

Sexual Consent

The Criminal Law in Europe and Overseas¹

*Keynote-Lecture at the 7th International Conference
of the International Association for the Treatment of Sexual Offenders (IATSO)
“Sexual Abuse and Sexual Violence - From Understanding to Protection and Prevention”
(Vienna, September 11th – 14th 2002)
Friday, 13th September 2002*

by Helmut GRAUPNER, JD
(www.graupner.at)

Abstract: What role can the criminal law play in the battle against child sexual abuse? Should sexual relations of, and with, persons under a certain age be criminalized regardless of the circumstances, even if they are consensual („age of consent“, „minimum age“)? Where should such a minimum age-limit be fixed? Should there be a special, higher age-limit for particular conditions (e.g. „seduction“, „corruption“)? Should sexual contacts with minors within a relationship of authority be criminalized generally or just if authority is abused? Should criminal proceedings be instituted ex officio or upon complaint only? Should authorities be provided with a power of discretion or should they be obliged to prosecute and sentence in each case? In answering these important questions, it is highly beneficial to have a look across the borders to the solutions other countries have reached in this area.

This presentation will provide an overview on the criminal law governing the sexual behavior of, and with, children and adolescents in all European jurisdictions and in selected jurisdictions outside of Europe. It will show which categories of offences exist and from which age onward young people can effectively consent to various kinds of sexual behavior and relations in the different countries. It turns out that all states in Europe and all of the studied jurisdictions overseas do have minimum age limits for sexual relations, do punish sexual relations with persons under a certain age. Nowhere is this age set lower than 12 years. In Europe in one-half of the jurisdictions, consensual sexual relations with 14-year-old adolescents are legal; in two-third with 15-year olds; in a majority, this is also the case when the older partner has started the initiative (and also when the initiative contains an offer of remuneration). In nearly all jurisdictions, such relations are legal from the age of 16 onwards. Most states apply a higher age limit for contacts in relationships of authority. If the authority is not misused the age limit in most jurisdictions is set between 14 and 16; if it is misused between 16 and 18. Most states make no difference between heterosexual and homosexual relations.

Key words: youth protection - youth rights - sexual offenses - age of consent - child sexual abuse - pedophilia - homosexuality - criminal law- human rights

Criminal law is the strongest weapon the state has in combating socially dangerous behavior and society always has used it to fight child sexual abuse. Today according to the case-law of the European Court of Human Rights states are even in an obligation to use the criminal law if effective deterrence cannot be achieved otherwise.² But while there is a basic consensus about the effectiveness and the necessity of the criminal law in this area there is a good deal of controversy about the exact construction of offenses.³

This controversy mainly centers around two questions:

1) *Should – in enforcing the law – be reserved the possibility to screen out cases of minor importance and cases where no harm has been done?* This question, on the one hand, arises out of the negative experience victims of sexual abuse have made with the criminal justice system and from the fear that in some cases criminal proceedings would do more harm than good; on the other hand the question arises out of the fact that each age limit – where ever it may be fixed – is arbitrary and that there always will be cases which do not require punishment.

2) *Up to which age should the special protection reach?* It is easy to hold that a sexual contact with a 5 year old always is abuse but it is much harder to hold that a sexual relation with a 12 year old in each and every case is abusive and it is definitely impossible to hold that a sexual contact with a 16 year old is abuse in each and every case. If the age limit is set too high the law easily can come into conflict with the need of adolescents to sexual liberty and it could easily turn from a mean of protection to a threat itself for the sexual self-determination of juveniles. So legislators have to find a reasonable and fair balance between the need of adolescents to protection from unwanted sex and their equally needed freedom to engage into self-determined sexual relationships.

Aware of the problems most jurisdictions have developed a multistage system consisting of 3 kinds of provisions in this area:

- 1) Minimum age limits
- 2) "Seduction" provisions and
- 3) Provisions on sexual contact in relations of authority

This multistage system reduces the protection with the decreasing need to protection and the increasing capacity to self-determination.⁴ A majority of jurisdictions stick to this multi-stage system. Only a minority to a single-stage system, which sets only one single minimum age limit. Below this limit all sexual contact is illegal; so once youths have reached this age limit they are treated the same way as adults. This system we can see mainly in the common-law countries and the jurisdictions on the territory of the former Soviet-Union.

It is this division into a multi-stage and a single-stage system of youth protection which makes many differences between the several countries understandable.

II. Minimum Age Limits

Minimum age provisions are provisions which generally declare sexual contact of and with persons under a certain age criminal.

Such minimum age limits are an invention of the past 200-300 years. The time before individual biological sexual maturity was the decisive factor. Sexual contact with immature children – consensual or not – always has been punished under the offences against (sexual) violence but consensual (heterosexual) relations with mature adolescents have been legal. With the exception of England & Wales⁵ and the German state of Saxony⁶ a fix minimum age has not been introduced before the 18th/19th century. This limits have been set very low, around the age of 10 to 12. In the 1920s the age limit in most European states still have been at 12 or 13 (as was the case with for instance Denmark, France, Finland, Greece, Ireland⁷, Italy, Spain, UK⁸ and in 11 Swiss cantons). The same is true for the US and Australia, where the age limits have been raised only as late as in the 50s, 60s or 70s of 20th century. In South Africa it was even 1988 when the age limit for sexual relations between women and boys has been raised from 7 (!) to 16 (and the one for lesbians from 12 to 19). In the beginning the minimum age limits just covered vaginal intercourse with girls. Only later these offences have been extended to cover (heterosexual) relations with boys as well. Girls traditionally have been seen more vulnerable than boys. Behind this historical background it is understandable why Estonia, Cyprus and Scotland have different age limits for girls and for boys (as you can see on Table I).

Today all states in Europe and all of the studied jurisdictions overseas do have minimum age limits (you can see on Tables I & VIII). When "no limit" is indicated on the table it must be said that in these countries there is no age limit only at first sight. If you study the respective jurisdictions you can see that in all these states there are age limits, just for some kinds of sexual conduct there are none. For such conduct individual capacity to give informed consent is the decisive factor or "depravation", and the courts often look to the explicitly established limits for the other kinds of contact in determining if such a capacity is already given or if the conduct did "deprave". So the explicitly set limit (for some kinds of contact) is used analogously (for the other kinds of contact for which there is no expressed limit on the books). In addition in some of the jurisdictions on the territory of the former Soviet Union the law enshrines the criterion "individual sexual maturity"; the courts however elaborated the rule that it is irrebuttably presumed that under 14 everyone is

immature. So the minimum age in these countries in fact is at 14, since adolescents over 14 seldom are still biologically sexually immature.

As you can see from Table I the lowest age limit is set at 12 and the highest one at 17.⁹ In most jurisdictions the limit is set at 14, 15 or 16. When we look in how many states consensual sexual relations (without "seduction" and out of a relationship of authority) are legal in a certain age-group we come to the following result:

14	46% (27 – 59)
15	68% (40 – 59)
16	98% (58 – 59)

So about 1/2 of the jurisdictions do not generally criminalize consensual sexual relations with 14 year olds. And more than 2/3 do not with 15 year olds. Only a minority established a general age limit of 16 and just one jurisdiction in Europe a higher one (namely Northern Ireland with 17).

When we have a look which countries fixed the limit at 16 and which ones lower we are confronted with the two systems mentioned in the beginning. As you can see from Table I the jurisdictions which established the age at 16 in most cases have a single-stage system (common-law countries, Belgium, Luxemburg, Latvia, Moldova). They do not have special provisions on authority-relations. So their general minimum age limit has to be valid for these – more problematic – relations as well. Once a juvenile has reached the age limit in these countries he is put on the same footing with adults, he enjoys no special protection against the misuse of authority. That's why in these countries the minimum age limit has to be higher than in countries with a multi-stage system. Besides this there are a few countries with a multi-stage system and nevertheless an age limit of 16. The characteristics of these is however that they allow for extensive screening, so that the law need not be and is not enforced in each and a very case (that is so in the NL - where about 2/3 of the cases are dropped -, Andorra, Finland and Norway). So jurisdictions with an age limit of 16 either established a single-stage system or allow for extensive screening or both.¹⁰

Nearly all states allow for **screening** out of cases which do not require prosecution and punishment. That means that either authorities have a power of discretion not to instigate proceedings and to judge each case on its merits or that criminal proceedings can only be instituted upon a complaint by

the juvenile or his/her legal guardian. Remarkably those jurisdictions without any possibility to screen out cases did set the age limit low, in most cases at 14 (as you can from Table I), and countries with an age limit of 16 do grant wide-ranging possibilities for screening.¹¹ The only exception is Switzerland which combines an age limit of 16 with the principle of legality¹² and proceedings (always) ex officio.¹³ No other state has a legislation as strict as this.

In some countries (as for instance Germany, Austria, Switzerland) the minimum age limit covers also (non-public) sexual acts in front of children and youths (**private exhibition**) and **incitement to masturbation**. Most jurisdictions however do not have such offenses. Private exhibition is not criminal in 2/3 of the European jurisdictions and incitement to masturbation not in 80%.¹⁴ Recently Portugal (1995) and Italy (1996) decriminalized incitement of children and youths (under 16) to masturbation.

Error about the age (if honest, not negligent) removes liability in nearly all European countries, with the only exceptions of the UK, Ireland, Italy and Norway. In the majority of jurisdictions also negligent error removes liability; mens rea (criminal intent) is afforded.

The **penalties** established are very diverse. They reach from 2 years in the UK (for vaginal intercourse with a girl between 13 and 16) to 21 years in Norway.

III. Homosexual Relations

As we turn to homosexual relations we can establish a clear international trend towards equality of lesbians and gay men. The European Court of Human Rights repeatedly ruled that a total ban on homosexual behaviour violates the European Convention on Human Rights, that also when more than two persons are involved,¹⁵ and in 1997 the now defunct European Commission on Human Rights held that a higher minimum age limit for homosexual conduct than for heterosexual violates the European Convention on Human Rights (Art. 8 & 14).¹⁶ The Commission rejected the arguments put forward in favor of a special age limit. It stated that current medical opinion is to the effect that sexual orientation is fixed in both sexes before the age of puberty¹⁷, that the risk posed by predatory older men would appear to be as serious whether the victim is a man or woman and it denied that „society’s claimed entitlement to indicate disapproval of homosexual conduct and its preference for a heterosexual lifestyle ... could in any event constitute an objective and reasonable justification for

inequality of treatment under the criminal law¹⁸. Last year the Court of Human Rights declared admissible three applications concerning such special age limits. A judgment by the Court is expected for later this year.

Also the United Nations Human Rights Committee held that a total ban on homosexual behavior violates the fundamental right to privacy (*Toonen v. Commonwealth of Australia* 1994). And in its concluding observations on the report of Austria under the International Covenant on Civil and Political Rights (ICCPR) the Committee declared higher age limits for homosexual conduct, as compared to heterosexual, as violating international human rights law and called on Austria to repeal its respective law: (quote) “The Committee considers that existing legislation on the minimum age of consent for sexual relations in respect of male homosexuals is discriminatory on grounds of sex and sexual orientation. It requests that the law be revised to remove such discriminatory provisions” (Human Rights Committee 1998, par. 13).¹⁹

The World Health Organisation (WHO) deleted homosexuality from its International Classification of Diseases (ICD) in 1993.

The parliamentary bodies of the Organisation for Security and Cooperation in Europe (OSCE)²⁰, the Council of Europe (COE) and the European Union (EU) all demanded to end discrimination of homosexuals with the COE- and EU-bodies calling on their member states to fully equalize homo- and bisexuals with heterosexuals before the law.²¹ More and more states not only have repealed special offences against homosexual conduct but even further have enacted anti-discrimination laws, outlawing discrimination of homo- and bisexuals,²² and legally recognized same-sex partnerships (cf. for extensive survey in Graupner 1998a, 1998c, 1999a). The Scandinavian countries (Denmark; Greenland; Norway; Sweden; Iceland, Finland) and Germany even introduced *de facto* (not *de iure*) marriage of same-sex couples, so-called “registered partnership, (cf. for details in Graupner 1998a, 1998c, 1999a). The Netherlands in 2001 opened up civil marriage and more and more jurisdictions now also do allow for joint adoption by same-sex couples. The European Parliament repeatedly declared that it will not allow the accession of states to the European Union which in their legislation discriminate against lesbians and gay men (European Parliament 1998b).

In our field 2/3 of the jurisdictions in Europe today set equal age limits (as you can see on see table 2).^{23 24} In addition most of the countries with unequal limits are states from the former Communist bloc. In the Eastern bloc only Poland (since 1932), the GDR (since 1988) and Slovenia (since 1977)

treated homo- and heterosexuality equally in their criminal law. All the other states had special provisions against homosexual conduct, often a total ban. Disintegration of the Communist bloc has been the starting point for a remarkably rapid development towards equality and decriminalization in these countries. So the picture given in Table II. in some way just reflects a snapshot of this development. Lithuania and Estonia for instance already have passed new Criminal Codes with equal age limits, which just have not entered into force yet.

Among the member states of the COE a vast majority (33 out of 44) has set equal age limits and only 2 of the 15 EU-states (Ireland and Portugal²⁵) still have a higher age limit for homosexual conduct.

IV. Seduction

As we turn to the second kind of provisions. We can see that most jurisdictions don't have a provision on "seduction" of youths (as you can see on Table III). The states which do have mostly set lower minimum age limits: at 12, 14 or 15. Just three states combine an age limit of 16 with an additional provision on "seduction" (Andorra, Finland and the NL). As can be seen from table III. in most jurisdictions the offense is restricted to certain forms of "seduction", certain means are afforded.

Generally we can speak of two types of "seduction-provisions", an older one and a more modern type. The older type covers all kinds of "seduction", regardless of the means employed (see Greece, Iceland, Germany before 1994). Under such laws each sexual contact with an adolescent is rendered criminal if the older partner has taken the initiative to the contact. Relations however are complex and in most cases it is not clearly discernible who took the initiative to which sexual contact. Moreover the quality of a relationship does not really depend on who started the initiative to a contact. So those general seduction-provisions emphasizing just on who took the initiative often lead to a "moralizing" case-law that protects more traditional moral norms than self-determination and autonomy of young people. "Seduction"-provisions which focus on the mean "false promise of marriage" also belong to this type of offenses.

The more modern type of "seduction"-provisions is restricted to certain constellations and certain kinds of behaviour. This type of offences aims to protect adolescents over the general age limit

against certain inferences with their sexual self-determination. Inferences which do not reach the intensity needed for the enforcement of the offenses on sexual violence. An example for this more modern type of seduction provisions is the German law with its three constellations "*practising on a position of constraint*", "*against remuneration*" and "*practising on lacking capacity to sexual self-determination*" (Art. 182 CC).²⁶

Also this law of the modern type however mainly is based on the convictions of lawyers. During the hearings in both chambers of the German parliament experts of all other areas of science (physicians, psychologists, psychotherapists, criminologists, sexologists and social workers) did oppose the law. They expressed the opinion that in the case of adolescents over 14 years of age the law can not contribute to the solution of the problems involved and they expressed the fear that the law would do more harm than good to the adolescents involved. While the lawyers focused on the „immaturity“ of 14 and 15 year old adolescents and their need for protection against undue influences, the other experts pointed out that adolescents of 14 and over generally are sufficiently able to cope with such influences and emphasized their right to sexual self-determination. They took the view that this age group requires protection of the criminal law only against the use of force and coercion and against misuse of a relationship of authority and they feared that criminalization beyond that would endanger the sexual self-determination of adolescents. While they acknowledged that problematic situations could occur which bear the potential of leading to negative experiences they were of the opinion that neither does the (attempted) eradication of all negative experiences further a positive psychosexual development nor are the criminal law and criminal investigations apposite means to solve the problems connected with such problematic situations.

The non-legal experts did accept the concerns of the lawyers but they pointed out that the criminal law, as being not only the strongest but also the uncouthiest weapon of the state, would not be suited to solve the problems and to enable adolescents to a self-determined sexual life; instead the employment of the criminal law would create serious problems and dangers for the youths it intends to protect.²⁷ In reaction to this opposition by the non-legal experts heard by parliament, somewhat as a compromise a clause has been included into the law obliging the courts to drop a case if the wrong-doing was minor, whereby special consideration should be given to the behavior of the younger partner (Art. 182 par. 4 CC). This clause according to the case-law primarily is applied when the younger one starts the initiative or when he/she readily agrees to the initiative.²⁸ Moreover prosecution based on the alternative „practising on lacking capacity to sexual self-determination“ (Art. 182 par. 2 CC) has been bound to a complaint by the legal guardian of the juvenile.²⁹ Also in

Austria recently a similar provision could only be passed against considerable resistance from experts, youth organisations and the public at large.

Table III. does not supply information, from which age onwards a minor can legally consent to "seduction"; since also in states which do not have special provisions on seduction, seduction of course can be prosecuted under the minimum age provisions, which do cover all sexual contacts, regardless of the means employed. Table IV shows in how many states consensual sexual relations (with "seduction" but out of a relationship of authority) are legal in a certain age-group (see table IV):

14	46% (26 – 57)
15	61% (35 – 57)
16	88% (50 – 57)

So in nearly 1/2 of the jurisdictions a 14 year old can legally consent to "seduction"; and in a majority a 15 year old can. The countries which do allow this as of 16 only again are those with a single-stage system or with extensive possibilities to screen out.^{30 31}

V. Relations of Authority

As we turn to the third kind of offences, we can see that most jurisdictions do have special higher age limits for contact within relations of authority (look at table V); mainly those with a minimum age limit of under 16. Only a minority does not have such provisions; e.g. mainly common-law countries and former soviet-union-jurisdictions. In most jurisdictions it does not suffice that a relationship of authority exists but it is afforded that the authority is misused in order to gain consent to the sexual contact. With one regular exception: contacts between ascendants and their descendents always are criminal regardless if authority has been misused or not. Therefore two different situations must be separated:

a) *Authority has not been misused* (for instance a love relationship between a student and his/her teacher)

On table VI you see in how many states such relations are legal in a certain age-group (see table VI):

14 **37% (22 – 59)**

15 **53% (31 – 59)**

16 **83% (49 – 59)**

(This table does not cover sexual relations between ascendants and their descendents!)

b) *Authority has been misused* (but the misuse does not arise to intimidation, coercion or force covered by the offences on sexual violence)

Table VII shows in how many states such relations are no criminal offence in a certain age-group (see table VII):

14 **17% (10 – 59)**

15 **25% (15 – 59)**

16 **47% (28 – 59)**

18 **95% (56 – 59)**

(This table does not cover sexual relations between ascendants and their descendents!)

Accordingly if authority has been misused the age limit mostly is set at 16 or 18, and if it is not misused at 14, 15 or 16.

VI. Overseas³²

Table VIII gives you an overview of the situation outside of Europe. Remarkably common-law countries (or countries having been under their influence) set the age limit in most cases at 16 and sometimes even today they still do have a total ban on homosexuality or on certain kinds of sexual contact; or a special higher age limit for certain sexual practices.

Countries with French or Spanish influence or which never have been a colony in most cases set the minimum age low, with the notable exception of countries which have been a prime target of Western sex tourism: Thailand raised from 13 to 15 in 1987 and in 1996 (for contacts „in the place of prostitution“) to 18; and the Philippines, while letting the minimum age at 12, passed a law criminalizing sexual contact with under 18 year olds, if the contact occurred for money, gift or any other consideration or due to any influence of an adult. Apart from these cases seduction-provisions however are very rare outside of Europe.

In the USA legislation in our field is up to the several states. The various states did establish very divergent regulations and there are minimum age limits from 14 up to even 18 in some states. It is striking that in the US the age limits go a lot higher than in the rest of the world.³³ A specialty of the US-system is that many states have established different age limits for different kinds of sexual practices (vaginal, anal, oral intercourse, mutual masturbation etc.)³⁴ often combined with different limits for different age breaks between the partners. This leads to very complex legal situations which hardly can be understood by ordinary people without the help of a specialized lawyer.

There is only one Federal Law in our field.³⁵ In 1994 a provision has been introduced against sextourism into the Federal Criminal Code. This law is worded in a way that can produce obscure results. The law makes it an offence to travel in interstate or international commerce with the intent to engage in sexual contact with someone under 16 (§§ 2423, 2243 Federal Criminal Code). The minimum age limit is set at 14 in Puerto Rico for instance. A couple consisting of a 15 and a 21 year old therefore can legally have sex there. But when both travel to another U.S.-state or to another country their relation becomes a criminal offence and the older partner is liable to imprisonment of up to 10 years, even if the relation also is legal in the other U.S.-state (e.g. Florida) or in the other country (e.g. Canada).

In Europe in the recent years several countries (Austria³⁶, Belgium, Finland³⁷, Germany³⁸, France³⁹ and Norway⁴⁰) have passed legislation making their citizens liable to prosecution under their laws on sexual minimum age regardless where the contact occurred, even when the contact has been completely legal in the country where it occurred.⁴¹ These laws also can produce obscure situations. A 19 year old Belgian for instance who travels to Spain and there has sex with his 15 year old Spanish summer-love commits a criminal offense (under Belgian law). But he is the only one who does so. All the other people making holidays there, from Britain, Italy, Denmark or elsewhere,

could legally engage in a relation with the 15 year old without getting a problem when returning home. While in Germany and Austria the respective laws address only the citizens of their countries going abroad,⁴² Belgium criminalizes everyone who is caught on its territory.⁴³ As a result for example a 20 year old German (or Austrian, French etc.) can be prosecuted in Belgium for sexual relations with his 15 year old girl friend in his homecountry, which are legal there. In the UK such a law-project has been rejected.⁴⁴ The Council of the European Union recommended to introduce the principle of extritoriality but expressly left it open to the member states to bind prosecution on the requirement that an act constitutes a criminal offence in the country itself and abroad (Council of the European Union 1998, 4). The Council of Europe did the same, also leaving it open to the member states to afford double punishability.

VII. Governmental Expert Commissions

National governments frequently appointed expert commissions to scrutinize the law on sexual offences and to make recommendations.

Most of these commissions in Europe recommended a **minimum age** limit of 14;⁴⁵ the Dutch „Melai-Commission“ even of 12.⁴⁶ Also the experts heard by both chambers of the German parliament and by the Austrian parliament favoured an age limit of 14.⁴⁷ Three commissions suggested 15⁴⁸ and only one 16⁴⁹. Nearly all of them called for effective **screening** of cases where criminal proceedings would do more harm than good to the child and made concrete proposals in this respect (as a necessity of a complaint, power of discretion for prosecution authorities and the courts, power for the victim to veto criminal proceedings etc.) (Graupner 1995, 2, 26ff; 1997b, Vol. 2, 26ff).

Just one of the commissions proposed a special age limit for **„seduction“**: the dutch „Melai-Commission“, which recommended a minimum age limit of 12 suggested to criminalize sexual contacts with 12 to 16 year olds, if the older partner initiated the contact.⁵⁰ Most of the European commissions proposed the not to criminalize „seduction“ over the age of 14.⁵¹ Three set this limit at 15⁵² and one at 16⁵³. No European commission recommended a special provision for sex against remuneration. The Swedish Commission explicitly called for the repeal of the respective provision in the Swedish law.⁵⁴ The non-legal experts heard by both chambers of the German parliament opposed „seduction“-provisions (see above).⁵⁵

Since the late sixties only one of the European commissions proposed a special (higher) age limit for **homosexual contacts**.⁵⁶ All other commissions advocated uniform provisions.⁵⁷ The same is true for almost all of the experts heard by the German parliament⁵⁸ and by the Austrian parliament⁵⁹.

The European commissions did not find to uniform conclusions in the area of **relations of authority**. The English *Policy Advisory Committee* (1981) and based upon its findings *the Criminal Law Revision Committee* (1984) opposed a special provision on contacts in relationships of authority. 16 and 17 year old adolescents, they argued, don't require special protection against teachers, employers, youthclub-leaders and other persons in authority over them. Disciplinary law would suffice.⁶⁰ Moreover such a law would be contradictionary since the partners could even marry in this age group. The other commissions advocated a special higher age limit for relationships of authority. As age limit the Dutch *Melai-Commission* (1980) recommended 16, the *Law Reform Commission of Ireland* (1990) 17 and the *Swedish Commission on Sexual Offences* as well as the *Swiss Law Reform Commission* (1977) 18. In Germany four of the experts heard by parliament advocated 16, two 18 Deutscher Bundestag (1970).⁶¹

VIII. Summary

To sum it up, All states in Europe and all of the studied non-European jurisdictions do have minimum age limits for sexual relations, do punish sexual relations with persons under a certain age. This age nowhere is set lower than 12 years.

In Europe in nearly 1/2 of the jurisdictions consensual sexual relations with 14 year old adolescents are legal; in almost 2/3 with 15 year olds; in a majority also when the older partner has started the initiative (and also when the initiative contains an offer of remuneration). In nearly all jurisdictions such relations are legal from the age of 16 onwards.

Most states apply a higher age limit for contacts in relationships of authority. If authority is not misused this age limit in most jurisdictions is set between 14 and 16; if it is misused between 16 and 18.

Most states make no difference between homo- and heterosexual relations.

Thank you for your attention!

IX. Conclusions

It was not the intention of this presentation to provide final answers to the two questions posed at the beginning. It should rather present a factual comparative law basis for further discussion of these problems.

I however do not conceal that in applying the rules established by the European Court on Human Rights⁶² in accordance with the recommendations of most of the European governmental expert commissions on the topic and in accordance with experts from the Council of Europe (Horstkotte 1984) I am of the opinion⁶³ that sexual acts with prepuberal children should (remain to) be criminalized, that a minimum „age limit of 14 is sufficient and a higher age limit for cases of ‘seduction’ neither workable nor necessary“ (Horstkotte 1984, 198). A higher age limit for contacts in relationships of authority should be set and it should be applied, when authority is used to pressure a young person into consenting to sexual acts. An age of 16 seems to be sufficient in this respect. And „the availability of some procedural reliefs should not obscure the fact that in many cases a complete dropping of the procedure and a crisis management by medical and youth welfare services and by private persons and organizations constitute the most efficient support“ (Horstkotte 1984, 197). Screening seems indispensable and states should provide for effective remedies for that. Finally, the law should make no differences between heterosexual and homosexual behaviour (Horstkotte 1984, 202).

Cited Cases:

Abdulaziz, Cabales and Balkandali v. UK, 94 ECtHR Series A (1985)

B.B. v. State, 659 So.2d 256 (Fla. 1995)

Campbell v. State, 709 P.2d 425 (Wyo. 1985)

Campbell v. Sundquist, Tennessee Supreme Court, 926 S.W. 2d 250, Tenn. (1996)

Commonwealth v. Balthazar 318 N.E.2d 478 (Mass. 1974)

Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980)

Commonwealth v. Wasson, Supreme Court of Kentucky, 842 SW 2d 487, Ky (1992)

Dudgeon v. UK, 45 ECtHR Series A (1981)

- Gryczan v. State of Montana*, Montana Supreme Court, ND 96-202 (1997)
- Halm v. Canada* (Minister of Employment and Immigration), 2 F.C. 331, 27 CRR (2d) 23, 28 Imm.L.R. (2d) 252 (1995)
- Inze v. Austria*, 126 ECtHR Series A (1987)
- Marckx v. Belgium*, 31 ECtHR Series A (1979)
- Michael M. v. Superior Court*, 450 U.S. 464 (1981)
- M.K. vs. Austria*, ECmHR, Decision (appl. 28867/95) (1997)
- Modinos v. Cyprus*, 259 ECtHR Series A (1993)
- National Coalition for Gay and Lesbian Equality v. Minister of Justice*, Constitutional Court of South Africa (08.05. 1998)
- National Coalition for Gay and Lesbian Equality v. Minister of Justice*, Johannesburg High Court (09.10.1998)
- Norris v. Ireland*, 142 ECtHR Series A (1988)
- Open Door and Dublin Well Women v. Ireland*, ECtHR, press release 468 (29.10.1992)
- People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980)
- People v. Scott*, 9 Cal.4th 331, Cal. SC (1994)
- People v. Uplinger*, 447 N.E.2d 62 (N.Y. 1983)
- R v. C.M.*, Ontario Court of Appeals, O.J. No. 1432 (1995)
- R v K & F*, EDL 71 (1932)
- R v N*, (3) ShA 147 (T) (1961)
- R v. Roy*, 125 Quebec Court of Appeals, Canadian Criminal Cases (3d), 442 (1998)
- Rassmussen v. DK*, 87 ECtHR Series A (1984)
- State of Georgia v. Anthony Powell*, Georgia Supreme Court (23.11.1998)
- State v. Lawrence&Gardner*, Texas Supreme Court (according to IGLHRC 1998)
- State v. Cuiffini* 395 A2d 904, App. Div. (N.J. 1978)
- State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976)
- Sutherland v. UK*, ECmHR, Report (appl. 25186/94) (1997)
- The People v. T.A.J.*, Cal. Ct. App., 1st App. Distr., Div.2, A076464, 9th April (1998)
- Toonen v. Commonwealth of Australia*, Communication No. 488/1992, 50th session, United Nations Human Rights Committee CCPR/C/50/D/488/1992 (1994)
- X&Y v. NL*, ECtHR, judgement 26.03.1985 (EuGRZ 1985, 297)

References:

- Austria Press Agency (1998). *Schwedens Parlament verbietet Kauf "sexueller Dienste"*, 29.05., Vienna.
- Bundesministerium für Justiz (1956-1962). *Protokolle der Kommission zur Ausarbeitung eines Strafgesetzentwurfes*, Vienna, Austria.
- Criminal Law Revision Committee (1984). *15th Report: Sexual Offences*, London.
- Committee of Ministers (1993). *Sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults – Recommendation No. R(91)11 and Report of the European Committee on Crime Problems*, Council of Europe Press: Strasbourg.
- Council of Ministers of the European Union(1997). *Joint Action concerning the combat against trafficking in humans and sexual exploitation of children*, 97/154/JI, OJ L 63/2-6.
- Danish Council for the Criminal Law (1975). *Straffelovradets udtalelse om strafferetlige aldersgraenser for seksuelle forhold*; Betaenkning nr. 747, Copenhagen 1975; unpublished translation into German by Mag. Kurt Krickler, Wien 1984; see Council of Europe: *Sexual Behaviour and Attitudes and Their Implications for Criminal Law*, Reports presented to the 15th Criminological Research Conference 1982, European Committee on Crime Problems, p. 188, Strasbourg 1984.
- Demsar, Drago (1981). *Law and Development in Yugoslavia*, in: *Contemporary Developments in the Definition and Punishment of Sex Offences*, Nouvelles Études Pénales I, Toulouse.
- Deutscher Bundesrat (1992). *Niederschrift über die 9. Sitzung des Ausschusses für Frauen und Jugend am 04. März 1992 in Bonn, Öffentliche Anhörung zum Sexualstrafrecht (§§ 175, 182 StGB)*, Bonn
- Deutscher Bundestag (1970). *28., 29. und 30. Sitzung des Sonderausschusses für die Strafrechtsreform*, 6. Wahlperiode, Stenographischer Dienst, Bonn 23., 24. und 25. November 1970, Bonn.
- Deutscher Bundestag (1990). *Aids: Fakten und Konsequenzen, Endbericht der Enquetekommission des 11. Deutschen Bundestages „Gefahren von Aids und wirksame Wege zu ihrer Eindämmung“*, Zur Sache 90, 13, Bonn.
- Deutscher Bundestag (1993). *Protokoll der 93. Sitzung des Rechtsausschusses am Mittwoch, dem 20. Oktober 1993 in Bonn, Öffentliche Anhörung*, Protokoll Nr. 93, Bonn
- European Parliament (1997). *Resolution on the Respect for Human Rights Within the European Union*, 08 April, A4-0112/97, Strasbourg.
- European Parliament (1998a). *Resolution on the Respect for Human Rights Within the European Union*, 17 February, A4-0034/98, Strasbourg.
- European Parliament (1998b). *Resolution on Equal Rights of Lesbians and Gay Men in the*

European Union, 17 September, B4-0824 & 0852/98, Strasbourg.

European Parliament (1998c). *Resolution on the Respect for Human Rights Within the European Union (1997)*, Strasbourg, December.

Fernand-Laurent, Jean (1988). *The Legal and Social Problems of Sexual Minorities*, UN-Economic and Social Council Document (E/Cn.4/Sub.2/1988/31.06.1988), Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Geneva

Graupner, Helmut (1995). *Sexualität, Jugendschutz & Menschenrechte - Über das Recht von Kindern und Jugendlichen auf sexuelle Selbstbestimmung*, 2 Volumes, University of Vienna (Diss. iur.)

Graupner, Helmut (1997a). *Keine Liebe zweiter Klasse - Diskriminierungsschutz und Partnerschaft für gleichgeschlechtlich L(i)ebende*, Rechtskomitee LAMBDA, Vienna.

Graupner, Helmut (1997b). *Sexualität, Jugendschutz & Menschenrechte - Über das Recht von Kindern und Jugendlichen auf sexuelle Selbstbestimmung*, 2 Volumes, Peter Lang, Frankfurt, M/Berlin/Bern/New York/Paris/Vienna.

Graupner, Helmut (1997c). *Sexuelle Mündigkeit - Die Strafgesetzgebung in europäischen und außereuropäischen Ländern*, Zeitschrift für Sexualforschung 10(4), 281-310, Stuttgart.

Graupner, Helmut (1997d). *Austria*. In: West, D.J. & Green, R., *Socio-Legal Control of Homosexuality - A Multi-Nation Comparison*, 269-287, Plenum: New York.

Graupner, Helmut (1998a). *Von „Widernatürlicher Unzucht“ zu „Sexueller Orientierung“ - Homosexualität & Recht*, in: Roth, R. & Hey, B., *Que(e)erdenken. Weibliche/männliche Homosexualität und Wissenschaft*, Studienverlag, Innsbruck.

Graupner, Helmut (1998b). *Homosexualität und Strafrecht in Österreich*, 6th ed., Rechtskomitee LAMBDA: Vienna.

Graupner, Helmut (1998c). *Keine Liebe zweiter Klasse – Diskriminierungsschutz und Partnerschaft für gleichgeschlechtlich L(i)ebende*, 2nd ed., Rechtskomitee LAMBDA: Vienna.

Graupner, Helmut (1998d). *Update on Austria*. Euroletter 65 (November).

Graupner, Helmut (1999a). *Keine Liebe zweiter Klasse – Diskriminierungsschutz und Partnerschaft für gleichgeschlechtlich L(i)ebende*, 3rd ed., Rechtskomitee LAMBDA: Vienna.

Graupner, H.(1999b). *Love versus Abuse – Crossgenerational Sexual Relations of Minors: A Gay Rights Issue?*, *Journal of Homosexuality*, 37 (4) 23-56.

Graupner, H. (2000), *Sexual Consent – The Criminal Law in Europe and Overseas*, *Archives of Sexual Behaviour*, Vol. 29, No. 5, 415-461

- Health Council of the Netherlands (1969). *Memorie van Toelichting*, Bijlage 4, Zitting 1969-70 – 10347; German Translation: Speijer-Report, Pais Press Produkt, Schweiz 1976
- Horstkotte, H. (1984). *Ages and Conditions of Consent in Sexual Matters*, in: Council of Europe, European Committee on Crime Problems, Sexual Behaviour and Attitudes and Their Implications for Criminal Law: Reports presented to the 15th Criminological Research Conference 1982, p. 165ff, Strasbourg.
- House of Commons (1994). *Minutes of the Debate on the Criminal Justice and Public Order Bill*, 21.02.1994, 48 CD 21/28, London.
- Human Rights Committee (1998). *Concluding Observations to the Report of Austria Submitted under Art. 40 International Covenant of Civil and Political Rights*, 46th session, Geneva: 11.11.1998
- International Gay and Lesbian Human Rights Commission (IGLHRC) (1998). *IGLHRC Celebrates the 50th Anniversary of the UDHR*, email 11.12.
- Justis- og politidepartementet (1997). *Seksuallovbrudd - Straffelovkommisjonens delutredning VI*, NOU 1997:23, Oslo.
- Ministry of Justice (1997). *Letter to the Author*, 07.07., Kiev.
- Ministry of Labour (1998). *Violence Against Women – Government bill 1997/98:55*, Fact Sheet, Swedish Government Offices: Stockholm.
- Niederländische Strafrechtsreformkommission (Melai-Kommission) (1980). *Schlußbericht 1980*, see Edward Brongersma, Schutzalter 12 Jahre? – Sex mit Kindern in der niederländischen Gesetzgebung, in: Angelo Leopardi, Der pädosexuelle Komplex, S. 213ff, Berlin/Fft. 1988
- Note (1991). Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex.
104 *Harvard Law Review* 1660
- Oikeusministeriön (1993). *Seksuaalirikokset - Rikoslakiprojektin ehdotus*. Oikeusministeriön lainvalmisteluosaston julkaisu 8. Helsinki.
- Österreichischer Nationalrat (1995). *Unterausschuß des Justizausschusses, Zusammenfassende Darstellung der Expertenanhörung zu den §§ 209, 220, 221 StGB*, 10.10.1995 (Doc: U-AU-JUS.DOC).
- Pizarro Belez, Teresa (1996). *Sem Sombra de Pecado - O Repensar dos Crimes Sexuais na Revisão do Código Penal*, Lisboa.
- Policy Advisory Committee on Sexual Offences (1981). *Report on the Ages of Consent in Relation to Sexual Offences*, London.

- Posner, Richard A. & Silbaugh, Katharine B. (1996). *A Guide to America's Sex Laws*, The University of Chicago Press: Chicago & London
- Rebane, Ilmar (1980). *Commented Soviet Estonian Penal Code*, Eesti Raamat: Tallin.
- Stonewall (1998). *First Step to Equalize Age of Consent in UK*, Euroletter 61, 4 (July).
- Schweizer Expertenkommission für die Revision des Strafgesetzbuchs (1977). *Aenderung des Strafgesetzbuches und des Militärstrafgesetzes betreffend die Strafbaren Handlungen gegen Leib und Leben, gegen die Sittlichkeit und gegen die Familie: Vorentwurf und Erläuternder Bericht zu den Vorentwürfen*, 3.82 600 14786/1, 3.82 1400 14786/2, Bern.
- Swedish Commission on Sexual Offences (1976). Kjellin-Sexualbrottsutredningen, *Sexuella övergrepp*, Stockholm 1976; (1) see Brongersma; E.: The Meaning of „Indecency“ with Respect to Moral Offences Involving Children, *British Journal of Criminology*, 20, 20-34, 1980; (2) see Council of Europe: *Sexual Behaviour and Attitudes and Their Implications for Criminal Law*, Reports presented to the 15th Criminological Research Conference 1982, European Committee on Crime Problems, Strasbourg 1984; (3) see Verband von 1974: *Ein Land schafft gleiches Recht – Beitrag zur Diskussion um Paragraph 175 StGB nach amtlichen Drucksachen des Schwedischen Reichstages*, Hamburg 1979
- The Law Reform Commission of Ireland (1989). *Consultation Paper on Child Sexual Abuse*, Dublin.
- The Law Reform Commission of Ireland (1990). *Report on Child Sexual Abuse*, Dublin.
- Walmsley, Roy & White, Karen (1979). *Sexual Offences - Consent and Sentencing*, Home Office Research Study No. 54, London.
- Wockner, Rex (1998). *House of Lords Stalls Age-of-Consent Change*, Euroletter 62, 10 (August).

Notes:

¹ The information given in this paper is based upon a thorough analysis of the respective provisions of the national criminal law and of the jurisdiction of the courts in each state. The author studied the text of the laws, the case-law of the courts, commentaries to the criminal law and other literature and sought information from the Ministries of Justice and from University law schools in the respective countries. The sources are too numerous to represent them here but detailed references to these sources and the full text of the laws are given in the country-by-country survey contained in Graupner (1995, 2, 359-748; 1997b, 2, 359-748). Where information is based on sources not given there or in Graupner (2000), explicit references are given in the text here. The author attempted to be as thorough and encompassing as possible. Due to the nature of such an extensive comparative law study it is however never possible to exclude all possibilities of error, inaccuracy, misunderstanding and deficiencies concerning up-to-date-information. Therefore the author referenced each information in a way to facilitate the reader's way back to the sources.

² Case X and Y vs. NL 1985

³ Also the Council of the European Union did not proscribe specific detailed offences to the member states but remained in relatively vague terms and expressly stated that the terms (as „child“, „sexual abuse“ or „unlawful sexual acts“) used by it have to be interpreted according to the national legal systems (Council of the European Union 1997, 2f). Also the Committee of Ministers of the Council of Europe did not define the terms „child“ and „young adult“ used in its recommendations to the member states on the issue (Committee of Ministers 1993, 22): „for the purposes of implementing the present recommendation in member states, the terms 'child' and 'young adult' are defined in accordance with the age limits laid down in national legislation“ (ibid).

⁴ The German Constitutional Court for instance hold that a minor is „from the beginning and increasing with his age (...) a personality protected by Art. 2 I of the German Constitution (the right to free development of one's personality) in connection with Art. 1 I (the right to respect for human dignity)“. His competence increases according as his ability to self-determination exceeds his need for protection. In especially a discerning minor should be able to exercise rights on his own, which are central to his personality („höchstpersönliche Rechte“) (see BVerfGE 47, 46 (74) in: NJW 1978, 807; BVerfGE in: NJW 1982, 1375 (1378)). Similarly the case-law of Austrian Supreme Court. In Switzerland even the written law itself does contain this formula. According to Art. 19 II of the Swiss Civil Code „discerning minors“ without the consent of their legal representative can exercise the „rights accorded to them on the basis of their personality“ (details in Graupner 1995, Vol. 1, 63f; 1997b, Vol. 1, 63f).

⁵ which introduced an age limit as early as 1285 (at 12 years of age)

⁶ where in 1572 a fix limit of 12 has been set for vaginal intercourse with girls.

- ⁷ Only for vaginal intercourse with girls the age limit was 16 (since 1885).
- ⁸ Only for vaginal intercourse with girls the age limit was 16 (since 1885).
- ⁹ In England & Wales – as a rest of the old total ban (repealed in 1994) – a higher limit of 18 applies to anal intercourse only. The same is true for the Isle of Man (21). The total ban on (heterosexual) anal intercourse is even still in force in Gibraltar, Jersey, Guernsey and in Northern Ireland. In Turkey the higher age limit (of 18) applies to anal and vaginal intercourse only.
- ¹⁰ The only exception being Switzerland (cf. next paragraph).
- ¹¹ In *England & Wales* 75% of the cases with 13 to 15 year old girls are dropped. Also with homosexual contacts most cases are dropped (Walmsley & White 1979, p. 42). In the years 1990-1992 only 9, 10 and 12 men over 21 have been prosecuted for homosexual contact with a young man under 21 (the then age of consent for homosexual conduct lowered to 18 in 1994) (House of Commons 1994, p. 102). Also in the *Netherlands* about 2/3 of the cases are dropped; moreover relations with minors over 12 can be prosecuted only upon complaint (of the adolescent, his legal representatives or the Council for Youth Protection). And as a result of extensive power of discretion granted to the prosecution authorities there have hardly been any prosecutions for sexual relations with 14 and 15 year old adolescents in *Norway* (personal communication Thore Langfeldt, World Congress for Sexology, Valencia 1997). As the *Netherlands* also *Portugal* (over 12) binds prosecution for (consensual) sexual relations with minors under the minimum age on a complaint (by the minor or his legal representative). But even some countries with an age limit lower than 16 do require a complaint: *Greece*, *Hungary* (heterosexual acts only), *Italy* (over 10), *Malta*, *San Marino*, *Spain* (also the state prosecutor can complain), *Vatican*.
- ¹² Principle of legality means that police authorities are obliged to investigate, prosecutors to prosecute and courts to convict in each and every case. No power of discretion is attributed to them.
- ¹³ Proceedings ex officio means that prosecution can take place without complaint or consent of the victim, its legal representative or a certain institution or organisation.
- ¹⁴ Recently *Portugal* (1995) and *Italy* (1996) decriminalized incitement of children and youths (under 16) to masturbation.
- ¹⁵ Case *Dudgeon v. UK* 1981; *Norris v. Ireland* 1988; *Modinos v. Cyprus* 1989
- ¹⁶ Case *Euan Sutherland v. UK* (appl. 25186/94, report 01.07.97)
- ¹⁷ *Euan Sutherland v. UK* (par. 59, 64)
- ¹⁸ *Euan Sutherland v. UK* (par. 64f)
- ¹⁹ Already the study of Fernand-Laurent (1988) on behalf of the UN-Commission on Human Rights (elaborated by appointment of the Economic and Social Council) called for an end of discrimination of homosexuals and for equal age of limits for homo- and heterosexual contact.
- ²⁰ former Conference for Security and Cooperation in Europe (CSCE)
- ²¹ For details cf. Graupner, 1995, Vol. 1, 433ff; 1997b, Vol. 1, 433ff), European Parliament (1997, 1998a, 1998b, 1998c)
- ²² *Norway* (1981), *France* (1985, 1986), *Denmark* (1986), *Sweden* (1987), *Ireland* (1989), the *Netherlands* (1992, 1994), *Austria* (1993), *Slovenia* (1995), *Spain* (1995), *Luxemburg* (1997). *South-Africa* (1994, 1996), *Ecuador* (1998) and *Fiji* (1998) even enshrined the principle of non-discrimination on the basis of "sexual orientation" in their national constitutions. For other examples outside of Europe and for sources cf. the extensive survey in Graupner (1998a, 1998c, 1999a).
- ²³ All countries which took over the french Code Napoléon or which oriented their criminal law after it, repealed the ban on homosexuality during the 19th century. Homosexuality has not been mentioned in the criminal law anymore, homo- and heterosexual relations were treated equally. Special offences - as there are higher minimum age limits, bans on homosexual prostitution only or higher penalties in the case of homosexual acts in a public place - did not exist. The (uniform) age limits have been set very low, between 12 and 14 in most states. Some countries in the beginning even had no fixed limit. The countries however which did not come under the influence of the Code Napoléon kept the total ban on homosexuality up to the 20th century. Decriminalization in the 19th century has been confined to the Romanic jurisdictions. But also there discriminatory regulations have been reintroduced, in most cases higher age limits for homosexual relations (for some time). *Italy* and *Turkey* have been the only countries in Europe which decriminalized homosexuality in the 19th century and ever since have been treating homosexual relations equally under its criminal legislation. But only *Portugal* (1912-1945), *Spain* (1928-1934), *Serbia* (1929-1994) and *Romania* (1948-1996) (and the Soviet Union 1934-1993 (year when Russia abolished the law; the Ukraine did 1991, Estonia 1992, Latvia 1992, Lithuania 1993, Belarus in 1994, Moldova 1995)) reintroduced the total ban on homosexuality (cf. for details Graupner 1997b, 1998a).
- ²⁴ In the case of seduction-provisions only two (Färöer, Greece) jurisdiction(s) do establish differences concerning minors (see Table III.). *Bulgaria*, *Cyprus* and *Romania* have general discriminatory provisions in this area (ibid).
- ²⁵ *Portugal* repealed all special laws against homosexual behaviour in 1982 and since 1945 established an equal age limit of 16. The current inequality results from a lowering of the minimum age limit in 1995 for heterosexual contact only (from 16 to 14). The following inequality between hetero- and homosexual contacts has been criticized in the literature (Pizarro Beleza 1996, 27).
- ²⁶ cf. also the similar provisions in *Finland*, *Italy* and *Portugal*
- ²⁷ Cf. *Deutscher Bundesrat* (1992), *Deutscher Bundestag* (1993), Graupner (1995, Vol. 1, 361-408; 1997b, Vol. 1, 361-408)
- ²⁸ Case-law of the German Supreme Court („Bundesgerichtshof“) on the identical Art. 174 par. 4 CC and the former Art. 175 par. 4 CC. In interpreting Art. 182 par. 4 CC the Federal Court sticks to this case-law (cf. BGH 06.04.1995, 1 StR 82/95).
- ²⁹ This complaint has to be made within three months after knowledge of deed and perpetrator (Art. 77b CC). The public prosecutor is entitled to prosecution only if due to an outstanding public interest in prosecution he deems prosecution necessary (Art. 182 CC). BGH 06.04.1995, 1 StR 82/95
- ³⁰ See the *Netherlands* where 80-90% of the cases (of seduction of 16 and 17 year old adolescents) are dropped. Many of these countries also bind prosecution upon a complaint (by the adolescent or his legal representative): *Germany* (for the alternative „practicing on lacking ability to sexual self-determination“, Art. 182 par. 2 CC), *Monaco* (girls over 15), the *Netherlands* (over 12; as soon as the minor is 16 even just he himself can complain, legal representatives can do so for minors under 16 only), *Portugal* (over 12), *Spain* (also the state prosecutor can complain). Also the offence of seduction by a false promise of marriage (which has not been considered for this calculation, see table IV/FN 1) in the successor states of the *former Yugoslavia*, in *San Marino* and in *Turkey* can be prosecuted on the basis of a complaint (by the minor or his legal representative) only. The same is true for the offences of „corruption of minors“ in *Malta* and the *Vatican* (see table IV/FN 1).
- ³¹ *Switzerland* and *Iceland* are the only countries which do allow legally effective consent into „seduction“ from the age of 16 only and do establish a multistage system and do not allow for extensive screening.
- ³² See table VIII
- ³³ *Wyoming* set the minimum age limit even as high as 19. Just one of the jurisdictions studied worldwide does establish a higher one: *Chile*, where the limit is 20. The most restrictive legislation the author found was Canadian legislation between the years 1955 and 1969: homosexual but also heterosexual "gross indecency" (potentially all kinds of sexual contact) has been a criminal offense regardless of the age of the partners. In 1969 the offense has slightly been modified: if not more than two persons were present and the partners were married or both above 21 years of age. In 1988 this law has been abolished (for details cf. Graupner 1997b, 334/46).
- ³⁴ With the exception of total bans on (certain) homosexual acts in some US-states (see table VIII) homosexual contacts are subject to the same regulations as heterosexual ones. Homosexual conduct (or some kinds of) therefore either is totally illegal or subject to the same regulations. Unequal laws for the protection of youths (as different age limits) for hetero- and homosexual contacts are not known in the US-law.
- ³⁵ Besides the provisions on "child"-pornography. These render all visual depiction of sexual acts by and with persons under 18 years of age criminal. Also visual depictions representing "lascivious exposure" of the "genitals or the pubic area" of a person under 18, even if this person is fully clothed

and when the outlines of these areas are not discernible through clothing (§§ 2251-2256 Federal Criminal Code; Confirmation of Intent of Congress in Enacting Section 2252 and 2256. Section 160003 of Pub.L. 103-322). *Canada* passed a similar law in 1993 (ch. 46, 40-41-42 Elizabeth II.23.06.1993). In Europe only *Estonia, France, Germany, Italy, Latvia, Spain and Sweden* have an age limit for taking part in pornographic performances that is higher than the general age-limit (as far as the criminal law is concerned).

³⁶ Art. 64 CC. This regulation applies to the general age limit of 14 only, not to the higher minimum age for homosexual relations (18 years).

³⁷ Chapter 1 § 11 CC

³⁸ In 1998 Germany extended this principle of extritoriality also to ist seduction-provision (Art. 182 CC) (cf. IV above and Table III.) (Art. 1 lit. 2b 6th Criminal Law Reform Act 1998).

³⁹ Art. 227-27-1 CP

⁴⁰ For sexual contacts with persons under 14.

⁴¹ This is of importance since these countries as a principle do confine the absolute application of their criminal law to offences on their territory. The question does not arise in countries, which bound their citizens to their criminal law wherever they are and irrespective of the law of the country where the offence occurs (for example the Netherlands, Italy, Poland, the Czech Republic). For Italy see also Art. 604 CP, as amended by law 02.08.1998 (no. 269), in relation to Art. 4ff CP.

⁴² France applies its law to ist citizens and to foreigners permanently residing in France

⁴³ Also Norway applies its respective laws such extensively. But for the prosecution of an offence committed by a non-resident foreigner abroad a decision by the king is afforded.

⁴⁴ Traditionally the UK restricted the power of its jurisdiction to actions within its own territory. Sexual conduct outside the Kingdom did not fulfill an offence triable by British courts even if the conduct was an offence both at home and abroad. In 1997 the British parliament passed a law however making also (certain) sexual offences (against persons under 16) abroad triable by its courts. But as a requirement the conduct can only be prosecuted in the UK if it is an offence both in the UK and abroad (s. 7 & 8 Sex Offenders Act 1997).

⁴⁵ Schweizer Expertenkommission (1977), Swedish Commission on Sexual Offences (1976), Danish Council on the Criminal Law (1975), Bundesministerium für Justiz (1956-1962)

⁴⁶ Niederländische Strafrechtsreformkommission (Melai-Kommission) 1980

⁴⁷ Deutscher Bundesrat (1992), Deutscher Bundestag (1993); Österreichischer Nationalrat (1995)

⁴⁸ The Norwegian Criminal Law Commission (which recommended to lower the minimum age limit in Norway from 16 to 15; Justis- og politiedepartementet 1997); The Finnish Criminal Law Commission 1993 (which recommended to lower the minimum age limit in Finland from 16 to 15; Oikeusministeriön 1993); The Law Reform Commission of Ireland (1990); but also: „Although age limits are necessarily arbitrary, the age in this country of 15 on one view seems particularly difficult to justify ... No doubt, prosecutorial discretion and flexible sentencing can, and probably does, avoid the grosser injustices which such a law could produce: nonetheless, its retention on the statute book in this form is at least questionable“ (The Law Reform Commission of Ireland 1989, 65).

⁴⁹ Policy Advisory Committee on Sexual Offences 1981 (and just adopting its recommendations the Criminal Law Revision Committee 1984)

⁵⁰ Niederländische Strafrechtsreformkommission (Melai-Kommission) 1980

⁵¹ Schweizer Expertenkommission (1977), Swedish Commission on Sexual Offences (1976), Danish Council on the Criminal Law (1975), Bundesministerium für Justiz (1956-1962)

⁵² The Norwegian Criminal Law Commission 1997 (Justis- og politiedepartementet 1997); The Finnish Criminal Law Commission 1993 (Oikeusministeriön 1993); The Law Reform Commission of Ireland 1990 (only for vaginal and anal (not oral) penetration of (not by) adolescents it recommended an age limit of 17)

⁵³ Policy Advisory Committee on Sexual Offences 1981 (and just adopting its recommendations the Criminal Law Revision Committee 1984)

⁵⁴ Swedish Commission on Sexual Offences (1976)

⁵⁵ Deutscher Bundesrat (1992), Deutscher Bundestag (1993)

⁵⁶ Policy Advisory Committee on Sexual Offences 1981 (and just adopting its recommendations the Criminal Law Revision Committee 1984)

⁵⁷ The Norwegian Criminal Law Commission 1997 (Justis- og politiedepartementet 1997); The Finnish Criminal Law Commission 1993 (Oikeusministeriön 1993); The Law Reform Commission of Ireland (1990), Niederländische Strafrechtsreformkommission (Melai-Kommission) 1980, Schweizer Expertenkommission (1977), Swedish Commission on Sexual Offences (1976), Danish Council on the Criminal Law (1975), Health Council of the Netherlands (1969)

⁵⁸ Deutscher Bundesrat (1992), Deutscher Bundestag (1973, 1990, 1993)

⁵⁹ Österreichischer Nationalrat (1995)

⁶⁰ June 1998 the House of Commons (by 234:194) rejected a motion to introduce an age-limit of 18 for relationships of authority (Stonewall 1998)

⁶¹ cf. Graupner (1995, Vol. 1, 596; 1997b, Vol. 1, 596)

⁶² See Introduction. So far the European Court on Human Rights never had to use this test to give a final ruling on an age of consent regulation. In the only case in which it had to deal with an age of consent issue, in the end – for formal reasons – it refused to decide the question (*Dudgeon vs. UK* 1981, §§ 62, 66). The European Commission on Human Rights, however, repeatedly did decide age of consent issues. All but one of these cases concerned special higher age limits for male homosexual relations (cf. the section on “Homosexual Relations” above). In the only case dealing with a general minimum age limit the Commission upheld a limit of 14 years (*M.K. vs. Austria* 1997). In all these decisions, however, the Commission merely referred to the necessity to protect the young without giving any special reasoning; i.e. not in detail referring to or applying the principles for review elaborated in its and the case-law of the Court. According to protocol No. 11 to the European Convention on Human Rights as of 1st November 1998 the Commission and the Court both have been replaced by a new and permanent European Court on Human Rights.

⁶³ For a detailed reasoning see Graupner (1997b, 1999b)