupation. We have to internalise the truth of the slogan that injustice to one, anywhere in the world, is injustice to us all.
36. So Helmut's choice of sub-theme for this celebration – 'against sexual apartheid' – is particularly apposite. For to afford gays and lesbians rights as full, proud, productive participants in a fully

equal society is to promise to accept and fulfil the richness of humanity's own full potential.