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Modernising Nation, Modernising Sexuality: The Regulation of Homosexuality in the Codification of Swiss Criminal Law

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1 Introduction[1]

Swiss criminal law was the last substantial field of law to be codified in the Swiss nation state and while work on it began in 1890 it was not enacted until 1942. 50 years of preparation might strike one as a long process for codification yet it needs to be taken into account that, unlike its European neighbours, Switzerland nationalised its criminal code in its entirety. Whilst elsewhere regulations of sexualities were modernised through amendments (such as in England and Wales), or revisions (such as in the Weimar Republic), in Switzerland they were modernised through the codification of both civil and criminal regulations which was commissioned by the Swiss Department of Justice towards the end of the nineteenth century. These two codes were milestones in the articulation of national unity and national values through the demarcation of boundaries between acceptable and unacceptable behaviour. While the Civil Code also provides a contextual framework for an investigation of the construction of sexualities, my concern here is exclusively with the unification of the Criminal Code.

The Swiss Criminal Code set out to be an exemplary "modern law" based on the principles of safeguarding liberty and equality of all citizens, which were premises of the liberal nation state. Emerging from struggles between different schools of law, Swiss lawyers aimed to reconcile both a punitive and a preventative approach to criminal law. Amongst the important innovations of "modern criminal law" was the inclusion of a youth criminal law as well as the newly introduced principle of criminal responsibility. Rehabilitation and prevention were added to

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the merely punitive purpose of criminal law practised beforehand (Bundesblatt, 1918; Gschwend, 1994). Additionally influential was the fundamental principle that a crime needed specification in order to be punishable ("sine lege nulla poena"). Criminal acts therefore needed careful specifications and descriptions for which, with regard to sexual offences, experts from other disciplines had to be consulted. My use of the term "modern" thus is taken from its historical context as the editors saw the unification of the Swiss Criminal Code as an opportunity to devise an explicitly modern law on the epistemological basis of a "modern science of criminal law". This approach was not uncontested and the unification of the code turned, at times, into a fight between different schools of criminal law (for a more legal discussion, see Gschwend, 1994).

"Modernising sexuality", in turn, signifies also an agreement with the premise that the reform of sexual regulation was a more pivotal part of the processes of modernisation (Bech, 1997; Epstein, 1990; Seidman, 1996; Turner, 1996; Vance, 1989; Weeks, 1977). The regulation of sexualities as the bridging between the intimate, private, so-called micro-structural with public concerns, collective interests and national identity is increasingly being recognised as equally constitutive to modernising processes as, for instance, urbanisation or industrialisation (Mottier, 2000; Nagel, 1998; Nagel, 2000; Weeks, 1998). In both private and public spheres the construction of norms about the body, gender and sexuality turned them into sites of social, political and moral struggles and the (re)construction of sexualities and intimate relations significantly shaped, alongside the reconstitution and reorganisation of production and space, the modern period. "Modernising sexuality" in this context is not about modernity per se, but about how sexualities impact and interconnect with other processes which are associated with the continuous making of modernity in the context of nation building. Whilst processes of modernisation span across a much longer period, my concern here is with the period between the 1890s and 1930s. Implied in the process of modernising is a process of typologising and hierarchising of sexualities, which went hand in hand with the need to order and validate, or to exclude and invalidate in relation to the national collective. Marital heterosexuality was hence normalised and institutionalised by the law, the state and social conventions in such a way that modern sexualities have to be understood as structured by a framework of heteronormativity (Jackson, 1999; Richardson, 1996, 2000).

Normalising processes can be exposed through discursive strategies of inclusion and exclusion in the construction of boundaries. The construction and legal regulation of homosexuality is, with regard to this, particularly interesting because as a non-conformist sexuality it can also, at the same time, provide us with an insight into the normative construction of conformist sexualities such as heterosexuality. There has been an increasing amount of research and literature dedicated to the (de)criminalisation of homosexuality initiated by Michel Foucault's

(1978) and Jeffrey Weeks' (1977) paradigmatic reconceptualisation of (homo)sexuality, its regulation and connection with identity formation and the concomitant claim that sexuality and intimacy should be a pivotal interest to social theorists.[2]

The second half of the nineteenth century is a key period for analysing the intersection between gender, sexuality and processes of modernisation, including the codification into law which this article seeks to examine. Yet the legal-political discussions about homosexuality, at the same time, also provide a platform to examine strategies of professionalisation of newly emerging fields such as psychiatry which through their involvement in typologising and taxonomising sexualities also established themselves in the public sphere and created a medico-forensic need for their expertise. Thus, the increasing interest of the medical sciences in sexual matters from the late nineteenth century onwards, particularly at the intersection with modern nation states' interest in reforming sexual regulations, has been theorised as "the medicalisation of sexuality" (see for instance, Foucault, 1978; Weeks, 1977).

With regards to sexualities, the example I will focus on here is the construction of same-sex desire and sexual acts as they were formulated during the unification of the Swiss Criminal Code. Outlining the rise of medical explanations of homosexuality provides a backdrop to examine in more detail enduring and competing explanations of same-sex desire, particularly during the 1920s, when the cleavage between different conceptualisations of same-sex relations, from religiously moralised to medically pathologised, was openly present. During the parliamentary debates[3] in 1929 and 1931, the gulf between different approaches to same-sex regulation almost threatened to collapse the whole Criminal Law Bill and the regulation of «unnatural indecency» was stipulated as one of the four «battle horses» (Luzerner Tagblatt, 6.3.1930). In the following, an analysis of some of the controversies is provided together with a discussion why Switzerland focused its legislation particularly on young people between sixteen and twenty

2 There is a wealth of socio-historical approaches to the (de)criminalisation of homosexuality in various national or comparative contexts, some being more sensitive to gender than others (see, for instance, Bleibtreu-Ehrenberg, 1978; Faderman and Eriksson, 1990; Gilde, 1999; Hacker, 1987, 1997; Hirschfeld, 1899; Hutter, 1992; Lautmann, 1977, 1993; Leroy-Forgeot, 1997; Löfström, 1998b; Mort, 1987; Nye, 1991; Schoppman, 1998; Sommer, 1998; Weeks 1977, 1985).

3 Prof. Carl Stooss was commissioned to create a first draft in 1890 which was subsequently discussed and modified by numerous commissions of experts and which underwent a wider process of consultation until 1918 when the draft was handed over to Parliament for further discussion. Delayed in the early 1900s by the unification of the Civil Code and in the 1920s by the reform of the Military Penal Code, the criminal law came finally before the National Council Plenary in 1929. Having had two more editors, Prof. Emil Zürcher and Prof. Ernst Hafter, the Bill then moved between the two chambers until consensus on all articles was reached in 1937. Despite the careful preparation of over forty years, a referendum was taken and the law was only narrowly accepted by a people's vote in July 1938, and was finally enacted in 1942 (Gschwend, 1994; Trechsel, 1995).

years of age. My insistence in using the term same-sex desire will become clear in that the article attempts precisely to re-examine, rather than presume, the acceptance of the concept of homosexuality in political circles at the time.

2 The rise of medicalised concepts of sexuality

Notions and meaning of sexuality are historically, culturally and spatially specific which paves the way for the social constructionist approach employed here. Although same-sex love can be located across history, what is subsumed under "homosexuality" is thought to be a modern phenomenon. The coining of the terms "homosexuality" and "the homosexual" (Foucault, 1978; Weeks, 1977), as well as the "invention" of heterosexuality (Katz, 1990; Lautman, 1994; Richardson, 1996) are now accepted to have emerged in the second half of the nineteenth century. Notably, this was a period when scientific professions in general underwent significant changes in terms of specialisation: the medical profession came to be accredited with expert knowledge, the legal profession was changing under the influence of philosophy, the social sciences arose, all of which were part of and constitutive of the historical context of social modernisation (Hutter, 1992; Mort, 1987; Seidman, 1996; Weeks, 1985). Mapped against the background of social change and moral panics in both public and private spheres, nation states increasingly formulated laws regulating people's behaviour, including dissident sexual behaviour.

It was at this point that "the homosexual" as a distinct type of person with a set of characteristics emerged and became the subject of regulatory discourse, as opposed to same-sex behaviour or acts which up until then were the subject of regulation (Weeks, 1977; Foucault, 1978). "The making of the modern homosexual" (Plummer's notion) was thus deeply implicated in the processes of modernisation (Adam, 1996; Bech, 1997; Greenberg, 1996). The reason why sociologists generally embrace notions of the constructedness of sexualities, such as the paradigm of "the making of the modern homosexual" (Plummer, 1981), is that it contributes to an understanding of the constitution of identity. In the midst of other typologies that were arising during the nineteenth century, such as "the criminal" or "the insane", the "homosexual" was cast as a type of person rather than as someone engaging in certain dissident sexual acts. What was distinctly modern about homosexuality then was that the rise of medicalised and pathologised concepts of same-sex love moved the emphasis from certain sexual acts to the person engaging in them.[4]

4 Nevertheless, some scholars claim that homosexual identities have existed before modernity and that too much emphasis has been given to the break of modernity (Norton, 1997; Puff, 1997).

Until the nineteenth century the legislation typically affecting homosexual behaviour was that referring to sodomy, often termed the "sin against nature". However, some European countries, such as France, did not penalise homosexual behaviour per se, rather it was indecent public behaviour that was seen in need of regulation (Ariès, 1984; Nye, 1991). Crucially, definitions of sodomy varied widely according to culturally specific moral and ethical concerns throughout the early modern period (and indeed continue to do so in many states of the U.S.) as they were not restricted to same-sex behaviour but could include any form of non-procreative sex. The term sodomy did not follow strict definitions based on dogmatic theology, rather it could incorporate any act that was deemed to endanger the sexual and social order and thus could include masturbation, anal intercourse between spouses, same-sex behaviour, oral sex, bestiality and so forth (Boswell, 1980; Porter, 1991; Puff, 1997; Weeks, 1991).

Thus, the criteria were not applied against a particular type of person but against a series of acts and contemporary theorists stress that the law was a central aspect of the regulation of all non-procreative sex (Weeks, 1977; Foucault, 1978; Mort, 1987). The association of "deviance" with all forms of social unorthodoxy was used as a means of social control as it helped to provide a clear-cut threshold between permissible and impermissible behaviour. Further, it helped to facilitate the segregation of those labelled "deviant" from others and hence contributed to limit their behaviour patterns (Weeks, 1977; Porter and Weeks, 1991). The nineteenth century witnessed an increase in the number of regulations in many European countries. However, Foucault (1978) argues that these did not constitute an expression of increased sexual repression, rather they were a witness to an explosion of unorthodox sexualities which, through a network of interconnecting mechanisms, ensured 'the proliferation of specific pleasures and the multiplication of disparate sexualities' (Foucault, 1978, 49). Thus, the abolition of the death penalty for sodomy in England, for example, and its replacement by a penal servitude of between ten years and life was clearly witness not to increased repression but to decreased repression, at least in the legal sense.

The body and sexuality, having become sites of moral and political struggles, also became of increasing interest to "experts" which gave rise to "expert" fields of knowledge such as sexology, psychoanalysis and psychiatry (Weeks, 1977; Seidman, 1996). From the early nineteenth century onwards, there was an increased interest in the person engaging in problematic sexual acts, both in legal practice and in the psychological and medical professions. This resulted in a concern with the homosexual person, the young sexually active person, or the "mentally deficient" person. The result was a breakdown of the formerly execrated forms of non-procreative sex into a number of "perversions and deviations" and it became the experts' task to classify these new forms such as the "homosexual" or the "invert", to list the manifestations and discuss the causes. Although in competition with

other terminologies, it was from 1869 onwards that it became possible to perceive the nineteenth century homosexual as 'a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology' (Foucault, 1978, 43). However, the homosexual was the subject of codification concomitant with a variety of deviant sexualities, such as the pederast, invert, hermaphrodite, zoophile, zooerast (Krafft-Ebing's notions), auto-monosexualist, as well as later discarded notions such as mixoscophile, gynecomast, presbyophile and so forth (Foucault, 1978; Sedgwick, 1990).

One of the prerequisites for the emergence of biological concepts of sexuality in the nineteenth century was the concept of population. This, according to Foucault (1978), facilitated a discourse in which 'the sexual conduct of the population was taken both as an object of analysis and as a target of intervention' (Foucault, 1978, 26). At the juncture of the "body" and the "population", sex became a secular public issue and sexuality was constituted as an area of investigation. Society could now pursue the task of producing "true" discourses concerning sex. The emerging sciences started to classify sexuality, which Foucault accredits to the appropriation of the confessional:

> *"Situated at the intersection of a technique of confession and a scientific discursivity, where certain major mechanisms had to be found for adapting them to one another [...], sexuality was defined as being "by nature": a domain susceptible to pathological processes, and hence one calling for therapeutic or normalizing interventions; a field of meanings to decipher; the site of processes concealed by specific mechanisms; a focus of indefinite causal relations; and an obscure speech (parole) that had to be ferreted out and listened to." (Foucault, 1978, 68)*

In addition, the medicalisation of social problems offered the emerging medical profession the prospect of enhancing their occupational prestige by broadening the scope of their traditional jurisdiction (Greenberg and Bystryn, 1996). The emergence of "population" which could be subjected to statistical regularities also facilitated another approach to human conduct which understood itself as 'a manifesto for an emerging meritocracy', that is eugenics. Eugenics, defined by Galton as the science of good stock, became increasingly popular as biological explanations were mapped onto social problems such as poverty and criminality, and preventative mechanisms were sought to address the social changes associated with urbanisation and industrialisation. Based on Galton's hereditary principle this program had implications for the family, the position of women in society, the use of birth control, state legislation and sexual morals and offered applications which often overlapped with other concerns, such as social purity and social hygiene (Jones 1986). Foucault (1978) suggests that the programs of eugenics

and the medicine of perversions were the two great innovations in the technology of sex of the second half of the nineteenth century. Indeed, in many ways sexology and sex reforms were implicated with social hygiene and moral reforms and there was no clear-cut divide between eugenicists, the social moralists and reforming sexual theorists (Weeks, 1985).

In order to arrive at more historicist understandings of homosexuality one needs to extend the analysis to a differentiated contextual analysis. As Weeks (1985, 6) argues, "sexuality as a [...] phenomenon is the product of a host of autonomous and interacting traditions and social practices: religious, moral, economic, familial, medical, juridical". Yet gender as a tool in the analysis of concepts of homosexuality has often been sidelined. Sedgwick (1990) argues that the inclusion of women in concepts of homosexuality has become increasingly problematic because even though homosexuality was a relatively gender-neutral term when it was coined it has been overwhelmingly applied with a male bias whether for etymological reasons or because of the greater attention to men in the discourses surrounding it. Thus, work on the construction of sexuality implicitly or explicitly consolidates notions of the homosexual as male (see for instance Foucault, 1978; McIntosh, 1968; Sullivan, 1995), or, somewhat more sympathetically, situate lesbianism as epiphenomenal to gay male history (e. g. Weeks, 1977; D'Emilio, 1983; Hutter, 1992). Although some scholars root this omission in the absence of explicit penalisation of female homosexuality in England and Germany (Lautman, 1993), female sexuality has been shown to be highly regulated (Walkowitz, 1984; Mort, 1987; Bland, 1992; Smart, 1992). Regulations on prostitution, for example, had wide reaching effects on working class women in general and sanctions around illegitimate childbirth reiterated the norm of marital heterosexuality. Feminist scholars have argued that the lack of theorising female homosexuality is due to the difficulty in conceptualising lesbian relationships in the past (Faderman, 1981; Jeffreys, 1985). The gendering of sexualities, however, presents a more fundamental part of the analysis as recent work on the ways in which gender is implicated in notions of sexuality has shown (Valdes, 1995; Bravman, 1997; Löfström, 1998a, 1998b).

The nineteenth century has witnessed significant shifts in the perception and definition of same-sex desire as well as sex in general. Notions and definitions of sexual relations have been shown to be historically and culturally specific and can thus be conceptualised in a social constructionist approach. The body, gender and sexuality received increasing interest from emerging and/or professionalizing scientific disciplines which, in turn, used this platform to establish themselves in the public sphere with their "expert knowledge". As a result, constructions of (homo)sexuality have also been theorised in terms of their increased medicalisation.

3 Conceptions of same-sex desire in swiss criminal law

In 1914 the Geneva psychiatrist Pierre-Louis Ladame commented on the article regulating "unnatural indecency" that no other regulations had been redrafted and experienced such profound modifications as the one touching upon homosexuality (Ladame, 1914). Indeed, the very first draft was not based on a principal distinction between heterosexual and homosexual sexual assaults but aimed to penalise first and foremost offences involving violence. Nevertheless, the first draft also carried a regulation which targeted "unnatural indecency, pederasty and sodomy" as punishable offences, which was, despite its modern remit, a remnant of older laws. Notwithstanding numerous propositions to drop the regulation altogether, some lawyers insisted on keeping the threat of penalisation for both moral and political reasons. Morally, they based their argument on the tradition of penalising all non-procreative and/or extra-marital sexual acts and, politically, they argued that no Criminal Code would be capable of consensus which did not condemn "unnatural indecency". However, it should be pointed out that none of these concepts had a unified meaning. During the debates, pederasty was used to delineate implicitly either all male same-sex sexual relations or specific acts between males. Sodomy had no consistent meaning and was variably used to delineate same-sex behaviour between men only, between men or between women, or to include bestiality as well. Carl Stooss, for example, the "father" of the Swiss criminal code, used sodomy as synonymous with bestiality. In addition, necrophilia also featured in the first draft but was later removed from the section on sexual offences.

The section of offences against sexual morality *(Verbrechen gegen die geschlechtliche Sittlichkeit/délits contre les moeurs)* included a catalogue of sexual regulations. While the regulation on same-sex desire was initially at the end of the section, it was moved forward in 1908, giving evidence of its pivotal role in the establishment of the social and sexual order. Nevertheless, it would be unfair to say that homosexuality alone proved such a cornerstone. As far as interventions and reactions from the people went, the age of consent, young women's and girls' protection from sexual contact as well as prostitution proved to be consistent points of interventions, particularly from social purity circles amongst which the women's groups had a crucial role. Thus, when the final code effectively established an age of consent of 20 years for same-sex contacts and 16 years, in some cases 18 years for the heterosexual age of consent, one should not forget that the (heterosexual) age of consent of 16 years was in fact a compromise between the women's social purity groups who demanded 18 or 20 years in response to existing cantonal ages of consent which were as low as 12 years. The rise of the age of consent itself was a relatively new and largely post-Reformation phenomenon across Europe (Killias, 2000). Concomitant with the conception of the «modern» categories of childhood

and adolescence which emerged in the nineteenth century, transgressions against young people were taken more seriously and came to constitute an offence against the social order.

Within the first few years of debating the criminal code, pederasty and bestiality were dropped whereas a prison sentence for "acts against nature" between adults and youths was introduced. Also punishable was the exploitation of dependent relationships and it was deemed that male prostitution ought to be punishable, contrary to female prostitution. Adult consenting homosexual relations, on the other hand, remained exempt from the catalogue of penalization despite repeated attempts by catholic-conservative lawyers to introduce them. The discussions in those early years attest, as does the medical evidence and literature which was cited, that a medicalised conception of homosexuality had gained wider acceptance with its premises that because of its innateness people's sexual behaviour should not be penalized (although, of course, this left the door open for so-called therapeutic interventions by psychiatrists ranging from castration or euthanasia in Nazi Germany to aversion therapies later in the twentieth century).

The article persistently exempted, from 1896 onwards, the penalisation of adult, consenting same-sex sexual behaviour, partly on the grounds of a medical explanation of homosexuality and partly on the principle that in those circumstances no "legal property", that is, no individual rights and freedom were infringed. But whereas all the drafts carried forward a regulation which might produce an interpretation that the development of the criminal code indeed exemplifies the acceptance of a medico-psychiatric concept of homosexuality (see for instance, Delessert, 2002), this also caused debates. From the inception of the codification there were repeated attempts to penalise all same-sex behaviour as well as bestiality in the legal commissions as well as in the National Council commission and the National Council plenary. Indeed, catholic-conservative politicians at one point made their agreement to the whole Criminal Code partly dependent on the regulation of "unnatural indecency" (*widernatürliche Unzucht / débauche contre nature*). The regulation of "unnatural indecency", which only after 1900 became exclusively connotated with same-sex sexual behaviour was part of a catalogue by catholic-conservatives to reject the law, other points of objection being the (lack of) death penalty, abortion and offences against the family.[5]

Although their demand to penalise all same-sex relations proved ultimately not successful, catholic-conservatives nevertheless carried on a highly influential discourse. Furthermore, precisely because this discourse did not originate from

5 The Catholic-Conservative party remained a strong conservative force, even after political power was more evenly distributed upon the introduction of proportional representation in 1918. At the same time, while in other European countries this time of social upheaval led to women's enfranchisement, in Switzerland women remained exempt from political rights until 1971.

within the larger medical or legal establishment it could be easily overlooked and the Swiss Criminal Code regulations could be taken as an example for the successful medicalisation of homosexuality. Whilst this is true in many ways, there are, nevertheless, some important ramifications to be made as the counter-discursive arguments launched by catholic-conservative politicians were nearly successful. For this purpose, I want to zoom in on the period in the late 1920s when the Criminal Law Bill was debated in Swiss Parliament.

4 The parliamentary debate in 1929

In March 1929, when the section on sexual offences of the Criminal Code Bill was debated in the National Council the regulation of same-sex desire dominated the discussions and resulted in such a disarray that it was referred back to the commission for further deliberation. Agreement in the plenary later in the same year was only reached after two key interventions: One being the publication of an influential article in the main Swiss legal journal by the then editor of the Bill, Prof Ernst Hafter, and the other being the intervention of the Swiss Association of Psychiatrists, represented by Auguste Forel, Hans W. Maier and André Repond. Although the traditionally more conservative Council of States nearly rejected the new proposal later, a version of the regulation of same-sex desire was passed which exempted adult consenting same-sex behaviour from penalisation but which criminalised same-sex sexual relations involving a young person between 16 and 20 years. Principally the law defined the end of childhood at 16 years but further protective measure were installed for young people between 16 and 20 years in the sphere of sexual relations: for young women heterosexual relations were further regulated until 18 years by an article which aimed to protect them from "seduction", whereas same-sex sexual relations were restricted until 20 years, effectively setting up an age of consent of 20 years for same-sex relations. Sexual contacts with children, that is until the age of 16 years, were penalised regardless of sex or age of perpetrator and exempting the question of consent, thus defining the end of childhood at 16 years.

In discussing the legal regulations about the sexual behaviour involving young people as they are specified in criminal codes I wish to make it clear that I am not questioning the need for regulations, rather I want to expose how they came about, whose or what purpose they served and who was consulted. One of the key concepts at the time in regulating sexuality was not "consent" but "protection". There are some significant differences inherent in these two terms, although for the purpose of this article I have translated the age of protection as what we now know as the age of consent. Yet the concept of "consent" is different from "protection" in that it suggests that people are at least to some degree constructed

as agents invested with the potential *to* consent. The protection discourse so prominent in the beginning of the twentieth century constructed both young people and women predominantly in terms of their passive sexual subject positions and in need of protection *from* sexual relations at large. Whilst this was consistent with prevalent views of sexuality in terms of active and passive (Puenzieux and Ruckstuhl, 1994; Smart, 1992), the criminal law of course also served to reiterate and consolidate these conceptions.

But let me examine in more detail how the Swiss intended to regulate same-sex sexual relations and for what reasons. Upon introducing the Bill to the plenary of the National Council in March 1929, Councillor Seiler reporting from the commission, which prepared the draft beforehand, emphasised the reasons why adult consenting same-sex relations were left exempt from penalisation. "Decisive for us", he argued, "seems to be the necessity for action in serious cases because of the endangering of youth and the danger of spreading in case of [complete] exemption from punishment" (Steno. Bull. NR, 1929, 166). A number of issues from this statement are indicative of the perception of same-sex relations at the time. This "need for action in serious cases" suggests that not all same-sex encounters were viewed with the same disdain and that, indeed, these serious cases, which presumably were also highly visible and had a public component, which were seen to be responsible for "the endangering of youth". Furthermore, this statement makes clear that the Criminal Code was intended to have a preventative character and that rather than merely penalising criminal acts it was also to "prevent the spreading of homosexuality", therefore to be an interventionist mechanism.

Debating the regulation of "unnatural indecency" at a time when new explanations about same-sex desire were emerging from the medical sciences and started to get incorporated into legal discourses, the legislators were somewhat slower in accepting the "new scientific evidence" and maintained a dualistic explanation of same-sex relations. Although even the most conservative parliamentarians made some concession to the medical view that *some* same-sex behaviour was due to "homosexuality", the explanatory concept referring to a hereditary disposition, most parliamentarians equally continued to view same-sex relations also as an aberration which would "ruin the character and destroy the moral sense" not just for the individual concerned but for wider society and consequently the whole nation. The commission's reporter put it most bluntly when he said that "unnatural indecency" would "lead to the degeneration of the nation and to the decay of its strength" (Steno. Bull. NR, 1929, 166). The role of regulation was one of prevention, for the individual as well as for the "social body" of the nation. This concern for the nation was not entirely new to the 1920s, rather the concern for the boundaries of the nation – both biological and moral – had emerged since the 1900s. An earlier version of this argument was put forward in

1912 by the judge and politician Johann Geel who held that "if we do not plan punishment for such things we will poison the moral sense of our nation" (Commission, 1912).

What was proposed to be punishable were adult/youth sexual relations (youth meaning above the age of protection but not having reached all layers of maturity), the exploitation of dependent relationships, violent assaults and male prostitution. Whilst the abuse of dependency and violent assaults were never much contested, fierce debate characterised the development of the Criminal Code with regard to whether same-sex sexual relations should be punishable per se. Some of that ongoing debate can be explained by the situation of cantonal criminal laws which predominantly knew regulations of "unnatural indecency", "sodomy" and so on, affecting relations between men only, between men or between women, and some including bestiality and some targeting all non-procreative sexual acts. There were four cantons, however, where same-sex sexual acts were not penalised at all (Geneva, Vaud, Wallis, Ticino, and since 1919 Basel). Thus, cantonal criminal laws at the time in Switzerland represented the plethora of different forms of penalisation of same-sex sexual relations found across Europe (see, for instance, Hirschfeld, 1899; Schüle, 1984).

Throughout the debates on the regulation of sexualities in Switzerland catholic-conservatives pushed continuously for the penalisation of all same-sex desire which always went together with demanding the criminalisation of bestiality as well. Opposed to that were those who embraced a liberal approach to criminal law stressing the need for infringed rights and properties for anything to constitute a crime. Amongst those who saw no need for same-sex behaviour to be penalised a priori there was also general endorsement of the new scientific evidence arguing that homosexuality was a predisposition. The concept "homosexuality" started to appear during the 1910s in the Swiss legal discourse and was explicitly connotated with a medical explanation of same-sex behaviour. "Unnatural indecency", in contrast, remained to be used in discussions of same-sex relations to denote other explanations as well.

Despite the increasing influence of a medico-psychiatric conception of same-sex desire an older, religio-moral explanation continued to exist. Namely that "unnatural indecency" could be acquired as a result of excessive debauchery, depravity and indecent behaviour in general, based on a conception that excessive sexual activity *per se* was morally and physically damaging, leading to a corrupted moral character and economic inefficiency. Thus, while there is evidence that medicalised concepts of homosexuality gained influence within and beyond medical-psychiatric circles, equally there was an adherence to a moral framework which was framed in terms of youth protection but served a larger, collective purpose. On this basis, throughout the unification of Swiss Criminal Code most people involved in the legislating process seemed to have adopted a dual conception of

same-sex behaviour allowing for both the medical and the religio-moral explanation to coexist.

5 Gendering homosexuality

In terms of gender, the remit of equality in the drafting of the code meant that female and male same-sex desire were nominally treated the same. However, while the regulation was worded in a way as to include female same-sex relations very few of the discussions conceptualised female same-sex desire. Where it was raised it was in relation to what same-sex acts were seen to constitute which was essentially incompatible with female sexuality at large. Furthermore, female same-sex relations were never conceived to present a similar threat to the collective as male same-sex acts. On the contrary, one parliamentarian went as far as to suggest that in fact women's same-sex relations were favourable to heterosexual relations as they were less dangerous to young women, in that the danger of pregnancy was absent and consequently the chain of events which could bring on young women's "downfall" and loss of respectability. Germany had encountered a similar problematic during its law reforms: penalising only male same-sex relations, the inclusion of female homosexuality in 1909 was partly rejected on the grounds that no one could imagine women committing "acts similar to intercourse", which was what the law specified (Hutter 1992; Puenzieux and Ruckstuhl, 1994; Sommer, 1998). One needs to remember, of course, that these debates took place in all male environments and that sexuality was understood in an active/ passive framework.

But the problem was not only with the conception but with the possibility of implementation. In arguing against a proposal to specify "acts similar to intercourse" the socialist Huber said that 'that is, to my knowledge, a term which has until now hardly been described in relation to homosexual acts between women and the judge, who in future will have to decide over acts similar to intercourse between women, will be in a position of great embarrassment' (Steno. Bull. NR, 1929, 192). Similarly, the Federal Councillor of Justice, Ernst Häberlin, argued that "acts similar to intercourse" would present investigators and judges with much difficulty when dealing with female same-sex relations:

> *"Think of the resulting investigations and court proceedings and think of homosexuality of women folk (Frauensperson) whom we also threaten with penalisation. I don't know – I am, thank god, no expert in such matters – acts similar to intercourse between two women – that would be a bit of a puzzle to me." (Steno. Bull. SR, 1931, 537)*

Consequently, Swiss legislators explicitly refrained from using the terminology "acts similar to intercourse" in order to include women and instead used "indecent acts". This wording, however, was generally perceived to be so vague as to be meaningless yet in the absence of any better solutions it continued to be used. So while on the surface, the regulation of same-sex desire seemed to be gender neutral, the discussion and problematisation of certain homosexualities point nevertheless to gendered conceptions. In that sense, Switzerland did not depart from the gendered constructions of homosexuality prevalent at the time. Even if the regulation did not indicate it, the Swiss version of regulating same-sex desire incorporated gendered conceptions in a neutral wording.

6 Preserving the national character

Germany was often used as an example both to support and contradict the same propositions with regard to regulating same-sex desire. To some, the German experience indeed embodied all the fears about same-sex relations that Swiss politicians had. Homosexuality, in their view, was highly visible in Germany, where people had the impertinence of organising collectively and having "social gatherings", which, in their view, meant that "the vice and aberration" was threatening to spread. Others made a case that the effects of the sanctions imposed under the infamous §175 (outlawing of male homosexuality) could equally make an argument against penalisation, on the grounds that they were actually ineffective. Although there was general agreement that political activism regarding sexual rights was on a higher level than in Switzerland and that this was undesirable for Switzerland, opinions about strategies were divided, some arguing that, contrary to their purpose, it was precisely the legal sanctions which had given rise to "homosexual propaganda" and the activism for the abolition of §175.

Thus, in acknowledging the early homophile movement in Germany, Switzerland also clearly had a vision that its own criminal code ought not to give rise to a similar effect. To exempt adult consenting homosexuality from regulation thus was in part a strategic move to provide as little grounds as possible to the pockets of homophile activism existing in Switzerland and outside. The Federal Councillor Häberlin gave a lot of weight to this aspect of public political activity when he went on to say that:

> *"One can understand that these people who feel that they have a pathological condition, who have a pathological condition, want to defend themselves against being seen as criminals. This view they want to make known to a bigger audience and to win them over. As soon as the state recognises that they are not criminals and as soon as it does not drag them to court they do*

not have a right to produce this literature and distribute it." (Steno. Bull. SR, 1931, 536, emphasis in original)

Catholic-conservatives, however, were not convinced by this argument and, in response, argued that Switzerland also should not become a safe haven for those persecuted in Germany. In the same token they constructed same-sex relations not only as a particular urban occurrence and threat in the context of rapid social change, but also as a foreign one.[6] If indeed, criminalisation was fostering public activism on sexual rights, they certainly did not want to exempt same-sex relations from penalisation in Switzerland for fear of "importing such foreign behaviour".

Similarly, opinions were split on whether criminalisation gave rise to more cases of sexual blackmail or not. There had been several high profile cases of blackmail since the 1900s, particularly in Germany, involving respected public figures. It seems that the blackmailing of wealthy middle-class men by threatening to publicise their engagement in same-sex acts was almost endemic. Somewhat surprisingly, the issue of blackmail effected the most consensual view, namely its ubiquitous condemnation by all sides and the stated need for its eradication. Cleary, blackmail and extortion were other criminal offences, yet this does not wholly explain the ubiquitous condemnation. Instead, I would suggest that the middle-class legislators were so outspoken against blackmail because blackmail itself was a sign of moral degradation, perceived to be disproportionally used by the working class, and thus in need of strict condemnation. The legislators were well aware of the political economies of sexuality in the context of which not only blackmail and homosexuality were popularly seen as causally connected (Schlatter, 2003). The ubiquitous outrage against occurrences of blackmail can thus partly be explained with the legislators' perception that extortion disturbed the social and economic order and morality. Nevertheless, strategies for its eradication varied widely with some politicians arguing that the absence of penalisation would remove the grounds for blackmail. Catholic-conservatives, on the other hand, maintained that the social stigma would continue to provide breeding grounds for extortion and that penalisation was necessary.

A further and overarching discursive strand in the regulation of same-sex desire, as indicated above, was an assessment of its danger to wider society. Same-sex relations, implicitly always male, were repeatedly framed as posing a "threat", "corrupting youth", and constituting a "social danger", that is, a danger to society. This danger, I would argue, was the perceived threat to the moral boundaries as well as to the biological boundaries of the nation, as in a climate where eugenic and social hygienic concerns were popular, anxieties about future generations of the nation were particularly mapped onto young people and their sexual activities.

6 A similar discursive argument about being outside its national character has more recently been deployed by President Mugabe in Zimbabwe (Human Rights Watch, 2003).

In other words, rather than merely a concern for their individual welfare, young people represented the future of the nation and were therefore invested with the interest of the nation.

But let me return to the debates in 1929 when the regulation of homosexuality had to be referred back to the National Council's commission for further elaboration. It was now that the Swiss Psychiatrist Association demanded, and was granted, a hearing by the commission. Also between the March meeting and the November meeting of the National Council, an influential article which was partly based on the (probably) first survey of eighty-six homosexuals in Switzerland was published by Ernst Hafter and became decisive for the future of the regulation of homosexuality. Summarising his arguments Hafter asserted that the publication of literature by "affected groups" would not foster propaganda, for he thought it would provoke repulsion with "normals". Nevertheless, he placed potential danger in such literature in that 'young, unsteady people disposed to revelling *(schwelgen und ausgelassen sein)* could suffer damage by this seductive enlightenment' (Hafter, 1929, 50). While the concept of propaganda has certainly gone out of fashion some time in the second half of the twentieth century, promotion seems to denote much the same, namely that public activism around homosexuality could actually foster and increase the number of people engaging in these acts.[7] Acknowledging that the German criminal law had "caused" a social movement, Swiss legislators desperately wanted to prevent homosexuality to develop such a high public profile. Hafter thus proposed that penalisation should only affect cases where minors were involved when he argued: 'not homosexual activity per se is decisive. The decisive thought is to protect young people from seduction and ruin' (Hafter, 1929, 65). Seduction of young people had become the overriding concern and Hafter's proposition aimed at protecting young people from being seduced into same-sex activity, whether by adults or minors. Again, the concept of «seduction» presumed a prefixed set of an active and passive partner and was derived from a prevalent understanding of sexuality.

This concern with the possible dangers of seduction and the concern with young people was also fuelled by Swiss psychiatrists. Among the three psychiatrists who spoke to the commission of the National Council was Auguste Forel, psychiatrist, sexologist, social reformer, socialist, women's rights supporter and eugenicist. One of the prominent issues was once again the question whether homosexuality was acquired or congenital and the psychiatrists explained that they distinguished between "true" (congenital) and "false" (acquired) homosexuality. Forel argued that according to psychiatry the penalisation of "true" homosexuality was futile as it was an abnormal condition. Furthermore, he stressed that

7 This concern about propaganda seems to have some continuities throughout the twentieth century as the prevention of "the promotion of homosexuality" embedded in Clause 28 in Britain seems to echo very similar concerns indeed (Cooper and Herman, 1995).

homosexuality ought not to be confused with pederasty and that both sexes needed to be treated equally. The psychiatrists refuted the perception that homosexuality was the result of a depraved conduct and stressed that "true homosexuality" was determined by a disposition and presented a constitutional anomaly (Commission, 1929).

Nevertheless, they supported a preventative mechanism with regard to young people and their development and urged the legislators to adopt Hafter's proposition to penalise the seduction of minors which they perceived as problematic. In their presentation, the psychiatrists estimated that the occurrence of homosexuality was the same as for epilepsy, which was 0.5%. They furthermore asserted that no increase had been observed despite its increased appearance in the public sphere. Although the psychiatrists made a case for the congenitality of homosexuality they nevertheless left the door open for other interpretations of same-sex relations by distinguishing between "true" and "false" homosexuality. Yet the concern with seduction of youth also needs to be understood in relation eugenic thinking. In relation to eugenics' concern for "quality management" of the nation, the seduction of young people into illicit sexual relations posed a general threat to the "stock of the nation".

In his groundbreaking book "The Sexual Question" (1905), Forel argued that (heterosexual) marriage was not a cure for homosexuality and that, furthermore, it was not advisable as it made the married partners unhappy and only covered up homosexuality. In addition, marriages of homosexuals only took away good hereditary stock from reproduction. The implicit condition of this argument being, of course, that the other marital partner did not have a disposition to homosexuality, or indeed any other condition deemed hereditary. In his rational approach to sexuality Forel (1905, 251) argued:

> *"As long as homosexual love does not implicate minors it remains rather innocent, because it does not produce any offspring and will therefore become extinguished automatically through the process of selection. When two individuals are adult and consenting, it is certainly less harmful than prostitution, which is legally protected."*

There seems to be a contradiction that the psychiatrists, and alongside them many lawyers and legislators, would subscribe to the view that homosexuality was congenital and that consequently a "healthy sexual drive" could hardly be distracted by seduction, when, at the same time, they supported a regulation which explicitly aimed at protecting young people from seduction into same-sex relations. However, minors were thought to need "special" protection not only in terms of their individual subject positions but because particular interests were mapped onto young people's sexual conduct.

In the legal text, the term "homosexuality" was nowhere mentioned. This can be interpreted as a strategic omission as one of the reasons for exempting adult consenting same-sex behaviour from punishment was to prevent public activism and politicisation similar to Germany. The preservation of Switzerland as a nation "where these things don't happen" was a major imperative. Concerns for the biological and the moral quality of the nation thus overlapped on the issue of young people's sexuality which had become the paramount concern in the debates about the regulation of same-sex desire. The language of protection and the concern for boundaries of exclusion were a strand of argument shared by a majority. The following statement from a catholic-conservative councillor spoke equally to those interested in biological boundaries and those interested in moral boundaries:

> *"The purpose of penalisation and the setting of a barrier mean [...] the protection of the health and purity of our public life (Volksleben). The traffic among same-sexed people is apt to destroy the character and the sense of morality. Surely it is the duty of the state to prevent this. It is the duty of the collective to maintain order. If the aberration spreads more it will lead to the degeneration of the race and to the decay of its strength." (Steno. Bull. SR, 1931, 535)*

The debates in Swiss Parliament thus show a variety of concerns which were mapped onto homosexuality or which same-sex desire seemed to represent and which, mostly, depart from concerns with the individual but focus predominantly on the significance for the wider collective. As seen, a great sense of danger was attached to the possibility of the creation of a social movement. The Swiss legislators wanted to foreclose collective identity formation as Germany had witnessed it and to some extent this has probably been successful as Switzerland has not witnessed as big an upsurge of the gay liberation movement as other countries. The issue of blackmail equally stipulated much debate and, at the intersection of two aspects of middle-class morality, that of sexual morality and economic morality, never united the opinions. Last but not least, this section has tried to excerpt the ways in which the "threat of homosexuality" was used to delineate great danger for society and its future. Framed as youth protection, the concern was not the young people themselves but what they represented, namely the future of the nation both in biological as well as in moral terms.

7 Conclusion

Despite an increasing popularity of a medical explanation of same-sex desire older, more religio-moral explanations continued to exist. This dualist concep-

tion of same-sex desire was successfully carried into the discussions of the Swiss Criminal Code. Thus, while the term "homosexuality" had clear medical connotations in the historical configuration of Switzerland around 1930, other explanations for same-sex relations continued to co-exist and far from being clearly dichotomised, sexuality was conceived of as both a series of sexual acts and as belonging to a particular personage, with the potential to be inheritable. Although the Lamarckian idea about the hereditability of acquired characteristics had been widely rejected amongst the scientific community by the 1930s, some of its premises proved to have more enduring legacies when it served socio-political purposes: namely in the argument that acquisition and/or frequency of certain acts held dangers for both individual and society.

The period of concern during which legal, medical and political discourses impacted on the development of the Swiss Criminal Code and thus the construction of homosexuality was the time between 1893 and 1931. As the first national code, it can be seen as an effort to build national unity and identity and to resolve cantonal differences with regard to the regulation of sexualities as well as a testimony to the growth of the state and its interventions in private life. The conception of same-sex desire underwent significant changes from medical, legal and political points of view and as part of the social process of modernisation the construction of homosexuality contributed significantly to the normalising processes with regard to sexuality, particularly its binary "other", heterosexuality. Yet the social construction of homosexuality also impacted on constructions of gender and age. Although committed to an egalitarian principle, thus "treating" male and female homosexuality equally in the eyes of the law, gendered conceptions of sexualities were reiterated and consolidated in this process. Crucially, notions of homosexuality were enriched with concerns about age underlining the interest in creating and maintaining national norms of sexual behaviour, as well as with anxieties about the future of the nation, thus exemplifying how sexuality and nation were intertwined in processes of social modernisation.

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