The Postwar Debate about Section 175 (June 19, 1957)

Abstract

Section 175 of the German criminal code was established in 1871; its primary purpose was to make homosexual acts between men a crime. The early interpretation of the law was fairly narrow; men could only be convicted of a crime if it could be proven that they had engaged in "intercourse-like" behavior, which made it an extremely difficult law to enforce. In the German Empire and the Weimar Republic, convictions under the law were typically in the hundreds every year. However, the National Socialists rewrote the law so that it applied more broadly and used the law to target and imprison gay men. Scholars estimate that there were about 100,000 arrests under section 175 during the Nazi regime, with a little over half of those arrests resulting in conviction. Most men convicted under Section 175 served fixed prison terms, but scholars believe that between 5,000-15,000 gay men were sent to concentration camps for violating the law (mostly men who had multiple convictions of violating the law). In the concentration camps, they had to wear pink triangles, which marked them as "homosexuals," or "175ers." After the fall of Nazi Germany, East and West Germany were allowed to keep Section 175 in effect, though the Allied powers forced both countries to repeal other Nazi statutes and laws. West Germany chose to use the Nazi version of Section 175, while East Germany opted for the earlier, narrower version of the law; East Germany was more permissive towards gay men, while West Germany pursued proceedings against gay men with considerable zeal. In this article in *Der Spiegel*, a West German news magazine, it is made clear that the West German decision to keep Section 175 was not without controversy, but homosexuality remained illegal until 1969, when West Germany partially decriminalized homosexuality.

Source

The Specific Nature of Man

The 24 prominent professors of criminal law, judicial officers, judges and lawyers who make up the "Grand Criminal Law Commission" and have been working since June 1954 to reform the German Criminal Code, which has been decades in the making, and who now seek to implement it, find this undertaking hindered by a recent decision of the Federal Constitutional Court in Karlsruhe that relates to one of the criminal laws in the greatest need of reform.

The judges in Karlsruhe faced a problem that also preoccupied penal reformers, the question of whether Section 175 of the penal code is still valid today.[1] By lodging a constitutional complaint, Berlin lawyer Dr. Werner Hesse had tried to obtain the reversal of two verdicts issued against a cook and a businessman convicted of offenses under Section 175 by the Hamburg Regional Court.

Counselor Hesse's efforts were unsuccessful, and the Federal Constitutional Court (BVG) rejected the constitutional complaint. But the court did not arrive at its decision easily: Nearly sixteen months had passed between the presentation of oral arguments in January 1956 and the issuing of an 80-page verdict by the First Senate under BVG President Dr. Wintrich.

The arguments contained in these 80 pages must have troubled the "Grand Criminal Law Commission." The commission had not yet completed its deliberations on Section 175, but they largely agreed that in future, Section 175a should be retained, but that "simple" indecency under Section 175 should no longer be punishable.

The decision of the Constitutional Court was so inconsistent with this tendency within penal reform that

the reformers had to seriously question whether it did not render a change in these fiercely controversial penal provisions impossible from the outset.

Counselor Hesse had largely based his constitutional complaint on two arguments:

> Section 175 violates the principle of equality outlined in the Basic Law, since it punishes same-sex indecency only between men, but not between women.
>
> Section 175 restricts the right to the free development of the personality guaranteed by the Basic Law.

In order to clarify these questions, the Constitutional Court in Karlsruhe first invited half a dozen prominent experts — medical doctors, sociologists and criminologists — to inform them about the most recent research.

While the opinions submitted showed that experts are farther than ever from agreeing upon the nature of homosexuality, they nevertheless made clear once again what the penal reformers have long known: that the overwhelming majority of medical doctors consider Section 175 (but not Section 175a) to be unjust or counterproductive.

Invasion of Privacy

For the first time, these experts also answered the question of whether there was any objective justification for punishing male aberrations but not lesbian love. Professor Kretschmer, director of the University Psychiatric Hospital in Tübingen, rejected any differentiation between male and female deviance as regarded their danger to society or the threat to individuals or legally protected interests. Essentially, explained Professor Graßberger, head of the University of Vienna's Institute of Criminology, the individual homosexual act imperiled the social interests of men and women in similar ways.

In its decision, the court however reached the opposite conclusion. It determined that the Basic Law is not applicable here because "the specific nature of woman as a female sexual being and of man as a male sexual being affect the offense so fundamentally differently that the comparable element—the abnormal turning of the sex drive to the same sex—recedes and lesbian love and male homosexuality do not appear as comparable offenses in the legal sense."

The key assumption underlying this decision is that prostitution is specific to male but not to female homosexuality, upon which all of the consulted experts agreed. The court saw additional fundamental differences between female and male homosexuality in the fact that "the woman of lesbian tendencies" finds it "easier to maintain sexual abstinence" than the man, and that it is "virtually impossible to draw a clear line between a lesbian relationship and a tender friendship between women." This leads the court to draw the astonishing conclusion that "as a consequence… if female homosexuality were to be penalized, women [would] be subject to blackmail to a far greater degree than men."

By referring to the danger of blackmail for lesbians, which is apparently intended to help justify the impunity from prosecution of lesbian love, the court opens the door to considerations of expediency, which it expressly and emphatically does not wish to apply to the area of male homosexuality. After all, most criminalists agree that the social dangers to male homosexuals are a consequence of the threat of punishment and the resulting danger of blackmail, but the court did not address this issue at all.

Even more than the peculiar constructions that the constitutional judges used to override the principle of equality, the legal scholars of the "Grand Criminal Law Commission" objected to the argument with

which the Constitutional Court denied homosexuals the right to the free development of the personality (Article 2 of the Basic Law).

The constitutional complaint in which the court had to decide argued that Section 175 violates this fundamental right, for it is "a forcible constriction of the existence of individuals who are attracted to the same sex—whose nature is in most cases in-born—if they are not afforded the opportunity to put these feelings into practice." In particular, there is no public interest in "making the voluntary practice of homosexual relations between adults a punishable offense."

The lawyer cornered the constitutional judges with his reference to this universal personal right; they had to concede that "the realm of the sexual… also belongs to the free development of the personality guaranteed" by the Basic Law.

In order nevertheless to reject the constitutional complaint, the Karlsruhe judges deployed legally rather questionable arguments. To be sure, they conceded that an "ultimate, inviolable realm of human freedom" exists, which the legislator is per se prevented from entering, and that "processes that take place in 'communication' with others" are part of the immediate private sphere and can be "removed from the grasp of legislators." Whether, however, this is the case or not depends exclusively, according to the Karlsruhe judges, upon "whether the 'social impact' is sufficiently intense."

"When evaluating the question of when a legislative intervention in the inviolable realm of human freedom is permissible on the grounds of intense societal impact," the judges explained, "whether the act in question violates moral law" can be of great significance.

The judges in Karlsruhe used moral law to extricate themselves from the dilemma, albeit with some effort. While admitting the difficulty of "determining the applicability of a moral law," they nonetheless declared categorically that "same-sex activities clearly violate the moral law."

The judges also explained where they took their yardstick for moral conduct, namely from the teachings of the two major Christian confessions, which however, unlike the Karlsruhe judges, make no distinction between female and male homosexuality and also condemn as immoral normal sexual relations outside of marriage.

The constitutional judges were apparently also not concerned by the fact that at least one of the major Christian confessions had already addressed the problem of homosexuality with particular thoroughness, arriving, on the basis of Christian moral law, at significantly different conclusions from the Federal Constitutional Court.

The Roman Catholic Advisory Committee, which deliberated on issues of homosexuality under the late archbishop of Westminster, Bernard Cardinal Griffin, noted in its final report, published in 1956: "It is not the business of the State to intervene in the purely private sphere… Morally evil things so far as they do not affect the common good are not the concern of the human legislator."

The Advisory Committee also underlined how this principle should be applied in practice: It recommended that British lawmakers decriminalize acts that took place between adults in private and by mutual consent. Like the German criminal law reformers, the Committee wished to see the offenses encompassed in German law by Section 175a continue to be punishable by law.

In arriving at a verdict rooted in Christian moral law, however, the Federal Constitutional Court apparently saw no reason to take account of such a weighty position published by prominent Catholic Christians. Nor did the judges allow themselves to be swayed by the fact that everywhere else, homosexuality is punishable or not punishable regardless of the validity of Christian moral law. After all

— in many Catholic countries, homosexuality is not punishable by law,
— mainly Protestant countries have lifted the threat of punishment in recent years, and
— Muslim and other states far removed from Christianity have introduced penalties.

The *Deutsche Zeitung und Wirtschaftszeitung* noted: “We should therefore conduct the debate in future without moral justifications and instead explore the question of the expediency of punishments.”

The court, however, apparently believes such considerations of expediency to be completely inconsequential. What is more: it asserted that the circumstance that some states have dispensed with prosecution can be set aside, precisely by noting that “such changes to the law... emerged from an altered understanding of the expediency of punishing homosexuality.”

The German courts have, however, always had difficulty finding grounds to punish voluntary homosexual acts between adults. After all, the “instinctive reaction of the normal individual to deviant and abhorrent sexual practices… is not grounds for punishment, ” as the Cologne penologist Professor Lange notes laconically in the latest edition of his commentary on the penal code.

In the effort to find grounds for prosecution, the German courts have thus far cited quite diverse objects of legal protection. Thus, the Düsseldorf Higher Regional Court defines the object of protection in Section 175 “not as the individual, but the general welfare of the German people in their moral force and physical health as well as the integrity of their administration.” The Hamburg Higher Regional Court thinks of “public health and above all morality,” while the Frankfurt High Criminal Court sees the object of legal protection “in the perpetrator’s own morality.”

In light of such shifting grounds for decision, it is no surprise that as early as 1930, the draft of a major reform of the criminal code intended to abolish Section 175. Professor Lange of Cologne explains the fact that Section 175 was instead reformulated and expanded in 1935 in such a way that today, even men who have never touched one another can be found guilty, noting that the section had no longer met the requirements of “a time in which organized male bonding and permanent barracking were considered necessary.”

The legal scholars who are working on a reform of the penal code are also not immune to such misgivings. While they would like to see Section 175 (not, however, section 175a) struck from the criminal code, they have already elaborated a special regulation in case this recommendation is accepted by the legislator, which grants protections to young men that under specific conditions go beyond Section 175a. The criminal code reformers make no bones about the “specific conditions” they mainly have in mind: military service in the Bundeswehr.

NOTES

[1] Under Paragraph or Section 175 so-called simple indecency between men is punishable by a prison sentence. Under Section 175a, so-called gross indecency between men is punishable by up to 10 years in prison. Aggravated cases can involve coercion, the abuse of a relationship of dependence in service, employment or subordination as well as the seduction of a minor or the commercial nature of the action.

Source of original German text: “Die Eigenart des Mannes”, *Der Spiegel*, June 19, 1957, pp. 23–6. Accessible online at: https://www.spiegel.de/spiegel/print/d-32092778.html

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Recommended Citation: The Postwar Debate about Section 175 (June 19, 1957), published in: German History in Documents and Images, <https://germanhistorydocs.org/en/occupation-and-the-emergence-of-two-states-1945-1961/ghdi:document-5255> [February 07, 2025].