

ANTITHETICAL SEXUAL SENTIMENT
AND SECTION 175 OF THE IMPERIAL PENAL CODE

W. Herzen

“Deputy Bebel has recently brought up Section 175 of the Imperial Penal Code. I admit his remarks have been a great shock. They have in a sense, disconcerted and deeply discouraged me. I have also received the petition cited by Mr. Bebel, demanding the repeal of this paragraph, which is, what is more, signed by famous men from all walks of life, and the whole thing has been a riddle to me.”

These words were spoken by Pastor Schall, a Parliamentary deputy, at the sitting of the 18th January 1898. They give an excellent idea of the intensity of feelings experienced by those who get their first insight into this question from the above-mentioned petition. It has put the whole matter into flux. The deliberations on the Lex Heinze* have revived widespread interest in the homosexual question. The public is only concerned with this matter from time to time, from case to case: on the occasion of some

* Lex Heinze and Lex Carolina mentioned on page 24 [online: in Bernstein, ‘The Judgement of Abnormal Sexual Intercourse’, Bernstein on Homosexuality page, www.studiesinanti-capitalism.net] trans.

sensational trial, as for instance last occurred during the Wilde proceedings (in these pages also). [Online: in the Bernstein on Homosexuality page, www.studiesinanti-capitalism.net] Things which run counter to conventional sexual morality are only discussed publicly when they can no longer be hushed up. The main thing required by rampant hypocrisy is that legal regimentation of some kind or other should prevent these things coming to the surface. The honest citizen can then feel at peace and everything can go on just as before. However, consideration of Section 175 makes these questions unavoidable. For we are here concerned with a legal paragraph which turns out to be absurd whatever way one looks at it. Medically, juristically, ethically - whatever way one takes it - what emerges is that it cannot bear more than superficial scrutiny.

The part of part of Section 175 which concerns us here runs as follows: "*Unnatural coupling undertaken between persons of the male sex. . . * is punishable by imprisonment. Civil rights can also be withdrawn*". As a result of von Muler's influence this paragraph was transferred intact from the Prussian penal code (Section 143) into the German imperial penal code. It concerned homosexual love amongst men (homosexual as opposed to heterosexual, which is normal love of a person of one sex for a member of the opposite sex).

* ". . .and between people and animals. . ." – concerns itself with sodomy.

Medical investigation did not master the homosexual question till the 1850s. Up till then the mode of approach as expressed in the fairly similar laws of various countries passed as the scientific view. The homosexual was branded a criminal by these laws. But medicine has categorised homosexuality as a mental sickness. The chief representative of this medical school, Krafft-Ebing (Vienna) divides homosexuals* into individuals whose *“inverted sexuality appears spontaneously, without external cause, with the development of sexual life, as an individual manifestation of an abnormal form of the sexual life, having the force of a congenital phenomenon; or it develops upon a sexuality the beginning of which was normal, as a result of very definite injurious influences, and thus appears as an acquired anomaly”*.

This distinction disappears completely upon closer examination, as it is not possible to easily envisage unnatural sexual feelings being an acquired taste. Far more to the point is the explanation that this abnormal kind of sexual activity only sets in at a later level of development; the harmful influence only provides the impetus which releases perverse sexual urges which have been present in the hereditary factor

* Dr R. v. Krafft-Ebing, *“Psychopathia sexualis mit besonderer Berücksichtigung der konträren Sexualempfindung. Eine klinische-forensische Studie.”* Stuttgart 1894, Ferdinand Enke, p.195 (Quotes in the text are taken from “Psychopathia Sexualist with Special Reference to Antipathetic Sexual Instinct”, translated by F. S. Klaf. Mayflower-Dell paperback, trans.)

of the organism since its existence. *“The acquisition is simply an awakening of the impulse, a coming to light; it as little provides a guide to the spiritual sphere as to the physical”.**

Even if one were to agree with Krafft-Ebing’s division and to accept his approach, it would be found upon going through the relevant literature that there remained a significant number of situations which are referred to there, that are not properly covered by his pathological approach. I will pick out several instances.

Above all there is the amazingly high incidence of homosexual love. There are only a few reliable references about its distribution amongst the female sex. Nonetheless, the experts state categorically, as I can also confirm, that it is at least as widespread as male homosexuality. As far as this is concerned, it has not been possible to ascertain its distribution with absolute certainty because the Penal Code has made access to experimental data difficult. Ulrichs**, whose

* Dr. med. M. Hirschfeldm, *“Der s.175 des Reichsstrafgesetzbuch. Die homosexuale Frage im Urtheile der Zeitgenossen.”* Leipzig. 1898. Max Spohr. P.57 (Section 175 of the Penal Code. The Homosexual Question Judged by Contemporaries, trans.) In this work are gathered the replies sent to the author of the petition, Dr Hirschfeld, by those whose support had been requested. Here the objections of the opponents, insofar as they can be seen from the replies, are refuted and thus this pamphlet can be seen as the foundation for the petition.

**Ulrichs, under the pen-name *“Numa Numantius”*, has put out a mass of publications demand the equal treatment of homosexual and normal love. He originated the expression *“Uranian”* for homosexual. (This is derived from the myth of

writings on the matter in question are highly regarded, estimates that for every two hundred sexually normal adult men there is one homosexual. He estimates there are 50,000-60,000 homosexuals in Germany. The percentage is said to be still greater amongst the Magyars and Southern Slavs. Krafft-Ebing says on p.231: *“The subject of one of my cases knows personally, at his home-town (13,000 inhabitants), fourteen homosexuals. He further declares that he is acquainted with at least eighty in a city of 60,000 inhabitants”*.

Furthermore one is struck by the occurrence of homosexual love *“amongst all races, all nations, whatever their level of civilisation, among high and low, in town and country, amongst the educated and uneducated, the worthy and less worthy characters.”* (Hirschfeld, Secion 175, p.43). There have been homosexual men and women who had the utmost importance for our cultural life. Upon this list are names like: Sophocles, Phidias, Socrates, Alexander the Great, Julius Caesar, Virgil, Michelangelo, Shakespeare, Moliere, Prince Eugen of Savoy, Charles XII, Christine of Sweden, Frederick the Great, Ludwig II of Bavaria, John Joachim Winckelmann, Count Platen, Grillparzer, etc.

Furthermore, if one compares the character of heterosexual and homosexual love, one comes

Plato’s “Symposium”, and embodied the idea that homosexuals were a ‘third sex’, with a woman’s mind in a man’s body or vice versa. It is frequently used in the text and has been translated as homosexual, trans.)

Angel Clifford, editor and translator, *Bernstein on Homosexuality*, published by Athol Books, 1977. Posted in 2007 by Studies in Anti-Capitalism.net at www.studiesinanti-capitalism.net

to the conclusion summed up by Edward Carpenter in the following words: *“In the vast majority of cases, love of persons of the same sex bears a normal and healthy character”*. Krafft-Ebing classifies individuals with innate antithetical sexual feelings as follows: 1. Psycho-sexual hermaphrodites; 2. Homosexuals; 3. Effeminate; 4. Hermaphrodites; and places individuals in these categories only on the basis of the different strength of their inclinations and whose gradations form a perfect analogy with those who love normally.

Once these extensive observations have been absorbed it is impossible to dissent from Schopenhauer’s dictum: The universal geographical and temporal distribution of love for persons of the same sex proves that it must spring from human nature.

But where can the explanation for this phenomenon be found? Psycho-sexual pathology furnishes no answer. In my estimation it is to be found in embryology in conjunction with phylogeneticism and anthropology.

Frank Lydstone and Kiernan and after them the Frenchman Chevalier in particular, were the first to see the source of antithetical sexual feelings in the circumstances of development. This teaching is finally beginning to seep through here in Germany. It has been expressed in easily intelligible German language by Dr. med. Th. Ramien (pseudonym). We will briefly go into this analysis.

These investigators proceed from the fact that the human foetus remains entirely hermaphrodite (bisexual) up to the end of the third month. During this period it is impossible to ascertain the sex of the embryo, as the rudimentary sexual organs of both sexes are present (i.e. Wolffian bodies, gonad, "*Müllersche Gänge*" and the rudiment of the outer genitals). Corresponding with the bisexuality of the sexual organs, the remaining parts of the sexual apparatus, the spinal and cerebral centres, must also be bisexual in the embryonic stage of development. The further development of the sexual organs must be understood in this way: the growth of certain cell masses and the diminution of others causes gradual completion of differentiation. The accurate description of this does not belong here. However, in accordance with the empirical law of homologous sexual development, this includes the centres of the sexual apparatus. "*The rule is that with the development of the external parts in a male direction, the motive centre to the woman strengthens, whilst the formation of female sexual characteristics develops the inclinations towards the man.*" (Ramien, pp.10-11).*

Remnants of the rudimentary bisexual development of the sexual apparatus exist in both

* Dr. med. Th. Ramien: "*Sappho und Sokrates oder wie erklärt sich die Liebe der Männer und Frauen zu Personen des eignes Geschlechtes?*" Leipzig 1896. Max Spohr. (Sappho and Socrates, or How Can the Love of Men and Women for Members of Their Own Sex Be Explained? Trans.)

the adult male and female. Like the other rudiments (such as the appendix and the ear muscles) they indicate an earlier level of organization, in this case, the originally existing bisexuality. These residuals are: In the male the *Uterus masculinus*, a vestigial womb (remnant of the *Müllersche Gänge*), the nipples; in the female the parophoron, the vestigial spermatic cord of the male (remnants of the renal portions of the Wolffian bodies), and the epophoron, the vestigial remains of the epidymis of the male (remnant of Wolff's ganglia). There are many hangovers from the initial bisexual disposition of the primary sexual characteristics and in fact there are not as many malformations and structural defects in any other part of the body (e.g., cleft formation of the urethra, *Epispadie*, *Uterus bicornis*, *bipartitus*). The conclusion thus suggests itself that such structural defects also occur in the sexual centres. This is what occurs with homosexuality. Here, a tertiary sexual character, inclination for the same sex, has developed whilst inclination for the opposite sex is stunted. For this reason homosexuality is not a "*Pathos*", but merely an "*Anomalia*".

This sequence of conclusions is supported by a further amount of material derived from anthropology and zoology.

But the whole fabric of proof emerges as a series of conclusions from an analogy and for this reason the correctness of the interpretation just described, taken scientifically, can only be proven

to a quite high level of probability. In my opinion, there is only one thing which could turn a high probability into fully-fledged proof, and that would be a systematically undertaken investigation of the *secondary* sexual characteristics of homosexuals. If close to those of other sex, then it can be correspondingly assumed that in most cases the secondary sexual characteristics are likewise as near. Thus whilst the homosexual man is closer to the female type in his secondary sexual characteristics, the opposite will be the case in the homosexual female. These circumstances are touched upon here and there in the relevant literature, but always as a subordinate matter. Thus for example, in Krafft-Ebing, p.250, where the confessions of a homosexual doctor are referred to. *“This doctor will never have found genital abnormalities in his six hundred homosexuals, with who he has had sexual intercourse, but there have been frequent similarities to female bodily forms such a weak development of hair, delicate complexion, a more high-pitched voice. Male development occurred not unrarely.”* (Nicht selten kam Mannesentwicklung, trans.) In isolated instances milk secretion took place. On page 281, Krafft-Ebing cites Dr. Flatau, who, on examining the vocal organs of twenty-three homosexual women, found several larynxes had a marked male form.

The prospect of carrying through such a medical and statistical investigation, which promises such good results at present founders

insofar as men are concerned, on the existence of Section 175, which makes it almost impossible to amass the relevant material in quantities sufficient to constitute proof. Only its repeal can free the way for a further investigation.

If we reconsider that Section after this brief excursion into medicine we will find it quite unnecessary to waste further words on its injustice and uselessness.

But this paragraph is a juristical nonsense as well. The expression, "*unnatural*" is quite misplaced and false. I refer to Bernstein's relevant explanations in this journal.* He also establishes with complete accuracy the reasons why most countries punish homosexual love in men but not in women (with the exception of Austria however).

The unclear expression in the paragraph opens up loopholes for the elaboration of juristical interpretations as to how it has actually been applied in different ways at different times.

However, apart from this, and even if we for a moment ignore the results of medical investigation, there still remains another range of arguments for its repeal. In this case, the law decrees a punishment where nobody's *rights* are infringed. This violates a principle which is at the basis of existing law. The present-day state does not have the task of spreading individual morality, of decreeing or enforcing chastity. In fact, it is

* "*Neue Zeit*", XIII, 2, p.233. I will not embark below upon a historical retrospect of homosexual love, but rather refer to this essay in the matter.

from this point of view that the French have refused to punish homosexual love (as early as 1791); this is the practice in Italy, Belgium, Holland, Luxemburg, Bavaria, Württemberg, Hanover. Punishment occurred in Austria, Russia, England, the United States of America and Germany.

In Prussia the scientific verdict of the medical world's delegation was sought in 1869 (on the 24th March) and this was unconditionally in favour of the repeal then section 143 of the Prussian Penal Code. The report ended in these words: *Accordingly, we are not in a position to give any reasons why, when other kinds of sexual misbehavior are allowed to occur and are disregarded by penal law, it is precisely misbehavior with animals or between persons of the male sex that should be menaced.*" The same conclusion was reached for similar reasons by the head of the Austrian Board of Health in his authoritative remarks on the so-called sodomy paragraphs (section 186) of the Austrian draft penal law. In both cases the effect was nil. In Prussia it was thought that popular consciousness had to be allowed for and so that paragraph was retained. As though this were the measuring rod of what was right. I need hardly refer to the practice of trying witches, the abolition of which was being demanded by advanced thinkers (e.g., as early as 1515 by the doctor, Wier) long before the last of these unfortunates really met their death on the funeral pyre. The concepts: popular

consciousness, superstition, popular prejudice, all mean the same thing. If today, at the end of the 19th century, there are no weddings celebrated on a Friday, that is also only a result of popular consciousness. A pretty sample of how the consciousness of educated people views the homosexual question is provided in the pamphlet, "Section 175". One of this cultural elite - the petition was only sent to these - wanted to see corporal punishment introduced for homosexuals, another recommended suicide to them.

Moreover, the *effect* of the law is quite illusory in that it does not achieve the real intention of the legislators. If one bears in mind that homosexual love is the manifestation of a powerful natural inclination, then it is clear at the outset, as I have already said above, that it is impossible to bring about reform with prison sentences. The one purpose which all judicial punishment should have, the reform of the punished, is thus not fulfilled by the paragraph; it is useless.

Neither is the second purpose of the law, the deterrent effect, achieved. The law has not stemmed the spread of homosexuality; its repeal will not promote it. The homosexuals of Berlin, Hamburg, and London are certainly not less numerous than those of Paris or Brussels. There are places here where homosexuals hold their gatherings, baths they frequent, premises where they hold their dances, and streets in which male prostitutes offer themselves to homosexuals.

Homosexuals too have their *Café National* in Berlin. A German aristocrat returned to Berlin in the summer of 1897, after living abroad for several decades “to avoid the homosexual-paragraph”. A letter from him says literally “No, this folly drives me around in exile for near enough forty years, only for me to see at the end of my days in the capital of the fatherland, which I missed so much, that homosexual life under section 175 is more extensive, unabashed and unconstrained than in any spot in the Orient or Occident”. (Hirschfeld, pp.67-8)

And all this, moreover, under the eyes of the police, who are well aware of the amazing extent of homosexuality, and maintain lists of homosexuals, which are only produced when public scandal is aroused. Taught by experience the police have limited themselves with unaccustomed leniency to observation and documentation, a mildness which has only been achieved by science as a result of laborious investigation. They saw the amazing breadth and depth of homosexuality. It can be found right up to the highest levels: princes, high officials, high military men, politicians of all party political shades - all are entered upon the police lists. I believe the petition would achieve the most outstanding success if the initiates could resolve to provide the public with names from all spheres. “*There would be a scandal*”, explained Deputy Bebel at the Reichstag sitting of 13th January 1898, “*such as there has never been in the world before,*

a scandal which would make the Panama-scandal, the Drefus-scandal, the Exchange and Lützow-scandal all appear as pure child's play."

Section 175 has called into being one of the most repugnant phenomena which has ever existed: blackmail, extortion. The punishment of male homosexual love provides the opportunity for the most extensive, unashamed extortion. The blackmailers, the extortioners are not only organised in single cities and nationally: they also have international connections. Hardly a year passes when the public prosecutor does not have to move against the unholy, criminal activity of this lot. The repeal of Section 175 would put an end to all this at a stroke.

If it was thought the repeal of Section 175 would leave juveniles defenceless, it would be sufficient to simply extend Section 176 to all persons (the present *paragraph* only covers sexual misbehavior forced upon *female* persons by force and threats).

In general, homosexual love should be placed on an equal footing with heterosexual love before the law. The petition also culminates with this demand. The venture set in motion by the author and first signatories of the petition (Bebel, Wildenbruch, Krafft-Ebing and Franz v. Liszt) has been meritorious and courageous. They have encountered much opposition, experienced much hostility and ill will. But has it ever been otherwise in the fight against deep-rooted prejudices?

Yet I must expressly observe that I do not wish my explanations to represent homosexuality as an inevitable evil. Homosexual love is an innate drive and like any other drive, it can be influenced and controlled by reasonable training of the body and mind - of course this would have to be exercised over several generations - but never by legal paragraphs.

For homosexuals, neither prison, nor the mad-house, but hygiene in the widest sense of the word.