A Crime by all means – Female same-sex Sexuality in the First Republic of Austria*

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Abstract

Sexual acts between people of the same sex, called "unnatural fornication" (Unzucht wider die Natur), were still criminalized in 19th and 20th century Austria. Given that Austria was among the very few European countries criminalizing male and female same-sex acts, this paper will scrutinize the impact of the culprit's gender on proceedings as well as the almost invisibility of female same-sex acts suggesting that the sexual categories introduced by fin-de-siècle sexologists, mostly – if not solely – applied to male defendants.

Key words: unnatural fornication; homosexuality; criminal law; sexology; gender; Interwar period; prostitution.

1. Introduction

On October 9th, 1928, the mechanic Joseph R. reported to the Viennese vice squad that his fiancée, sixteen years old Margarethe H., engaged in prostitution and that "lesbian and unnatural orgies happened daily between her and her landlady"[1]. The prosecution brought a charge of sodomy, unnatural fornication and procuration against Margarethe H. and three other women. To avoid an unfortunate encounter between her and her co-defendants, juvenile Margarethe H. was brought to trial in Linz, the capital of Upper-Austria, whereas concerning the latter the trial took place in Vienna. The judgement found Margarethe H. guilty of unnatural fornication with persons of the same sex based on the fact that she and two other women satisfied each other orally and by mutual masturbation. At the beginning of the 20th century it was established practice in Austrian jurisdiction that these acts constituted unnatural fornication but it was not long before that this interpretation was widely contested in Austrian legal discourse.

Governmental attempts to regulate and control human sexuality become most evident in criminal codes. According to Isabel Hull, historically there have been three different types of illicit sexual or sex-related acts: violent forms of heterosexuality, typically with a male offender and a female victim; violent deeds arising from heterosexual intercourse like abortion or infanticide and finally voluntary sexual acts which were no result of violence or coercion but offended against religion or morality. Concerning this last-mentioned category, prosecution was not justified by protection of people but by ethical values.[2] Among those acts leading to criminal proceedings although not interfering with the physical integrity of others was "unnatural fornication"[3] (*Unzucht wider die Natur*). Unnatural fornication was still criminalized during the 19th and 20th century as either

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[1] "... dass ... sich lespische [sic!] und wiedernatürliche [sic!] Orgien täglich abspielen ...", OÖLA, BG/LG Linz, Schachtel 343, 13 Vr 810/29 (all translations made by the author).

[2] See HULL, Isabel, Sexualstrafrecht und geschlechtsspezifische Normen in den deutschen Staaten des 17. und 18. Jahrhunderts, in GERHARD, Ute, (ed), Frauen in der Geschichte des Rechts. Von der Frühen Neuzeit bis zur Gegenwart, München, 1997, p. 221-234, p. 223.

[3] I chose to use the translation "unnatural fornication" for the German term *widernatürliche Unzucht* as Tracie Matysik suggests in her article on female homosexuals in Fin de siècle Germany; see MATYSIK, Tracie, "In the Name of the Law: The 'Female Homosexual' and the Criminal Code in Fin de Siècle Germany", *Journal of the History of Sexuality*, Vol. 13, No 1, 2004, p. 26-48. The term "unnatural fornication" is also applied by Jens Rydström in a study on bestiality and homosexuality in Sweden from 1880 to 1950; see RYDSTRÖM, Jens, Sinners and citizens: Bestiality and Homosexuality in Sweden, 1880-1950, Chicago and London, 2003. Rydström also uses the terms "fornication against nature" and "crime against nature" which I will likewise use. The term "sodomy" (*Sodomie*), on the contrary, is used in 19th and 20th century in Austrian legal language solely to describe sexual acts of humans with animals. Such, it forms just one alternative of the crime "unnatural fornication", the other alternative are sexual acts between people of the same sex. "Gross indecency", a term sometimes used and best translated as *schwere Unzucht*, includes a lot more than same sex sexuality and bestiality and while it was certainly enough understood to be immoral it was not necessarily understood to be "against nature".

sodomia ratione sexus (unnatural fornication between people of the same sex) or *sodomia ratione generis* (unnatural fornication with an animal).[4]

During the 18th century "sexuality" became a subject of medicine and till the beginning of the 19th century even its non-procreative forms were no longer considered to be sinful or blasphemous. Nevertheless, crimes against nature were not affected by the liberalization of the legislation on sex crimes during and after Enlightenment.[5] With the decrease of religious reasoning for the punishability of non-procreative and extramarital sexual acts Christianity lost the normative power concerning same-sex sexual acts to a newly emerging science: sexology.[6] The knowledge provided by sexologists constituted different types of human beings and sexualities. The pathologizing of same-sex sexuality and the increasing discourse about the various forms of sexual behaviour influenced legal practice as well. Given that in Austrian law from 1803 on there had been no change in the wording of the crime one could conclude that there was no change in the prosecution of same-sex acts as well. In contrast, an analysis of legal discourse and legal practice in contrast shows a significant tendency to broaden the legal interpretation at the end of the 19th and the beginning of the 20th century.[7] By this time, Austria was among the very few European countries still criminalizing male as well as female same-sex sexual acts.[8]

This paper is based on an analysis of the decisions of the Austrian Supreme Court of Justice and the legal records of the Regional criminal court in Linz. The last mentioned data consists of 280 files of criminal cases, including a total of 463 persons accused of unnatural fornication, 17 women amongst them. Assuming that the culprit's gender had certain impacts not only on the probability of prosecution but also on the criminal proceedings themselves this paper will analyse why – in contrast to male same-sex behaviour – sexuality between women remained almost invisible in legal discourse and legal practice. Medical as well as legal discourse described sexual acts between women as rare and deficient. Still, it was the criminalization of same-sex acts between both sexes together with sexology's findings that led to the significant broadening of legal interpretation in Austria at the beginning of the 20th century. But sexologists not only focused on the question of which acts were to be seen as sexual acts. They also raised the issue whether culprits diagnosed to suffer from so called "contrary sexual feelings" or "sexual inversion" could be considered responsible for their deeds. Therefore the paper will finally focus on whether this question was answered in the same way for male and female defendants.

2. The invisible woman

Most European countries ceased to punish female same-sex acts during the 19th century.[9] Because of its gender-neutral wording Austrian law in contrast criminalized unnatural fornication between men as well as between women until the partial reform of criminal law in 1971.[10] In Austria, as in other European countries including women in the legislation, only a handful of them were prosecuted. Proportions of male and female defendants throughout Austria show an average of a little less than 5 percent women charged with unnatural fornication.[11] The greater silence on female same-sex sexuality might be due to the fact that sexual acts between women were not taken as seriously as male same-sex sexuality and therefore were noticed less often. Austrian jurists like Eduard Senft and August Brunner doubted whether two women could engage in sexual intercourse at all. While according to Brunner, sexual intercourse between two females was simply impossible,[12] Senft reckoned that the "indecent embraces between woman and woman" offering little enough pleasure were just compensatory acts for lack of heterosexual intercourse. Even if carried out with a "membrum artificiosum" Senft considered them just masturbatory deeds.[13]

In his famous and influential book "Psychopathia sexualis" the Austro-German sexologist and psychiatrist Richard von Krafft-Ebing summed up contemporary beliefs:

> "[S]exual inversion does not affect woman in the same manner as it does man, for it does not render woman impotent; ... because woman (whether sexually inverted or not) is by nature not as sensual and certainly not as aggressive in the pursuit of sexual needs as man, for which reason the inverted sexual intercourse

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4 For this terminology see FEUERBACH, Anselm, Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts, Aalen, 1986 (14th edition, originally published in 1847), p. 740.

5 While masturbation or non-procreative sexual acts between man and woman ceased to be punished by the end of the 18th century, unnatural fornication remained a crime.

6 See LAUTMANN, Rüdiger, Seminar: Gesellschaft und Homosexualität, Frankfurt am Main, 1977, p. 126.

7 A similar observation is made by Jörg Hutter concerning Paragraph 175 of the German criminal law. In Germany from 1871 on only male-male sexual acts have been penalized. See HUTTER, Jörg, Die gesellschaftliche Kontrolle des homosexuellen Begehrens. Medizinische Definitionen und juristische Sanktionen im 19. Jahrhundert, Frankfurt am Main, 1991, p. 31-60.

8 Besides Austria Magnus Hirschfeld lists Finnland, Sweden, the Netherlands, Greece and some Swiss cantons as still criminalizing same-sex acts between women at the beginning of the 20th century; see HIRSCHFELD, Magnus, Die Homosexualität des Mannes und des Weibes, Berlin, 1914, p. 842.

9 See also LÖFSTRÖM, Jan, "A Premodern Legacy: The 'Easy' Criminalization of Homosexual Acts Between Women in the Finnish Penal Code of 1889", Journal of Homosexuality, No. 35: 3-4, 1998, p. 53-79.

10 *Bundesgesetz vom 8. Juli 1971, mit dem das Strafgesetz, die Strafprozessordnung und das Gesetz über die bedingte Verurteilung geändert und ergänzt werden (Strafrechtsänderungsgesetz 1971)*, BGBl 1971/273.

11 See MÜLLER, Albert, FLECK, Christian, "'Unzucht wider die Natur' – Gerichtliche Verfolgung der 'Unzucht mit Personen gleichen Geschlechts' in Österreich von den 1930er bis zu den 1950er Jahren", *Österreichische Zeitschrift für Geschichtswissenschaften*, Vol. 9, No. 3, 1998, p. 400-422, p. 419.

12 See BRUNNER, August, "Die Rechtsprechung des Kassationshofes in Wien", *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1903, p. 795-805, p. 800.

13 See SENFT, Eduard, Bemerkungen über das Verbrechen der widernatürlichen Unzucht, *Österreichische Vierteljahresschrift für Rechts- und Staatswissenschaft*, 1866, p. 195-233, p.211.

among women is less noticeable, and by outsiders is considered mere friendship."[14]

The idea of a discrete female sexuality contradicted contemporary ideas of sexuality privileging heterosexual coitus over all other forms of sexual expression.[15] Thus, equalizing friendship and love between women functions as one explanation for the invisibility of female unnatural fornication,[16] but there might also exist another one: legal authorities tended to state some sort of "shamelessness" or "foulness" in female defendants thus establishing and maintaining a general connection between lewdness and female same-sex behaviour. Focusing on female sexual deviance in general obstructed the view for more specific sexual deviations in women. In a case about two girls in 1925 the coroner of the court district of Linz, for example, noted:

> "Without being asked the girl unabashedly mentions more unsavoury detail about [her codenfendant's] habits, which have nothing to do with the present case but proof the absolute shamelessness of [her co-defendant]."[17]

In his study "Tribades on Trial" Theo van der Meer came to the conclusion that late 19th and early 20th century medical practice in the Netherlands ignored romantic friendships between women and focused mainly "on the tribade as a lewd or morally degenerated woman".[18] These women were generally characterized by an irregular life on the margins of society. The connection between lewdness and same-sex behaviour seemed to be still at play in Austria in the early 20th century. The fact that a considerable number of women charged with unnatural fornication were prostitutes, likely to be linked to sexual deviance and criminal behaviour, fortified this perception.[19] Prostitutes indicated a transgression: As "public women" they left the private sphere normally considered to be the female domain, and they signalized autonomous female sexual subjectivity.[20] Prostitution was held paradigmatic when it came to female lewdness and criminality.[21] Hence, the second narrative consisted in the linkage between prostitution, and female same-sex sexuality. The topos of the "tribade-prostitute" was to be found in various European countries.[22]

The crime of unnatural fornication between women crossed the line in more than one aspect: Same-sex sexual acts were considered to be lewd because they did not take place within marriage, the legal institution intended for sexual intercourse, and they were considered to be unnatural because they were not procreational in intent and did not fit into the heterosexual matrix.[23] Krafft-Ebing proved to be well aware of this, citing Parent-Duchatelet's "De la prostitution" (1857):

> "... there are prostitutes who let themselves be known as given to tribadism; persons who have been in prison for years, and in these hot-beds of Lesbian love, ex abstinentioa, acquired this vice. It is interesting to know that prostitutes hate those who practice tribadism, – just as men abhor pederasts; but female prisoners do not regard the vice as indecent."[24]

So, Krafft-Ebing established a discursive connection between prostitution as the archetypal example of (female) sexual deviance and female same-sex behaviour and sexual desire. Following this assumption the investigating detective in one of the cases at the criminal court of Linz stated that the defendant, a prostitute named "Rita", was "perverted due to her profession"[25]. Hence, the conjunction between prostitution, female same-sex sexuality and female criminality was frequently reproduced both in the fields of criminal law and of sexology and impeded the perception of female same-sex sexuality as phenomenon of its own.

Since contemporary beliefs ascribed sexual aggression and autonomy to men and sexual sedateness to women, women's autonomous sexual behaviour was in need for an explanation. This explanation was found in the paradigm of "sexual inversion" – a model based on the reversal of sexual traits within men and women. If women acted like men concerning their

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[14] KRAFFT-EBING, Richard, Psychopathia Sexualis with especial reference to the Antipathic Sexual Instinct. A medico-forensic study, London, 1905, p. 395-396. This argument was resurrected in the late 20th century when same-sex acts between women and between adult men became legal whereas acts between an adult male person and a male person between 14 and 19 (later 18) years of age remained punishable; see Regierungsvorlage Strafrechtsänderungsgesetz (1970), 39 BlgNR XII. GP.

[15] How influential this perception proves to be is very well shown in Klaus Schwaighofer's opinion that a sexual act can only constitute rape if a penis is involved; see SCHWAIGHOFER, Klaus, *Juristische Blätter*, 1992, p. 729 (OGH 23.4.1992, 15 Os 11/92). Schwaighofer changed his opinion six years later following the Supreme Court of Justice's jurisdiction on the subject matter; see SCHWAIGHOFER, Klaus, "Zur Reform des Sexualstrafrechts durch das StRÄG 1998", *Juristische Ausbildung und Praxisvorbereitung*, 1998/99, p. 150-157, p. 154.

[16] Concerning this assumption see as well KNAUS, Kordula, "Mere Mates or Mainly Monsters: Homoeroticism and Homosexuality in Operas Around 1900", in BARTSCH, Cornelia, GROTJAHN, Rebecca, UNSELD, Melanie (ed), Felsensprengerin, Brückenbauerin, Wegbereiterin. Die Komponistin Ethel Smyth, München, 2010, p. 175-188, p. 186.

[17] "Das Mädchen bringt ziemlich ungeniert und unbefragt noch weitere unappetitliche Details von den Gewohnheiten der [Mitangeklagten], die jedoch schließlich nichts mit der vorliegenden Sache zu tun haben, jedoch die völlige Schamlosigkeit der [Mitangeklagten] dartun.", OÖLA, BG/LG Linz Schachtel 310, Vr VI E 429/25.

[18] See VAN DER MEER, Theo, "Tribades on Trial: Female Same-Sex Offenders in Late Eighteenth-Century Amsterdam", *Journal of History of Sexuality*, Vol. 1, No. 3, 1991, p. 424-445, p. 444.

[19] Four out of a total of 17 women in my data were prostitutes.

[20] See ENGELSTEIN, Laura, "Gender and the Juridical Subject: Prostitution and Rape in Nineteenth-Century Russian Criminal Codes", *Journal of Modern History*, Vol. 60, 1988, p. 458-495, p. 471.

[21] The German title of Cesare Lombroso's famous book on female criminality – "Das Weib als Verbrecherin und Prostituierte" (1894) – maintained these linkage.

[22] See for example BECCALOSSI, Chiara, "The Origin of Italian Sexological Studies: Female Sexual Inversion, ca. 1870-1900", *Journal of the History of Sexuality*, 2009,Vol. 18, No. 1, p. 103-120, p. 114.

[23] For the term "heterosexual matrix" see BUTLER, Judith, Gender Trouble. Feminism and the Subversion of Identity, New York, 1990.

[24] KRAFFT-EBING, Psychopathia Sexualis, p. 608.

[25] "... infolge ihres Berufs pervers veranlagt"; OÖLA, BG/LG Linz Schachtel 353, 12 Vr 1962/29.

sexual choice they had to do so as well in other areas of life.[26] Concerning the punishability of unnatural fornication Krafft-Ebing considered Austrian legislation to be more coherent than the German one since Austria criminalized same-sex acts not only between men but also between women. Nevertheless he assumed that there had been no convictions of women under Austrian law:

> "Public opinion in Austria evidently considers sexual acts between women only as acts against morality, not against the law."[27]

In this regard Krafft-Ebing was mistaken as is clearly demonstrated by the jurisdiction not only of lower Austrian courts but also the Austrian Supreme Court of Justice.[28] Certainly, women were not perceived as sexual subjects in the same way as men and the number of women charged and convicted of unnatural fornication fell short of the number of male culprits. But the fact that from the *Constitutio Criminalis Theresiana*,[29] the very first Austrian criminal Code applicable to all Austrian provinces, until the second half of the 20th century same-sex acts between women were punishable and have indeed been punished signalizes the recognition of female sexual subjectivity.[30]

3. Defining sex

Despite legal and medical discourse attaching less importance to female same-sex sexuality the punishability of sexual behaviour between women became influential with regard to the interpretation of the law. The idea of women being incapable of having coitus with each other plus the fact that sexology shifted the focus from physical action to emotional sensation fostered the broad interpretation of the crime at the turn from 19th to 20th century. By 1787, with the Josephian criminal code[31] (*Josephinisches Strafgesetzbuch*) coming into force, the once manifold[32] sodomitical sins were reduced to two: Sexual acts between human beings and animals and between people of the same sex. Although those "carnal offences" ceased to be punished by death they remained crimes not only against morality but against human nature and were considered "a vilification of mankind". Soon the Josephian criminal code turned out to be in need of reform and an ad hoc established commission started to work out a draft that finally became the Austrian criminal code 1803[33] (*Strafgesetz 1803*). The criminal code 1803 – being more clandestine than the Josephian criminal code – only called for "unnatural fornication" to be a crime but did not specify which acts constituted this crime against nature. Irrespectively of the declaration that these acts were lewd as well as unnatural the wording of the law lacked an exact determination which acts were criminalized leaving the issue open to legal interpretation.

Sebastian Jenull, professor for criminal law and rector of the University of Graz, argued that unnatural fornication should be interpreted in the way the *Constitutio Criminalis Theresiana* had put it in 1769 penalizing not only sexual acts with animals and same-sex sexuality but also necrophilia, masturbation and unnatural sexual acts between man and woman, a term applying to anything that was not missionary position and procreative in intention.[34] District attorney Joseph Waser followed the opinion expressed in a decree of the Ministry of Justice (*Justiz-Hofdekret*) in 1824.[35] The decree was sent to the court of appeal for Tyrol and Vorarlberg answering the question posed by the appellate court whether onanism – in particular masturbation in front of others or mutual masturbation – was embraced by the term unnatural fornication. The replying decree made clear that the criminal code 1803 did not forbid any of the above mentioned forms of masturbation.[36]

During the following years legal practice constrained the crime to pederasty[37] and sodomy as long as there was a similarity to cohabitation. Forensic doctors looked for the marks of anal intercourse on both the active and the passive part. Sexual acts other than that, like mutual masturbation, coitus *inter femora* (intercrural sex), or oral sex, were not yet held culpable. In his study of the Viennese criminal court from the Enlightenment until the Austrian revolution of 1848 Friedrich Hartl reported only a few cases of unnatural fornication with people of the same sex. Most unnatural acts coming to the attention of the court happened where several journeymen shared a room if not a bed. Unnatural acts between women remained rare as did sodomy. In summary Hartl asserts that judges adopted a liberal attitude towards unnatural fornication, considering it a misdemeanour rather than a felony. If a conviction took place the sentences used to be rather lenient.[38]

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[26] "The female urning may chiefly be found in the haunts of boys. She is the rival in their play, preferring the rocking-horse, playing at soldiers etc., to dolls and other girlish occupations. The toilet is neglected, and rough boyish manners are affected. Love for art finds a substitute in a pursuit of the sciences. At times smoking and drinking are cultivated even with passion."; KRAFFT-EBING, Psychopathia Sexualis, p. 398-399.

[27] KRAFFT-EBING, Richard, Psychopathia Sexualis mit besonderer Berücksichtigung der conträren Sexualempfindung. Eine Studie für Ärzte und Juristen, 12th ed., Stuttgart, 1903, p. 280. This passage is not included in the English translation of Krafft-Ebing's book, translation cf. BAUER, Heike, "Theorizing Female Inversion: Sexology, Discipline, and Gender at the Fin de Siècle", *Journal of the History of Sexuality*, Vol. 18, No. 1, 2009, p. 84-102, p. 95.

[28] See for example E vom 18.2.1887, KH 1028; E vom 21.3.1927, Os 76/27, SSt VII/28.

[29] *Constitutio Criminalis Theresiana oder der Römisch-Kaiserl zu Hungarn und Böheim etc etc Königl Apost Majestät Mariä Theresiä Erzherzogin zu Oesterreich, etc etc peinliche Gerichtsordnung* published on December 31st, 1786 and came into effect on January 1st, 1770.

[30] See also ENGELSTEIN, Laura, The key to happiness: sex and search for modernity in fin-de-siècle Russia, New York, 1992, p. 71-73.

[31] *Allgemeines Gesetzbuch über Verbrechen und derselben Bestrafung*. Kundgemacht mit Patent vom 13.1.1787 (JGS Nr 611).

[32] See RYDSTRÖM, Jens, "'Sodomitical Sins are Threefold': Typologies of Bestiality, Masturbation, and Homosexuality in Sweden, 1880-1950", *Journal of the History of Sexuality*, Vol. 9, No. 3, 2000, p. 240-276.

[33] *Strafgesetz über Verbrechen und schwere Polizei-Übertretungen*, Patent vom 3.9.1803 (JGS Nr 626).

[34] See JENULL, Sebastian, Das Oesterreichische Criminal-Recht II, Graz, 1809, p. 193.

[35] See WASER, Joseph, Strafgesetz über Verbrechen sammt den dazugehörigen Verordnungen, Wien, 1839, § 113.

[36] Justiz-Hofdekret vom 14. August 1824, Nr 2035 JGS.

[37] Forensic medicine used the term "pederasty" to describe anal intercourse between men.

[38] See HARTL, Friedrich, Das Wiener Kriminalgericht. Strafrechtspflege vom Zeitalter der Aufklärung bis zur österreichischen Revolution, Wien, 1973, p. 155.

The criminal code 1803 was replaced by a new criminal code in 1852[39] (*Strafgesetz 1852*). Officially, the criminal code 1852 was just a "new-edition" of the criminal code 1803 including all the amendments in criminal law made so far. Paragraph 129 I of the criminal code 1852 punished unnatural fornication, explaining that unnatural fornication was "indecency" either "(a) with animals" or "(b) with people of the same sex". A person found guilty of unnatural fornication could be sentenced to hard labour for a period between one year and five years. This meant in fact a tremendous increase in penalty compared to the degree of penalty given in the criminal code 1803: six months to one year of hard labour.[40] Although the criminal code 1852 specified that only sexual acts with animals or with people of the same sex were to be understood as unnatural fornication it still lacked a more detailed definition of the crime. Privileging coitus and focusing mostly if not solely on male-male sexual acts jurisdiction asked for acts which could be understood as "coitus-like". To be categorized as coitus-like an act had to allow for "carnal mixing" or show at least some closeness to an orifice of the body that allowed for carnal mixing.

Based on this assumption, courts tended to give a narrow construction of Paragraph 129 I b in the first instance, although legal practice was not entirely consistent. In 1858 the Austrian Supreme Court reversed a judgement of the appellate court of Innsbruck, Tyrol, in which the appellate court convicted a man who seduced a boy to indecent acts of unnatural fornication. The Supreme Court on the contrary was of the opinion that the defendant was only guilty of masturbation which was not seen as a crime.[41] One year later the Supreme Court considered it unnatural fornication if a man rubbed his virile member at the bare hips and the anus of another man until he ejaculated.[42] But in the case of a 42-years old man who persuaded an eight years old boy to masturbate him until ejaculation, the Supreme Court found that the minor had only been "an instrument but not the subject of sexual abuse"[43]. Men rubbing their penises against each other were not seen to commit a carnal offence since – according to the Supreme Court – this requested coitus-like acts such as pederasty.[44] In contrast some unpublished decisions by the Supreme Court showed the tendency to broaden the legal interpretation of unnatural fornication. In 1877 the Supreme Court ruled that the crime against nature was not limited to pederasty and that it was not necessary that an act showed similarity to heterosexual coitus to constitute unnatural fornication.[45]

Whether unnatural fornication called for deeds similar to intercourse or could be committed as well through other sexual acts and which acts could be seen as coitus-like remained contended. The Austrian jurist, professor of law and politician Eduard Herbst interpreted every sexual act *contra naturam* as indecency.[46] This opinion was shared by Hugo Hoegel who could find no difference between pederasty and mutual masturbation. Hoegel execrated even embraces or kisses between people of the same sex, but at least he did not ask for them to be punished.[47] Karl Janka, Heinrich Lammasch, and Otto Friedmann on the contrary held the view that unnatural fornication confined to sexual intercourse respectively to coitus-like acts.[48] Lammasch supported his opinion with the historical development of the crime which showed a reduction rather than a broadening of the legal interpretation.

In the late 19th century the assumption that the crime of unnatural fornication asked for coitus-like acts became widely contested by scientists studying human sexuality and establishing a new science called "sexology". The writings of sexologists like Carl Westphal, Richard von Krafft-Ebing or Albert Moll, to name but a few, drew the attention from the culprit's body to the "soul", from sexual acts to sexual sensation.[49] This shift in perspective not only allowed for the construction of the "modern homosexual", as Michel Foucault

[39] *Kaiserliches Patent, wodurch eine neue, durch die späteren Gesetze ergänzte, Ausgabe des Strafgesetzbuches über Verbrechen und schwere Polizei-Uebertretungen vom 3. September 1803, mit Aufnahme mehrerer neuer Bestimmungen, als alleiniges Strafgesetz über Verbrechen, Vergehen und Uebertretungen für den ganzen Umfang des Reiches, mit Ausnahme der Militärgränze, kundgemacht, und vom 1. September 1852 angefangen in Wirksamkeit gesetzt wird*, RGBl 1852/117.

[40] It is interesting, though, that these fact is only mentioned in GOCHNAT, Karl, Das oesterreichische Strafgesetz und die Verordnungen über die Gerichtscompetenz, Wien, 1852, p. 76, and HYE, Anton, Das österreichische Strafgesetz über Verbrechen, Vergehen und Uebertretungen und die Preßordnung vom 27. Mai 1852. I, Wien, 1855, p. 16.

[41] OGH 842.

[42] OGH 917.

[43] „... der unmündige B [soll] nicht als der Gegenstand, sondern nur als Werkzeug des geschlechtlichen Missbrauches verwendet worden sein"; OGH 1052.

[44] OGH 1215.

[45] These decisions are mentioned in Strafgesetz über Verbrechen und Vergehen vom 27. Mai 1852, R.G.B. Nr. 117 und das Pressgesetz vom 17. Dezember 1862, R.G.B. 1863 Nr. 6 sammt den ergänzenden und erläuternden Gesetzen und Verordnungen unter Anführung einschlägiger Beschlüsse und Entscheidungen des Obersten Gerichts- und Cassationshofes, 15th edition, Wien, 1884, p. 88 recital 4, 5 and 9 concerning Paragraph 129 I b.

[46] See HERBST, Eduard, Handbuch des allgemeinen österreichischen Strafrechtes I, Wien, 1855, p. 242.

[47] See HOEGEL, Hugo, "Die Verkehrtheit' des Geschlechtstriebes im Strafrechte", *Der Gerichtssaal*, Vol. 53, 1897, p. 103-121, p. 120. The draft for a new criminal code presented by Hoegel in 1908 considered not only sexual acts with persons of the same sex or with an animal as a crime but also necrophilia. Every distinction between various forms of sexual acts was abandoned; see HOEGEL, Hugo, Teilreformen auf dem Gebiete des österreichischen Strafrechtes (einschließlich des Preßrechtes), Hannover, 1908, p. 167.

[48] See JANKA, Karl, Das österreichische Strafrecht, Prag, 1884, p. 327; LAMMASCH, Heinrich, Grundriß des Strafrechts, Leipzig, 1899, p. 77; FRIEDMANN, Otto, Das österreichische Strafgesetz: mit Berücksichtigung der strafrechtlichen Nebengesetze; systematische Darstellung, Berlin, 1905, p. 1116.

[49] See WESTPHAL, Carl, "Die conträre Sexualempfindung, Symptom eines neuropathischen (psychopathischen) Zustandes", *Archiv für Psychatrie und Nervenkrankheiten*, 1869, p. 73-107; KRAFFT-EBING, Psychopathia Sexualis; MOLL, Albert, Die konträre Sexualempfindung, 3rd edition, Berlin, 1899.

pointed out,[50] it also rendered any differentiation between various forms of sexual acts meaningless: The crucial point was no longer whether the questionable acts showed an external similarity to heterosexual coitus but whether they led to sexual satisfaction. Thus, it became impossible to discern between punishable and non-punishable sexual acts by focusing on their similarity to coitus.

The significant turn in jurisdiction came with the Supreme Court's decision No. 2747.[51] On December 27th, 1901, the criminal court of Graz, Styria, acquitted Siegbert G. of unnatural fornication. The Supreme Court reversed the judgement concluding that Siegbert G. had committed "self-abuse" while utilizing the body of another man. In opposition to its previous jurisdiction the Supreme Court now stated that unnatural fornication was not only committed by acts similar to heterosexual intercourse but by "every act meant to enhance sexual excitation and exceeding the limits of decency"[52]. An act constituted unnatural fornication if the body of a person of the same sex was used to satisfy sexual lust. This reasoning resembles almost word by word a passage in a paper by Krafft-Ebing about the "sexual invert" at criminal court (*Der Konträrsexuale vor dem Strafrichter*).[53] But whereas Krafft-Ebing made an argument for the decriminalization of same-sex sexual acts, the Supreme Court significantly broadened the meaning of unnatural fornication by equalizing sexual acts with the evocation of sexual sensation. To fortify its opinion the Supreme Court used a second argument for expanding the interpretation: The punishability of same-sex sexual acts between women. According to the contemporary conception of sexuality coitus-like acts between women were considered to be utterly impossible. In order not to render the prohibition of same-sex sexuality between women idle legislation the wording of the law had to cover more than that. This line of thought had become obvious in a decision in 1887 in which the Supreme Court had already stated that "the indecency known under the name 'lesbian love'"[54] constituted a crime by all means. Almost 15 years later, in its verdict on Siegbert G., the Supreme Court cited this decision to fortify its argumentation that it seemed unjustifiable to restrict the criminal liability to coitus-like acts when it came to male-male sexuality.

4. Criminal Responsibility for Sexual Behaviour

The influence of sexology not only became noticeable concerning the interpretation of the law. It also raised the question of the criminal responsibility of those culprits who where diagnosed as suffering from "contrary sexual feelings" or "sexual inversion". When the *Constitutio Criminalis Theresiana* was in force insanity eliminated criminal responsibility. Later criminal codes as well only punished those who possessed both discretional capability and sense of discernment. The idea of unnatural fornication being not just an awful and unholy vice but a symptom or expression of a pathological condition suggested the possibility of lacking criminal responsibility.

In the 17th and 18th century forensic doctors had tried to figure out whether a crime had taken place by looking for the telltale signs of pederasty on the suspects' bodies. The preoccupation with the body's visible marks now gave way to scrutinizing the soul shifting the focus from the question whether someone committed a crime to the question whether someone could be held responsible for his or her deeds. Sexologists moved the search for identifying marks to the interior. Unlike the signs for criminal acts the signs for contrary sexual feelings were not found on the body's surface but in the childhood, in character traits, and in the inner life of the defendants. The psychiatrist examining 46-years-old Karl M., who was accused of sexual acts with two young men under the age of 18, considered him to be "a true urning, a man with female feelings and female affinities since his youth."[55] As a boy, Karl M. used to play with dolls and rejected the rougher games of boys. Physical examinations became the exception only taking place if the capacity to act and to give testimony of those involved was questionable – as in case of children or mentally disabled.

Coming back to the initial case of juvenile Margarethe H. it seems interesting that the record does not contain a psychiatric examination. A house search at the place of one of Margarethe's co-defendants produced books with explicit lesbian content and

[50] Foucault dates the "hour of birth" of the modern homosexual to 1869/70 and the publication of Westphal's study "Die conträre Sexualempfindung"; see FOUCAULT, Michel, The History of Sexuality. An Introduction, New York, 1990, p. 43. Although Foucault's theories have been widely adopted there has been lots of criticism. Hergemöller complains that Foucault does not consider important historical epochs as for example the Middle Ages; see HERGEMÖLLER, Bernd-Ulrich, Das Mittelalter, in ALDRICH, Robert (ed), Gleich und anders. Eine globale Geschichte der Homosexualität, Hamburg, 2007, p. 57-78, p. 75. In London, as Trumbach points out, since the 18th century at least, there existed the "molly", the effeminate, passive homosexual man, a third – albeit not socially accepted – gender identity. At the end of the century as their female counterpart some women were categorized as sapphists or "tommies"; see TRUMBACH, Randolph, Sex and the Gender Revolution. Heterosexuality and the Third Gender in Enlightenment London. Volume 1, Chicago, 1998, p. 8. Above that sodomites have not always been considered as "temporary aberration" nor have homosexuals per se been seen as "species". In a recent study Dobler points out that Foucault's dictum has been misunderstood: in his original writing Foucault did not refer to a temporary aberration but to someone who was lead astray, to a recidivist; see DOBLER, Jens, Zwischen Duldungspolitik und Verbrechensbekämpfung. Homosexuellenverfolgung durch die Berliner Polizei von 1848 bis 1933, Frankfurt am Main, 2008, p. 15. Likewise, Halperin argues that Foucault's "schematic opposition between sodomy and homosexuality is first and foremost a discursive analysis, not a social history, let alone an exhaustive one. *It is not an empirical claim about the historical existence or nonexistence of sexually deviant individuals.*"; HALPERIN, David, "Forgetting Foucault; Acts, Identities, and the History of Sexuality", *Representations*, Vol. 63, 1998, p. 93-120, p. 99.

[51] E vom 12.9.1902, KH 2747.

[52] "...jede Handlung, welche, der Erregung des Geschlechtstriebes dienend, die von der Sitte gezogenen Grenzen überschreitet"; KH 2747.

[53] See KRAFFT-EBING, Richard, Der Conträrsexuale vor dem Strafrichter. De Sodomia ratione sexus punienda. De lege lata et de lege ferenda. Eine Denkschrift, Leipzig, 1894, p. 17. See also BEACHY, Robert, "The German Invention of Homosexuality", *The Journal of Modern History*, Vol. 82, No. 4, 2010, p. 801-838, p. 818-820.

[54] "... die unter dem Namen der Lesbischen Liebe ... bekannte Unzucht"; E vom 18.2.1887, KH 1028.

[55] OÖLA BG/LG Linz Schachtel 490, 6 E Vr 2218/36: "... eines echten Urnings, eines Mannes mit weiblichem Geschlechtsempfinden und weiblichen Neigungen von Jugend auf."

other evidence indicating deviant sexuality. Still, the question whether Margarethe H. might suffer from "contrary sexual feelings" and could therefore be held responsible for her deeds was never asked. Psychiatric examinations in cases of unnatural fornication remained rare in the beginning of the 20th century but they were not unknown to Austrian criminal courts. Whether contrary sexual feelings offered a full excuse soon became a power struggle between judges and medical experts: The discussion did not only focus on scientific knowledge about deviant sexuality but on the question whether it was for the psychiatrist to determine the presence or absence of responsibility or for the judge.[56] The Supreme Court decided this question in favour of the latter and straightened out that "contrary sexual feelings" were only able to function as a full excuse if they were the symptom of a mental illness.[57]

Even though contrary sexual feelings did not serve as lawful excuse they could function as a mitigation cause. But the knowledge procured by sexologists seemed to have different implications for men and women. Five of 30 men accused of unnatural fornication in the court district of Linz in the same year as Margarethe H. had to undergo a psychiatric examination and three of them were diagnosed to suffer from "contrary sexual feelings".[58] Among the total number of male defendants in the analysed data 28 were examined but none of the women was sent to psychiatric examination. In 80 cases of male defendants contrary sexual feelings – either diagnosed by psychiatrists or simply assumed by the court – were accepted as a mitigation cause whereas – with one exception[59] – this proved to be irrelevant in case of female defendants. Considering women, psychiatric experts and law finding authorities seemed to be less concerned with the "inner life" or the "soul" than in case of men. The only case in which a woman was at least mentioned in a psychiatric opinion was that of Maria E., sentenced to eight months of hard labour together with her husband Franz E. in 1929. The couple had seduced their fourteen years old employee Franziska P. and while Franz E. had sexual intercourse with the girl, Maria E. touched her genitals and brought Franziska P. to touch hers. The preliminary investigation showed that this was not Maria E.'s first encounter with unnatural fornication. Former employee Leopoldine S. testified that Maria E. had wanted to use the same water for washing herself like Leopoldine S. did and "other nonsense". Finally, Maria E. asked Leopoldine S. "to let her touch it" showing her a flask of perfume and offering it to Leopoldine S. in case of approval.[60] Leopoldine S. claimed that she had no idea of her employer's intention, a testimony the court apparently believed since it did not institute proceedings against her. Nevertheless, it was Maria E.'s husband, who claimed that it was his "highest pleasure to see two women naked and to please them", who was examined. The psychiatric expert observed "a homosexual trait" based on the fact that Franz E. had fallen for excessive masturbation since the age of thirteen. That he rejected sexual intercourse with men, however, seemed to be of no importance at all.[61] His wife Maria E. was roughly considered in one sentence, in which the expert assumed that she must likewise suffer from "perverse sexual feelings" leading her to carry out acts that were "more or less homosexual".[62] Whereas Franz E.'s "homosexual trait" mitigated the sentence, Maria E.'s "morbid disposition" was not considered a mitigation cause.

Even in the case of Franziska K., the only woman who received a milder punishment due to her perversion, no psychiatric expert was called upon. Franziska K.'s sexual disposition was simply derived from a character reference issued by her hometown, asserting that she "has a bad reputation and abandoned herself to lesbian love"[63], and two previous convictions for the same offence.

5. Conclusion

Unnatural fornication between people of the same sex was among the very few sex related crimes at the beginning of the 20th century in which prosecution was only justified by morality and not by the violation of a person's legally protected interest. While the criminalization of male-male sexual acts was quite common among European countries, only a small number of countries punished sexual acts between women. Amongst them was Austria showing a long and unbroken history of the criminalization of unnatural fornication between both sexes. During the time period analysed in this paper several discourses on female same-sex sexuality overlapped and interacted with each other. Although the punishability of women had influence on the interpretation of the law, female same-sex sexuality was less visible than its male counterpart. The invisibility of female same-sex sexuality can be explained by the lack of importance attached to female sexuality in general. This perception resulted in a smaller number of cases of female unnatural fornication to be known by the public and to be studied. Only few sexologists addressed the subject of contrary sexual feelings among women at length. Those cases noticed by courts and by sexologists of-

[56] Concerning the question of authority see as well WETZELL, Richard, "Psychiatry and criminal justice in modern Germany, 1880-1933", *Journal of European Studies*, Vol. 39, No. 3, 2009, p. 270-289, p. 271.

[57] See E vom 27.2.1901, KH 2569; E vom 15.6.1908, KH 3474; E vom 19.4.1918, KH 4525.

[58] OÖLA BG/LG Linz, Schachtel 332, 6 Vr 1619/28; OÖLA BG/LG Linz, Schachtel 335, 6 Vr 635/28; OÖLA BG/LG Linz, Schachtel 335, 6 Vr 992/28; OÖLA BG/LG Linz, Schachtel 335, 6 Vr 1309/28; OÖLA BG/LG Linz, Schachtel 338, 11 Vr 6/29.

[59] OÖLA, BG/LG Linz Schachtel 476, 6 Vr 716/36.

[60] „Sie wollte sich auch gleichzeitig im selben Wasser waschen und solche ‚Tanz'. Einmal zeigte sie mir ein Fläschen [sic!] Parfum und sagte mir, daß ich dasselbe mitbenützen dürfe, wenn ich ‚ihrs angreifen lasse'"; OÖLA, BG/LG Linz Schachtel 347, 9 Vr 1242/29.

[61] „Zunächst ist daran festzuhalten, dass bei E. ein homosexueller Zug besteht [!], und zwar ein gewisser Narzissmus insofern, als er seit seinem 13ten Lebensjahre bis in die Jetztzeit hinein, also auch während seiner beiden Ehen, in ziemlich exzessiver Weise die Selbstbefriedigung pflegte. Einen gleichgeschlechtlichen Verkehr, sei es nun mit jugendlichen oder älteren Männern lehnt er ab." OÖLA, BG/LG Linz Schachtel 347, 9 Vr 1242/29.

[62] "Insbesonders die zweite Frau [Maria E.] dürfte gleichfalls sexuell krankhaft veranlagt sein, da sie an dem Mädchen P. Betastungen, also mehrminder homosexuelle Akte [!] vollzog." OÖLA, BG/LG Linz Schachtel 347, 9 Vr 1242/29.

[63] "... genießt einen schlechten Leumund u. ist der lesbischen Liebe ergeben."; OÖLA, BG/LG Linz Schachtel 476, 6 Vr 716/36.

ten involved women who were already otherwise perceived as sexual deviants and/or criminal like prostitutes allowing for the equalization of prostitution with all forms of female criminality and female sexual deviance. This association of female same-sex sexuality with female criminality at large throughout legal and medical discourse left little room for concerns about the culprit's inner life.

Notwithstanding the little importance attached to female same-sex sexuality the Austrian Supreme Court of Justice used the criminalization of unnatural fornication between women as an argument for broadening the interpretation of the law. The Court's reasoning was also based on the knowledge about human sexuality and sexual desire spread by sexologists at the turn of the century. The focus shifted from sexual acts to sexual sensation. The perception that a sexual act between persons of the same sex was only punishable if it resembled heterosexual coitus was abandoned. Thus, more and more acts were to be understood "sexual" and therefore held punishable.

Sexologists understood sexual acts between people of the same sex not as a vice but as the expression of a pathological condition which they called "contrary sexual feelings" or "sexual inversion". Arguing that same-sex sexuality belonged in the realm of medicine rather than criminal law medical experts raised the question of criminal responsibility. Judges won the power struggle concerning who was called to decide about a culprit's discretional capability and sense of discernment. Although contrary sexual feelings did not remove criminal responsibility they could function as a mitigating cause. In this respect as well legal and medical authorities paid much more attention to male than to female culprits. The idea that autonomous female sexuality itself was deviant and likely to be criminal impeded the consideration of contrary sexual feelings when it came to female culprits.