Zeitschrift: Der Kreis : eine Monatsschrift = Le Cercle : revue mensuelle
Band: 27 (1959)
Heft: 1

Artikel: Homosexuals and the law
Autor: Ayer, A.J.
DOI: https://doi.org/10.5169/seals-567606

Then one night, after we had had a long talk, with the lights out an with myself sitting on his bed, he said:

«David, it is wonderful to feel like a human being again. I can really feel myself getting stronger by the day — thanks to you.»

«That's great, Terry. It is grand having you here — this war will go on, and we will no doubt be parted again some day, but when it is over, you and I are going to get together and set up some business — and that for keeps. How do you feel about that?»

«David boy, that is my idea too. By the way, I think I strained my back a bit today — same place! — Anything you can do about it?»

«That recurrent strain! Terry, you know I can do somthing about it!»

I DID . . .

From: The New Statesman, London

Homosexuals and the Law

The Wolfenden Report is at last to be debated in parliament. As is now well known, it recommends that the indulgence in homosexual relations, in private and with mutual consent, by men who have reached the age of 21 shall cease to be a criminal offence. Is there any good reason why this recommendation should not be carried out?

There are various arguments which might be brought against it. It has been said, for instance, that public opinion is not ready for the change. As a statement of fact, this is not easy to discuss since no scientific inquiry into the state of public opinion on this question has yet been undertaken. It is not known what answers people would give if the issue were put to them clearly. I think it probable indeed that a majority would be found to disapprove of homosexuality. The disapproval of sodomy is still widespread. But from the fact that a person disapproves of homosexual practices it does not follow that he thinks they should be treated as crimes. Such evidence as there is available, for example of the public's reaction to the Montagu case, does not suggest that there is general satisfaction with the way the law now operates or a strong majority opinion that it should not be changed.

Moreover, even if it were established that the majority of the public was in favour of leaving things as they are, this would not relieve the members of parliament from the responsibility of forming their own judgments and acting in accordance with them. They should take the state of public opinion into account,but they have not to be entirely guided by it. It is not and should not be a principle of government that social reform must wait upon a favourable plebiscite. No plebiscite dictated the reform of the Factory Acts in the 1870s. It is possible even that, had a vote been taken, a majority would have been found against reform: for many people believed that it was wrong and futile for the state to interfere in such economic questions, and many of the factory workers themselves were against the abolition of child labour, because they did not see how they could survive without the money that their children earned.

Yet I do not suppose that anyone would now maintain that these measures should not have been enacted until the public had received a sufficient education in economics. At the present time it would apear that a majority of the

public is opposed to the abolition of capital punishment. But a member of parliament who voted to retain it only for this reason, when he himself thought on all other grounds that it ought to be abolished, would be acting wrongly. He would not be doing his duty by his constituents. For he represents them by pursuing, in the light of their opinions, what he honestly takes to be their interests, not by surrendering his judgment to theirs.

In the case of the laws against homosexual practices, this point comes out even more clearly than in the case of the death penalty for murder. I believe the abolitionists to be right in maintaining that the existence of the death penalty is not a unique deterrent; but if they were wrong, the adoption of this measure, though still desirable for other reasons, would represent a certain danger to public security. On the other hand, no public interest ist threatened by the measures which are advocated by the Wolfenden Committee. It is not to be supposed that male homosexuals would launch a campaign of proselytization or that they would be successful if they did. This has not happened in the case of female homosexuality, which is not an offence, though only the good sense of the House of Lords prevented it from being made one as recently as 1921. It is clear that young people must be protected from seduction by homosexuals no less than by heterosexuals, but the Wolfenden Report provides for this. The exceptional attention which the Committee paid to this point is shown by its fixing the age of consent at 21, whereas in the case of heterosexual relations it is only 16.

The fact is that those who wish to maintain the existing laws against homosexual behaviour do not regard male homosexuals as a menace to them. They are moved rather by a feeling of repugnance for homosexual practices as such. But just among those in whom this feeling is strongest there is the least likelihood of its sources and its justification being rationally considered or discussed. It is seldom combined with any clear understanding of the psychological and social causes of homosexuality or of its effects.

A second argument which has been put forward is that it is «a serious step» to reverse «provisions of the criminal law which have stood for a long time». It is, indeed, a serious step: but the suggestion that, if a law is bad, it is redeemed by being old is not a serious argument. Further, to talk of provisions which have stood for a long time is in this context slightly disingenuous. The present law concerning sodomy does derive from a statue of Henry VIII, which turned it in 1553 from an ecclesiastical into a civil offence, though the penalties against it have been relaxed. No one has been hanged for sodomy since the 1830s, and though sentences of seven years' imprisonment or more are still given in a few cases, the present maximum penalty of life imprisonment is not enforced. But nowadays fewer male homosexuals are prosecuted for sodomy than for «gross indecency», which was first made into a criminal offence in 1885. The clause was introduced by Henry Labouchere, who tacked it on to a statute dealing with prostitution and the female age of consent: it was passed without discussion in a thin House. Labouchere explained that it was intended to protect boys over the age of 13 from assault, but in fact it was used from the start to punish any form of homosexual conduct between consenting adults. Oscar Wilde received the maximum sentence of two years' imprisonment for this new offence. There is reason to believe that Labouchere knew what he was about, but also that those who were swayed by him did not.

I do not think that a measure of this kind would pass, if it were now submitted to parliament for the first time: I doubt even whether the government

would wish to enact a law against sodomy as such, if one did not already exist. But this is consistent with their being unwilling to repeal these laws. The position taken is that you do not condone an evil by refusing to enact a law against it, for you may be held to consider that it is not the type of evil with which it is suitable for the law to deal; but that, when laws do exist against it, you condone it by repealing them. There is no logical distinction between these procedures: but it is assumed that there is a difference in their psychological effects.

The premise of this argument, that homosexual behaviour is wrong in itself, is accepted by many of those who reject its conclusion. I think it fair to say that I do not share this view. The reason which is most often given for it is that homosexuality is unnatural. But if «unnatural» means «uninstinctive», this is biologically false, apart from the fact that what is uninstinctive need not be wrong. If «unnatural» means «uncommon», it is again false, and again what is uncommon need not be wrong. If «unnatural», in this context, just means «wrong», there is no argument.

I do not deny that under present social conditions the practice of homosexuality has many attendant evils; the moral isolation of homosexuals which they try to overcome by establishing a kind of sexual freemasonry; the furtiveness which goes with their fear of being ridiculed or disgraced; the difficulty which they have in forming stable and emotionally satisfying relationships. But it seems to me that these evils result from the prevailing social attitude towards the practice of homosexuality, and especially from its being subject to legal sanctions, rather than from the intrinsic nature of any homosexual act.

However this may be, the important question which has now to be decided is not whether homosexual behaviour is a sin but whether it is a crime; and surely, so long as it occurs between consenting adults, it has none of the attributes of a crime. It is a maxim that the criminal law should not concern itself with people's private lives except to repress conduct which is injurious to society or highly injurious to the persons who engage in it, and neither of these conditions is satisfied in the present case. No adverse social effect has been observed in France or Belgium or the Scandinavian countries, in which the legal practice with regard to homosexuality is very much the same as that which is advocated by the Wolfenden Report. As for the personal effects, if homosexuals are psychologically maladjusted, they might benefit by psychiatric treatment, as many hetetrosexuals also could. But whatever readjustment they may need, it has not been found that treating them as criminals is an essential means of bringing it about.

Once the arguments against the Wolfenden proposals have been disposed of, the case in their favour is surely overwhelming. At present the legal sanctions against homosexuality are not an effective deterent: they are an encouragement to blackmail; and they operate most capriciously. It is arguable, indeed, that with the growth of psychological understanding fewer prosecutions against homosexuals will be undertaken, so that the recommendations of the Wolfenden Committee will be adopted in practice even though they are rejected in principle. It may even come to the point where juries will refuse to convict. But is this thought to be desirable? Is it not tbetter to have the courage to undertake reform than to allow the law to fall into contempt? A. J. Ayer

Kameradschaftliche Vereinigungen und Zeitschriften des Auslandes:

angeschlossen an die «Stiftung Internationales Komitee für sexuelle Gleichberechtigung», ICSE; Sekretariat: Damrak 57, Tel. 34596, Postbus 1564, Amsterdam. — Organ: Newsletter.

Deutschland: Gesellschaft für Reform des Sexualrechts e. V., Grunewaldstrasse 78/1, Berlin-Schöneberg.
Int. Freundschaftsloge (IFLO) Postfach 1399, Bremen.
Organ: IFLO-Bundesbrief.
Verein für humanitäre Lebensgestaltung (VhL), Kettenhofweg 46, Frankfurt a. M.

Dänemark: Forbundet af 1948, Postbox 1023, Kopenhagen K. Organ: PAN.

Holland: Cultuur- en Ontspanningscentrum (COC), Postbus 542.
Amsterdam C. Central-Büro: Damrak 57, Tel. 34596. Organ: Vriendschap.
Clublokal: «De Schakel», Korte Leidsedwarstraat 49, Tel. 64511.

Norwegen: Det Norske Forbundet av 1948, Postboks 1305, Oslo.

Schweden: Riksförbundet for sexuellt likaberättigande, Postbox 850, Stockholm I.

USA: One Inc., 232, South Hill Street, Los Angeles 12, Calif.
Mattachine Society, 693 Mission Street, San Francisco 5, Calif.

Belgien: Centre de Culture et de Loisirs, boîte postale 1, Forest 3, Bruxelles.
Tous les réunions: 29, rue Jules Van Praet, Ier étage. (Près de la Bourse).

Sonstige Zeitschriften und Vereinigungen, dem ICSE noch nicht angeschlossen:

Deutschland: Der Weg, Verlag Rolf Putziger, Uhlandstrasse 149, Berlin W 15.
«der neue ring», Monatsschrift. Verlag Gerhard Prescha, An der Hammer Kirche 26, Hamburg 26.

Frankreich: Arcadie, 162, rue Jeanne d'Arc, Paris 13.