XXII. GP.-NR
91 /J
2003 -02- 05

Anfrage

der Abgeordneten Dr. Caspar Einem und GenossInnen

an den Bundesminister für Justiz

betreffend strafrechtliche Verfolgung homo- und bisexueller Männer (§209 StGB)

Aktuelle Entscheidungen des Europäischen Gerichtshofs für Menschenrechte

Der Europäische Gerichtshof für Menschenrechte (EGMR) hat vor kurzem Österreich wegen der jahrelangen strafrechtlichen Verfolgung homo- und bisexueller Männer auf Grund des § 209 StGB verurteilt, und zwar in folgenden Fällen (siehe beiliegende Entscheidungen des EGMR, die auch im Internet unter http://hudoc.echr.coe.int abgerufen werden können):

- L. & V. vs. Austria, Judg. 09.01.2003, Appl. 39392/98, 39829/98
- S.L. vs. Austria, Judg. 09.01.2003, Appl. 45330/99

Besonders kritisiert hat der Gerichtshof die Verweigerung der Aufhebung des § 209 auch noch nach dem Oktober 1995, obwohl durch die parlamentarische Expertenanhörung am 10. Oktober 1995 bereits bekannt war, dass es keinen Grund für das schwule Sondermindestalter gibt (L. & V.: par. 51; S.L.: par. 43).

Ersatz des § 209 StGB durch den § 207b StGB

§ 209 StGB ist mit Ablauf des 13. August 2002 außer Kraft getreten (Bundesgesetzblatt I 134/2002, Art. I Z. 19b, Art. IX iVm Art. 49 Abs. 1 B-VG). Das anti-homosexuelle Strafgesetz § 209 StGB wurde jedoch nicht ersatzlos gestrichen, sondern entgegen den Warnungen der Experten und der sozialdemokratischen Parlamentsfraktion durch eine neue Strafbestimmung, § 207b StGB, ersetzt. Entsprechend den Übergangsbestimmungen (Bundesgesetzblatt I 134/2002, Art. X) ist § 209 StGB weiterhin in all jenen Fällen anzuwenden, in denen das Strafurteil erster Instanz am 13. August 2002 (24.00 Uhr) bereits gefällt war.

Dementsprechend wurden in der Folge und werden weiterhin

- nicht rechtskräftige erstinstanzliche Verurteilungen zu Freiheitsstrafen auf Grund des außer Kraft getretenen § 209 StGB noch bestätigt (zB. Oberlandesgericht Wien 03. Dezember 2002, 19 Bs 186/02);
- die Milderung rechtskräftig verhängter (Freiheits)Strafen verweigert (zB. Oberlandesgericht Wien 18. September 2002, 20 Bs 303/02);
- Inhaftierte nicht aus der Haft (nicht einmal aus Anstalten für geistig abnorme Rechtsbrecher) entlassen (zB. Landesgericht für Strafsachen Wien 06. Dezember 2002, 181 BE 84/02z)
- und die Vormerkungen nach § 209 StGB in den polizeilichen Datenbanken (wie dem EKIS-Kriminalpolizeilichen-Aktenindex) nicht gelöscht (zB. Bundespolizeidirektion Graz 09. Dezember 2002, 08. Jänner 2003, GZ P-491/80 – (11)).

Die Probezeiten von nach § 209 StGB (teil)bedingt verhängten Freiheitsstrafen laufen trotz der Aufhebung des § 209 ebenso weiter wie die Probezeiten bedingter Entlassungen aus nach § 209 verhängten Freiheitsstrafen oder aus Anstalten für geistig abnorme Rechtsbrecher. Nach wie vor schwebt über den betroffenen Opfern des § 209 das Damoklesschwert der jederzeitigen Gefahr, die grundrechtswidrig verhängte Freiheitsstrafe doch noch (zur Gänze) verbüßen zu müssen. Auch die Eintragung der Verurteilungen auf Grund des § 209 StGB im Strafregister bleibt von der Aufhebung des Gesetzes unberührt.

Offene Begnadigung und Straftilgung der § 209-Opfer

Lediglich ein § 209-Opfer wurde bisher vom Bundespräsidenten auf Vorschlag des Justizministers begnadigt (BMJ GZ 98.478/16-IV 4/02). Auch in diesem Fall (dem medial bekannten „Liebesbrief-Fall" aus dem Jahr 2001) erfolgte jedoch lediglich eine teilweise Begnadigung. Die Tilgung der Verurteilung aus dem Strafregister wurde auch hier nicht gewährt.

Leider wurde auch ein Abänderungsantrag der sozialdemokratischen Abgeordneten Dr. Jarolim, Bures, Heinisch-Hosek und GenossInnen zum Strafrechtsänderungsgesetz 2002 (betreffend Straftilgung und Strafmilderung) in der Sitzung des Nationalrates am 10. Juli 2002 mit den Stimmen von ÖVP und FPÖ abgelehnt.

Offene Entschädigung der § 209-Opfer

Angesichts all dessen versteht es sich leider von selbst, dass kein Opfer des § 209 StGB für das Leid und die Zerstörung der bürgerlichen Existenz durch Bloßstellung, Stigmatisierung, kriminalpolizeiliche Ermittlungen, kriminalgerichtliche Verfahren und Verurteilung sowie schließlich bis hin zur Internierung in Anstalten für geistig abnorme Rechtsbrecher jemals entschädigt worden ist. Dies, obwohl Personen, die auf Grund des § 209 StGB in Haft gehalten wurden (oder werden), „Gewissensgefangene" im Sinne des Mandats von Amnesty International sind.

Der Europäische Gerichtshof für Menschenrechte hat in den drei genannten Fällen die Republik Österreich (neben einem Beitrag zu den Anwaltskosten) auch zu Entschädigungszahlungen für erlittene immaterielle Schäden verpflichtet und zwar:

- 15.000 EUR pro Beschwerdeführer in den Fällen L. & V. vs. Austria
- 5.000 EUR im Fall S.L. vs. Austria

Daher ist nun die Frage einer generellen Rehabilitierung von Opfern des §209 StGB wieder aktuell, wobei eine generelle Aufhebung bzw. Tilgung von Verurteilungen und das Festsetzen von Entschädigungszahlungen bekanntlich dem Nationalrat obliegt.

Die unterzeichneten Abgeordneten stellen daher folgende

Anfrage

1. Teilen Sie, nun nach den Urteilen des EGMR in den Fällen L & V gg. Österreich. sowie S.L gg. Österreich, die Ansicht der unterzeichneten Abgeordneten, dass die jahrzehntelange strafrechtliche Verfolgung auf Grund des § 209 StGB (und zuvor des § 129 I StG) fundamentale Grundrechte (insb. der Jugendlichen und ihrer über 18 bzw.19jährigen Partner) verletzt hat und Unrecht war? Wenn nein: warum nicht?

2. Halten Sie, nun nach den Urteilen des EGMR in den Fällen L & V gg. Österreich. sowie S.L gg. Österreich, eine Entschuldigung der Republik Österreich bei den Opfern des § 209 StGB (und zuvor des § 129 I StG), ähnlich der Entschuldigung des deutschen Bundestages für die seinerzeitige entsprechende Strafverfolgung in Deutschland durch den § 175 dtStGB (BT-Drs. 14/4894, Dezember 2000), für angebracht?
   A) Wenn nein: warum nicht?
   B) Wenn ja: werden Sie Initiativen hiefür setzen?
      B1) Wenn nein: warum werden Sie keine Initiativen setzen?
      B2) Wenn ja: welche Initiativen werden Sie konkret setzen und wann?

3. Halten Sie, nun nach den Urteilen des EGMR in den Fällen L & V gg. Österreich. sowie S.L gg. Österreich, eine umfassende ***gesetzliche Rehabilitierung der Opfer*** des § 209 StGB (und zuvor des § 129 I StG) durch sofortige Tilgung sämtlicher Verurteilungen, durch Verbot jeglicher Benachteiligung wegen Verurteilungen nach § 209 StGB oder wegen geführter Strafverfahren oder sonstiger behördlicher Tätigkeiten auf Grund von § 209 StGB sowie durch Löschung sämtlicher Vormerkungen nach § 209 StGB aus den polizeilichen Datenbanken für angebracht?
   A) Wenn nein: warum nicht?
   B) Wenn ja: werden Sie Initiativen (z.B. Rehabilitierungsgesetz) hiefür setzen?
      B1) Wenn nein: warum werden Sie keine Initiativen setzen?
      B2) Wenn ja: welche Initiativen werden Sie konkret setzen und wann?

4. Halten Sie, nun nach den Urteilen des EGMR in den Fällen L & V gg. Österreich. sowie S.L gg. Österreich, eine ***Aufhebung der Verurteilungen nach § 209 StGB*** (und zuvor des § 129 I StG) ähnlich dem deutschen NS-Aufhebungsgesetz für angebracht?
   A) Wenn nein: warum nicht?
   B) Wenn ja: werden Sie Initiativen hiefür setzen?
      B1) Wenn nein: warum werden Sie keine Initiativen setzen?
      B2) Wenn ja: welche Initiativen werden Sie konkret setzen und wann?

5. Halten Sie, nun nach den Urteilen des EGMR in den Fällen L & V gg. Österreich. sowie S.L gg. Österreich, eine ***finanzielle Entschädigung der Opfer*** des § 209 StGB (und zuvor des § 129 I StG), insb. der Personen, die inhaftiert waren, verurteilt wurden oder in kriminalpolizeiliche oder kriminalgerichtliche Ermittlungen gezogen wurden, für angebracht?
   A) Wenn nein: warum nicht?
   B) Wenn ja: werden Sie Initiativen hiefür setzen?
      B1) Wenn nein: warum werden Sie keine Initiativen setzen?
      B2) Wenn ja: welche Initiativen werden Sie konkret setzen und wann?
   C. Wenn ja: welche Beträge erscheinen Ihnen, auch unter Berücksichtigung der nun vom EGMR zugesprochenen Entschädigungsbeträge, für angemessen?

6. Gegen wie viele Personen ist im Jahre 2002 auf Grund des ***§ 207b Absatz 1 StGB*** (als alleiniges bzw. als im Sinne der Verurteiltenstatistik führendes Delikt) ein Strafverfahren eingeleitet worden (aufgeschlüsselt nach Gerichten)?
   A) Wie schlüsseln sich diese Zahlen jeweils in die folgenden sechs Konstellationen auf:
      A1) Fälle, in denen, die jugendlichen Partner eines männlichen Verdächtigen ausschließlich männlich waren;
      A2) Fälle, in denen, die jugendlichen Partner eines männlichen Verdächtigen ausschließlich weiblich waren;
      A3) Fälle, in denen, die jugendlichen Partner eines männlichen Verdächtigen sowohl weiblich als auch männlich waren;
      A4) Fälle, in denen, die jugendlichen Partner einer weiblichen Verdächtigen ausschließlich männlich waren;
      A5) Fälle, in denen, die jugendlichen Partner einer weiblichen Verdächtigen ausschließlich weiblich waren;
      A6) Fälle, in denen, die jugendlichen Partner einer weiblichen Verdächtigen sowohl weiblich als auch männlich waren;
   B) Wie alt waren jeweils die Verdächtigen und ihre jugendlichen Partner (aufgeschlüsselt nach den sechs Konstellationen)?
   C) Wieviele der Verdächtigen waren jeweils entweder unbescholten oder lediglich nach § 209 StGB vorbestraft (aufgeschlüsselt nach den sechs Konstellationen)?

7. Wie oft ist im Jahre 2002 auf Grund des § 207b Absatz 1 StGB (als alleiniges bzw. als im Sinne der Verurteiltenstatistik führendes Delikt) Verwahrungshaft und wie oft Untersuchungshaft verhängt worden (aufgeschlüsselt nach Gerichten)?
A) Wie schlüsseln sich diese Zahlen jeweils in die folgenden sechs Konstellationen auf:
A1) Fälle, in denen, die jugendlichen Partner eines männlichen Verdächtigen ausschließlich männlich waren;
A2) Fälle, in denen, die jugendlichen Partner eines männlichen Verdächtigen ausschließlich weiblich waren;
A3) Fälle, in denen, die jugendlichen Partner eines männlichen Verdächtigen sowohl weiblich als auch männlich waren;
A4) Fälle, in denen, die jugendlichen Partner einer weiblichen Verdächtigen ausschließlich männlich waren;
A5) Fälle, in denen, die jugendlichen Partner einer weiblichen Verdächtigen ausschließlich weiblich waren;
A6) Fälle, in denen, die jugendlichen Partner einer weiblichen Verdächtigen sowohl weiblich als auch männlich waren;
B) Wie alt waren jeweils die Betroffenen und ihre jugendlichen Partner (aufgeschlüsselt nach den sechs Konstellationen)?
C) Wieviele der Verdächtigen waren jeweils entweder unbescholten oder lediglich nach § 209 StGB vorbestraft (aufgeschlüsselt nach den sechs Konstellationen)?

8. Wie viele Personen sind im Jahre 2002 auf Grund des § 207b Absatz 1 StGB (als alleiniges bzw. als im Sinne der Verurteiltenstatistik führendes Delikt) verurteilt worden (aufgeschlüsselt nach rechtskräftigen und nicht rechtskräftigen Verurteilungen sowie nach Gerichten)?
A) Wie schlüsseln sich diese Zahlen jeweils in die folgenden sechs Konstellationen auf:
A1) Fälle, in denen, die jugendlichen Partner eines männlichen Verurteilten ausschließlich männlich waren;
A2) Fälle, in denen, die jugendlichen Partner eines männlichen Verurteilten ausschließlich weiblich waren;
A3) Fälle, in denen, die jugendlichen Partner eines männlichen Verurteilten sowohl weiblich als auch männlich waren;
A4) Fälle, in denen, die jugendlichen Partner einer weiblichen Verurteilten ausschließlich männlich waren;
A5) Fälle, in denen, die jugendlichen Partner einer weiblichen Verurteilten ausschließlich weiblich waren;
A6) Fälle, in denen, die jugendlichen Partner einer weiblichen Verurteilten sowohl weiblich als auch männlich waren;
B) Wie alt waren jeweils die Verurteilten und ihre jugendlichen Partner (aufgeschlüsselt nach den sechs Konstellationen)?
C) Wieviele der Verurteilten waren jeweils entweder unbescholten oder lediglich nach § 209 StGB vorbestraft (aufgeschlüsselt nach den sechs Konstellationen)?

9. In wievielen Fällen ist 2002 nach § 207b Absatz 1 StGB (als alleiniges bzw. als im Sinne der Verurteiltenstatistik führendes Delikt) eine Freiheitsstrafe, in wie vielen Fällen eine teilbedingte und in wie vielen Fällen eine unbedingte Freiheitsstrafe verhängt worden (aufgeschlüsselt nach den o.a. sechs Konstellationen, nach Gerichten und nach rechtskräftigen und nicht rechtskräftigen Verurteilungen)?
A) Wie hoch waren diese Freiheitsstrafen jeweils und wie alt jeweils die Verurteilten und ihre jugendlichen Partner (aufgeschlüsselt nach den o.a. sechs Konstellationen)?
B) Wieviele der Verurteilten waren jeweils entweder unbescholten oder lediglich nach § 209 StGB vorbestraft (aufgeschlüsselt nach den o.a. sechs Konstellationen)?

10. In wievielen Fällen ist 2002 nach § 207b Absatz 1 StGB (als alleiniges bzw. als im Sinne der Verurteiltenstatistik führendes Delikt) eine Maßnahme verhängt worden (aufgeschlüsselt nach Einweisungen gem. § 21 Abs. 1 StGB, § 21 Abs. 2 StGB, § 22 StGB, § 23 StGB einerseits sowie nach den o.a. sechs Konstellationen, nach Gerichten und nach rechtskräftigen und nicht rechtskräftigen Einweisungen andererseits)?
A) Wie alt waren jeweils die Betroffenen und ihre jugendlichen Partner (aufgeschlüsselt nach den o.a. sechs Konstellationen)?
B) Wieviele der Betroffenen waren jeweils entweder unbescholten oder lediglich nach § 209 StGB vorbestraft (aufgeschlüsselt nach den o.a. sechs Konstellationen)?

11. Wieviele Personen befinden sich derzeit wegen § 207b Abs. 1 StGB (als alleiniges oder im Sinne der Verurteiltenstatistik führendes Delikt) in Untersuchungshaft, wie viele in Strafhaft und wieviele im Maßnahmenvollzug (aufgeschlüsselt nach § 21 Abs. 1, § 21 Abs. 2 § 22, § 23 StGB), aufgeschlüsselt nach Vollzugsanstalten? Wie lange werden diese Personen noch in Haft zu verbringen haben?

12. Gegen wie viele Personen ist im Jahre 2002 auf Grund des ***§ 207b Absatz 2 StGB*** (als alleiniges bzw. als im Sinne der Verurteiltenstatistik führendes Delikt) ein Strafverfahren eingeleitet worden (aufgeschlüsselt nach Gerichten)?
A) Wie schlüsseln sich diese Zahlen jeweils in die folgenden sechs Konstellationen auf:
   A1) Fälle, in denen, die jugendlichen Partner eines männlichen Verdächtigen ausschließlich männlich waren;
   A2) Fälle, in denen, die jugendlichen Partner eines männlichen Verdächtigen ausschließlich weiblich waren;
   A3) Fälle, in denen, die jugendlichen Partner eines männlichen Verdächtigen sowohl weiblich als auch männlich waren;
   A4) Fälle, in denen, die jugendlichen Partner einer weiblichen Verdächtigen ausschließlich männlich waren;
   A5) Fälle, in denen, die jugendlichen Partner einer weiblichen Verdächtigen ausschließlich weiblich waren;
   A6) Fälle, in denen, die jugendlichen Partner einer weiblichen Verdächtigen sowohl weiblich als auch männlich waren;
B) Wie alt waren jeweils die Verdächtigen und ihre jugendlichen Partner (aufgeschlüsselt nach den sechs Konstellationen)?
C) Wieviele der Verdächtigen waren jeweils entweder unbescholten oder lediglich nach § 209 StGB vorbestraft (aufgeschlüsselt nach den sechs Konstellationen)?

13. Wie oft ist im Jahre 2002 auf Grund des § 207b Absatz 2 StGB (als alleiniges bzw. als im Sinne der Verurteiltenstatistik führendes Delikt) Verwahrungshaft und wie oft Untersuchungshaft verhängt worden (aufgeschlüsselt nach Gerichten)?
A) Wie schlüsseln sich diese Zahlen jeweils in die folgenden sechs Konstellationen auf:
A1) Fälle, in denen, die jugendlichen Partner eines männlichen Verdächtigen ausschließlich männlich waren;
A2) Fälle, in denen, die jugendlichen Partner eines männlichen Verdächtigen ausschließlich weiblich waren;
A3) Fälle, in denen, die jugendlichen Partner eines männlichen Verdächtigen sowohl weiblich als auch männlich waren;
A4) Fälle, in denen, die jugendlichen Partner einer weiblichen Verdächtigen ausschließlich männlich waren;
A5) Fälle, in denen, die jugendlichen Partner einer weiblichen Verdächtigen ausschließlich weiblich waren;
A6) Fälle, in denen, die jugendlichen Partner einer weiblichen Verdächtigen sowohl weiblich als auch männlich waren;
B) Wie alt waren jeweils die Betroffenen und ihre jugendlichen Partner (aufgeschlüsselt nach den sechs Konstellationen)?
C) Wieviele der Verdächtigen waren jeweils entweder unbescholten oder lediglich nach § 209 StGB vorbestraft (aufgeschlüsselt nach den sechs Konstellationen)?

14. Wie viele Personen sind im Jahre 2002 auf Grund des § 207b Absatz 2 StGB (als alleiniges bzw. als im Sinne der Verurteiltenstatistik führendes Delikt) verurteilt worden (aufgeschlüsselt nach rechtskräftigen und nicht rechtskräftigen Verurteilungen sowie nach Gerichten)?
A) Wie schlüsseln sich diese Zahlen jeweils in die folgenden sechs Konstellationen auf:
A1) Fälle, in denen, die jugendlichen Partner eines männlichen Verurteilten ausschließlich männlich waren;
A2) Fälle, in denen, die jugendlichen Partner eines männlichen Verurteilten ausschließlich weiblich waren;
A3) Fälle, in denen, die jugendlichen Partner eines männlichen Verurteilten sowohl weiblich als auch männlich waren;
A4) Fälle, in denen, die jugendlichen Partner einer weiblichen Verurteilten ausschließlich männlich waren;
A5) Fälle, in denen, die jugendlichen Partner einer weiblichen Verurteilten ausschließlich weiblich waren;
A6) Fälle, in denen, die jugendlichen Partner einer weiblichen Verurteilten sowohl weiblich als auch männlich waren;
B) Wie alt waren jeweils die Verurteilten und ihre jugendlichen Partner (aufgeschlüsselt nach den sechs Konstellationen)?
C) Wieviele der Verurteilten waren jeweils entweder unbescholten oder lediglich nach § 209 StGB vorbestraft (aufgeschlüsselt nach den sechs Konstellationen)?

15. In wievielen Fällen ist 2002 nach § 207b Absatz 2 StGB (als alleiniges bzw. als im Sinne der Verurteiltenstatistik führendes Delikt) eine Freiheitsstrafe, in wie vielen Fällen eine teilbedingte und in wie vielen Fällen eine unbedingte Freiheitsstrafe verhängt worden (aufgeschlüsselt nach den o.a. sechs Konstellationen, nach Gerichten und nach rechtskräftigen und nicht rechtskräftigen Verurteilungen)?
A) Wie hoch waren diese Freiheitsstrafen jeweils und wie alt jeweils die Verurteilten und ihre jugendlichen Partner (aufgeschlüsselt nach den o.a. sechs Konstellationen)?
B) Wieviele der Verurteilten waren jeweils entweder unbescholten oder lediglich nach § 209 StGB vorbestraft (aufgeschlüsselt nach den o.a. sechs Konstellationen)?

16. In wievielen Fällen ist 2002 nach § 207b Absatz 2 StGB (als alleiniges bzw. als im Sinne der Verurteiltenstatistik führendes Delikt) eine Maßnahme verhängt worden (aufgeschlüsselt nach Einweisungen gem. § 21 Abs. 1 StGB, § 21 Abs. 2 StGB, § 22 StGB, § 23 StGB einerseits sowie nach den o.a. sechs Konstellationen, nach Gerichten und nach rechtskräftigen und nicht rechtskräftigen Einweisungen andererseits)?
A) Wie alt waren jeweils die Betroffenen und ihre jugendlichen Partner (aufgeschlüsselt nach den o.a. sechs Konstellationen)?
B) Wieviele der Betroffenen waren jeweils entweder unbescholten oder lediglich nach § 209 StGB vorbestraft (aufgeschlüsselt nach den o.a. sechs Konstellationen)?

17. Wieviele Personen befinden sich derzeit wegen § 207b Abs. 2 StGB (als alleiniges oder im Sinne der Verurteiltenstatistik führendes Delikt) in Untersuchungshaft, wie viele in Strafhaft und wieviele im Maßnahmenvollzug (aufgeschlüsselt nach § 21 Abs. 1, § 21 Abs. 2 § 22, § 23 StGB), aufgeschlüsselt nach Vollzugsanstalten? Wie lange werden diese Personen noch in Haft zu verbringen haben?

18. Gegen wie viele Personen ist im Jahre 2002 auf Grund des ***§ 207b Absatz 3 StGB*** (als alleiniges bzw. als im Sinne der Verurteiltenstatistik führendes Delikt) ein Strafverfahren eingeleitet worden (aufgeschlüsselt nach Gerichten)?
A) Wie schlüsseln sich diese Zahlen jeweils in die folgenden sechs Konstellationen auf:
A1) Fälle, in denen, die jugendlichen Partner eines männlichen Verdächtigen ausschließlich männlich waren;
A2) Fälle, in denen, die jugendlichen Partner eines männlichen Verdächtigen ausschließlich weiblich waren;
A3) Fälle, in denen, die jugendlichen Partner eines männlichen Verdächtigen sowohl weiblich als auch männlich waren;
A4) Fälle, in denen, die jugendlichen Partner einer weiblichen Verdächtigen ausschließlich männlich waren;
A5) Fälle, in denen, die jugendlichen Partner einer weiblichen Verdächtigen ausschließlich weiblich waren;
A6) Fälle, in denen, die jugendlichen Partner einer weiblichen Verdächtigen sowohl weiblich als auch männlich waren;
B) Wie alt waren jeweils die Verdächtigen und ihre jugendlichen Partner (aufgeschlüsselt nach den sechs Konstellationen)?
C) Wieviele der Verdächtigen waren jeweils entweder unbescholten oder lediglich nach § 209 StGB vorbestraft (aufgeschlüsselt nach den sechs Konstellationen)?

19. Wie oft ist im Jahre 2002 auf Grund des § 207b Absatz 3 StGB (als alleiniges bzw. als im Sinne der Verurteiltenstatistik führendes Delikt) Verwahrungshaft und wie oft Untersuchungshaft verhängt worden (aufgeschlüsselt nach Gerichten)?
A) Wie schlüsseln sich diese Zahlen jeweils in die folgenden sechs Konstellationen auf:
A1) Fälle, in denen, die jugendlichen Partner eines männlichen Verdächtigen ausschließlich männlich waren;
A2) Fälle, in denen, die jugendlichen Partner eines männlichen Verdächtigen ausschließlich weiblich waren;
A3) Fälle, in denen, die jugendlichen Partner eines männlichen Verdächtigen sowohl weiblich als auch männlich waren;
A4) Fälle, in denen, die jugendlichen Partner einer weiblichen Verdächtigen ausschließlich männlich waren;
A5) Fälle, in denen, die jugendlichen Partner einer weiblichen Verdächtigen ausschließlich weiblich waren;
A6) Fälle, in denen, die jugendlichen Partner einer weiblichen Verdächtigen sowohl weiblich als auch männlich waren;
B) Wie alt waren jeweils die Betroffenen und ihre jugendlichen Partner (aufgeschlüsselt nach den sechs Konstellationen)?
C) Wieviele der Verdächtigen waren jeweils entweder unbescholten oder lediglich nach § 209 StGB vorbestraft (aufgeschlüsselt nach den sechs Konstellationen)?

20. Wie viele Personen sind im Jahre 2002 auf Grund des § 207b Absatz 3 StGB (als alleiniges bzw. als im Sinne der Verurteiltenstatistik führendes Delikt) verurteilt worden (aufgeschlüsselt nach rechtskräftigen und nicht rechtskräftigen Verurteilungen sowie nach Gerichten)?
A) Wie schlüsseln sich diese Zahlen jeweils in die folgenden sechs Konstellationen auf:
A1) Fälle, in denen, die jugendlichen Partner eines männlichen Verurteilten ausschließlich männlich waren;
A2) Fälle, in denen, die jugendlichen Partner eines männlichen Verurteilten ausschließlich weiblich waren;
A3) Fälle, in denen, die jugendlichen Partner eines männlichen Verurteilten sowohl weiblich als auch männlich waren;
A4) Fälle, in denen, die jugendlichen Partner einer weiblichen Verurteilten ausschließlich männlich waren;
A5) Fälle, in denen, die jugendlichen Partner einer weiblichen Verurteilten ausschließlich weiblich waren;
A6) Fälle, in denen, die jugendlichen Partner einer weiblichen Verurteilten sowohl weiblich als auch männlich waren;
B) Wie alt waren jeweils die Verurteilten und ihre jugendlichen Partner (aufgeschlüsselt nach den sechs Konstellationen)?
C) Wieviele der Verurteilten waren jeweils entweder unbescholten oder lediglich nach § 209 StGB vorbestraft (aufgeschlüsselt nach den sechs Konstellationen)?

21. In wievielen Fällen ist 2002 nach § 207b Absatz 3 StGB (als alleiniges bzw. als im Sinne der Verurteiltenstatistik führendes Delikt) eine Freiheitsstrafe, in wie vielen Fällen eine teilbedingte und in wie vielen Fällen eine unbedingte Freiheitsstrafe verhängt worden (aufgeschlüsselt nach den o.a. sechs Konstellationen, nach Gerichten und nach rechtskräftigen und nicht rechtskräftigen Verurteilungen)?
A) Wie hoch waren diese Freiheitsstrafen jeweils und wie alt jeweils die Verurteilten und ihre jugendlichen Partner (aufgeschlüsselt nach den o.a. sechs Konstellationen)?
B) Wieviele der Verurteilten waren jeweils entweder unbescholten oder lediglich nach § 209 StGB vorbestraft (aufgeschlüsselt nach den o.a. sechs Konstellationen)?

22. In wievielen Fällen ist 2002 nach § 207b Absatz 3 StGB (als alleiniges bzw. als im Sinne der Verurteiltenstatistik führendes Delikt) eine Maßnahme verhängt worden (aufgeschlüsselt nach Einweisungen gem. § 21 Abs. 1 StGB, § 21 Abs. 2 StGB, § 22 StGB, § 23 StGB einerseits sowie nach den o.a. sechs Konstellationen, nach Gerichten und nach rechtskräftigen und nicht rechtskräftigen Einweisungen andererseits)?
A) Wie alt waren jeweils die Betroffenen und ihre jugendlichen Partner (aufgeschlüsselt nach den o.a. sechs Konstellationen)?
B) Wieviele der Betroffenen waren jeweils entweder unbescholten oder lediglich nach § 209 StGB vorbestraft (aufgeschlüsselt nach den o.a. sechs Konstellationen)?

23. Wieviele Personen befinden sich derzeit wegen § 207b Abs. 3 StGB (als alleiniges oder im Sinne der Verurteiltenstatistik führendes Delikt) in Untersuchungshaft, wie viele in Strafhaft und wieviele im Maßnahmenvollzug (aufgeschlüsselt nach § 21 Abs. 1, § 21 Abs. 2 § 22, § 23 StGB), aufgeschlüsselt nach Vollzugsanstalten? Wie lange werden diese Personen noch in Haft zu verbringen haben?

24. Erfolgte die Nichtigkeitsbeschwerde zur Wahrung des Gesetzes der Generalprokuratur zur Geschäftszahl Gw 435/02 vom 30. Dezember 2002 gegen einen Beschluß des Oberlandesgerichts Innsbruck auf nachträgliche Strafmilderung infolge Aufhebung des § 209 StGB in Ihrem Auftrag?
A) Wenn ja: weshalb erteilten Sie diesen Auftrag und werden Sie im Lichte der jüngsten Urteile des EGMR, der Generalprokuratur den Auftrag erteilen, diese Beschwerde zurückzuziehen?
B) Wenn nein: wann erlangten Sie davon Kenntnis und werden Sie im Lichte der jüngsten Urteile des EGMR, der Generalprokuratur den Auftrag erteilen, diese Beschwerde zurückzuziehen?

CONSEIL DE L'EUROPE / COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF L. and V. v. AUSTRIA

(Applications nos. 39392/98 and 39829/98)

JUDGMENT

STRASBOURG

9 January 2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of L. and V. v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mr G. BONELLO,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER, *judges*,
and Mr S. NIELSEN, *Deputy Section Registrar*,

Having deliberated in private on 5 December 2002,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 39392/98 and 39829/98) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Austrian nationals, Mr G.L. and Mr A.V. ("the applicants"), on 20 June and 10 December 1997, respectively.

2. The applicants were represented by Mr H. Graupner, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicants alleged, in particular, that the maintenance in force of Article 209 of the Austrian Criminal Code, which penalised homosexual acts of adult men with consenting adolescents between fourteen and eighteen years of age, and their convictions under that provision violated their right to respect for their private life and were discriminatory.

4. The applications were transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The applications were allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section.

7. By a decision of 22 November 2001 the Court declared the applications partly admissible.

8. The applicants filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicants were born in 1967 and 1968 respectively and live in Vienna.

A. The first applicant

10. On 8 February 1996 the Vienna Regional Criminal Court (*Landesgericht für Strafsachen*) convicted the first applicant under Article 209 of the Criminal Code (*Strafgesetzbuch*) of homosexual acts with adolescents and sentenced him to one year's imprisonment suspended on probation for a period of three years. Relying mainly on the first applicant's calendar diary, in which he had made entries about his sexual encounters, the court found it established that between 1989 and 1994 the first applicant had had, in Austria and in a number of other countries, homosexual relations either by way of oral sex or masturbation with numerous persons between fourteen and eighteen years of age, whose identity could not be established.

11. On 5 November 1996 the Supreme Court (*Oberster Gerichtshof*), upon the first applicant's plea of nullity, quashed the judgment regarding the offences committed abroad.

12. On 29 January 1997 the Vienna Regional Criminal Court resumed the proceedings, which had been discontinued as far as the offences committed abroad were concerned, and found the first applicant guilty under Article 209 of the Criminal Code of the offences committed in Austria sentencing him to eleven months' imprisonment suspended on probation for a period of three years.

13. On 27 May 1997 the Supreme Court dismissed the first applicant's plea of nullity in which he had complained that the application of Article 209 of the Criminal Code violated his right to respect for his private life and his right to non-discrimination, and had suggested that the Supreme Court request the Constitutional Court to review the constitutionality of that provision.

14. On 31 July 1997 the Vienna Court of Appeal (*Oberlandesgericht*), upon the first applicant's appeal, reduced the sentence to eight months' imprisonment suspended on probation for a period of three years.

B. The second applicant

15. On 21 February 1997 the Vienna Regional Criminal Court convicted the second applicant under Article 209 of the Criminal Code of homosexual acts with adolescents, and on one minor count of misappropriation. It sentenced him to six months' imprisonment suspended on probation for a period of three years. The Court found it established that on one occasion the second applicant had had oral sex with a fifteen-year-old.

16. 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 Article 209 of the Criminal Code was discriminatory and violated his right to respect for his private life and had suggested that the Court of Appeal request the Constitutional Court to review the constitutionality of that provision. It also dismissed his appeal against sentence. The decision was served on 3 July 1997.

II. RELEVANT DOMESTIC LAW AND BACKGROUND

A. The Criminal Code

17. Any sexual acts with persons under fourteen years of age are punishable under Articles 206 and 207 of the Criminal Code.

18. Article 209 of the Criminal Code, in the version in force at the material time, read as follows:

> "A male person who after attaining the age of nineteen fornicates with a person of the same sex who has attained the age of fourteen years but not the age of eighteen years shall be sentenced to imprisonment for between six months and five years."

19. This provision was aimed at consensual homosexual acts, as any sexual act of adults with persons up to nineteen years of age are punishable under Article 212 of the Criminal Code if the adult abuses a position of authority (parent, employer, teacher, doctor, etc.). Any sexual acts involving the use of force or threats are punishable as rape, pursuant to Article 201, or sexual coercion pursuant to Article 202 of the Criminal Code. Consensual heterosexual or lesbian acts between adults and persons over fourteen years of age are not punishable.

20. Offences under Article 209 were regularly prosecuted, an average of sixty criminal proceedings being opened per year, out of which a third resulted in a conviction. As regards the penalties applied, a term of

imprisonment usually exceeding three months was imposed in 65 to 75% of the cases, of which 15 to 25% were not suspended on probation. According to information given by the Federal Minister for Justice in reply to a parliamentary request, in the year 2001 three persons were serving a term of imprisonment based only or mainly on a conviction under Article 209 of the Criminal Code and four others were held in detention on remand in proceedings relating exclusively to charges under Article 209.

21. On 10 July 2002, following the Constitutional Court's judgment of 21 June 2002 (see below), Parliament decided to repeal Article 209 of the Criminal Code. In addition, it introduced Article 207b of the Criminal Code, which penalises sexual acts with a person under sixteen years of age if that person is for certain reasons not mature enough to understand the meaning of the act and the offender takes advantage of this immaturity or if the person under sixteen years of age is in a predicament and the offender takes advantage of that situation. Further, Article 207b penalises inducing persons under eighteen years of age to engage in sexual activities by payment. Article 207b applies irrespective of whether the sexual acts at issue are heterosexual, homosexual or lesbian. The above amendment, published in the Official Gazette (*Bundesgesetzblatt*) no. 134/2002, entered into force on 14 August 2002.

22. According to the transitional provisions, the amendment does not apply to criminal proceedings in which the judgment at first instance has already been given. It does exceptionally apply, subject to the principle of the application of the more favourable law, where a judgment is set aside *inter alia* following the re-opening of the proceedings or in the context of a renewal of the proceedings following the finding of a violation of the Convention by the European Court of Human Rights. Apart from these situations, convictions under Article 209 remain unaffected by the amendment.

B. Proceedings before the Constitutional Court

23. In a judgment of 3 October 1989, the Constitutional Court found that Article 209 of the Criminal Code was compatible with the principle of equality under constitutional law and in particular with the prohibition on gender discrimination contained therein. That judgment was given upon the complaint of a person who subsequently brought his case before the Commission (*Z. v. Austria*, no. 17279/90, Commission decision of 13 May 1992, unreported).

24. The relevant passage of the Constitutional Court's judgment reads as follows:

> "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 leaves offences on the statute book or creates new offences only 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 the 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 ...' *Pallin* in *Foregger/Nowakowski* (publishers), Vienna commentary to the Criminal Code, 1980, para. 1 on Article 209 ...). 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 section 7 para. 1 of the Federal Constitutional Law and section 2 of the Basic Constitutional Act those legislating on the criminal law cannot reasonably be challenged for taking the view, 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 concluding that it is necessary to punish under the criminal law homosexual acts committed with young males, as provided for under Article 209 of the Criminal Code. This conclusion was also based on their views of morality, which they wanted to impose while duly observing the 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 section 7 para. 1 of the Federal Constitutional Law, in conjunction with section 2 of the Basic Constitutional Act."

25. On 29 November 2001 the Constitutional Court dismissed the Innsbruck Regional Court's request to review the constitutionality of Article 209 of the Criminal Code.

26. The Regional Court had argued, *inter alia*, that Article 209 violated Articles 8 and 14 of the Convention as the theory that male adolescents ran a risk of being recruited into homosexuality on which the Constitutional Court had relied in its previous judgment, had since been refuted. The Constitutional Court found that the issue was *res judicata*. It noted that the fact that it had already given a ruling on the same provision did not prevent it from reviewing it anew, if there was a change in the relevant circumstances or different legal argument. However, the Regional Court had failed to give detailed reasons for its contention that relevant scientific knowledge had changed to such an extent that the legislator was no longer entitled to set a different age limit for consensual homosexual relations than for consensual heterosexual or lesbian relations.

27. On 21 June 2002, upon a further request for review made by the Innsbruck Regional Court, the Constitutional Court found that Article 209 of the Criminal Code was unconstitutional.

28. The Regional Court had argued, firstly, as it had done previously, that Article 209 of the Criminal Code violated Articles 8 and 14 of the Convention and, secondly, that it was incompatible with the principle of equality under constitutional law and with Article 8 of the Convention, as a

relationship between male adolescents between fourteen and nineteen years of age was first legal, but became punishable as soon as one reached the age of nineteen and became legal again when the second one reached the age of eighteen. The Constitutional Court held that the second argument differed from the arguments which it had examined in its judgment of 3 October 1989 and that it was therefore not prevented from considering it. It noted that Article 209 concerned only consensual homosexual relations between men aged over nineteen and adolescents between fourteen and eighteen years of age. In the fourteen-to nineteen-year age bracket homosexual acts between persons of the same age (for instance two sixteen-year-olds) or of persons with one-to five-year age difference were not punishable. However, as soon as one partner reached the age of nineteen, such acts constituted an offence under Article 209 of the Criminal Code. They became legal again when the younger partner reached the age of eighteen. Given that Article 209 did not only apply to occasional relations but also covered ongoing relationships, it led to rather absurd results, namely a change of periods during which the homosexual relationship of two partners was first legal, than punishable and then legal again and could therefore not be considered to be objectively justified.

C. Parliamentary debate

29. In the spring of 1995 the Social Democratic Party, the Green Party and the Liberal Party brought motions in Parliament to repeal Article 209 of the Criminal Code. They argued in particular that the legislator in the 1970s had justified this provision on the theory that male adolescents were at a risk of being recruited into homosexuality while female adolescents were not. However, modern science had shown that sexual orientation was already established at the beginning of puberty. Moreover, different ages of consent were not in line with European standards. In this respect they referred in particular to Recommendation 924/1981 of the Parliamentary Assembly of the Council of Europe which had advocated equal ages of consent for heterosexual and homosexual relations. Protection of juveniles against sexual violence and abuse was sufficiently afforded by other provisions of the Criminal Code, irrespective of their sexual orientation.

30. Subsequently, on 10 October 1995, a sub-committee of the Legal Affairs Committee of Parliament heard evidence from eleven experts in various fields such as medicine, sexual science, AIDS prevention, developmental psychology, psychotherapy, psychiatry, theology, law and human-rights law. Nine were clearly in favour of repealing Article 209, an important argument for the experts in the fields of medicine, psychology and psychiatry being that sexual orientation was, in the majority of cases, established before the age of puberty, which disproved the theory that male adolescents were recruited into homosexuality by homosexual experiences.

Another recurring argument was that penalising homosexual relations made AIDS prevention more difficult. Two experts were in favour of keeping Article 209: one simply stated that he considered it necessary for the protection of male adolescents; the other considered that despite the fact that there was no such thing as being recruited into homosexuality, not all male adolescents were already sure of their sexual orientation and it was therefore better to give them more time to establish their identity.

31. On 27 November 1996 Parliament held a debate on the motion to repeal Article 209 of the Criminal Code. Those speakers who were in favour of repealing Article 209 relied on the arguments of the majority of the experts heard in the sub-committee. Of those speakers who were in favour of keeping Article 209, some simply expressed their approval while others emphasised that they still considered the provision necessary for those male adolescents who were not sure of their sexual orientation. There was an equal vote at the close of the debate (91 to 91). Consequently, Article 209 remained on the statute book.

32. On 17 July 1998 the Green Party again brought a motion before Parliament to repeal Article 209 of the Criminal Code. The ensuing debate followed much the same lines as before. The motion was rejected by 81 votes to 12.

33. On 10 July 2002 Parliament decided to repeal Article 209 of the Criminal Code (see paragraph 21 above).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

34. The applicants complained about the maintenance in force of Article 209 of the Criminal Code, which criminalises homosexual acts of adult men with consenting adolescents between fourteen and eighteen years of age, and about their convictions under that provision. Relying on Article 8 of the Convention, taken alone and in conjunction with Article 14, they alleged that their right to respect for their private life had been violated and that the contested provision was discriminatory, as heterosexual or lesbian relations between adults and adolescents in the same age bracket were not punishable.

Article 8 provides:

> "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."

Article 14 provides:

"The enjoyment of the rights and freedoms set forth in [the] 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."

35. Given the nature of the complaints, the Court deems it appropriate to examine the case directly under Article 14, taken together with Article 8.

36. It is not in dispute that the present case falls within the ambit of Article 8, concerning as it does a most intimate aspect of the applicants' private life (see, for instance, *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, p. 21, § 52; *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 90, EHCR 1999-VI). Article 14 therefore applies.

37. The applicants submitted that, following the Court's admissibility decision in the present case, the Austrian Constitutional Court declared Article 209 of the Criminal Code to be unconstitutional and that subsequently Parliament decided to repeal this provision. However, the Constitutional Court's judgment, which is based on other grounds than those relied on in the present application, has not acknowledged, let alone afforded redress for, the alleged breach of the Convention. Moreover, their convictions still stood. The applicants therefore argued that they were still victims, within the meaning of Article 34 of the Convention, of the violation alleged. Nor can it be said that merely repealing the contested legislation has resolved the matter within the meaning of Article 37 § 1 (b) of the Convention.

38. The applicants asserted that in Austria, like in the majority of European countries, heterosexual and lesbian relations between adults and consenting adolescents over fourteen years of age were not punishable. They submitted that there was nothing to indicate that adolescents needed 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, Article 209 of the Criminal Code also hampered homosexual adolescents in their development by attaching a social stigma to their relations with adult men and to their sexual orientation in general. In this connection, the applicants, referring to the Court's case-law, contended that any interference with a person's sexual sphere and any difference in treatment based on sex or sexual orientation required particulary weighty reasons (see *Smith and Grady v. the United Kingdom*,

cited above, § 94, and *A.D.T v. the United Kingdom*, no. 35765/97, § 36, 31 July 2000, unreported).

39. This was all the more true in a field where a European consensus existed to reduce the age of consent for homosexual relations. Despite the fact that a European consensus had been growing ever since the introduction of their application, the Government had failed to come forward with any valid justification for upholding, until very recently, a different age of consent for homosexual relations than for heterosexual or lesbian relations. In particular, the applicants pointed out that in April 1997, in September and December 1998 and again in July 2001, the European Parliament had requested Austria to repeal Article 209. Similarly, in November 1998, the Human Rights Committee, set up under the International Covenant on Civil and Political Rights, had found that Article 209 was discriminatory. The Parliamentary Assembly of the Council of Europe had issued two recommendations in 2000 advocating equal ages of consent for heterosexual, lesbian and homosexual relations and a number of member States of the Council of Europe had recently introduced equal ages of consent.

40. Further, the applicants pointed out that the Commission, in the Sutherland case (*Sutherland v. the United Kingdom*, no. 25186/94, Commission's report of 1 July 1997, unreported) had departed from its earlier case-law relied on by the Government. In their view, the difference between the present application and the Sutherland case was not decisive, as the fact that under United Kingdom law in force at the material time the adolescent partner was also punishable was only referred to by the Commission as a subsidiary argument. As to the Government's further argument that Article 209 had been considered necessary for the protection of male adolescents, they submitted that the great majority of scientific experts whose evidence had been heard in Parliament in 1995 had disagreed with this view.

41. The Government drew attention to the recent amendment of the Criminal Code. They asserted that, in the applicants' cases, there were no changes as a result of the new legal position. The Government therefore stated that their position remained unchanged and maintained their previous submissions.

42. The Government referred to the Constitutional Court's judgment of 3 October 1989 and to the case-law of the Commission (cf. *Z. v. Austria*, no. 17279/90, Commission decision of 13 May 1992, unreported, and *H.F. v. Austria*, no. 22646/93, Commission decision of 26 June 1995, unreported) pointing out that the Commission had found no indication of a violation either of Article 8 alone or taken in conjunction with Article 14 of the Convention in respect of Article 209 of the Austrian Criminal Code. As to the aforementioned case of *Sutherland v. the United Kingdom*, the Government pointed out that there was an important difference, namely that

under Article 209 of the Austrian Criminal Code, the adolescent participating in the offence was not punishable. Moreover, they referred to the fact that, in 1995, the Austrian Parliament had heard numerous experts and had discussed Article 209 extensively with a view to abolishing it, but had decided to uphold it, as the provision was still considered necessary, within the meaning of Article 8 § 2 of the Convention, for the protection of male adolescents.

43. The Court notes at the outset that, following the Constitutional Court's judgment of 21 June 2002, Article 209 of the Criminal Code has been repealed on 10 July 2002. The amendment in question entered into force on 14 August 2002. However, this development does not affect the applicants' status as victim within the meaning of Article 34 of the Convention. In this connection, the Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a victim unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for instance, *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI). In the present case it is sufficient to note that the applicants were convicted under the contested provision and that their respective convictions remain unaffected by the change in the law. Thus, as the applicants rightly pointed out, it cannot be said that the matter has been resolved within the meaning of Article 37 § 1 (b) of the Convention.

44. According to the Court's established case-law, a difference in treatment is discriminatory for the purposes of Article 14 if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". Moreover, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see the *Karlheinz Schmidt v. Germany* judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24; *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 29, ECHR 1999-IX and *Fretté v. France*, no. 36515/97, §§ 34 and 40, ECHR 2002-I).

45. The applicants complained about a difference in treatment based on their sexual orientation. In this connection, the Court reiterates that sexual orientation is a concept covered by Article 14 (see the above-cited *Salgueiro da Silva Mouta v. Portugal* case, § 28). Just like differences based on sex, (see the *Karlheinz Schmidt v. Germany* judgment, ibid., and the *Petrovic v. Austria* judgment of 27 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 587, § 37), differences based on sexual orientation require particularly serious reasons by way of justification (see the above-cited *Smith and Grady v. the United Kingdom* case, § 90).

46. The Government asserted that the contested provision served to protect the sexual development of male adolescents. The Court accepts that the aim of protecting the rights of others is a legitimate one. It remains to be ascertained whether there existed a justification for the difference of treatment.

47. The Court observes that in previous cases relied on by the Government which related to Article 209 of the Austrian Criminal Code, the Commission found no violation of either Article 8 of the Convention alone or taken together with Article 14. However, the Court has frequently held that the Convention is a living instrument, which has to be interpreted in the light of present-day conditions (see, for instance, the above-cited *Fretté v. France* case, ibid.) In the Sutherland case, the Commission, having regard to recent research according to which sexual orientation is usually established before puberty in both boys and girls and to the fact that the majority of member States of the Council of Europe have recognised equal ages of consent, explicitly stated that it was "opportune to reconsider its earlier case-law in the light of these modern developments" (*Sutherland v. the United Kingdom*, Commission's report, cited above, §§ 59-60). It reached the conclusion that in the absence of any objective and reasonable justification the maintenance of a higher age of consent for homosexual than for heterosexual acts violated Article 14 taken together with Article 8 of the Convention (ibid., § 66)

48. Furthermore, the Court considers that the difference between the Sutherland case and the present case, namely that the adolescent partner participating in the proscribed homosexual acts was not punishable, is not decisive. This element was only a secondary consideration in the Commission's report (ibid., § 64).

49. What is decisive is whether there was an objective and reasonable justification why young men in the fourteen-to eighteen-year age bracket needed protection against any sexual relationship with adult men, while young women in the same age bracket did not need such protection against relations with either adult men or women. In this connection the Court reiterates that the scope of the margin of appreciation left to the Contracting State will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, for instance, *Petrovic v. Austria*, cited above, § 38, and *Fretté v. France*, cited above, § 40).

50. In the present case the applicants pointed out, and this has not been contested by the Government, that there is an ever growing European consensus to apply equal ages of consent for heterosexual, lesbian and homosexual relations. Similarly, the Commission observed in the above-mentioned Sutherland case that "equality of treatment in respect of the age

of consent is now recognised by the great majority of Member States of the Council of Europe" (ibid., § 59).

51. The Government relied on the Constitutional Court's judgment of 3 October 1989, which had considered Article 209 of the Criminal Code necessary for avoiding that "a dangerous strain .. be placed by homosexual experiences upon the sexual development of young males". However, this approach has been out-dated by the 1995 Parliamentary debate on a possible repeal of that provision. As was rightly pointed out by the applicants, the vast majority of experts heard in Parliament clearly expressed themselves in favour of an equal age of consent, finding in particular that sexual orientation was in most cases established before the age of puberty and that the theory that male adolescents were "recruited" into homosexuality had thus been disproved. Notwithstanding its knowledge of these changes in the scientific approach to the issue, Parliament decided in November 1996, i.e. shortly before the applicants' convictions, in January and February 1997 respectively, to keep Article 209 on the statute book.

52. To the extent that Article 209 of the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour (see *Smith and Grady v. the United Kingdom*, cited above, § 97).

53. In conclusion, the Court finds that the Government have not offered convincing and weighty reasons justifying the maintenance in force of Article 209 of the Criminal Code and, consequently, the applicants' convictions under this provision.

54. Accordingly, there has been a violation of Article 14 of the Convention taken in conjunction with Article 8.

55. Having regard to the foregoing considerations, the Court does not consider it necessary to rule on the question whether there has been a violation of Article 8 taken alone.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

57. The applicants each requested 1 million Austrian schillings (ATS), equivalent to 72,672.83 euros (EUR), as compensation for non-pecuniary damage. They asserted that they suffered feelings of distress and humiliation due to the maintenance in force of Article 209 of the Criminal Code and, in particular, the criminal proceedings against them resulting in their convictions, which stigmatized them as sexual offenders. Furthermore, the first applicant submitted that he suffered from epilepsy, which had increased his anxiety and suffering during the trial, and that he had lost his work as a result of his conviction.

58. The Government contended that the finding of a violation in itself would afford the applicants sufficient just satisfaction for any non-pecuniary damage suffered.

59. The Court observes that, in a number of cases concerning the maintenance in force of legislation penalising homosexual acts between consenting adults, it considered that the finding of a violation in itself constituted sufficient just satisfaction for any non-pecuniary damage suffered (see the *Dudgeon v. the United Kingdom* judgment (just satisfaction) of 24 February 1983, Series A no. 59, pp. 7-8, § 14; the *Norris v. Ireland* judgment of 26 October 1988, Series A no. 142, pp. 21-22, § 50; and the *Modinos v. Cyprus* judgment of 22 April 1993, Series A no. 259, p. 12, § 30). However, in a case which concerned a conviction for homosexual acts with a number of consenting adults (*A.D.T v. the United Kindgom*, cited above, §§ 43-45), the Court awarded 10,000 pounds sterling (GBP) in respect of non-pecuniary damage. Similarily, in cases which concerned investigations in respect of the applicants resulting in their discharge from the army on account of their homosexuality the Court awarded GBP 19,000 to each applicant for non-pecuniary damage (see *Smith and Grady v. the United Kingdom* (just satisfaction), nos. 33985/96 and 33986/96, § 13, ECHR 2000-IX).

60. In the present case, the Court notes that Article 209 of the Criminal Code has recently been repealed and that the applicants have therefore in part achieved the objective of their application. However, they were convicted under Article 209 of the Criminal Code. The Court considers that the criminal proceedings and, in particular, the trial during which details of the applicant's most intimate private life were laid open in public, have to be considered as profoundly destabilising events in the applicants' lives which had and, it cannot be excluded, continue to have a significant emotional and psychological impact on each of them (*Smith and Grady* (just satisfaction), ibid). Making an assessment on an equitable basis, the Court awards the applicants EUR 15,000 each.

B. Costs and expenses

61. The applicants requested a total amount of EUR 65,590.93. This sum is composed of EUR 5,633.53 for costs and expenses incurred by the first applicant in the domestic proceedings, EUR 1,655.12 for costs and expenses incurred by the second applicant in the domestic proceedings and EUR 58,302.28 for costs and expenses incurred by both applicants in the Convention proceedings.

62. Further, the applicants, in their submissions of 3 August 2002, asserted that following the Court's judgment further costs will have to be incurred in order to remove the consequences flowing from the violation of the Convention. They argued in particular that - in case of a finding of a violation by the Court - they will be entitled, pursuant to Article 363a of the Code of Criminal Procedure, to have the criminal proceedings renewed in order to have their convictions set aside and to have them removed from their criminal record. The applicants therefore requested the Court to rule that the respondent Goverment were obliged to pay any future costs necessary for removing the consequences of the violation at issue and to reserve the fixing of the exact amount to a separate decision.

63. The Government asserted that the amount claimed by the applicants was excessive. They submitted, in particular, that the applicants had failed to submit a detailed statement of costs as regards the domestic proceedings. Moreover, the second applicant had also been convicted of misappropriation. Accordingly, the domestic proceedings had not only been instituted for the offence under Article 209 of the Criminal Code. Further, the Government asserted that the applicants' counsel had not correctly applied the lawyers' fees as regards the Convention proceedings, and argued that it had not been necessary to submit two separate applications. The Government considered that a total amount of EUR 5,813.83 for costs and expenses would be appropriate as regards the first applicant and a total amount of EUR 4,142,35 as regards the second applicant.

64. The Court recalls that only legal costs and expenses found to have been actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and which are reasonable as to quantum are recoverable under Article 41 of the Convention (*Smith and Grady* (just satisfaction), cited above, § 28, with further references).

65. As to the costs of the domestic proceedings, the Court notes that the applicants each submitted a bill of fees by the lawyer who represented them in the criminal proceedings, which indicates a lump sum for their defence. The difference in the amounts claimed by the applicants is explained by the fact that, in the first applicant's case, two sets of criminal proceedings were instituted, as his first conviction had been partly set aside by the Supreme Court. The Court observes that in the first applicant's case the proceedings

related only to Article 209 of the Criminal Code. The Court therefore finds that the entire costs were actually and necessarily incurred. Moreover, it finds that the amount claimed is reasonable and awards it in full, that is EUR 5,633.53. In the second applicant's case the Court, making allowance for the fact that the criminal proceedings against him related mainly to Article 209 but also to a minor count of misappropriation, awards EUR 1,500.

66. As to the costs of the Convention proceedings, the Court considers them to be excessive. Making an assessment on an equitable basis, the Court awards each applicant EUR 5,000.

67. The total amount awarded in respect of costs and expenses is, therefore, EUR 10,633.53 as regards the first applicant and EUR 6,500 as regards the second applicant.

68. As to the applicants' request for future costs linked to removing the consequences of the violation of the Convention found, the Court considers that such a claim is speculative. The Court notes in particular that both applicants were sentenced to a prison term suspended on probation in 1997 and that the three-years probationary period has already expired. What remains is the entry of their convictions in their criminal records. In this situation it is open to doubt as to whether there will be any need for the applicants to have the criminal proceedings against them renewed, as the Government may well choose other means to have their convictions expunged. The Government may for instance decide to grant the applicants a pardon and have their convictions removed from their criminal records. Having regard to these circumstances, the Court dismisses the applicants' claim for future costs.

C. Default interest

69. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention;

2. *Holds* that there is no need to rule on the complaints lodged under Article 8 of the Convention alone.

3. *Holds*

(a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage and 10,633.53 (ten thousand six hundred thirty-three euros and 53 cent) in respect of costs and expenses;

(b) that the respondent State is to pay the second applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage and EUR 6,500 (six thousand five hundred euros) in respect of costs and expenses;

(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 9 January 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren. NIELSEN
Deputy Registrar

Christos ROZAKIS
President

CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF S.L. v. AUSTRIA

(Application no. 45330/99)

JUDGMENT

STRASBOURG

9 January 2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of S.L. v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mr G. BONELLO,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER, *judges*,
and Mr S. NIELSEN, *Deputy Section Registrar*,

Having deliberated in private on 5 December 2002,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 45330/99) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mr S.L. ("the applicant"), on 19 October 1998.

2. The applicant was represented by Mr H. Graupner, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicant alleged that the maintenance in force of Article 209 of the Austrian Criminal Code, which penalised homosexual acts of adult men with consenting adolescents between fourteen and eighteen years of age, violated his right to respect for his private life and was discriminatory.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section.

6. By a decision of 22 November 2001 the Court declared the application admissible.

7. The applicant filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1981 and lives in Bad Gastein (Austria).

9. At about the age of eleven or twelve the applicant began to be aware of his sexual orientation. While other boys were attracted by women, he realised that he was emotionally and sexually attracted by men, in particular by men who are older than himself. At the age of fifteen he was sure of his homosexuality.

10. The applicant submits that he lives in a rural area where homosexuality is still taboo. He suffers from the fact that he cannot live his homosexuality openly and - until he reached the age of eighteen - could not enter into any fulfilling sexual relationship with an adult partner for fear of exposing that person to criminal prosecution under Article 209 of the Criminal Code (*Strafgesetzbuch*), of being obliged to testify as a witness on the most intimate aspects of his private life and of being stigmatised by society should his sexual orientation become known.

II. RELEVANT DOMESTIC LAW AND BACKGROUND

A. The Criminal Code

11. Any sexual acts with persons under fourteen years of age are punishable under Articles 206 and 207 of the Criminal Code.

12. Article 209 of the Criminal Code, in the version in force at the material time, read as follows:

> "A male person who after attaining the age of nineteen fornicates with a person of the same sex who has attained the age of fourteen years but not the age of eighteen years shall be sentenced to imprisonment for between six months and five years."

13. This provision was aimed at consensual homosexual acts, as any sexual act of adults with persons up to nineteen years of age are punishable under Article 212 of the Criminal Code if the adult abuses a position of authority (parent, employer, teacher, doctor, etc.). Any sexual acts involving the use of force or threats are punishable as rape, pursuant to Article 201, or sexual coercion pursuant to Article 202 of the Criminal Code. Consensual heterosexual or lesbian acts between adults and persons over fourteen years of age are not punishable.

14. Offences under Article 209 were regularly prosecuted, an average of sixty criminal proceedings being opened per year, out of which a third resulted in a conviction. As regards the penalties applied, a term of imprisonment usually exceeding three months was imposed in 65 to 75% of the cases, of which 15 to 25% were not suspended on probation. According to information given by the Federal Minister for Justice in reply to a parliamentary request, in the year 2001 three persons were serving a term of imprisonment based only or mainly on a conviction under Article 209 of the Criminal Code and four others were held in detention on remand in proceedings relating exclusively to charges under Article 209.

15. On 10 July 2002, following the Constitutional Court's judgment of 21 June 2002 (see below), Parliament decided to repeal Article 209 of the Criminal Code. In addition, it introduced Article 207b of the Criminal Code, which penalises sexual acts with a person under sixteen years of age if that person is for certain reasons not mature enough to understand the meaning of the act and the offender takes advantage of this immaturity or if the person under sixteen years of age is in a predicament and the offender takes advantage of that situation. Further Article 207b penalises inducing persons under eighteen years of age to engage in sexual activities by payment. Article 207b applies irrespective of whether the sexual acts at issue are heterosexual, homosexual or lesbian. The above amendment, published in the Official Gazette (*Bundesgesetzblatt*) no. 134/2002, entered into force on 14 August 2002.

B. Proceedings before the Constitutional Court

16. In a judgment of 3 October 1989, the Constitutional Court found that Article 209 of the Criminal Code was compatible with the principle of equality under constitutional law and in particular with the prohibition on gender discrimination contained therein. That judgment was given upon the complaint of a person who subsequently brought his case before the Commission (*Z. v. Austria*, no. 17279/90, Commission decision of 13 May 1992, unreported).

17. The relevant passage of the Constitutional Court's judgment reads as follows:

> "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 leaves offences on the statute book or creates new offences only 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 the 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 ...' *Pallin* in *Foregger/Nowakowski* (publishers), Vienna

commentary to the Criminal Code, 1980, para. 1 on Article 209 ...). 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 section 7 para. 1 of the Federal Constitutional Law and section 2 of the Basic Constitutional Act those legislating on the criminal law cannot reasonably be challenged for taking the view, 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 concluding that it is necessary to punish under the criminal law homosexual acts committed with young males, as provided for under Article 209 of the Penal Code. This conclusion was also based on their views of morality, which they wanted to impose while duly observing the 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 section 7 para. 1 of the Federal Constitutional Law, in conjunction with section 2 of the Basic Constitutional Act."

18. On 29 November 2001 the Constitutional Court dismissed the Innsbruck Regional Court's request to review the constitutionality of Article 209 of the Criminal Code.

19. The Regional Court had argued, *inter alia*, that Article 209 violated Articles 8 and 14 of the Convention as the theory that male adolescents ran a risk of being recruited into homosexuality on which the Constitutional Court had relied in its previous judgment, had since been refuted. The Constitutional Court found that the issue was *res judicata*. It noted that the fact that it had already given a ruling on the same provision did not prevent it from reviewing it anew, if there was a change in the relevant circumstances or different legal argument. However, the Regional Court had failed to give detailed reasons for its contention that relevant scientific knowledge had changed to such an extent that the legislator was no longer entitled to set a different age limit for consensual homosexual relations than for consensual heterosexual or lesbian relations.

20. On 21 June 2002, upon a further request for review made by the Innsbruck Regional Court, the Constitutional Court found that Article 209 Criminal Code was unconstitutional.

21. The Regional Court had argued, firstly, as it had done previously, that Article 209 of the Criminal Code violated Articles 8 and 14 of the Convention and, secondly, that it was incompatible with the principle of equality under constitutional law and with Article 8 of the Convention, as a relationship between male adolescents between fourteen and nineteen years of age was first legal, but became punishable as soon as one reached the age of nineteen and became legal again when the second one reached the age of eighteen. The Constitutional Court held that the second argument differed from the arguments which it had examined in its judgment of 3 October 1989 and that it was therefore not prevented from considering it. It noted that Article 209 concerned only consensual homosexual relations between men aged over nineteen and adolescents between fourteen and

eighteen years of age. In the fourteen-to nineteen-year age bracket homosexual acts between persons of the same age (for instance two sixteen-year-olds) or of persons with a one-to five-year age difference were not punishable. However, as soon as one partner reached the age of nineteen, such acts constituted an offence under Article 209 of the Criminal Code. They became legal again when the younger partner reached the age of eighteen. Given that Article 209 did not only apply to occasional relations but also covered ongoing relationships, it led to rather absurd results, namely a change of periods during which the homosexual relationship of two partners was first legal, than punishable and then legal again and could therefore not be considered to be objectively justified.

C. Parliamentary debate

22. In the spring of 1995 the Social Democratic Party, the Green Party and the Liberal Party brought motions in Parliament to repeal Article 209 of the Criminal Code. They argued in particular that the legislator in the 1970s had justified this provision on the theory that male adolescents were at a risk of being recruited into homosexuality while female adolescents were not. However, modern science had shown that sexual orientation was already established at the beginning of puberty. Moreover, different ages of consent were not in line with European standards. In this respect they referred in particular to Recommendation 924/1981 of the Parliamentary Assembly of the Council of Europe which had advocated equal ages of consent for heterosexual and homosexual relations. Protection of juveniles against sexual violence and abuse was sufficiently afforded by other provisions of the Criminal Code, irrespective of their sexual orientation.

23. Subsequently, on 10 October 1995, a sub-committee of the Legal Affairs Committee of Parliament heard evidence from eleven experts in various fields such as medicine, sexual science, AIDS prevention, developmental psychology, psychotherapy, psychiatry, theology, law and human-rights law. Nine were clearly in favour of repealing Article 209, an important argument for the experts in the fields of medicine, psychology and psychiatry being that sexual orientation was, in the majority of cases, established before the age of puberty, which disproved the theory that male adolescents were recruited into homosexuality by homosexual experiences. Another recurring argument was that penalising homosexual relations made AIDS prevention more difficult. Two experts were in favour of keeping Article 209: one simply stated that he considered it necessary for the protection of male adolescents; the other considered that despite the fact that there was no such thing as being recruited into homosexuality, not all male adolescents were already sure of their sexual orientation and it was therefore better to give them more time to establish their identity.

24. On 27 November 1996 Parliament held a debate on the motion to repeal Article 209 of the Criminal Code. Those speakers who were in favour of repealing Article 209 relied on the arguments of the majority of the experts heard in the sub-committee. Of those speakers who were in favour of keeping Article 209, some simply expressed their approval while others emphasised that they still considered the provision necessary for those male adolescents who were not sure of their sexual orientation. There was an equal vote at the close of the debate (91 to 91). Consequently, Article 209 remained on the statute book.

25. On 17 July 1998 the Green Party again brought a motion before Parliament to repeal Article 209 of the Criminal Code. The ensuing debate followed much the same lines as before. The motion was rejected by 81 votes to 12.

26. On 10 July 2002 Parliament decided to repeal Article 209 of the Criminal Code (see paragraph 15 above).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

27. The applicant complained about the maintenance in force of Article 209 of the Criminal Code which criminalises homosexual acts of adult men with consenting adolescents between fourteen and eighteen years of age. Relying on Article 8 of the Convention, taken alone and in conjunction with Article 14, he alleged that his right to respect for his private life had been violated and that the contested provision was discriminatory, as heterosexual or lesbian relations between adults and adolescents in the same age bracket were not punishable.

Article 8 provides:

"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."

Article 14 provides:

"The enjoyment of the rights and freedoms set forth in [the] 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."

28. Given the nature of the complaints, the Court deems it appropriate to examine the case directly under Article 14, taken together with Article 8.

29. It is not in dispute that the present case falls within the ambit of Article 8, concerning as it does a most intimate aspect of the applicant's private life (see, for instance, *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, p. 21, § 52; *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 90, EHCR 1999-VI). Article 14 therefore applies.

30. The applicant asserted that in Austria, like in the majority of European countries, heterosexual and lesbian relations between adults and consenting adolescents over fourteen years of age were not punishable. He submitted that there was nothing to indicate that adolescents needed 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, Article 209 of the Criminal Code also hampered homosexual adolescents in their development by attaching social stigma to their relations with adult men and to their sexual orientation in general. In this connection, the applicant, referring to the Court's case-law, asserted that any interference with a person's sexual sphere and any difference in treatment based on sex or sexual orientation requires particularly weighty reasons (see *Smith and Grady v. the United Kingdom*, cited above, § 94, and *A.D.T v. the United Kingdom*, no. 35765/97, § 36, 31 July 2000, unreported).

31. This was all the more true in a field where a European consensus existed to reduce the age of consent for homosexual relations. Despite the fact that a European consensus had been growing ever since the introduction of his application, the Government had failed to come forward with any valid justification for upholding, until very recently, a different age of consent for homosexual relations than for heterosexual or lesbian relations. In particular, the applicant pointed out that in April 1997, in September and December 1998 and again in July 2001, the European Parliament had requested Austria to repeal Article 209. Similarly, the Human Rights Committee, set up under the International Covenant on Civil and Political Rights, has found that Article 209 was discriminatory. The Parliamentary Assembly of the Council of Europe issued two recommendations in 2000 advocating equal ages of consent for heterosexual, lesbian and homosexual relations and a number of member States of the Council of Europe have recently introduced equal ages of consent.

32. Further, the applicant pointed out that the Commission, in the Sutherland case (*Sutherland v. the United Kingdom*, no. 25186/94, Commission's report of 1 July 1997, unreported) had departed from its earlier case-law relied on by the Government. In his view, the difference

between the present application and the Sutherland case is not decisive, as the fact that under United Kingdom law in force at the material time, the adolescent partner was also punishable was only referred to by the Commission as a subsidiary argument. As to the Government's further argument that Article 209 was still considered necessary for the protection of male adolescents, he submitted that the great majority of scientific experts whose evidence had been heard in Parliament in 1995 had disagreed with this view.

33. The Government drew attention to the recent amendment of the Criminal Code. They asserted that the applicant, who has always claimed to be attracted by men older than himself, runs no risk of being punished for any homosexual relations under the newly created section 207b of the Criminal Code. The Government therefore stated that their position remained unchanged and maintained their previous submissions.

34. The Government referred to the Constitutional Court's ruling of 3 October 1989 and to the case-law of the Commission (cf. *Z. v. Austria*, no. 17279/90, Commission decision of 13 May 1992, unreported, and *H.F. v. Austria*, no. 22646/93, Commission decision of 26 June 1995, unreported) pointing out that the Commission had found no indication of a violation either of Article 8 alone or taken in conjunction with Article 14 of the Convention in respect of Article 209 of the Austrian Criminal Code. As to the aforementioned case of *Sutherland v. the United Kingdom*, the Government pointed out that there was an important difference, namely that under Article 209 of the Austrian Criminal Code, the adolescent participating in the offence was not punishable. Moreover, they referred to the fact that, in 1995, the Austrian Parliament had heard numerous experts and had discussed Article 209 extensively with a view to abolishing it, but had decided to uphold it, as the provision was still considered necessary, within the meaning of Article 8 § 2 of the Convention, for the protection of male adolescents.

35. The Court notes at the outset that, following the Constitutional Court's judgment of 21 June 2002, Article 209 of the Criminal Code has been repealed. The amendment in question entered into force on 14 August 2002. However, this development does not affect the applicant's status as a victim within the meaning of Article 34 of the Convention. In this connection, the Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a victim unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for instance, *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI). In the admissibility decision of 22 November 2001 in the present case, the Court accepted that the applicant, who has always asserted that he felt attracted by men older than himself, was prevented by Article 209 of the Criminal Code from entering into any sexual relationship

corresponding to his disposition. Accordingly, it found that he was directly affected by the maintenance in force of Article 209 until he attained the age of eighteen. Having regard to the present situation, the Court considers that the Constitutional Court's judgment, which is based on other grounds than those relied on in the present application, has not acknowledged let alone afforded redress for the alleged breach of the Convention. Nor can it be said that the "matter has been resolved" within the meaning of Article 37 § 1 (b) of the Convention. The present case differs from the Sutherland case which has been struck off the Court's list upon the request of the parties, who had reached a settlement following a change in domestic law (*Sutherland v. the United Kingdom* [GC], no. 25186/94, 27 March 2001, unreported).

36. According to the Court's established case-law, a difference in treatment is discriminatory for the purposes of Article 14 if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". Moreover, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see the *Karlheinz Schmidt v. Germany* judgment of 18 July 1994, Series A no. 291-B, pp. 32–33, § 24; *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 29, ECHR 1999-IX and *Fretté v. France*, no. 36515/97, §§ 34 and 40, ECHR 2002-I).

37. The applicant complained about a difference in treatment based on his sexual orientation. In this connection, the Court reiterates that sexual orientation is a concept covered by Article 14 (see the above-cited *Salgueiro da Silva Mouta v. Portugal* case, § 28). Just like differences based on sex, (see the *Karlheinz Schmidt v. Germany* judgment, ibid. and the *Petrovic v. Austria* judgment of 27 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 587, § 37), differences based on sexual orientation require particularly serious reasons by way of justification (see the above-cited *Smith and Grady v. the United Kingdom* case, § 90).

38. The Government asserted that the contested provision served to protect the sexual development of male adolescents. The Court accepts that the aim of protecting the rights of others is a legitimate one. It remains to be ascertained whether there existed a justification for the difference of treatment.

39. The Court observes that in previous cases relied on by the Government which related to Article 209 of the Austrian Criminal Code, the Commission found no violation of either Article 8 of the Convention alone or taken together with Article 14. However, the Court has frequently held that the Convention is a living instrument, which has to be interpreted in the light of present-day conditions (see, for instance, the above-cited *Fretté v. France* case, ibid.) In the Sutherland case, the Commission, having regard to recent research according to which sexual orientation is usually

established before puberty in both boys and girls and to the fact that the majority of member States of the Council of Europe have recognised equal ages of consent, explicitly stated that it was "opportune to reconsider its earlier case-law in the light of these modern developments" (*Sutherland v. the United Kingdom*, Commission's report, cited above, §§ 59-60). It reached the conclusion that in the absence of any objective and reasonable justification the maintenance of a higher age of consent for homosexual than for heterosexual acts violated Article 14 taken together with Article 8 of the Convention (ibid., § 66).

40. Furthermore, the Court considers that the difference between the Sutherland case and the present case, namely that the adolescent partner participating in the proscribed homosexual acts was not punishable, is not decisive. This element was only a secondary consideration in the Commission's report (*ibid.*, § 64).

41. What is decisive is whether there was an objective and reasonable justification why young men in the fourteen-to eighteen-year age bracket needed protection against any sexual relationship with adult men, while young women in the same age bracket did not need such protection against relations with either adult men or women. In this connection the Court reiterates that the scope of the margin of appreciation left to the Contracting State will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, for instance, *Petrovic v. Austria*, cited above, § 38, and *Fretté v. France*, cited above, § 40).

42. In the present case the applicant pointed out, and this has not been contested by the Government, that there was an ever growing European consensus to apply equal ages of consent for heterosexual, lesbian and homosexual relations. Similarly, the Commission observed in the above-mentioned Sutherland case that "equality of treatment in respect of the age of consent is now recognised by the great majority of Member States of the Council of Europe" (*ibid.*, § 59).

43. The Government relied on the Constitutional Court's judgment of 3 October 1989, which had considered Article 209 of the Criminal Code necessary for avoiding "that a dangerous strain .. be placed by homosexual experiences upon the sexual development of young males". However, this approach has been out-dated by the 1995 Parliamentary debate on a possible repeal of that provision. As was rightly pointed out by the applicant, the vast majority of experts heard in Parliament clearly expressed themselves in favour of an equal age of consent, finding in particular that sexual orientation was in most cases established before the age of puberty and that the theory that male adolescents were "recruited" into homosexuality had thus been disproved. Notwithstanding its knowledge of these changes in the scientific approach to the issue, Parliament decided in November 1996 to keep Article 209 on the statute book.

44. To the extent that Article 209 of the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour (see *Smith and Grady v. the United Kingdom*, cited above, § 97).

45. In conclusion, the Court finds that the Government have not offered convincing and weighty reasons justifying the maintenance in force of Article 209 of the Criminal Code.

46. Accordingly, there has been a violation of Article 14 of the Convention taken in conjunction with Article 8.

47. Having regard to the foregoing considerations, the Court does not consider it necessary to rule on the question whether there has been a violation of Article 8 taken alone.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

49. The applicant requested 1 million Austrian schillings (ATS), equivalent to 72,672.83 euros (EUR) as compensation for non-pecuniary damage. He asserted that he was hampered in his sexual development. He reiterates that he felt particularly attracted by men older than himself but that Article 209 of the Criminal Code made any consensual sexual relationship with men over nineteen years of age an offence. Moreover, Article 209 generally stigmatised his sexual orientation as being contemptible and immoral. Thus, he suffered feelings of distress and humiliation during all of his adolescence.

50. The Government did not comment.

51. The Court observes that, in a number of cases concerning the maintenance in force of legislation penalising homosexual acts between consenting adults, it considered that the finding of a violation in itself constituted sufficient just satisfaction for any non-pecuniary damage

suffered (see the *Dudgeon v. the United Kingdom* judgment (just satisfaction) of 24 February 1983, Series A no. 59, pp. 7-8, § 14; the *Norris v. Ireland* judgment of 26 October 1988, Series A no. 142, pp. 21-22, § 50; and the *Modinos v. Cyprus* judgment of 22 April 1993, Series A no. 259, p. 12, § 30).

52. Nevertheless the Court notes that the judgments in the above-cited cases were given between twenty and ten years ago. The Court considers it appropriate to award just satisfaction for non-pecuniary damage in a case like the present one, even though Article 209 of the Criminal Code has recently been repealed and the applicant has therefore achieved in part the objective of his application. In fact, the Court attaches weight to the fact that the applicant was prevented from entering into relations corresponding to his disposition until he reached the age of eighteen. Making an assessment on an equitable basis, the Court awards the applicant EUR 5,000.

B. Costs and expenses

53. The applicant requested a total amount of EUR 30,305.34 for costs and expenses incurred in the Strasbourg proceedings.

54. The Government did not comment.

55. The Court finds the applicant's claim excessive. Making an assessment on an equitable basis, the Court awards EUR 5,000 for costs and expenses.

C. Default interest

56. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention;

2. *Holds* unanimously that there is no need to rule on the complaints lodged under Article 8 of the Convention alone.

3. *Holds*

(a) by 4 votes to 3 that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) in respect of non-pecuniary damage;

(b) unanimously that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) in respect of costs and expenses;

(c) unanimously that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 January 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN	Christos ROZAKIS
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinion is annexed to this judgment:

(a) parly dissenting opinion of Mrs Vajić, joined by Mrs Botoucharova and Mr Kovler.

C.R.
S.N.