German History in Documents and Images

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The Federal Constitutional Court Rules on the Constitutionality of Paragraph 175 (1957)

In 1957, West Germany's Federal Constitutional Court ruled on an appeals case brought by Günter R., a cook, and Oskar K., a merchant, both of whom had been found guilty of violating Paragraph 175 of the criminal code, which prohibited homosexual relations between men. Paragraph 175 dated back to the founding of the German Reich in 1871. During the Weimar Republic, however, the criminal prosecution of homosexuals had declined considerably, and in 1929 a Reichstag committee even voted to repeal Paragraph 175. But the rise of the Nazi regime prevented the implementation of the repeal and even saw the passage of an amended version of Paragraph 175, which extended the persecution of male homosexuals by broadening the definition of criminally indecent activities between men, and by stipulating harsher punishments for so-called offenders.

When the Federal Republic was founded in 1949, it adopted the Nazi revisions to Paragraph 175. In their appeals case, Günter R. and Oskar K. presented Paragraph 175 as an embodiment of National Socialist racial thought, and argued that it violated the democratic principles upon which the Federal Republic was supposedly based. Furthermore, the two argued that Paragraph 175 represented a violation of the Basic Law, particularly Article 2, which guaranteed each individual the right to the free development of his personality. Finally, because Paragraph 175 criminalized sexuality activity between men but not women, they also argued that it violated Article 3 of the Basic Law, which stipulated the equal rights of men and women.

The appeals process dragged on for six years, and by the time Federal Constitutional Court issued the following ruling in 1957, one of the appellants, Oskar K., had already died. The court ultimately ruled to reject all aspects of the appellants' charge. According to historian Robert G. Moeller, in issuing its decision, the court "unambiguously expressed its view that the criminalization of male homosexual activity violated no part of the Basic Law nor did it undermine the foundations of a 'free democracy.'"

Among other things, reconstructing postwar Germany meant reconstructing gender relations, which had been thoroughly disrupted by the Nazi era, the devastations of World War II, and the war's long and difficult aftermath. As Moeller emphasizes, the court's assessment of the constitutionality of Paragraph 175 stressed that "those relations should be only heterosexual." [Robert G. Moeller, "The Homosexual Man is a 'Man,' the Homosexual Woman is a 'Woman'": Sex, Society, and the Law in Postwar West Germany," *Journal of the History of Sexuality*, vol. 4, no. 3, pp. 395-429.]

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1. The penal regulations against male homosexuality (§§175f. StGB) do not violate the special equality clause of paragraphs 2 and 3 of Article 3 of the Basic Law because in this instance the biological difference between the sexes so decisively marks the legally relevant facts of the case that similar elements recede entirely in comparison.

2. The regulations (§§175 f. StGB) do not violate either the basic right to free development of the personality (Article 2, Paragraph 1 GG), because homosexual activity violates the moral law and it cannot be clearly determined that a public interest in its punishment is absent.

[. . .]

Judgment of the First Senate, May 10, 1957
- 1 BvR 550/52 -

in the case of the related constitutional appeals 1. of the cook Günther R. against the judgment of the Greater Criminal Division 6 of the District Court of Hamburg of October 14, 1953 2KLs. 86/52 -, 2). of the merchant Oskar K. who died on April 26, 1956, against the judgment of the Greater Criminal Division 4 of the District Court of Hamburg of February 2, 1952 -KLs. 254/51 -.

VERDICT
1. The constitutional appeal of Günter R. is rejected.
2. The constitutional appeal of Oskar K. is settled due to his death.

GROUNDS
A.
With this constitutional appeal the appellants fight their conviction because of sexual offense between members of the same sex; further they seek to establish the invalidity of Paragraph 175f. StGB.

[. . .]

Both appellants based their constitutional appeals on the fact that the criminal judgments issued against them unjustly took §§ 175 and 175a StGB as valid law. [They maintained that] § 175 StGB in the June 28, 1935 version of the law contained National Socialist ideas and therefore lost its validity with the collapse of the National Socialist dictatorship. This law rested on the so-called enabling act of March 24, 1933, which was unconstitutional; therefore, laws that were based upon it are void. Further, §§ 175 and 175a StGB violated Articles 2 and 3 of the Basic Law.

[. . .]

4. The Supreme Court first agreed to hear expert testimony with regard to the following questions in the case of the appellant K.

a) Are there essential differences in the drives of men and women that also have an effect on same-sex activity?

b) In what way do male homosexuality, on the one hand, and lesbian love, on the other, represent a social danger? In the family and in society, are their effects and outward manifestations different? What role do the surplus of women and the frequency of communal housekeeping arrangements among two or more women play in this relationship (e.g., the danger of malicious gossip and of blackmail)?

c) Is there a difference in the activity and lack of inhibition in same-sex relations between men on the one hand and between women on the other, so that there is a difference in the degree of the propagation of such relations and the danger of seduction, especially of youth, to such acts? Does male homosexuality appear in the public sphere more frequently than lesbian love? Is there prostitution among male homosexuals and lesbians?

In preparation of the oral hearing the Court obtained authoritative statements from the expert witnesses.

[. . .]

B.
In the case of the constitutional appeal of R……
The constitutional appeal is permissible but is without foundation.

I.
The basis for the appellant's first charge against the validity of Paragraph 175, 175a StGB is the National Socialist origins of these regulations. He asserts that the law changing the criminal code of June 28, 1935 is invalid, because it was issued by the National Socialist government of the Reich on the basis of the law for the alleviation of the national emergency and the Reich of March 24, 1933 (RGBl. I, 141), the so called enabling act, without the participation of the legislature; a criminal law issued during a period of such striking violations of democratic principles cannot remain valid in a democratic political order. There is no objective justification for the aforementioned law's increase in the criminal penalties for homosexuality, and it is only understandable as an outgrowth of National Socialist racial teaching; the new regulations are characterized by a National Socialist world-view to such a degree that they ought not to be applied in a free democracy.

This objection is without foundation.

1. On many occasions, the Federal Constitutional Court has already applied laws and statutes that were issued by the National Socialist government on the basis of the enabling act, thus acknowledging the fact that these laws are not void. [. . .]

2. Thus, in the case of laws and statutes issued on the basis of the enabling act, it is necessary to determine whether they are no longer applicable on the basis of their content.

[. . .]

We should not forget: from 1945 until the convening of the Bundestag there was virtual unanimity in the Western zones of occupation that §§ 175 and 175a StGB were not "laws shaped by National Socialism" to such a degree that they should be denied force in a free democratic state.

[. . .]

II.

[. . .]

As the basis for his claim that §§ 175, 175a Nr. 3 StGB and the Basic Law are incompatible, in the first instance the appellant refers to Art. 3 GG of the Basic Law. [. . .]

§§ 175, 175a StGB violates the explicit principle of the equal rights of men and women in Art. 3 Sec. 2 and 3 GG, because same-sex relationships between men, but not between women, are criminally punishable. In addition, § 175a Nr. 3 StGB is irreconcilable with the special principle of equality because the age up to which young men are protected from seduction for same-sex offenses is set at twenty-one, while the age up to which young women are protected from seduction for the purpose of [heterosexual] intercourse is only sixteen, according to § 182 of the StGB.

Moreover, unless particular aggravating circumstances are present, there is simply no adequate objective basis for punishing same-sex relationships, because the public interest is not violated by same-sex relationships as such. The punishment of male homosexuality is thus arbitrary and repudiates the general principle of equality of Art. 3 Sec. 1 GG.

[. . .]

Biological differences also justify a different treatment of the sexes in the case of homosexuality. [. . .]

As different sexual beings, men and women can commit homosexual immorality only in the particular forms possible for their sex. In these incidents, the particular sexual character of homosexual immorality is apparent both in different methods of bodily acts as well as in different psychological attitudes during these acts; these biological differences determine the entire social conception of this form of sexual activity.

The evidence has completely convinced the court of this. It indicated in the first instance that the propagation of female homosexuality is far less extensive than that of male homosexuality. [. . .]

As the expert witness Giese made clear, two aspects of sexuality must be distinguished: the procreative-instinctual, that is, the aspect that relates to the unconscious functioning of the body in the context of sexuality, and a social aspect that is shaped by the former. Starting with the bodily structure of the sexual organs, there are indications that men are more aggressive and demanding, while women are more accepting and ready for sacrifice. This difference in physiological function cannot be separated from the individual's existence as a sexual being; it codetermines the sexual being of men and women (Kroh). The decisive difference between men and women -- that encompasses in essence all other differences -- is however the fact that as part of the procreative-instinctual aspect, fatherhood does not directly follow the brief act of insemination (*kurzen Zeugungsvorgang*) along the path of further procreative-instinctual contributions but along the path of social contributions, separated from that moment in time, while the social contributions of motherhood are constituted by a lengthy natural process in which the act of conception is immediately tied to the procreative-instinctual contributions of pregnancy, birth, and nursing. Unlike men, women will be involuntarily reminded by their bodies that sexual activity is associated with burdens. It may be due to this that for women, bodily desire (sexuality) and the ability to experience tenderness (the erotic) are almost always blended together, while for men, particularly for homosexuals, these two components frequently remain distinct (Wiethold-Hallermann). A particular danger for male sexuality is thus the danger of the shift in focus away from any readiness to accept responsibility toward the sheer gratification of lust. [. . .]

Differences in sex life are possibly even more significantly expressed in homosexual than in heterosexual relations, because a woman's organism, destined for motherhood, involuntarily points toward how to function in a womanly-motherly fashion in a social sense, even if she is not biologically a mother, while there is no corresponding compensation for men. Thus it is easier for the woman who is inclined toward lesbianism to endure sexual abstinence, while the homosexual man tends to fall victim to uninhibited sexual need (Giese; similarly, Grassberger and Scheuner).

According to their sex, individuals also have a different susceptibility to seduction for homosexual intercourse in puberty, and this too plays a role in determining the difference between male and female homosexuality. All expert witnesses agree that puberty is a phase in which there is uncertainty about the orientation of the sexual drives; impressions gathered in this period can be of decisive importance for shaping the personality of the maturing individual. A homosexual seduction at this age is particularly apt to lead to a faulty shaping of sexual feelings, leaving aside the question of whether this danger only exists when the inclination of the individual who is seduced favors such an outcome. The danger of such faulty development is, however, far smaller for young women than for young men. According to the expert witnesses, this general experience is explained in part by the fact that girls far more than boys are protected by a natural sense for sexual order, in part, because girls settle on heterosexual relations at a much earlier age relative to boys (Scheuner, Wiethold-Hallermann).

Moreover, experience tells us that the homosexual orientation of lesbians is not as exclusive as that of men, making it easier for the lesbian to achieve the "turn to the other sex" (Scheuner, also Grassberger, Wenzky, Kroh).

The differences in nature described here are also apparent from a social perspective.

Thus, the drive toward a "superstructure," a "home" (Giese), present in both sexes, can lead to long-lasting relations for homosexual men, but this is seldom achieved. Frequently, male homosexuals actively strive toward a homosexual group, but they reject more family-like ties, and they tend toward constant change of partners. Lesbian relationships, by contrast, tend in general toward permanence (Scheuner, Wenzky, Giese). Add to this a consideration of men's greater sexual aggression and it becomes apparent that the danger of homosexuality spreading among men is far greater than among women.

The difference in the desirable age-range of the partner strongly reinforces this difference (Grassberger). There are no adolescent lesbians; we know of no instances of the seduction of female youth by lesbians or even of tendencies that are analogous to the violation of young boys (Wenzky, Wiethold-Hallermann, Giese). [. . .]

A further difference in the social manifestation of male and female homosexuality is that homosexual prostitution represents a phenomenon specific to male homosexuality. None of the expert witnesses even knew of exclusively lesbian prostitution. [. . .]

Finally, the difference in social manifestations is apparent in the difficulty in locating the boundary between a lesbian relationship and a purely tender female friendship because for lesbians as well, tender feelings predominate over what is purely sexual. As a consequence, were female homosexuality a criminal offence, women would be far more subject to the danger of blackmail than men (Schelsky, Wiethold-Hallermann).

While the other expert witnesses unanimously see male and female sexuality as different, determined by the difference of man and woman as sexual beings, the expert witness Kretschmer advocated a somewhat different opinion. Although he did not question that there are differences between male and female sexuality -- he characterized that as something that we could take for granted, and added, "we would hardly anticipate that the nuances in male and female sexuality would not somehow express themselves in the relations among homosexuals as well." In his subsequent remarks, however, he placed an emphasis on the characteristics "that are of public interest," that is, he asked himself whether male and female homosexuality were characterized by thoroughgoing differences in terms of the danger they present to society and the danger of "threats to persons and legal property." From this perspective, he denied the existence of "truly fundamental differences" between the homosexuality of the two sexes. [. . .] The report of the expert witness Kretschmer thus diverges from those of the other experts not because it denies differences between male and female homosexuality, but because he explains these differences by other means, and because he assesses their significance from

the vantage point of the dangers they present to society. His comments point to the desirability of decriminalizing homosexuality between adults along with introducing particular protection of young women from homosexual seduction and possibly the criminalization of simple "leading astray" in addition to "seduction" as stated in § 175a Nr. 3 StGB.; this may be important for discussions of desirable future legal reform but it provides no standard for assessing the constitutionality of the existing law according to Art. 3 GG. What counts is whether the characteristics of male and female homosexuality are different, stemming from biological differences. Based on all the evidence from its investigation, the court is convinced of this. Thus the constitutional principle of the equal rights of the sexes is not applicable in this case.

This conclusion is further confirmed by the fact that in the battle for the equal rights of the sexes there was never any mention of the equal treatment of male and female homosexuality.

[. . .]

In the final analysis, the prohibition of differential treatment of Art. 3 Sec. 2 and 3 GG is not applicable in the context of criminal provisions against homosexual immorality, because the peculiarity of women as female sexual beings and the peculiarity of men as male sexual beings determine the characteristics of the criminal offence so fundamentally and so completely differently that the comparable element, the abnormal tendency of the drives to one's own sex, is of no significance; in a legal sense, lesbian love and male homosexuality appear as incomparable circumstances.

[. . .]

In yet another charge, the appellant alleges that the punishment of simple male homosexuality is arbitrary, because it is of no public concern, and he claims that the intervention of state authority into the arena of personal freedom is unjustified. This charge must be examined from the perspective of Art. 2 GG.

III.

Regarding this matter the plaintiff claims that the criminalization of simple homosexuality (§175 StGB) violates the right, granted everyone in Art. 2 Sec. 1 GG, to freely develop his personality. This right also encompasses the free sexual activity of the individual. It represents a forcible restriction of the lives of individuals who have homosexual feelings -- in most cases, an innate characteristic -- because they are not given the possibility to translate their feelings into practice. In particular there exists no need and no public interest in penalizing the voluntary exercise of homosexual intercourse between adults.

1. Sexuality belongs to those areas included in the free development of personality ensured as a fundamental right by Art. 2 Sec. 1 GG. This fundamental right is, however, restricted by the constitutionally-determined order. [. . .]

Homosexual activity unequivocally violates the moral law. In the area of sexual life as well, society demands from its members the observance of specific rules; violations of these are deemed amoral and are condemned. To be sure, there are difficulties involved in determining where the moral law applies. The personal moral sentiments of the judge cannot be determining in this case; no more adequate are the opinions of certain sectors of the population. It is of far more significance that the generally recognized religious groups, in particular both large Christian confessions, judge same-sex offenses to be immoral, and that their teachings provide much of the population with the standard of judgment for their moral behavior. The appellant considers the condemnation of homosexuality in the teachings of Christian theology to be of no significance: it is adopted from the Old Testament laws of the Jewish religion, which originated as a temporary emergency measure, prompted by considerations of population policy after the return from the Babylonian captivity. Whether this interpretation of the historical record is correct is irrelevant. At issue is not the particular historical experiences that led to the formulation of a moral judgment, but rather whether that judgment is generally recognized as a moral law.

One basis for claims that homosexuality is seen as immoral stems from the fact that in Germany the laws justifying the punishment of homosexual immorality have always made reference to the moral views of the people. [. . .]

These facts justify the statement that moral sensibility still condemns homosexuality today. By comparison, a few observations to the contrary, largely from partisan circles, are of no significance, and in any event they have been unable to effect a change in the general moral judgment.

The appellant's response to this is that a moral law can only be recognized if it is commonly shared by the occidental cultural world; this no longer applies to the condemnation of simple homosexuality now that it has been decriminalized in a number of states within the West European cultural sphere. -- We concede to the appellant that a change of moral attitudes is possible; thus new research data from medical science might lead to understanding homosexuality as an unavoidable bodily-spiritual deviation from the norm, and it would thus become meaningless to condemn it on moral grounds. By itself, the fact that a number of states have declined to prosecute [homosexuality] criminally still does not justify the assumption that moral judgments have changed in these states, because such a legal change might just as well have originated with altered conceptions of the expedience of punishing homosexuality. By no means can the suspension of criminal provisions in other states lead to the assumption that in Germany, homosexuality is no longer morally condemned.

If under these circumstances -- clear violation of morality, a tradition of punishment in the sphere of German law -- the lawgiver cannot decide to set aside or to interpret more narrowly the criminal provisions of § 175 nF StGB, then the Federal Constitutional Court cannot oppose this decision. This holds as well for the criminalization of homosexual relations between adult

men, which is particularly opposed by the appellant. The criminalization of such relations can still be justified by the by the fact that the need for protection against homosexual seduction does not end at age 21 and by the fact that a much more extensive propagation of homosexuality among adults, a probable consequence of lifting criminal penalties, would increase the endangerment of youth; in particular lifting criminal penalties for such relations between adult men could also lead to a less stringent judgment of such relations between adults and youth. Thus, with regard to relations between adult men, it is not the case that there is no public interest in the maintenance of criminal provisions, nor that the lawgiver has transgressed his boundaries.

2. In particular the appellant perceives a transgression of the boundary set for the lawgiver by Art. 2 Sec. 1 GG in the inclusion of immoral acts of all sorts, in particular, mutual masturbation, under the criminal provisions of the new version of § 175 StGB. In particular he had in mind this expansion of the criminal characteristics of the offence when he fought against the regulation on the basis of its National Socialist quality.

[. . .]

Homosexuality is peculiar because it offers few clearly visible characteristics that allow us to distinguish between serious cases and cases of lesser importance. Although the Prussian law and court opinion since the eighteenth century restricted criminal penalties to intercourse-like acts, that is, to particularly coarse forms of activity, and excluded acts of masturbation, there are no convincing reasons for this distinction. The legal pronouncement of the Reich Court up until 1935 also did not solve the problem of setting boundaries, because it was unable to provide a clearly circumscribed definition of intercourse-like activities. In legal commentary there was considerable criticism of the absence of a clear determination of the characteristics of the criminal act, in particular because the restrictions developed in legal decisions made it very difficult to provide evidence. The consequence was that in the draft reforms, in suitable instances there was no consideration of restricting cases to those of intercourse-like acts; every 'immoral activity' and 'act of letting oneself be abused for immoral acts,' in short, all acts were placed under criminal penalties. Given these circumstances, it cannot be classified as a violation of the fundamental principles of a state ruled by law, if the law of June 28, 1935 abandoned the restriction of simple homosexuality to intercourse-like acts, in particular, because various acts can be combined, as the example of the appellant indicates; and for moral sensibilities there is hardly a difference among them.

[. . .]

Source of original German text: *Entscheidungen des Bundesverfassungsgerichts* [*Decisions of the Federal Constitutional Court*].Tübingen: J.C.B. Mohr (Paul Siebeck), 1957, pp. 389-43.

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