

BOOK REVIEWS

Hidden Holocaust? Gay and Lesbian Persecution in Germany 1933–1945 edited by Günter Grau, translated by Patrick Camiller (London: Cassell, 1995) pages i–xxvii, 1–308. Price \$39.95 (soft-cover). ISBN 0 304 32956 8.

There are still many valid reasons why, even today, law students, academics and practitioners should study the way in which the German legal system operated during the Nazi era between 1933 and 1945.¹ We can observe how a government, determined to set up a society based upon fixed notions of the ‘inherent’ superiority of persons on the basis of race, ethnicity, gender and sexuality, was able to adapt previous laws and/or enact new laws that made even acts of extermination against those deemed ‘inferior’ totally legal. During this process, the Nazi rulers were aided and abetted by legal and medical/scientific ‘experts’. We can also more fully appreciate that our own more benign forms of prejudice and discrimination, if allowed to continue unchecked and unchallenged, can result in a legal system that eschews basic notions of justice. More than any other example in history, the German legal system in 1933–45 also serves as a stark reminder of the inadequacies of a ‘black-letter’ approach to the study of law, the dangers of separating law from morality and the importance of studying law within an ethical framework. Furthermore, those interested in human rights and civil liberties will better understand the historical context of the modern human rights movement.

The chilling role of the legal and medical/scientific fraternity in furthering the aims of the Nazi regime is dramatically illustrated in Günter Grau’s excellent and overdue book entitled *Hidden Holocaust? Gay and Lesbian Persecution in Germany 1933–1945*.² It serves as an important historical record of ‘one area of the Nazis’ rule that has previously been neglected by researchers and is little known to the public’.³ The deeply homophobic policies of the Nazi rulers and the resulting discrimination, exclusion and, in some cases, extermination have taken a long time to be fully appreciated by human rights lawyers and activists. Discrimination based upon sexuality was not explicitly prohibited in the international human rights instruments that followed the end of the Second World War.⁴

¹ For a detailed account of the Nazi legal system, see Ingo Muller, *Hitler’s Justice: The Courts of the Third Reich* (1991).

² Günter Grau (ed) *Hidden Holocaust? Gay and Lesbian Persecution in Germany 1933–1945* (Patrick Camiller, trans; 1995).

³ *Ibid* xxiv.

⁴ Universal Declaration of Human Rights, GA Res 217A, 3 UN GAOR (183rd plen mtg), UN Doc A/Res/217A (1948) art 2 prohibits discrimination on the grounds of ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status’. See also the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976) art 2(1) and International Covenant on Economic,

Gay and lesbian activists have been fighting over the years for such discrimination to be treated as of equal importance to discrimination based upon the traditional grounds of gender, race and ethnicity. Fortunately, there seems to be much more attention being paid in the 1990s to sexuality as an international human rights issue⁵ and Grau's book should help provide an important historical context to these recent moves.

The book was not specifically designed to be a text on gay and lesbian oppression during the Nazi era,⁶ rather, it was meant to simply serve as documentary evidence of how Nazi policies towards gays and lesbians were framed and pursued. Although it is not by any means a complete documentary record (the editor admits that some important documents are missing),⁷ the documents included more than adequately reflect the Nazi legal and medical/scientific edifice of gay and lesbian oppression. There are a total of 104 documents provided, which include texts of laws, decrees, orders, speeches, minutes and correspondence that highlight the Nazi regime's approach to gays and lesbians. In this respect, the book plays a similar role to *Documents on the Holocaust*,⁸ the definitive historical collection of written materials connected with the Holocaust. However, in my opinion, due to excellent introductions by both the editor⁹ and Claudia Schoppmann¹⁰ and the editor's insightful comments in introducing each section of documents, the book is actually more than a simple collection of documents.

The editor claims that the documents are not meant to be in chronological order, however, to a large extent this is not true. The first four parts of the book examine (respectively) the periods from the Nazis' rise to power in 1933 to September 1935; from September 1935 to 1936; from 1936 to the start of war in 1939; and finally from 1939 to the end of the Nazi era in 1945. These documents reveal the range of Nazi oppression of gays and lesbians: criminalisation of the sexual practices of male homosexuals (already in place prior to 1933, but further

Social and Cultural Rights, 16 December 1966, 993 UNTS 3, art 2(2). There are some lawyers who argue that 'sex' in this context includes 'sexual orientation': see, eg, Robert Wintermute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention and the Canadian Charter* (1995) 199–292. This issue is not yet settled under international law.

⁵ Note the publication of recent books such as Wintermute, above n 4 and Eric Heinze, *Sexual Orientation: A Human Right* (1995); and the fact that organisations such as Amnesty International have, since 1994, surveyed human rights abuses on the grounds of sexual orientation.

⁶ Some aspects of this subject are explored in Richard Plant, *Pink Triangle: The Nazi War Against Homosexuals* (1986).

⁷ Such as files from Gestapo headquarters and the central Reich Criminal Police Bureau: see Grau, above n 2, xxiv.

⁸ Yitzhak Arad, Yisrael Gutman and Abraham Margalio (eds), *Documents on the Holocaust* (1981).

⁹ Günter Grau, 'Persecution, "Re-education" or "Eradication" of Male Homosexuals Between 1933 and 1945' in Günter Grau (ed), *Hidden Holocaust? Gay and Lesbian Persecution in Germany 1933–1945* (1995) 1.

¹⁰ Claudia Schoppman, 'The Position of Lesbian Women in the Nazi Period' in Günter Grau (ed), *Hidden Holocaust? Gay and Lesbian Persecution in Germany 1933–1945* (1995) 8.

increased during the Nazi period),¹¹ surveillance, registration, segregation, isolation and incarceration. Many of these documents are simply bureaucratic orders or minutes of policy discussions. It is really only Document 14 that brings home the personal sufferings of victims of the Nazi regime. This was a plea by an anonymous gay man in June 1935 to the Reich Bishop, Ludwig Müller, asking him to intervene in order to have the appalling treatment of male homosexual prisoners alleviated.¹²

The last two parts of the book reveal the ultimate horrors perpetrated by the Nazi regime against gay men:¹³ medical experimentation and, for those who could not be 'cured', extermination. Part V examines the Nazis' increasing use of castration to 'cure' male homosexuals, whereas Part IV is a special case study of homosexuals in the Buchenwald concentration camp. This includes documents relating to hormone experiments carried out by so-called medical/scientific 'experts'¹⁴ inside the camp. On some levels, these documents are disappointing in that they do not adequately reveal the full extent of the horror of what happened, but instead, they consist of plain bureaucratic orders or bland details of rather minor events that took place inside the camp. The editor's comments¹⁵ and the play *Bent*¹⁶ provide a fuller sense of Nazi atrocities against gays and lesbians. However, on another level, the very ordinariness of these documents might do more to explain the reasons why the abominations of the Nazis' rule were able to occur with relatively little resistance or questioning by the perpetrators themselves.

While estimates of the numbers of gays and lesbians killed by the Nazi regime fluctuate between 200,000 to 1.5 million,¹⁷ the editor sets the figure more realistically at about 50,000. This is because re-education and possible castration came before murder; extermination was only meant to be a last resort if these other methods failed. The editor points out that it was possible for gays and lesbians to avoid prosecution by socially adapting to the reality of the time; for example, by denying their sexuality and entering into sham marriages. If a homosexual person was prepared to desist from their sexual practices and carry out useful work for the state he or she would be left relatively alone, although still subject to surveillance and heavy restrictions. For this reason, the editor admits that the persecution of gays and lesbians during the Nazi period was not the equivalent of a Holocaust¹⁸ (aptly referred to by Grau as a potential 'homo-

¹¹ German Penal Code art 175 (criminalising male homosexual sexual activity) had been in existence since 1871, but was revised and its scope substantially widened in 1935. See Grau, above n 2, document 18.

¹² Ibid document 14.

¹³ In general, most of the overt repression was committed against gay men, not lesbians. See below text accompanying nn 28–33.

¹⁴ The main 'expert' was a Dane, Dr Carl Peter Jensen, alias Carl Vaernet: Grau, above n 2, 281.

¹⁵ Ibid 264–5, 281–2.

¹⁶ Martin Sherman, *Bent* (1979).

¹⁷ See Grau, above n 2, 6, fn 7.

¹⁸ For a discussion of the word 'Holocaust', see Yehuda Bauer, 'Whose Holocaust?' (1980) 26 *Midstream* 42; Yehuda Bauer, 'On the Place of the Holocaust in History' (1987) 2 *Holocaust and Genocide Studies* 209.

caust').¹⁹ Unlike the Jews, there was never any Nazi intention to wipe out all homosexuals; rather it was the homosexual act or 'type' of person that needed to be eliminated. This is one of the most significant points of the book, which explains more clearly the treatment of gays and lesbians in comparison to the repression of other 'inferior' groups.

The estimate of 50,000 killed is still obviously a massive number of people put to death for no other reason than their sexuality. However, the figure of 1.5 million does accurately provide the estimated number of gay and lesbian *victims* of Nazi policies. This is because the regime published much propaganda which labelled gays and lesbians as inferior and diseased, which left indelible psychological stains on people whose lives were forever shattered and traumatised by this societal indoctrination, prejudice and climate of fear. The editor thus correctly concludes that all gays and lesbians were Nazi victims, even those who were never prosecuted.

Gay and lesbian prosecution during the Nazi's rule is also worth studying because of what it may tell us concerning prejudicial attitudes towards family forms that do not fit into the dominant version of what a 'family' should be. Again, by studying the extreme of prejudice we can obtain an insight into the dangers and problems associated with our remaining prejudices as to what our present day 'family' should consist of. Although we have clearly come a long way since the 'nuclear family only' days of the 1950s and 1960s,²⁰ we still seem to have trouble in accepting some forms of the 'family'.²¹ The Nazi version of an acceptable 'family' was a strict nuclear family, free of 'infection', especially from Jews, gypsies and all other 'non-Aryan' people. This 'family' was to be geared totally towards procreation; increasing the size of the German *Volk* was a major priority of the Nazi State. Because of this, there was to be an institutionalised gender hierarchy; women were to be confined to marriage—motherhood roles in order to breed the next generation of the *Volk*. Unpaid domestic labour was to be the German woman's lot in life.²²

From this picture of the 'family', it is clear why Nazi ideology and policies were so opposed to homosexuality. Grau mentions four obvious reasons.²³ First, with every homosexual, a potential producer of children was lost to the *Volk*. It was thus quite logical that when the Criminal Police Department was restructured in 1936, an Office was set up 'for the Combating of Homosexuality and Abortion';²⁴ both these being seen as a direct threat to the prevailing population

¹⁹ Grau, above n 2, 5.

²⁰ For example, unlike in the 1950s and 1960s, we now accept de facto relationships and single parents as legitimate family forms.

²¹ For example, we still do not allow same sex couples to marry, nor do we allow polygamous marriages to be carried out in Australia, nor do we recognise Aboriginal customary marriages: *Marriage Act 1961* (Cth).

²² As a result of these policies, the Nazis, upon coming to power, immediately closed down all 'feminist' orientated women's organisations and all women were removed from positions of power throughout Germany.

²³ Grau, above n 2, 3.

²⁴ *Ibid* 5.

policy.²⁵ Secondly, the Nazis feared that open homosexuality would corrupt children, causing a potential ‘epidemic’ of homosexuality. Thirdly, it was thought that homosexuals may form certain organisations that would eventually politically challenge the state. The political nature of the war against homosexuality is made clear in a number of the documents in this collection,²⁶ showing how the personal and the political were (and still are) interconnected. Finally, it was felt that homosexuality somehow endangered public morality. Some of these arguments are still used today to deny equality to gays and lesbians.

However, perhaps the most important reason for the persecution of gays and lesbians by the Nazis was the question of eugenics — the worry of endangering the ‘hereditary flow’ of the *Volk*. This is interestingly illustrated by the Nazis’ attitude towards homosexuals in occupied Poland, whom there was no need to prosecute ‘unless the way in which the offence was committed and its becoming public knowledge carry the risk of contagion to the German population as well.’²⁷ Thus, despite the inferior status of Poles in the Nazi hierarchy, German homosexuals actually had a far greater chance of arrest and prosecution than did Polish homosexuals!

Claudia Schoppmann’s contribution, referring to the situation of lesbians in Nazi Germany, is an important one. Only six of the documents in the collection deal specifically with the position of lesbians.²⁸ This is perhaps a typical example of both gender bias and the historical lack of attention and awareness of lesbianism. The Nazis published little documentation on this issue, due mainly to their general discounting of women’s role in society, except for marriage–motherhood and unpaid domestic labour in the home. However, given their rigid views concerning the role of women, and the direct challenge the very presence of lesbians made to this role and to their population policy, some may find it surprising that lesbianism was not specifically outlawed. In fact, this was a matter of some debate within the Nazi legal establishment,²⁹ and some German legal experts such as Justice Ernst Jenne³⁰ and Dr Rudolf Klare³¹ were strongly in favour of specific criminalisation of lesbian sexual activity. However, these views did not prevail for a number of reasons. First, it was argued that lesbianism did not preclude procreation: lesbians were considered to be ‘curable’. Secondly, homosexuality was far more widespread amongst men, and thus lesbianism was seen as much less of a threat. The low public profile of women in the Nazi State would have contributed to this perception. The fact that it was less conspicuous meant also that corruption of young women was more unlikely. Finally, there

²⁵ See the extract of the lecture by Josef Meisinger, Head of the Reich Office: *ibid* document 38.

²⁶ See, eg, *ibid* documents 38, 81: ‘[i]n our eyes they are not only criminals but much more: *political criminals*’.

²⁷ *Ibid* document 72.

²⁸ *Ibid* documents 21–6. Document 20 also contains some references to lesbian issues.

²⁹ See *ibid* document 21, an extract from the minutes of the discussions of the Academy of German Law on this issue. Interestingly, the fact that Austria, a fellow German speaking country, did not distinguish in their criminal laws between male and female homosexuality seemed to be of some importance in the discussion.

³⁰ *Ibid* document 22 sets out his views.

³¹ His views are extracted at *ibid* 72, 84.

were the pragmatic considerations that criminalisation might have started a flood of unwarranted legal proceedings and investigations.

Importantly, however, Schoppmann points out that the fact that lesbianism was not specifically outlawed did not mean that lesbians did not suffer. All lesbian clubs and organisations were closed and all lesbian newspapers, magazines and other printed matter were destroyed. Lesbians became subject to surveillance and thus many decided to socially adapt by looking 'feminine' and marrying persons of the opposite sex. Those who defied the authorities were tried and punished on the pretext of other 'anti-social' offences in the German Penal Code 1871. After 1937 lesbians (like all persons) could be arrested for being 'anti-social' or 'socially maladjusted', and then sent to concentration camps.³² One particularly nasty way the government dealt with lesbians was to force them into brothels as prostitutes in order to 'get them back on the right path.'³³ Because lesbianism was so hidden, it again is difficult to estimate how many died during the Nazi era solely due to their sexuality; but again, it is clear that all German lesbians were victims of the regime.

For those particularly interested in the legal system under the Nazi regime and how it was harnessed to further the homophobic aims of the regime, the book provides a wealth of information and food for thought. Many of the documents in the collection depict bureaucratic decision-making of legal 'experts' that shows a total disregard for notions of humanity, compassion, principles of fair and equal treatment before the law, and the rule of law in general. This extends to decision-making by both the ordinary courts and specialist courts, such as military courts and the special courts for members of elite Nazi corps (the *Schutzstaffeln* or the 'SS') and police. These special courts were established following a specific directive from Hitler³⁴ which authorised them to pronounce the death penalty on any member of the SS or police found to have committed even one 'unnatural' sexual act. This type of legal approach also typified the approach of the legal 'experts' mentioned in the book.³⁵ It also extended to activities at universities, as indicated by an extract of a 1937 legal dissertation which stated:

It can remain open whether the *Volk* is already capable of understanding the elimination of inferior types by killing them. But today it certainly welcomes at least the extermination of sex criminals and thus the prevention of an anti-social progeny. But the whole of the law should be in the service of racial regeneration.³⁶

³² Following Himmler's decree in December 1937 on the 'Preventative Combating of Crime': *ibid* document 47.

³³ *Ibid* 14.

³⁴ Made on 15 November 1941: *ibid* document 62.

³⁵ Such as Professor Dr Hans Frank, Dr Roland Freisler, Professor Dr Wenzeslaus Gleispach, Dr Günther Joel and Dr Rudolf Klare. Descriptions of each of these men are found in the 'Register of Persons': *ibid* xvii-xxiii.

³⁶ H Puvogel, *Die leitenden Grundgedanken bei der Entmannung Gefährlicher Sittlichkeitsverbrecher* (Legal dissertation, University of Göttingen, 1937): *ibid* 259.

Ingo Muller's important book *Hitler's Justice: The Courts of the Third Reich*³⁷ showed that members of the legal profession were not simply tools of the system, forced into simply administering Nazi edicts. Often lawyers, including judges, academics and government bureaucrats, went above and beyond what the 'law' directly said to add to the already unjust and discriminatory situation. Many were thus shown to be just as racist, sexist and anti-Semitic as their leaders and, not surprisingly, those with the most 'radical' views rose to positions of great prominence in the Nazi government. The documents in Günter Grau's collection show that the legal profession was equally as homophobic as Nazi ideology, and was thus complicit in the oppression of gays and lesbians.

This is clearly shown by the history of the crucial art 175 of the German Penal Code 1871, which criminalised male homosexual criminal activity. Although the editor points out that art 175 had been used to prosecute male homosexuals well before the Nazis' rise to power, it was used far more rigorously after 1933 and was substantially amended in 1935 in order for it to have wider applicability.³⁸ The editor states that after 1935 there was a surge of convictions under arts 175 and 175a,³⁹ mainly because 'judges followed an extreme interpretation and extension of the new categories.'⁴⁰

After 1935, judges were given the means by which to pronounce defendants guilty of an offence even though no written statute could be said to apply to the situation. Article 2 of the newly amended criminal code extended offences beyond the written law to what judges could find was the 'unwritten source of law',⁴¹ 'the basic principle of a criminal law'⁴² and, most ominously for gays and lesbians, to what promoted a 'healthy public feeling'.⁴³ In this manner, the rule of law became a farce; despite the cloak of legality, people were now able to be punished for 'crimes' that could not actually be found on the statute books. Judges became creative in interpreting art 175 and related sections in order to find defendants guilty despite the literal words of the relevant section. Another indication of the lack of the rule of law was the fact that especially after 1937 it was common for the *Gestapo* to place prisoners in concentration camps even after they had served their full sentence in prison.⁴⁴ Homosexual prisoners were also made available for experimentation purposes to many institutions doing

³⁷ Muller, above n 1. For a review of this book, see Sam Garkawe, 'Ingo Muller — *Hitler's Justice: The Courts of the Third Reich*' (1994) 20 *Monash University Law Review* 172.

³⁸ Grau, above n 2, document 18.

³⁹ *Ibid.* Article 175a was a further crime, relating to homosexual acts committed in the context of abuse of a relation of dependence. This offence was added to the statute books in 1935.

⁴⁰ However, the editor points out further explanations for this trend of greater prosecutions which began in 1936. He points to greater willingness of the public to report alleged homosexual activity, and a more coordinated national approach to the issue by the re-organised police force: *ibid* 131–2.

⁴¹ *Ibid* 65.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid* 132.

'medical/psychological' research into the 'prevention' and 'cure' of homosexuality.⁴⁵

I have two minor criticisms of this book. First, I was disappointed that no bibliography was included. This should have been provided for the purposes of further research, and because the documents are far from complete.⁴⁶ Secondly, for the sake of my own curiosity, I would have liked the editor to have provided a more complete history by spending some time discussing the position and prosecution of homosexuals both before and after the Nazi period. This is particularly so in light of the history of art 175, which remained on the statute books in Germany between 1871 and 1994.

Despite these minor criticisms, I would strongly recommend this book. It is particularly relevant to human rights lawyers, criminologists and historians, and especially pertinent to those interested in issues relating to sexual orientation. However, anybody concerned with basic questions of justice and ethics will find this book challenging and thought provoking. The history of gay and lesbian persecution during the Nazi era has for far too long not been given the attention it deserves.

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⁴⁵ Ibid 280. Most of these institutions were privately owned, although they were often generously funded by the Nazi government.

⁴⁶ Ibid xxiv. The editor admits that some were omitted because they were published elsewhere, and that a considerable number had been destroyed.

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