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## 377 and the Unnatural Afterlife of British Colonialism in Asia

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# 377 and the Unnatural Afterlife of British Colonialism in Asia

Douglas E. Sanders

## Abstract

The late 19<sup>th</sup> century saw the spread of anti-homosexual criminal laws to British colonies. The iconic example was the Indian Penal Code of 1860, with its prohibition of 'carnal intercourse against the order of nature,' a rewriting of the anti-Catholic 'buggery' law of 1534. The language of 377 travelled around the British colonial world. France and certain other parts of Europe had decriminalized homosexual acts a century earlier, so the colonial powers of Europe spoke with different voices. Modern decriminalization is largely the product of the human rights era - sixty years since the Charter of the United Nations and the Universal Declaration of Human Rights.

**KEYWORDS:** sodomy, homosexuality, human rights

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Section 377 of the *Indian Penal Code* of 1860 made “carnal intercourse against the order of nature” an offence.<sup>1</sup> This provision (or something very close to it), understood as prohibiting homosexual anal intercourse, is presently in force in all former British colonies in Asia with the exception of Hong Kong and Singapore (the latter retaining an alternative prohibition). Even the section number, 377, is repeated in the current laws in force in India, Pakistan, Bangladesh, Myanmar/Burma, Singapore, Malaysia and Brunei, reflecting the exact copying of the 1860 code for other British colonies. Sri Lanka, Seychelles and Papua New Guinea have the key wording from article 377, but different section numbers. Parallel wording appears in the criminal laws of many of the former British colonies in Africa. Prohibitions in Central Asia and in parts of the Middle East seem also to have colonial origins, some deriving from an early Russian copying of Western European laws.<sup>2</sup>

Of the great colonial powers of Western Europe – Britain, France, Germany, the Netherlands, Portugal and Spain – only Britain left this legacy to its colonies.<sup>3</sup> The British legacy is not restricted to one kind of provision. There were three: buggery (1534), unnatural intercourse (1860) and gross indecency (1885). To try to understand the history, we will look at the global impact of each of these three legislative innovations in turn. Their histories overlap, so the story can be confusing at times.

## I. BACK TO BUGGERY

British criminal laws prohibiting certain homosexual (and possibly certain heterosexual) acts, as well as bestiality, began in 1534. Legislation in the reign of Henry VIII, prohibited:

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<sup>1</sup> Human Rights Watch, “This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism” (New York, 2008) <http://www.hrw.org/en/reports/2008/12/17/alien-legacy-0>, [HRW]; Sumit Baudh, “Human Rights and the Criminalisation of Consensual Same-Sex Sexual Acts in the Commonwealth, South and Southeast Asia”, (New Delhi: South and Southeast Asia Resource Centre on Sexuality, 2008), [www.tarshi.net/downloads/Working\\_%20Paper\\_Sbaudh\\_16M08.pdf](http://www.tarshi.net/downloads/Working_%20Paper_Sbaudh_16M08.pdf).

<sup>2</sup> Daniel Ottosson, “State-Sponsored Homophobia: A World Survey of Laws Prohibiting Same Sex Activity Between Consenting Adults” (2008) ILGA, International Lesbian and Gay Association, [www.ilga.org/statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2008.pdf](http://www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2008.pdf).

<sup>3</sup> France did impose anti-homosexual criminal laws on some French colonies, and versions of these survive in countries such as Benin, Cameroon, and Senegal. *HRW, supra*, note 1 at 4.

...the detestable and abominable Vice of Buggery committed with mankind or beast.<sup>4</sup>

The word “abominable” was taken from Leviticus. Buggery was described as a “vice.” The term “buggery” itself traces back to “bougre,” or “heretic” in old French, and to the Latin “Bulgarus” for Bulgarian (equated with the heretics who followed the Orthodox branch of Christianity).<sup>5</sup> “Heresy” was a common euphemism in the Middle Ages for a group of sexual sins, so the 1534 wording was not innovative. The 1534 statute took over the offence of buggery from ecclesiastical law, so the prohibition was actually not new in 1534. The religious character of the provision is unmistakable.

We must go behind “buggery” to Leviticus, where we find the most influential condemnation of male homosexual acts in world history. These passages are common to Judaism and Christianity but not Islam. The two references are 18:22 and 20:13:

You shall not lie with a male as with a woman. It is an abomination.

If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death, their blood is upon them.

Leviticus also prescribes the death penalty for cursing ones parents, adultery, incest, and bestiality. It was also an “abomination” to eat pork, sow a field with two different kinds of seeds or weave cloth from two different kinds of fibers. The sexual prohibitions (quoted above) are part of a section of Leviticus called the “Holiness Code.” The Israelites were living in lands occupied by the Canaanites and other peoples. Circumcision began as a way of marking the Israelite men as separate from others. It was a sign of God’s covenant with Abraham. The concern was Jewish identity in the midst of other peoples. Homosexual acts and other sexual liberties were said to be practiced by the Canaanites on ritual occasions. Male-male sexual acts were prohibited for the Israelites as pagan.<sup>6</sup>

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<sup>4</sup> William N. Eskridge Jr, *Gaylaw – Challenging the Apartheid of the Closet*, (Harvard University Press, 1999), 157 gives the date as 1533 [*Eskridge Gaylaw*]; William N. Eskridge Jr, *Dishonorable Passions : Sodomy Laws in America 1861-2003* (Viking, 2008) at 16 [*Eskridge Passions*]. However, Gorton is convinced that it was 1534. Don Gorton, “Timing of Henry VIII’s Sodomy Law Matters” *The Gay and Lesbian Review* (Jan-Feb 2004) 6 [*Gorton*].

<sup>5</sup> *Compact Oxford English Dictionary*, 2d ed., s.v. “buggery”.

<sup>6</sup> Daniel Melminiak, *What the Bible Really Says about Homosexuality*, Sacramento: Alamo Square Press, 1994) at 46-7. On page 48, the author explains that ‘abomination’ referred to “any violation of purity rules that governed Israelite society and kept the Israelites different from the other peoples.” This suggests that the prohibition of male-male sex in Leviticus was not linked to

Early Christianity dropped most of the rules in Leviticus, including the food laws and circumcision. On these points, Islam is more consistent with Judaism than Christianity. Why did the prohibition on male-male sexual acts survive? Louis Crompton attributes its survival to the influence of the Jewish theologian Philo of Alexandria (20 BC – AD 50) who, like the early Christians, was concerned with reconciling Jewish and Classical traditions.

Widely read by early Christian theologians, Philo has been called the father of the fathers of the church, though he remained a faithful Jew all his life.<sup>7</sup> Philo railed against effeminate homosexual men and called for them to be killed.

In former days the very mention of [pederasty] was a great disgrace, but now it is a matter of boasting not only to the active by to the passive partners, who habituate themselves to endure the disease of effemination, let both body and soul run to waste, and leave no ember of their male sex-nature to smolder. Mark how conspicuously they braid and adorn the hair of their heads, and how they scrub and paint their faces with cosmetics and pigments and the like, and smother themselves with fragrant unguents... These persons are rightly judged worthy of death by those who obey the law [of Moses], which ordains that the man-woman who debases the sterling coin of nature should perish unavenged, suffered not to live for a day or even an hour, as a disgrace to himself, his home, his native land and the whole human race.<sup>8</sup>

In contrast to the passages in Leviticus, the story of Sodom in the Book of Genesis, 19:1-11 plays a much less central role. In that story, God destroyed the cities of Sodom and Gomorrah for the wickedness of the people, but allowed Lot and his immediate family to escape. Modern scholars regularly say that the Sodom story is not about homosexual acts, but about the sin of inhospitality on the part of the rich, aggressive and self-centered local people.<sup>9</sup> The Old and New

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the issue of procreation but served to strengthen the persuasiveness of the ritual differentiation strategy. If the alleged Canaanite practices were true, they may have confined homosexual acts to special, religiously sanctioned occasions.

<sup>7</sup> Louis Crompton, *Homosexuality and Civilization*, (Cambridge: Harvard University Press, 2003), at 43-4 [Crompton].

<sup>8</sup> Philo, translated by F.H. Colson and G.H. Whitaker, 10 Volumes, (Cambridge: Harvard University Press, 1929-1962), 3:37-8; 7:499, quoted in Crompton, 2003, at 44. Crompton notes the anti-homosexual views of early Christian scholars, pages 117-118.

<sup>9</sup> Derrich Sherwin Bailey, *Homosexuality in the Western Christian Tradition*, (London: Longmans Green, 1955); John Boswell, *Christianity, Social Tolerance and Homosexuality*, (Chicago: University of Chicago Press, 1980), 93-97; Mark Jordan, *The Invention of Sodomy in Christian Theology*, (Chicago: University of Chicago Press, 1997), 30-37 [Jordan].

Testaments either support or do not rule out this interpretation.<sup>10</sup> Philo, however, identifies male-male sex as one of the sins of the people of Sodom.<sup>11</sup>

Mark Jordan writes that “sodomy” emerged in Christian theology as a term for one or more sexual acts for the first time in the eleventh century.<sup>12</sup> This does not suggest that there were no earlier condemnations of same-sex acts under the rubric of “heresy” and “luxuria” (lust), which could be among the ‘sins of the Sodomites.’ It only suggests that the modern popular interpretation of the Sodom story as focused, perhaps exclusively, on homosexual acts comes rather late in Christian theological writings. By that time, Leviticus had already become the source for Roman and European laws, so there was no need to invoke the Sodom story. It is mainly in the criminal laws in the United States that “sodomy” becomes standard legal usage. In Islam, the condemnation of male same-sex acts is unequivocal in the retelling of the story of Lot in the Qur’an (which does not name his city). The text of the Qur’an appeared in the 7<sup>th</sup> century, suggesting that an anti-homosexual reading of the Sodom story was probably well-established by that time.

The role of Philo may explain why the condemnation of Paul in his Letter to the Romans, 1:26-27, seems to play no important role in the legal history.<sup>13</sup> We can assume that Philo, who remained Jewish in religion, would not have relied on Paul. Jesus makes no reference to homosexual acts.

### **A. Christianity to Roman Law to European Law**

We do not seem to have a detailed history of the transmission of the Leviticus prohibition from early Christianity into Roman law, then European ecclesiastical law, before becoming part of secular law, though Crompton gives parts of the story in some detail. He gives an overview:

When the Roman Empire became Christian in the fourth century, the Old Testament death penalty for male homosexual behavior was incorporated into Roman law. Later, this same precedent was cited when death for homosexual behavior was prescribed by criminal codes in France, Spain, England, the Holy Roman Empire, the Italian states, Scandinavia...<sup>14</sup>

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<sup>10</sup> Ezekiel 16:49-50 is explicit on the pride and greed of the people of Sodom.

<sup>11</sup> *Crompton, supra*, note 7 at 137.

<sup>12</sup> *Jordan, supra*, note 9 at 1.

<sup>13</sup> Louis Crompton, in contrast, sees Paul’s statements as highly influential: Crompton, 2003, 113-4. William Eskridge takes language from Paul for the title of his study *Dishonorable Passions, supra*, note 4.

<sup>14</sup> *Crompton, supra*, note 7 at 34 and chapter 5.

A key early vehicle for this transition was the Eastern Roman Emperor Justinian's law code, compiled between 529 and 534. This was an organized codification of Roman law that prescribed the death penalty for male-male sexual acts. It became the basis of much of European law and of ecclesiastical or canon law. Early in Justinian's rule certain bishops were accused of homosexual acts and tortured. At least one was castrated and carried naked through the streets of Constantinople. One of Justinian's laws warned that homosexual acts "cause famine, earthquake and pestilence."<sup>15</sup>

All European jurisdictions, it seems, mandated criminal prohibitions, whether based on Roman law, the direct enforceability of the Leviticus prohibition, canon or ecclesiastical law or local customary law influenced by the Christian tradition. Some, like Spain, had prohibitions in both ecclesiastical and secular law. The Protestant Reformation brought an end to the enforcement of canon law in Church courts in major parts of Europe. In countries like Denmark, Sweden and Britain, the prohibition of homosexual acts had been exclusively a matter of church law. It now had to come under secular law, enforced in state courts.<sup>16</sup> The same was true in the German empire.

With the introduction of the *Constitutio Criminalis Carolina* in 1532, criminal prosecution of sodomy for the first time gained an unmistakably clear legal basis in the German empire. In article 116 of the *Constitutio Criminalis Carolina*, women and men found guilty of same-sex sexual acts were to be sentenced to death.<sup>17</sup>

The 1534 buggery law in Britain is an example of this shift. It came one year after Parliament ended Papal jurisdiction over the English Church. Famously, the Protestant Reformation in Britain was led from above by King Henry VIII to

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<sup>15</sup> Crompton, *supra*, note 7 at 142-147.

<sup>16</sup> Canon law applied in Denmark until 1526. A prohibition of male-male sex was not, at that point, part of secular law, and a prohibition was not specifically enacted until 1683, although prosecutions occurred before that date. Wilhelm von Rosen, "Sodomy in Early Modern Denmark", in Kent Gerard & Gert Hekma, ed., *The Pursuit of Sodomy* (Haworth, 1988,) 177 [*von Rosen*] [Gerard and Hekma]. In Sweden, male-male sexual acts are mentioned in secular law for the first time in 1608. The National Law Code of 1734 contained no sanction, apparently a deliberate decision to avoid mentioning such activities to avoid publicizing their possibility, a recurring theme in European histories of the subject. Nevertheless, prosecutions occurred. Jonas Liliequist, "State Policy, Popular Discourse, and the Silence on Homosexual Acts in Early Modern Sweden" in Jan Lofstrom, ed. *Scandinavian Homosexualities*, (Haworth, 1998) 15. An explicit prohibition was enacted in Sweden (perhaps in 1866) and modern decriminalization occurred in 1944. On not naming the sin or offence, see Jordan, *supra*, note 9 at 133, 146 and 147; Helmut Puff, *Sodomy in Reformation Germany and Switzerland 1400-1600*, (Chicago: University of Chicago Press, 2003) 54 [Puff].

<sup>17</sup> Puff, *supra*, note 16 at 29.

secure his divorce and remarriage. The buggery law was part of a widening campaign against Catholics, which led to the expropriation of the monasteries, a campaign that began in earnest in 1536.

By 1534 the government was embarked upon a more sweeping program of change for the English Church. Henry had himself declared “Supreme Head” of the Church, in effect replacing the Pope at the apex of ecclesiastical authority. Moreover, it is likely that the chief minister Thomas Cromwell was then already eyeing the rich monastic properties in England for expropriation. Though official greed drove the dissolution of the monasteries, Cromwell characteristically sought a pretext for the policy. Thus the supposed sexual immorality of those in religious vocation was trumpeted.

Hen.8, c.6 [the buggery law] gave the common law courts jurisdiction over acts of sodomy, and explicitly denied “benefit of clergy,” the immunity ecclesiastics had traditionally enjoyed from punishment by royal officials. Together with a “visitation” campaign in 1535 that trumped up tales of sexual indiscretion in the religious houses, the sodomy law made the tendentious point that the Catholic Church in England had lapsed in its adherence to divine law. Henry stepped in to police religious morals, and righteously smote the monasteries where sins like buggery had been profligate; or so the pretext ran. . . . The program went on to encompass the execution of diehard English Catholics, most notably Sir Thomas More in 1535. The expropriation of the monasteries began in earnest in 1536, with Cromwell’s slanderous groundwork well in place. Accusations of sodomy rang out in the Parliamentary debate over the 1536 bill to suppress the monasteries.<sup>18</sup>

The 1534 legislation was anti-Catholic. It cannot be understood apart from the break of the English church from Rome and the confiscation of monastic properties.

We see certain patterns of language used over time: buggery, sodomy, a crime against nature, a crime not to be mentioned, not to be named. Thomas Aquinas defined ‘sodomitic vice’ as a subspecies of the sin ‘against nature’, a vice performed with a person of the same sex.<sup>19</sup> In 1644, Sir Edward Coke described the crime as “a detestable and abominable sin, among Christians not to be named.”<sup>20</sup> The *Laws of War*, governing the Navy and, first enacted in 1652, were amended in 1660 to prohibit “the unnatural and detestable Sin of Buggery or

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<sup>18</sup> Gorton, *supra*, note 4 at 6.

<sup>19</sup> Quoted in Robert Mills, “Male-Male Love and Sex in the Middle Ages” in Matt Cook, *et al*, *A Gay History of Britain* (Westport: Greenwood Press, 2007) 1 at 14 [Cook]. Mills cautions that the elements that constituted ‘sodomy’ in the medieval period were notoriously vague.

<sup>20</sup> Coke, *Institutes*, 1644, 58-9.

Sodomy with Man or Beast.<sup>21</sup> Sir William Blackstone, in his 1767 *Commentaries on the Laws of England*, referred to the 1534 law as prohibiting the “infamous crime against nature.”<sup>22</sup> Edward Coke, in his compilation of English law in the late 17<sup>th</sup> century wrote that buggery comprised acts

...Committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast.

Anal sex between two men or a man and a woman, along with bestiality, were covered by the provision.<sup>23</sup> Here we see the seminal wording for section 377 of the *Indian Penal Code* of 1860.

The 1534 buggery law applied in the American colonies either as a matter of inherited common law or by local statute. Twenty prosecutions are known to have occurred in the colonial period. After independence, most states eliminated the death penalty. New language developed criminalizing “sodomy”, “carnal knowledge” or “the infamous crime against nature.” From 1610 to 1900, each state enacted a criminal prohibition. Eskridge notes that a redefinition of these laws after 1880 includes oral sex.<sup>24</sup>

Four of the twenty-five German states did not criminalize homosexual acts. Germany unified in the late 19<sup>th</sup> century under Prussian leadership and Prussia’s prohibition became Paragraph 175 in a new national code. Like 377, 175 became another number, long associated with an anti-homosexual law.<sup>25</sup> Peter the Great, credited with bringing Western European influences into Russia, introduced a criminal prohibition for the military in 1716, allegedly copying European laws. In 1835, Tsar Nicholas I expanded the law to cover all males.<sup>26</sup>

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<sup>21</sup> B R Burg, *Boys at Sea : Sodomy, Indecency, and Courts Martial in Nelson’s Navy*, (Palgrave Macmillan, 2007) [Burg] at 28. The penalty was death. With slight alterations, the provision remained in force until 1866.

<sup>22</sup> Blackstone’s writings were very influential on United States law. Blackstone had taken the ecclesiastical law formulation of the offence and substituted “crime” for “sin”. See Don Gorton, “The Origins of Anti-Sodomy Laws” *The Harvard Gay and Lesbian Review* (Winter 1998) 10 at 12.

<sup>23</sup> *HRW*, *supra*, note 1 at 15.

<sup>24</sup> *Eskridge Passions*, *supra*, note 4 at 24-26, 157 and 328.

<sup>25</sup> It is the title of a documentary produced in the United States in 2000. See *Paragraph 175, Telling Pictures*, produced in association with Home Box Office, Rob Epstein and Jeffrey Friedman, narrated by Rupert Everett.

<sup>26</sup> Dan Healey, *Homosexual Desire in Revolutionary Russia*, (Chicago: University of Chicago Press, 2001) at 80-81 [Healey].

## **B. Summary**

A criminal law prohibition based on Leviticus travelled through early Christianity, Roman law, and ecclesiastical law to become a standard non-religious criminal offence in Europe, including Russia. The Protestant Reformation ended church courts in much of Europe, requiring the offence to be handled by secular law. This uniform pattern was broken by the Napoleonic *Penal Code* of 1810 which drew no distinctions between homosexual and heterosexual acts. That innovation was copied in the Netherlands, Belgium, Spain, Portugal and Italy. In result, it was only the British colonies that inherited a prohibition. In Asia and Africa, the legacy from 1534 is now hidden behind the language of the late 19<sup>th</sup> century *Indian Penal Code*, to which we will now turn.

## **II. CARNAL INTERCOURSE AGAINST THE ORDER OF NATURE**

The British buggery law was reformulated as unnatural intercourse in the *Indian Penal Code* of 1860. In this revised form, it traveled around the world.

377. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine.

Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

377 spread, but not on its own. It was only one article in a comprehensive code designed to state in an orderly and rational way the complete body of British criminal law. Continental European law is characterized by codes, while judge-made British ‘common law’ is found in innumerable court rulings, supplemented by specific statutes. A move to codes would have been a major change for Britain. Criminal law reform and the drafting of criminal codes took place for Britain and for India in the same period. This was a parallel process (though the results were different). The *Indian Penal Code* was not an enacted British code exported to India, but an Indian code inspired by British law.

### **A. Britain**

The 19<sup>th</sup> century was a period of major criminal law reform in the United Kingdom. British criminal law was a mess, in need of major reform and

rationalization. Jeremy Bentham, John Stuart Mill and the Utilitarians had strong ideas on law reform and codification:

Bentham and Mill envisioned a series of codes on every area of the law; so instead of relying on caselaw and independent digests, the entire corpus of legal knowledge would be written down in one source, in a concise, easy to read form. Moreover, codification would end the corruptive monopoly enjoyed by the legal profession. The common man would no longer have to depend on profit-hungry lawyers and magistrates to protect his rights. This cure-all approach [was] typical of the Utilitarians...<sup>27</sup>

Jeremy Bentham (1746-1832), who is credited with launching the 19<sup>th</sup> century codification movement, would have been no supporter of Article 377 or its kin. In 1785, Bentham wrote an essay entitled *Offences against One's Self* in which he argued that there was no justification for the criminalization of same sex acts. He did not make public his opinions on the matter and the essay remained unpublished for almost 200 years, finally emerging in 1978.<sup>28</sup> It stands as one of the earliest written defenses of homosexuality in English. Only recently has an earlier defense been found in Thomas Cannon's text of 1749.<sup>29</sup>

Given the novelty of codes for Britain, the reform movement did not proceed smoothly. As the 19<sup>th</sup> century progressed, at least five draft criminal codes were completed. Two royal commissions worked on the issues and both produced draft codes, in 1843 and 1848, respectively.<sup>30</sup> Parliament approved the *Indian Penal Code* in 1860, drafted by Thomas Babington Macaulay and the Indian Law Commission. When it came into force in 1862 it was the first criminal code in force in the British Empire.

In the early 1870s, the British Colonial Office asked R. S. Wright, a barrister, later a judge, to draft a criminal code for Jamaica that could serve as a

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<sup>27</sup> David Skuy, "Macaulay and the Indian Penal Code of 1862" (1998) 32 *Modern Asian Studies* 513 at 523 [Skuy].

<sup>28</sup> Edited by Louis Crompton, (1978) *Journal of Homosexuality*, 389, also at <http://www.columbia.edu/cu/lweb/eresources/exhibitions/sw25/bentham/#01>. John Stuart Mill, in *On Liberty*, 1859, stated that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." It was quoted in the US case *Commonwealth of Kentucky v Wasson*, 842 S.W. 2d, 487 (1992) as supporting a non-interventionist role for the state.

<sup>29</sup> Rex Wockner, "Early gay-rights writings found", *International News* # 680, May 7, 2007, <http://tobe.ca/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=142&cntnt01origid=68&cntnt01returnid=68>. An indictment of the book by Thomas Cannon, entitled *Ancient and Modern Pederasty Investigated and Exemplify'd*, was found in a box of unclassified legal documents from 1750. The book itself has not survived, but the indictment reproduces many of its passages.

<sup>30</sup> Skuy, *supra*, note 27 at 518.

model for all the colonies. In the late 1870s, the Lord Chancellor's Office asked James Fitzjames Stephen to prepare a code. It was introduced into Parliament in a Ministerial Bill in 1878. A revised bill was introduced in parliament in 1879 and 1880. It was never enacted. Stephen's draft was very influential overseas. It was adopted in Canada. It formed a basis for the Queensland code of 1899, which was influential in Africa.

In 1887, William Gladstone, the greatest statesman of 19<sup>th</sup> century Britain, wrote that one of the leading achievements of previous decades had been that "the disgusting criminal code" had been cast aside.<sup>31</sup> Of course, it had not been a code. And it was not replaced by a code (that is, a systematic statute). Reform took place piecemeal, by a number of statutes.<sup>32</sup> To this day British criminal law is uncodified.

The rationale for the buggery law was apparently not debated or reconsidered in the codification process that began in the 19<sup>th</sup> century. The goals of codification were not so much a rethinking of criminal law as the restating of existing laws in an orderly, consistent and accessible manner. The sole public policy analysis by Bentham on utilitarian grounds was not published in the period. Two judges remarked on the lack of any substantive critique of the provisions:

One magistrate who was against the death penalty for sodomy wrote in 1835 that the capital nature of the crime was only sustained by the 'difficulty of finding any one hardy enough to undertake, what might be represented as, the defence of such a crime'. Similarly, another judge lamented the fact that the punishments for homosexual acts were archaic and disproportionate to the offence but complained that the main problem was that 'there is no one to take the matter up'.<sup>33</sup>

## **B. India**

While the East India Company had been active in India for many years, formal governmental power dates to 1764 when the Company gained rights of governance over Bengal, Bihar and Orissa. In 1803, the Mogul emperor accepted British 'protection.' British India had gradually come into being, along with suzerain rights over the many Princely States that retained some autonomy. Britain was now in the position to undertake law reform for India. Following the pattern newly established for domestic law reform at home, Parliament

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<sup>31</sup> Paul Kennedy, *The Parliament of Man*, (Harper Collins Canada, 2006) at 283.

<sup>32</sup> For example, the buggery law was restated in the 1861 *Offences against the Person Act* 24 & 25 Vict. c.100.

<sup>33</sup> H.G.Cocks, "Secrets, Crimes and Diseases" in *Cook, supra*, note 19 at 107, 114.

established the Indian Law Commission in 1833. Thomas Babington Macaulay was appointed to chair the Commission.

Macaulay, the son of Zachary Macaulay, a British Colonial governor and abolitionist, was educated at Trinity College, Cambridge. He became a Member of Parliament in 1830. He traveled to India in 1834. Due to the illness of other commissioners, the 1837 draft of the *Indian Penal Code* was largely his work. Macaulay's draft was not immediately accepted. Twenty-three years passed, during which his work was reviewed and assessed by the Commission and the Supreme Court judges in Bombay, Calcutta, and Madras.

The Indian Mutiny broke out in 1857, posing a serious challenge to British control. One basic message of the Mutiny was the risk Britain faced if it challenged local religions and customs. Britain had allowed Christian missionaries to work in India, and this was resented. In 1858, after the Mutiny, Queen Victoria issued a proclamation that explicitly renounced "the right and the desire to impose Our convictions on any of Our subjects".<sup>34</sup> The East India Company was wound up and India came under the Crown, represented by a Viceroy.

In 1860, the *Indian Penal Code* was enacted and came into force in 1862. Although it came after the Indian Mutiny, it was not a document that reflected existing Indian laws or customs. It was largely a rewrite of the British Royal Commission's 1843 draft code. Macaulay attempted to reformulate the buggery law by broad provisions against any touching with intent to "gratify unnatural lust."<sup>35</sup> But this innovation was dropped in the 1860 version, which instead used the more established wording of Edward Coke and seemed to require "penetration." Within two decades, most of India's law was codified, both criminal and civil. In contrast Britain enacted a series of criminal reform statutes, but no criminal code.

Macaulay, and others in the period, had negative views of India. James Mill's book, *History of British India*, published in 1817, was highly critical of Indian religion and culture.

...as an employee of the East India Company Mill exercised a strong influence on the attitudes of the new class of colonial administrators, and his frequently republished *History*, with its utilitarian philosophical assumptions, helped to win British opinion away from the idealizing tendencies of the early orientalist such as William Jones, and paved the way for the racist attitudes towards India which became pervasive in the second half of the [19<sup>th</sup>] century. Mill's views were echoed by a number

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<sup>34</sup> Proclamation by the Queen in Council, reproduced in Radhey Shyam Chaurasia, *History of Modern India: 1707 A. D. to 2000 A. D.*, (Atlantic Publishers & Distributors, 2002), p. 208.

<sup>35</sup> *HRW*, *supra*, note 1 at 10.

of writers in the period including the historian Thomas Macaulay whose remark that Indians were ‘lesser breeds without the law’ summed up the opinion of many. In 1885 he wrote of the ‘monstrous superstitions’ of Indians, and summarily condemned ancient Sanskrit texts as ‘less valuable than what may be found in the most paltry abridgements used at preparatory schools in England’.<sup>36</sup>

Macaulay’s code was seen as a great achievement, bringing an orderly and systematic criminal law to a complex India. Its success was affirmed by its adoption in other British colonies in Asia.

### **C. Australia, Canada and Africa**

Stephen’s code was the basis for the Canadian *Criminal Code* of 1892, the New Zealand *Crimes Act* of 1893 and the *Queensland Penal Code* of 1899. The Queensland code was drafted by the Chief Justice of Queensland, Sir Samuel Griffith. It was adopted in Northern Nigeria in the nineteenth century, later becoming the basis for a uniform federal code in Nigeria in 1916.<sup>37</sup> The *Indian Penal Code* had been used in Kenya, Uganda and Tanzania, but those laws were later replaced by drafts based on the Nigerian criminal code. Sudan used the *Indian Penal Code*. In 1960 Northern Nigeria enacted a separate criminal code based on the Sudan code.

### **D. The Middle East, The Mediterranean, North Africa and Central Asia**

An Arab-American has written:

The Middle East has a long history of tolerance of homosexuality – it was European colonizers who introduced anti-gay laws to the region, and it is those laws that tyrants enforce for political gain.<sup>38</sup>

Western homophobia was exported to the Arab world, according to another author:

What passes in present-day Saudi Arabia, for example, as sexual conservatism is due more to Victorian Puritanism than to Islamic Mores...

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<sup>36</sup> J.J. Clarke, *Oriental Enlightenment* (Routledge, 1997) at 73. Clarke quotes from G.M. Young, *Th. B. Macaulay: Prose and Poetry*, (London: Hart-Davis, 1952) at 722, 728.

<sup>37</sup> *HRW*, *supra*, note 1 at 22-25.

<sup>38</sup> David Hall, “Gay, Arab, American” *The Advocate* (19 June 2007) 32, [http://www.advocate.com/issue\\_story\\_ektid45260.asp](http://www.advocate.com/issue_story_ektid45260.asp).

Originally, Islam did not have the same harsh Biblical judgment about homosexuality as Christianity.<sup>39</sup>

Prohibitions in British codes spread...

...in British-ruled territories of the Middle East – the Colony of Aden, Bahrain, Kuwait, Muscat and Oman, Qatar, Somaliland, the Sudan, and the Trucial States (today the United Arab Emirates).<sup>40</sup>

The Queensland Code was also widely adopted in non-African portions of the Commonwealth. Cyprus adopted it in 1928 and Palestine in 1936. It forms the basis of the present Israeli Criminal Code. Syria punishes “unnatural sexual intercourse” with three years imprisonment. Lebanon prohibits “all sexual relations that are unnatural.” Morocco and Mauritania also prohibit unnatural sexual acts. Bahrain uses the earlier English term “buggery” in its prohibition.<sup>41</sup>

In a curious piece of history, the “carnal knowledge” wording of the Queensland code, itself a slight rewording of the 1860 *Indian Penal Code*, traveled back to Europe. The island of Cyprus was a British protectorate or colony from 1878 until independence in 1960. In 1928, the “carnal knowledge” provision became part of the law. Much later, Cyprus signed the *European Convention on Human Rights* and joined the Council of Europe. After the European Court of Human Rights ruled in *Dudgeon v UK* in 1981 that the “buggery” and “gross indecency” provisions in Northern Ireland were a violation of the *European Convention*, no further prosecutions were initiated in Cyprus. An activist challenged the law, which was still on the books. In 1993, the European Court of Human Rights ruled that it conflicted with the *Convention*. It was the British precedent in *Dudgeon* that was decisive against the “carnal knowledge” provision.<sup>42</sup>

The laws vary in other parts of the Middle East, North Africa and Central Asia, but do not use the idea of ‘unnatural’ acts. Not all jurisdictions prohibit homosexual acts. They are not prohibited Iraq, Israel, Jordan, Kyrgyzstan,

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<sup>39</sup> As’ad AkuKhalil, a Lebanese-American scholar, writing in 1993 in the *Arab Studies Journal*, as quoted by Bill Strubbe “Cruising the Casbah” *Out Magazine* (September 2002) 115 at 116.

<sup>40</sup> Jehoeda Sofer, “Sodomy in the Law of Muslim States” in Schmitt and Sofer eds., *Sexuality and Eroticism Among Males in Moslem Societies* (Haworth 1992) 131 at 133 [Sofer]. The author says that a new code was introduced in 1956 in the British territories of the Persian Gulf. He says that Article 171 made sodomy punishable by imprisonment for up to ten years.

<sup>41</sup> *Ottosson, supra*, note 2.

<sup>42</sup> *Modinos v Cyprus*, ECHR, 15070/89, April 22, 1993.

Tajikistan or Egypt (though individuals in Egypt have been charged with ‘debauchery’).

### **E. Japan, China and Thailand**

Three Asian jurisdictions avoided direct or complete colonization. Each borrowed heavily from Western laws in the late 19<sup>th</sup> century, seeking recognition as civilized nations worthy of continuing independence. Japan and China have well-documented accounts of male homosexual love in particular periods, often idealized in literature. In Japan, anal intercourse was made a criminal offence in the Meiji legal code in 1873. It was hardly ever punished and dropped from the law in 1881 at the instigation of a French adviser.<sup>43</sup> In Siam, a drafting committee composed of Siamese, French, Japanese and British nationals considered codes from nine countries, but apparently the *Indian Penal Code* was the most influential for specific crimes. The 1908 criminal code barred acts “against human nature...” The section was dropped in 1956 when a reform eliminated sections with no history of enforcement.<sup>44</sup> In the late Qing Dynasty (1644-1912), China adopted German laws. Apparently, the borrowing of these laws did not include the ban on homosexual acts. Much later, the offence of “hooliganism” was used against homosexuals. In 1993, a directive from the Ministry of Public Security said that homosexuality did not justify such a charge. The offence of hooliganism itself was dropped from the law in 1997.<sup>45</sup>

### **F. Summary**

19<sup>th</sup> century codifications of British criminal law, while never enacted at home, spread throughout the empire, beginning with the *Indian Penal Code* of 1860. The result was rather amazing. Codes with criminal prohibitions of homosexual acts came into force in all ‘common law’ jurisdictions. The lead role in this process was played by the *Indian Penal Code*, a one-size-fits-all model code.

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<sup>43</sup> Mark McLelland, *Male Homosexuality in Modern Japan* (London: Curzon Press, 2000) at 26.

<sup>44</sup> Personal communications, Professor Peter Jackson, December 2002, and Professor Tamara Loos, November 2007. Siam’s ministers of justice from 1892 to 1913 all had law degrees from England. See Tamara Loos, *Subject Siam: Family, Law and Colonial Modernity in Thailand* (Ithaca: Cornell University Press, 2002), Chapter 2, particularly 65-67); Tokichi Masao, “The New Penal Code of Siam” (1908) *Yale Law Journal* 85-100. Professor Chalidaporn Songsamphan of Thammasat University has said the ban only applied to male-female anal intercourse: Pichaya Svasti, “Sex through the ages” *Bangkok Post* (January 22, 2008) O1.

<sup>45</sup> See Guo Xiao-fei, “Was there a De-criminalization of Homosexualities in Chinese History?” (Paper presented at the International Conference on Sexuality in China, 2007), [www.sexstudy.org](http://www.sexstudy.org).

This occurred in a period in which parallel prohibitions were eliminated in the other major European colonial powers except Germany.

### III. GROSS INDECENCY

The radical Liberal Party MP Henry Labouchere, editor of a muck-raking newspaper called *Truth*, introduced an amendment in the British Parliament in 1885 that made acts of ‘gross indecency’ between males an offence.

A banking heir, [Labouchere] put his money and energies into the radical weekly journal *Truth*, which advocated, among other things, the abolition of the House of Lords and an end to racism. As an MP, he championed the working classes, women and the dispossessed. Strongly influenced by the “social purity” ideas of the late 19<sup>th</sup> century, and their close links with the emergent feminist movement, Labouchere gave voice to widely held concerns about the destructive power of male lust. ... Sex had to be contained within marriage...<sup>46</sup>

Labouchere argued that existing laws were not adequate. Cocks’ study of prosecutions, however, shows that the law, in practice, was quite adequate to charge and convict individuals.<sup>47</sup> The new law was not a government proposal:

Whilst the importance of the legislation of 1885 and 1898 and the circumstances in which it was passed should not be underestimated, the specific provision against homosexual activity contained in the Criminal Law Amendment Act and the Vagrancy Law Amendment Act were secondary to their central focus on under-age sex and prostitution. Newspaper reports on the passage of the Acts included barely any reference to the clauses relating to homosexual activity.<sup>48</sup>

The Labouchere amendment and the legislation it was attached to were some of many moral initiatives of the period. In the U.S., the *Comstock Act* of 1873 made it a federal crime to send pornography, contraceptive information, information on

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<sup>46</sup> Rupert Smith, “That crucial day: The Labouchere amendment” *Gay Times* (September 2006) 21.

<sup>47</sup> H.G.Cocks, *Nameless Offences: Homosexual Desire in the 19<sup>th</sup> Century*, (I. B. Tauris Publishers, 2003) [*Cocks Nameless*].

<sup>48</sup> Matt Cook, *London and the Culture of Homosexuality, 1885-1914*, (Cambridge: Cambridge University Press, 2003) at 48, 49 [*Cook*].

abortion, or sex manuals through the mail.<sup>49</sup> Later, the U.S. *White Slave Act* of 1910, known as the *Mann Act* after its sponsor, banned the interstate transport of females for immoral purposes.

The new 'gross indecency' wording was simple and broad. There would be no need to allege that the accused was conspiring, soliciting, inciting or attempting. The focus on the end goal of anal penetration was gone. A decade later, this new formulation was used against Oscar Wilde in the most sensational homosexual trial in Western history. The 'gross indecency' law spread through the influence of Stephen's code and the Queensland penal code. It appeared in Malaysia and Singapore by amendment in 1938. It was the key provision in Canada but was never introduced in India.<sup>50</sup>

#### IV. 1534, 1860, and 1885

Section 377 of the *Indian Penal Code* was a restatement of the existing British law against "buggery" and a conservative statement at that. The reference to 'penetration' seemed to require evidence that in British practice was not necessary. 377 secularized the older offence of buggery. The key religious terms "abominable" and "vice" were gone, along with the term "buggery" itself, that had religious origins. The offence was cast in a modern, secular manner as "against the order of nature." In this it was congruent with the writings of influential sexologists of the late 19<sup>th</sup> century. There is a striking avoidance of definition of the sexual acts covered in the various statutes. The offence for some was 'not to be named' or 'not to be named among Christians.' Some feared that naming or criminalizing could have the effect of publicity that could "raise up strife and discord" or perhaps, in a perverse way, encourage some to experiment.<sup>51</sup>

To simplify, there were two kinds of provisions. Firstly, there was an offence focused on anal intercourse (buggery, carnal intercourse). It was expanded by judicial decisions over time to include oral sex, attempts, conspiracies and solicitation. It did not target homosexual acts in any precise way. It included some heterosexual and bestial acts but usually did not cover lesbian sexual activity. Secondly, there was an offence focused on indecency,

<sup>49</sup> *Eskridge Passions, supra*, note 4 at 26.

<sup>50</sup> Alok Gupta, *The Presumption of Sodomy*, draft dated April 10, 2007, page 40, in possession of the author.

<sup>51</sup> *Eskridge Passions, supra*, note 4 at 19. Sweden repealed the offence to avoid publicizing such activities, though prosecutions continued according to Jonas Liliequist, "State Policy, Popular Discourse, and the Silence on Homosexual Acts in Early Modern Sweden", in Jan Lofstrom ed, *Scandinavian Homosexualities: Essays on Gay and Lesbian Studies* (Haworth: The Haworth Press, 1998) 15.

capable of catching various forms of same-sex activity but limited to acts between men in its original 1885 formulation.

Many jurisdictions had both provisions. Both provisions applied in Malaysia and Singapore after a reform in 1938 introducing what is now 377A in Singapore and 377D in Malaysia. The Tasmanian version of these provisions that was challenged in *Toonen v Australia* had both “unnatural sexual intercourse” (section 122) and “indecent practice between male persons” (section 123).<sup>52</sup> The law in Botswana, challenged unsuccessfully in 2002 in the *Kanane* case, had both.<sup>53</sup>

Why do the legal systems in Germany and England in the last half of the 19<sup>th</sup> century restate or extend laws against some homosexual acts, ignoring the alternative patterns established in France and some other continental countries?

The last half of the 19<sup>th</sup> century was a period of immense social change. It was the era of Darwin, Marx and Freud.<sup>54</sup> It was a period of economic globalization comparable to the present day, with dramatic new levels in the movement of people, commodities and capital.<sup>55</sup> The period saw the last great surge of formal colonial expansion. The West took control of major parts of Africa, Asia and Oceania. Russia took control in the Caucuses and Central Asia. The independent states of Japan and Siam westernized their legal systems and built European-style palaces to assert their modernity and justify continuing autonomy. The Eiffel Tower and colonial railways displayed new Western engineering skills. Anthropology developed in the service of empire. New legal codes were part of this modernization. The new medical writings in the period were not consistent. Some, like those of Krafft-Ebing, seemed to support a pathological understanding of sexual variation. Others, like those of Albert Ellis, supported diversity. Though the new medical science was not unified, homophobia assumed a particular normalcy in Western thinking. The focus was medical or psychological, no longer religious. Emerging in a period of Western

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<sup>52</sup> *Toonen v Australia*, UN Human Rights Committee, March 31, 1994, CCPR/C/50/488/1992.

<sup>53</sup> E. K. Quansah, “Same-sex relationships in Botswana: Current perspectives and future prospects” (2004) 4 *African Human Rights Law Journal* 201. The law upheld by the Supreme Court of Zimbabwe in *Banana v State*, (2000) 8 Butterworth’s Human Rights Cases, 345, was described as intentional sexual relations *per anum* between two human males.

<sup>54</sup> Charles Darwin lived from 1809 to 1882 and published *The Origin of Species* in 1859. Karl Marx lived from 1818 to 1883 and published volume one of *Capital* in 1867. Sigmund Freud lived from 1856 to 1939 and published *The Interpretation of Dreams* in 1900. From 1856 to 1882, all three were alive. Freud, in his *Introductory Lectures on Psychoanalysis*, suggested that there had been three major intellectual challenges to the human view of its own uniqueness in creation: Copernicus (the earth is not the centre of the universe), Darwin (humans had evolved) and Freud (humans had unconscious drives). See Cornelia Dean, “Science and the soul: Descartes loses force” *International Herald Tribune* (28 June 2007) 9.

<sup>55</sup> Naill Ferguson “Sinking Globalization” *Foreign Affairs*, March/April, 2005, 64.

imperial expansion, the new ideas spread beyond the West, though their impact abroad was not the same as at home.<sup>56</sup>

In some jurisdictions in the West, ‘sexual psychopath’ laws developed to allow indefinite detention of sex offenders who were thought dangerous and likely to continue offending. Such laws were common in the U.S. after the pioneering statute in Michigan in 1935. They had the potential of radically increasing incarceration time.<sup>57</sup> Indefinite detention of a Canadian homosexual who a psychiatrist said was not dangerous but likely to commit homosexual acts again was seen as absurd by editorialists in Canada. The decision by the highest Canadian court made decriminalization in 1969 much easier.<sup>58</sup>

## V. ENFORCEMENT

Laws against consenting homosexual acts are very difficult to enforce in any systematic way. Most arrests involve some public activity, lack of consent or the involvement of minors and can be prosecuted under any criminal law system. Would the police attempt any systematic enforcement of the 1534 British law once the anti-Catholic campaigns of the period were over? Randolph Trumbach says that most of the cases “over the next century and a half seem to have been cases of rape against prepubescent boys.”<sup>59</sup>

H.G. Cocks has written that the law “was hardly enforced at all before the 1720s.”<sup>60</sup> He explains that the law in practice had come to prohibit any homosexual act. Such acts were either buggery or regarded in law as an attempt

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<sup>56</sup> It was the new bourgeoisie that ran the British imperial project and they projected an ethos of middle class respectability, distinguishing themselves from the lower classes and what they saw as a decadent aristocracy: George Mosse, *Nationalism and Sexuality, Respectability and Abnormal Sexuality in Modern Europe* (Howard Fertig, 1985) 9. This view of the aristocracy as profligate libertines perhaps led to the rejection of homosexuality, seen as an elite vice. In contrast, in Siam and Japan, it was the aristocracy that handled the projects of modernization and the defense of the state against colonialism. Their attitudes towards sexual issues would not have been the same as those of the new British middle-class.

<sup>57</sup> *Eskridge Passions, supra*, note 4 at 94, 95.

<sup>58</sup> Indefinite detention, to be followed, possibly, by a lifetime parole, revocable at any time, was upheld by the Supreme Court of Canada in *R v Klippert*, [1967] S.C.R. 822. Klippert’s sexual activity had been with teen aged males, but the decision made no reference to the issue of age. It logically applied to any homosexual acts.

<sup>59</sup> Randolph Trumbach, “Renaissance Sodomy, 1500-1700” in [Cook], *supra*, note 19 at 45, para 50. Prosecutions under the Laws of War were also slow to begin, starting in 1704 and 1706. Prosecutions were for sexual activity with teenage boys who worked on Royal Navy ships. See [Burg], *supra*, note 21 at *Boys at Sea*, Ch 2.

<sup>60</sup> H.G.Cocks, “Secrets, Crimes and Diseases” in [Cook], *supra*, note 19 at 110 [Cocks *Secrets*].

to commit buggery. In a famous case in 1870, two men were charged with conspiracy to commit buggery and soliciting others to do so by provocatively cross-dressing in streets and theatres.<sup>61</sup> Prosecutions shifted to charges of ‘indecent assault’ after 1850, apparently finding them easier to prove. “Assault” in these instances did not always mean assault. Cocks cites a case of two men alleged to have sexually “assaulted” each other.

Between 1806, when reliable figures begin, and 1900, 8,921 men were indicted for sodomy, gross indecency or other ‘unnatural misdemeanours’ in England and Wales. Ninety men per year were, on average, indicted for homosexual offences in this period. About a third as many again were arrested and their case considered by magistrates. Most of the men convicted were imprisoned, but between 1806 and 1861, when the death penalty for sodomy was finally abolished, 404 men were sentenced to death. Fifty-six were executed, and the remainder were either imprisoned or transported to Australia for life. Two such men, James Pratt and John Smith, were the last to be executed in Britain for sodomy on 27 November 1835.<sup>62</sup>

Cocks does not suggest that private activity was prosecuted, and the examples he cites involved public activity or scandals involving youth. Matt Cook notes that, while there were scandals and prosecutions, cruising places and “Molly houses” were features of the landscape over the period 1700-1885:

The persistent use of cruising areas such as St James’ Park and Moorfields suggests that there was no concerted crackdown and that periodic arrests and prosecutions did not comprehensively deter men from visiting these places. Some of the Molly Houses certainly seem to have been well known for long periods before they were raided and shut down. Witnesses in the trial of Gabriel Lawrence, who was hanged for his part in the Mother Clap case, testified that ‘the house bore the public character of a place of rendezvous for sodomites’ and that ‘it was notorious for being a Molly House’. Cook, the proprietor of the White Swan on Vere Street, had been in business for twelve years before being raided and was well enough known to attract customers from up to thirty miles away.<sup>63</sup>

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<sup>61</sup> Morris Kaplan, *Sodom on the Thames* (Ithaca: Cornell University Press, 2005) 1.

<sup>62</sup> *Cocks Secrets, supra*, note 60 at 109. See also *Cocks Nameless, supra*, note 47 at 7, 8, 17.

<sup>63</sup> *Cook, supra*, note 19 at 11.

Eskridge reports that enforcement was rare in the U.S. and usually involved minors. Almost 90% of reported California sodomy cases between 1920 and 1946 involved either the rape of an adult or sex with a minor.<sup>64</sup>

Most of the time, in most places with or without a sodomy law, few homosexuals are arrested for sexual activity.<sup>65</sup> One of the most infamous historical accounts of homosexual persecution was a sweep of convictions in the Dutch Republic from 1730 to 1733, which resulted in the execution of several hundred men.<sup>66</sup> But this campaign was short and exceptional. It showed that state authorities could find homosexual offenders if they wanted to. Its exceptional character shows that states, almost all of the time, did not make an effort to do so.

In South Asia, section 377 has been interpreted to include anal sex, oral sex, penetration between the thighs and mutual masturbation.<sup>67</sup> Yet, it seems, there has been very limited direct enforcement. A documented Indian case of police entrapping an individual, forcing him to identify others, arranging a meeting and arresting the others occurred in Lucknow in January, 2006. While the report also notes the arrest of AIDS outreach workers in Lucknow in 2001, the later account is unique in terms of its depiction of proactive strategies on the part of the police. Charges were dropped in both cases, though the AIDS workers were jailed for 47 days.<sup>68</sup>

Commentary suggests that the main effect of 377 is to support and confirm general patterns of non-recognition, discrimination, and marginalization in Indian society.

...the true impact of Section 377 on queer lives is felt outside the courtroom and must not be measured in terms of legal cases. Numerous studies, including both documented and anecdotal evidence, tell us that Section 377 is the basis for routine and continuous violence against sexual minorities by the police, the medical establishment, and the state. There are innumerable stories that can be cited – from the everyday violence

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<sup>64</sup> *Eskridge Passions*, *supra*, note 4 at 3, 66 and 86.

<sup>65</sup> A study of Prussia indicated 44 charges between 1700 and 1730, including charges for bestiality. Nine individuals were executed for bestiality and three for sodomy. James Streakley, "Sodomy in Enlightenment Prussia" in *Gerard and Hekma*, *supra*, note 16 at 163, para 164. In the same edited volume, Wilhelm von Rosen refers to sodomy between men as "in practice a nonexistent crime in Denmark for more than two hundred years." *Von Rosen*, *supra*, note 16 at 177.

<sup>66</sup> *Puff*, *supra*, note 16 at 5.

<sup>67</sup> *Khanu v. Emperor*, AIR 1925 Sind 286, *Muhammad Ali v. The State*, [1961] All Pakistan Law Decisions, High Court of Dacca 252, and *Brother John Antony v. State* [1992] 124 Criminal Law Journal 1352. See *HRW*, *supra*, note 1 at 19, 20, 21.

<sup>68</sup> *HRW*, *supra*, note 1 at 28.

faced by hijras [a distinct transgender category] and kothis [effeminate males] on the streets of Indian cities to the refusal of the National Human Rights Commission to hear the case of a young man who had been given electro-shock therapy for nearly two years. A recent report by the People's Union for Civil Liberties (Karnataka), showed that Section 377 was used by the police to justify practices such as illegal detention, sexual abuse and harassment, extortion and outing of queer people to their families...<sup>69</sup>

Police can arrest homosexuals if they (a) focus on cruising venues (parks and public toilets), (b) raid any gay saunas or bars, (c) use entrapment to solicit sexual advances, (d) seize address books and diaries, and (e) pressure individuals to identify others on threat of serious charges and possible imprisonment. Most of the time, the most police forces do none of the above. They see little use in wasting their limited resources on such activity when they regard homosexuality as a fact of life. In the West, police prefer that gay men go to saunas and bars. That lessens public cruising and open prostitution. Internet dating is also a gift to the police, lessening even more the public character of gay socializing.

Patterns of police non-enforcement are described, somewhat paradoxically, in major court cases. In the *Dudgeon*, *Norris* and *Modinos* cases before the European Court of Human Rights, involving Northern Ireland, Ireland and Cyprus respectively, the individuals bringing the cases had not been charged with any offence. In each case, the police was not routinely trying to enforce the law. In the *Toonen* case, brought under the *International Covenant on Civil and Political Rights*, police in Tasmania had not charged anyone "for several years." Each of these four cases was brought by a gay rights activist as part of a public campaign. They were allowed to pursue their cases though it was apparent they faced little possibility of arrest.<sup>70</sup>

The United States has much stricter rules on when an individual has "standing", that is, having sufficient personal interest in the issue to be allowed to challenge the constitutionality of a law. An individual clearly has standing if he or she has been prosecuted. The two leading cases, *Bowers v Hardwick* and *Lawrence v Texas*, both involved police entry into someone's bedroom for reasons unrelated to enforcing sodomy laws: serving an arrest warrant for a drinking offence or looking for an armed intruder. They found sexual activity, by accident, and laid charges. The charges did not result from routine enforcement of anti-homosexual criminal laws. Indeed, the lawyer defending Georgia's

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<sup>69</sup> "Introduction" to Arvind Narrain and Gautam Bhan, eds. *Because I Have a Voice: Queer Politics in India*, (New Delhi: Yoda Press, 2005) 7, 8.

<sup>70</sup> *Dudgeon v U.K.* (1981) 4 E.H.R.R. 149; *Norris v Ireland* (1991) 13 E.H.R.R. 183; *Modinos v Cyprus* (1993) 16 E.H.R.R. 485; *Toonen v Australia* (1994) CCPR/C/50/D/488/1992.

sodomy law in the US Supreme Court in *Bowers v Hardwick* in 1986 conceded that the last prosecution for consensual homosexual sodomy occurred in the 1930s (and the conviction of the two women involved had been overturned on appeal).<sup>71</sup>

We have little or no information on enforcement of anti-homosexual criminal laws in most jurisdictions in Asia. Available information on India and Singapore indicates that charges occur in situations of some public activity, or where there are issues of age, consent or extortion. The well-publicized charges against Anwar Ibrahim in Malaysia do not represent any general pattern of police enforcement of Article 377 in that country.<sup>72</sup>

## VI. DECRIMINALIZATION

Decriminalization has taken place episodically since 1791.

### A. The Napoleonic Penal Code

Before the French Revolution, sodomy was a serious crime handled by the religious courts. The first French Revolution abolished those courts. The *Penal Code* of 1791 was silent on sexual relations between consenting adults in private. That was repeated in the *Penal Code* of 1810.<sup>73</sup> The reform spread to the Netherlands in 1811 after a French invasion. Spain decriminalized sodomy in 1822, Belgium in 1843. The first Italian penal code in 1889 had no such prohibition. During the colonial period, The Philippines had a prohibition but

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<sup>71</sup> *Eskridge Passions, supra*, note 4 at 241, 242. Laws in some states had been broadened from anal intercourse to include oral sex. *Bowers v Hardwick* (1986) 478 U.S. 186; *Lawrence v Texas* (2003) 539 U.S. 558.

<sup>72</sup> See Gautam Bhan, "Queer Politics and Legal Reform in India", in Arvind Narrain, Gautam Bhan, *Because I Have a Voice* (New Delhi: Yoda Press, 2005) 40. Information on prosecutions in Singapore is provided later in this article, in a section on that country. Information on patterns in Malaysia comes from informal conversations with individuals connected with the PT Foundation in Kuala Lumpur, an organization that works on HIV-AIDS issues.

<sup>73</sup> Significant reforms occurred in the period. In 1790, primogeniture inheritance rights were abolished. In 1791, equal rights were granted to Jews and equal inheritance rights established for sons and daughters. In 1792, men without property were enfranchised and divorce allowed for the first time. In 1794, slavery was abolished. See Lynn Hunt, *Inventing Human Rights* (W. W. Norton and Co, 2007) at 28, 61, 62. Sofer writes that it has been suggested that the French decriminalization "was a result of Jean-Francois-Regis de Cambaceres, the head of the drafting commission, loving males. In fact, it should be seen as springing from the principles of the French Revolution." See *Sofer, supra*, note 40 at 133. See also Michael David Sibal, "The Regulation of Male Homosexuality in Revolutionary and Napoleonic France, 1780-1815" in Jeffrey Merrick and Bryant Ragan eds., *Homosexuality in Modern France* (Oxford: Oxford University Press, 1996).

Spain dropped in line with the reform at home. French decriminalization had a great influence in the Middle East, partly through the Italian penal code, “not only in the states which were ruled by the French, but also in Egypt, Turkey, and Libya.”<sup>74</sup>

## B. Reform in Russia

The new Union of Soviet Socialist Republics enacted a modern, secular criminal code in 1922 that ended the prohibition copied from Western Europe a hundred years earlier. The major study of developments in Russia reports that there was no boasting at home of the modern, rational, secular character of the decriminalization of sodomy. But a number of key figures in the government, including the Commissar for Health, visited Dr Magnus Hirschfeld’s Institute for Sex Research in Berlin and praised the Russian reform to Western European audiences. The reform in the USSR was paradoxical, and criminal prohibitions continued to exist for Union Republics in central Asia. Finally in 1933, Russia re-imposed a prohibition against sodomy without public debate or policy announcements at home.<sup>75</sup>

## C. The Reform Movement in Germany

The first gay-led public reform movement anywhere in the world occurred in Germany, led by professional homosexual men, doctors and lawyers.<sup>76</sup> Initially, it focused on the criminal law to be adopted when the various German states united in 1871. Then, it sought the repeal of section 175 in the new national criminal law. The first public figure was the lawyer Karl Heinrich Ulrichs, who wrote of “urnings” (uranians in English), a name for homosexuals he took from Plato’s Symposium. Karoly Maria Benkert, a medical doctor writing under the name Kertbeny, coined the word “homosexual” in an open letter on the criminal law issue in 1869. Dr. Magnus Hirschfeld and others formed the Scientific-Humanitarian Committee in 1897. Before World War I the Committee had chapters in four German cities and in Amsterdam, London and Vienna. Hirschfeld’s Institute for Sex Research was founded in 1919. The World League for Sexual Reform was established at the First Congress for Sexual Reform, held

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<sup>74</sup> *Sofer, supra*, note 40 at 133, 134.

<sup>75</sup> *Healey, supra*, note 26.

<sup>76</sup> John Adington Symonds met Ulrichs and included a discussion of his theories in his reformist writings in Britain. Through Symonds’ collaboration with Havelock Ellis on the book *Sexual Inversion* (1897), Ulrichs’ ideas entered the literature of homosexual defense in England. See James Steakley, *The Homosexual Emancipation Movement in Germany* (New York: Arno Press, 1975) 23 [*Steakley*].

in 1921. Succeeding conferences were held in Copenhagen, London and Vienna.<sup>77</sup>

The German reform movement was much more extensive than the later campaign in the United Kingdom. It involved a number of elite figures, a score of organizations, books and magazines. It had some support in the Social Democratic Party and the backing of the German Communist Party. A reform petition gained thousands of signatures. Reform bills were introduced. Scandals involving homosexual figures crippled the movement. Reform failed even before Adolph Hitler and the National Socialists came to power. Hitler's government raided Hirschfeld's institute and burned the books in its library. Hirschfeld was out of the country when this happened and never returned. He died abroad. Homosexuals were targeted in the Holocaust.

#### **D. Social Utility, Privacy and Secular Law**

As noted earlier, Jeremy Bentham, the British utilitarian philosopher, in an unpublished essay in 1785, argued that criminal laws should only be based on acts that can be demonstrated to cause harm to others. He argued first that homosexual acts were very satisfying for some, and second that they did not harm others. The argument from social utility therefore posited that these acts should not be criminalized. The laws were only based on an 'antipathy,' not on any assessment of benefit or harm. John Locke also required laws to be based on public harm, without commenting directly on anti-homosexual laws. This utilitarian, liberal or libertarian approach to criminal law was accepted by many academics. Two American academics, writing a casebook for criminal law students in 1940, made such utilitarian or liberal arguments, again without specific reference to anti-homosexual laws.<sup>78</sup> One of those academics, Herbert Wechsler, went on to be the academic coordinator for the American Law Institute's project to draft a model penal code. He chose "Benthamites" to work with him on the project.<sup>79</sup>

The prestigious American Law Institute (ALI) published its Model Penal Code in 1955, one of a series of model laws offered to governments for possible enactment. The ALI referred to consensual homosexual acts as matters of private morality that should only concern spiritual authorities.<sup>80</sup> Moral beliefs alone did not justify criminal prohibitions. The ALI model penal code was very influential in the United States. It influenced the new penal code in Illinois in 1961, the first

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<sup>77</sup> *Steakley, supra*, note 76 at 92.

<sup>78</sup> Jerome Michael, Herbert Wechsler, *Criminal Law and its Administration*, (The Foundation Press, 1940).

<sup>79</sup> *Eskridge Passions, supra*, note 4 at 121.

<sup>80</sup> *Eskridge Gaylaw, supra*, note 4 at 159.

decriminalization of homosexual acts in North America (done under the cover of a comprehensive law reform).

The report of the much more famous Wolfenden Committee in the United Kingdom in 1957 also argued that private morality should be outside criminal law. The government appointed the committee after public controversy over certain high-profile prosecutions.<sup>81</sup> The report was a sensation. The first run of 5,000 copies sold out within hours.<sup>82</sup> The conclusions had support from the Church of England. Ten years later, it led to decriminalization of homosexual acts in England and Wales. The Report gave impetus to reform movements in other common law jurisdictions.<sup>83</sup>

The silence around homosexuality was broken in the post-war period primarily by Kinsey and Wolfenden. Their reports were instant bestsellers, showing a pent-up demand for the discussion of sexual variation. As a result of the work of the American Law Institute and the Wolfenden Committee, 'privacy,' as a homosexual rights argument, had elite endorsement. The initial reforms, in the United States (1961 in Illinois), the United Kingdom (1967) and Canada (1969) were largely the result of elite proposals that invoked personal rights of privacy.<sup>84</sup>

The rationale for anti-homosexual views had shifted from religion and morality to ideas of pathology or illness. But it was wrong to use the criminal law to deal with an illness or a psychological variation. In any case, the medical arguments were collapsing. The research of Dr. Evelyn Hooker in the United States in the 1950s showed that gay men had no more psychological problems than others, dealing a blow to the medical arguments.<sup>85</sup> Her work led to the

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<sup>81</sup> Rupert Smith, "The Wolfenden Report" *Gay Times* (February 2007) 29.

<sup>82</sup> British Broadcasting Commission, On This Day: 4, September, 1957: "Homosexuality should not be a crime", [http://news.bbc.co.uk/onthisday/hi/dates/stories/september/4/newsid\\_3007000/3007686.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/september/4/newsid_3007000/3007686.stm).

<sup>83</sup> The reform in the UK was important. It was not part of a reform package, as in Illinois in 1961 or the USSR in 1922. It did not have the elite backing of the ruling party or the Prime Minister in power, as in Canada in 1969. There was a public and parliamentary debate on the specific issue. The reform was a compromise, only applying in England and Wales and entrenching an unequal age of consent for the next three decades. Leo Abse, the Member of Parliament who moved the reform bill, said his reading of Freud convinced him that everyone was bisexual. But he was willing to portray homosexuals as a troubled minority in order to secure passage of the reform. In fact, he said, the bill was to protect everyone "from their own homophobia." See Richard Smith, "Against the Law" *Gay Times* (August 2007) 72.

<sup>84</sup> Alfred Kinsey *et al*, *Sexual Behavior in the Human Male* (W. B. Saunders Co. 1948) showed homosexuality to be much more common than had been generally assumed.

<sup>85</sup> Evelyn Hooker, "The Adjustment of the Male Overt Homosexual" (1957) 21 *Journal of Projective Techniques*, 18; Evelyn Hooker, "Male Homosexuality in the Rorschach", (1958) 22 *Journal of Projective Techniques*, 33. Dr. Clarence A. Tripp, a psychologist, trained by Kinsey, published *The Homosexual Matrix* in 1975 (McGraw-Hill). On Tripp's death in 2003, the book

declassification of homosexuality as a mental illness in both the U.S. and the U.K. in 1973, and by the World Health Organization in 1983.

## **E. Equality Rights**

We see certain threads in the arguments, so far, for decriminalization.

### *1. Harm*

Under Utilitarian principles, a restrictive law cannot be justified unless the harms caused by the acts in question outweigh the benefits. On this basis Bentham supported decriminalization. Opponents of homosexual rights have regularly argued that there is harm. The Emperor Justinian, as we have seen, attributed earthquakes and plagues to homosexuality. Philo and others feared depopulation. In the U.K., it used to be common for opponents to speak of the threat that a “permissive society” posed to social stability. Richard Nixon linked the decline of the Roman Empire to the later emperors being, in his own words, “fags.”<sup>86</sup> In more recent times, AIDS was initially blamed on homosexuals. Christian right figures in the U.S. talk of the negative effects on society over time of recognizing same-sex marriage. They argue that same-sex marriage diverts attention and support from the nuclear heterosexual procreative family (seen as the bedrock of social stability). Anxiety and fears are common when homosexual individuals and couples are largely invisible in society. Now, however, some see social stability being enhanced by bringing homosexuals into socially approved relationships and supporting their interest in raising children (called by some ‘assimilation’).

### *2. Privacy*

Privacy is a very individualistic goal, and is associated with the Western enlightenment tradition. It appears as a right in the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights* (and so was available as an argument in post-war human rights litigation and debates). As an argument, it had some clear

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was remembered as something of a breakthrough. Author and AIDS activist Larry Kramer commented that the book was the first from a reputable source that dared to openly speak of homosexuality as a healthy occurrence. Historian Jonathan Ned Katz added that before the book “you could count on one hand the books on the subject that had any intellectual substance.” See Douglas Martin, “C. A. Tripp, 83, Author of Works on Homosexuality, Dies” *The New York Times* (22 May 2003) A29.

<sup>86</sup> Nixon speaking to aides in his office, May 13, 1971, as reported by Gene Weingarten, “Just What Was He Smoking”, *The Washington Post*, 21 March 2002.

advantages. Firstly, it was a right for everyone, whether heterosexual, bisexual or homosexual. When Prime Minister Trudeau in Canada said that the “state has no place in the bedrooms of the nation”, heterosexuals could immediately think of themselves in bed and agree. Secondly, privacy seemed to trump any need to do a utilitarian analysis of benefit and harm. Thirdly, you did not have to like homosexuals. Privacy rights suggested that homosexuals would or should stay in their bedrooms and closets, and not intrude in society’s public spheres demanding recognition. “We’ll leave you alone if you leave us alone” may have been the unstated offer.

### 3. *The separation of morals and crimes*

The idea in the Wolfenden Report that criminal laws should not be based simply on notions of morality was seen as such an innovative idea that it led to a public debate between Lord Devlin, a British judge, and H. L. A. Hart, a British legal philosopher. In the 1960s, this was the best-known intellectual controversy in the English speaking legal world, with dozens of articles written about the rival positions. Arguments about ‘morality’ and the ‘conservative’ character of various societies still surface in court cases, as in the decisions in August 2005 in Fiji and Hong Kong.<sup>87</sup>

### 4. *Equality and non-discrimination*

Human rights are built on the premise of respect for human dignity and equal rights of every person. In the past various groups were excluded – for example, non-citizens, slaves and women. What was distinctive about the enlightenment and post-war human rights formulations was their universalism. Human rights were for everyone. The issue was whether lesbian women and gay men (and in turn bisexuals, transgenders and intersexuals, now grouped together in the modern acronym LGBTI) were inside or outside that universalism. If inside, they were entitled to respect and equality. You had to accord homosexuals equal dignity, equal humanity, equal rights and equal recognition. Equality rights had far more extensive implications than the previous utilitarian and privacy arguments. You had to accept the homosexual couple living next door.

Human rights, as we now understand them, have developed in the post-war period. The *Charter of the United Nations* in 1945 and the *Universal Declaration of Human Rights* in 1948 set new goals for national legal systems. Those goals have continued to be elaborated through the political ups and downs

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<sup>87</sup> *Leung v Secretary for Justice*, [2005] HKCFI 713; *Thomas McCosker, Dhirenda Nadan v State*, August 26, 2005, High Court Fiji, Appellate Jurisdiction.

of the post-war world. There has been progress and there have been slack periods, but there has been no actual reversal in the development of universal human rights standards in this period. The number of non-governmental organizations that will deal with sexual orientation and gender identity issues has slowly increased, and now includes Amnesty International, Human Rights Watch, Global Rights, the International Commission of Jurists and the International Service for Human Rights.<sup>88</sup> The visibility of gays and lesbians began in the West in the 1960s. Now there are openly gay and lesbian elected members of legislatures in most Western countries. Sunil Pant became the first openly gay or lesbian person to be elected to national office in Asia when he won a seat on the interim legislature and constitutional drafting assembly in Nepal in May 2008.

The most striking set of judicial or quasi-judicial decisions in modern international human rights law began in 1981, applying principles of privacy and equality to rule against anti-homosexual criminal laws. These cases began in the European human rights system with decisions in *Dudgeon v United Kingdom* (1981), *Norris v Ireland* (1988), *Modinos v Cyprus* (1993) and *Sutherland v United Kingdom* (1997).<sup>89</sup> The same outcome occurred in *Toonen v Australia* (1994), a decision of the UN Human Rights Committee. In the Asia-Pacific region, such laws have been declared unconstitutional in Hong Kong, Nepal, and Fiji. The strong role of judicial decisions reflects the caution politicians and legislative bodies have shown in reform.

The majority of the judges of the European Court of Human Rights in *Dudgeon v U.K.* in 1981 relied on the Wolfenden Report. The US Supreme Court rejected the privacy argument in *Bowers v Hardwick* in 1986 but adopted it in *Lawrence v Texas* in 2003, with some judges also supporting equality rights. The European Court of Human Rights ruled that privacy included non-discrimination in employment in *Lustig-Prean v U.K.*<sup>90</sup> They were expanding the meaning of the privacy argument. Judge Winter, in a 2005 decision in Fiji, linked privacy with supporting relationships and the good of society in general.<sup>91</sup>

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<sup>88</sup> In 1998, Human Rights Watch and the International Gay and Lesbian Human Rights Commission jointly published a report "Public Scandals: Sexual Orientation and Criminal Law in Romania", probably the first such collaboration between a general human rights NGO and a lesbian/gay organization. In 2003 the same two organizations published "More Than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa."

<sup>89</sup> *Sutherland v United Kingdom*, 1 July 1997, European Commission on Human Rights. The decision was not appealed to the Court.

<sup>90</sup> (2000) 29 E.H.R.R. 548.

<sup>91</sup> *Thomas McCosker, Dhirenda Nadan v State*, 26 August 2005, High Court Fiji, Appellate Jurisdiction.

The way in which we give expression to our sexuality is the most basic way we establish and nurture relationships. Relationships fundamentally affect our lives, our community, our culture, our place and our time. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct risks relationships, risks the durability of our compact with the State and will be a breach of our privacy.

Echoes of the pre-equality ‘privacy’ arguments are still with us. George W. Bush, in the U.S. election campaign in 2004, said that “consenting adults can live the way they want to live”, though he rejected public recognition through same-sex marriage.<sup>92</sup> A current group in Lebanon, campaigning for decriminalization, has the name Hurriyyat Khassa or Private Liberties.<sup>93</sup> Malaysia’s Anwar Ibrahim was convicted of sodomy in a sensational and highly political case. Only after acquittal on a final appeal did he voice any criticism of the law. He said there was a question about the law intruding “on people’s privacy and their own private choices...” A privacy argument allowed him to criticize the law, while acknowledging that homosexuality was not accepted by Malay people.<sup>94</sup> No bolder critique was politically possible. Malaysia has a Muslim majority and Sharia courts in some of the States apply religious law to Muslims.

Decriminalization occurred in Hungary in 1961, Czechoslovakia in 1962, England and Wales in 1967, Bulgaria in 1968, Germany in 1968/9, Canada in 1969, Austria and Finland in 1971, South Australia and Norway in 1972, Portugal in 1982 and New Zealand in 1986. In the Americas, criminal prohibitions remain in parts of the Caribbean.

The United Kingdom, which historically had the most responsibility for globalizing criminal prohibitions, is now repentant. In May 2007 Foreign Office Minister Ian McCartney made a statement to the UN Human Rights Council:

The Foreign and Commonwealth Office is developing a strategy for promoting and protecting the human rights of LGBT people overseas. This year sees the 40<sup>th</sup> Anniversary of the Sexual Offences Act in the UK, which began the decriminalization of homosexuality. We can mark this milestone by speaking up for those millions around the world who are branded as criminals simply for being who they are. ...These will be difficult issues to raise, but we must speak up for those who cannot speak for themselves. In addition to efforts on decriminalization there are 5 other areas where UK action can make a difference:

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<sup>92</sup> Rex Wockner, “Bush, Kerry debate why people are gay” October 14, 2004 (a wire service story for gay media), [http://www.rodneycroome.id.au/other\\_more?id=1026\\_0\\_2\\_0\\_M](http://www.rodneycroome.id.au/other_more?id=1026_0_2_0_M).

<sup>93</sup> “Lebanon Gays Push for Law Change”, *ILGA Bulletin*, Issue 3 (2004) 5.

<sup>94</sup> AFP, Anwar, “Homosexuality laws must be amended” *The Nation* (11 November 2004) 5A.

- non-discrimination in the application of human rights;
- support for LGBT activists and human rights defenders;
- health and health education;
- raising LGBT issues at international / multilateral institutions;
- and bilateral engagement with key countries.<sup>95</sup>

The Netherlands had already been funding certain LGBT organizations in development countries, and for individuals to attend regional and international LGBT conferences.

### **F. Post Cold War Reforms**

With the collapse of the Soviet Union, decriminalization swept Eastern Europe. Russia and its former satellites were joining the West. Human rights were an entry point. If a state hoped to join the European Union, it first had to join the Council of Europe and sign the *European Convention on Human Rights*. Gradually, it was formalized that a state had to repeal anti-homosexual criminal laws to take even the first step in this process. Boris Yeltsin ended the criminal prohibition in Russia. Decriminalization occurred in Ukraine in 1991, Latvia and Estonia in 1992, Russia in 1993, Belarus in 1994, Moldova and Albania in 1995, Macedonia in 1996, Romania in 1996/2001, Bosnia and Herzegovina in 1998, Georgia in 2000 and Lithuania in 2004. Prohibitions from the U.S.S.R. era continue in what was Soviet Central Asia.

### **G. Criminal Laws Co-existing With Tolerance**

In a number of jurisdictions we have the odd trinity of (a) a criminal prohibition, (b) social disapproval, but (c) little actual police enforcement of the law. In such situations, gay bars and saunas may be tolerated, but are kept somewhat insecure.<sup>96</sup> Police raids and charges are possible. The existence of the law keeps a lid on things. Often, these patterns are quite stable. They seem stable today in Malaysia and Singapore. Stable patterns can be upset by gay men flaunting their presence, by some public scandal or by unexpected or aggressive police actions. In some places in Asia, they are now challenged in public campaigns by activists.

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<sup>95</sup> Ian McCartney, "The Foreign and Commonwealth is developing a strategy for promoting and protecting the human rights of LGBT people overseas" (statement to the UN Human Rights Council, 17 May 2007),

[http://www.idaho.org.uk/index.php?option=com\\_content&task=view&id=69&Itemid=20](http://www.idaho.org.uk/index.php?option=com_content&task=view&id=69&Itemid=20).

<sup>96</sup> Sometimes the lid is quite repressive. India in 2009 seems to have only one full-time gay bar (in New Delhi), though there are occasional gay parties at specific bars organized by Gay Bombay.

Why would there be no serious attempt at enforcement? Why retain a criminal law and not enforce it? Perhaps there is a very simple explanation: avoidance. Politicians want to avoid controversial subjects. They do not propose any change in the status quo unless they cannot avoid some kind of comment. A second simple explanation sees the retention of the law as a general statement of disapproval, one that perhaps will discourage homosexual activity. George W. Bush, when Governor of Texas, defended the Texas sodomy law as a “symbolic gesture of traditional values.”<sup>97</sup>

### 1. Containment of issues

There is another explanation: containment. Containment not of individuals, but of the issues that society will have to deal with if a criminal law is repealed. There is a series of issues involving gays and lesbians that only starts with issues of criminal law. The issues, in a logical sequence, are (a) being charged with a crime for having sex, (b) getting fired from your job, (c) being denied benefits available to heterosexual couples (for example, pensions, health insurance and rent-controlled apartments), (d) equal rights in relation to children (for example, custody, access, adoption and fertility treatment), (e) equal rights in immigration law to sponsor a partner, (f) general recognition of relationships (for example, ascription and registered partnerships or marriage)<sup>98</sup> and (7) open inclusion in public institutions (for example, LGBT teachers, professors, judges, legislators, cabinet members and human rights commissioners).

The group of lawyers who challenged sodomy laws in the United States in the case of *Bowers v Hardwick* saw criminal law change as a priority because, they said, “sodomy laws are the bedrock of legal discrimination against gay men and lesbians.”<sup>99</sup> A brief in the case argued that sodomy laws “provide a basis for further, unjustified discrimination”.<sup>100</sup> In other words, criminal prohibitions block progress on other issues, such as discrimination in employment or the recognition of relationships for purposes of health insurance or pensions.<sup>101</sup> Mr. Justice Kennedy, in *Lawrence v Texas*, invalidating state sodomy laws, said that when

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<sup>97</sup> *Eskridge Passions, supra*, note 4 at 315.

<sup>98</sup> Ascription refers to recognizing on-going same sex relationships on the basis that they are factually like on-going heterosexual relationships (either married or de facto). Registration is involved in the various systems established for ‘registered partnerships’, ‘civil unions’, or the French pacts of civil solidarity.

<sup>99</sup> *Eskridge Passions, supra*, note 4 at 235.

<sup>100</sup> *Eskridge Passions, supra*, note 4 at 241.

<sup>101</sup> This idea is reflected in Mr. Justice Stevens’ dissent in *Bowers v Hardwick* and Mr. Justice Scalia’s dissent in the later USSC decision in *Romer v Evans* (1996) 517 US 620. See *Eskridge Passions, supra*, note 4 at 266, 288.

...homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and the private spheres.<sup>102</sup>

The issue of job discrimination became the major public issue after decriminalization in the U.K., Hong Kong and Canada. But if the legal system brands homosexuals as criminals, how can we say that it should bar discrimination in employment?

In *Lawrence v Texas* (2003), a successful constitutional challenge to U.S. sodomy laws, the American Center for Law and Justice (linked to the Christian evangelist Pat Robertson) said that it had decided to enter the case after concluding that acceptance of the gay rights arguments by the court might provide a constitutional foundation for same-sex marriage. Focus on the Family and the Family Research Council argued in a joint brief in the case that the Texas criminal law was a reasonable means of promoting and protecting heterosexual marriage. In his dissent, Justice Scalia said the decision placed heterosexual-only marriage laws in question. These interveners, along with Scalia, were not so much supporting the criminal law as opposing same-sex marriage.<sup>103</sup>

In 1993, the government of Singapore stated at the UN World Conference on Human Rights in Vienna that human rights were still essentially contested notions:

Singaporeans, and people in many other parts of the world do not agree, for instance, that pornography is an acceptable manifestation of free expression or that homosexual relationships is just a matter of lifestyle choice. Most of us will also maintain that the right to marry is confined to those of the opposite sex.<sup>104</sup>

Back in 1993, the Singapore government, virtually alone in the world, saw the right to marry on the horizon. It certainly isn't on the horizon in Singapore these days, and the criminal law keeps it that way.

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<sup>102</sup> Quoted in *Eskridge Passions*, *supra*, note 4 at 326.

<sup>103</sup> The arguments in the case are canvassed in detail in *Eskridge Passions*, *supra*, note 4.

<sup>104</sup> Foreign Affairs Minister Wong Kan Seng, *The Real World of Human Rights*, 16 Vienna 1993, Singapore Government Press Release No: (20/JUN, 09-1/93/06/16), [1993] Sing. J. L. S. 605. Some of this language was repeated by Singapore's Deputy Prime Minister S. Jayakumar in September, 2005, at the UN Summit. He repeated that most human rights were still essentially contested concepts. "But the penchant of some states to present their views as universal norms inevitably provokes resistance, unnecessarily politicizes the process and is ultimately unhelpful to the cause of human rights. Unless this deeper issue is squarely addressed, any changes will only be superficial." Quoted in UFP, "U.N. assembly pressured over new human rights council" *Japan Times* (18 September 2005) 5.

In 2007, the Prime Minister of Singapore, Lee Hsien Loong, in parliamentary debates, said a number of seemingly pro-gay things: (i) sexual orientation is substantially inborn (not a matter of perverse choice), (ii) society should not make life more difficult for homosexuals than it already is, (iii) gay bars and clubs already operate openly, (iv) government will not actively enforce the criminal prohibition, and (v) many homosexuals are “responsible, invaluable, highly respected contributing members of society” and often our brothers, sisters, colleagues or children. How then did he support retaining the criminal prohibition? Firstly, by deferring to ‘conservative’ public opinion. Secondly, by wanting to contain homosexuality.

Lee added that although he does not want gays to leave the country, he said he does not see gays as a minority group as in the case of racial and religious minority groups and reiterated that gays “should not set the tone for Singapore society.”<sup>105</sup>

Here, we see a classic expression of fear of a minority. Minorities are commonly seen as threatening by majorities in some way. Some of the older anti-Asian writings in North America justified prohibitions on Asian immigration on the basis that Asians were actually really clever and would take over. Similarly, it seems full acceptance of homosexuals raises the possibility of gay interior decorators and fashion gurus setting the “tone” for Singapore society, leaving the unfortunately more sober heterosexuals in the shade.

William Eskridge has noted that the U.S. Supreme Court ruling in *Lawrence v Texas* that struck down anti-homosexual criminal laws did not result in any counter movements to try to restore such criminal laws.<sup>106</sup>

To date *Lawrence* has not inspired a sodomy-revival movement, in part because the sodomy issue was overripe by the time the Court finally

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<sup>105</sup> Sylvia Tan, “Allow space for gays but gay sex ban to stay” *fridae.com* (24 October 2007), <http://www.fridae.com/newsfeatures/article.php?articleid=2124&viewarticle=1>. AFP, “Singapore PM defends decision not to decriminalise gay sex” *Bangkok Post* (24 September 2007) 4, quotes Prime Minister Lee at a student forum saying “I think the tone of the society should really be set by the heterosexuals, and that’s the way many Singaporeans feel.”

<sup>106</sup> Other advances have seen counter strategies in the United States. The enactment of local anti-discrimination laws that banned discrimination on the basis of sexual orientation led to (a) popular votes to repeal such laws and (b) state-level laws or state-level constitutional amendments prohibiting such laws. When the possibility of same-sex marriage became legally credible in the US, many states passed constitutional amendments to define marriage as heterosexual, and Congress passed the *Defense of Marriage Act* to bar the recognition of state-level marriages (or civil unions) in national laws. School desegregation decisions of the USSC had also led to local actions to preserve segregation through the use of private schools. Abortion, while a right in certain circumstances, was also countered by a lack of state funding for this medical service. So a “sodomy-revival movement”, as Eskridge puts it, after the decision in *Lawrence v Texas*, could have been expected, not simply an acceptance that the US SC had now settled the matter.

settled it and in larger part because traditionalists' focus had moved on to same-sex marriage.<sup>107</sup>

In other words, retaining the criminal law had lost credibility due to (a) changed social attitudes, (b) new gay and lesbian visibility, (c) the extent of law reform that had already occurred in state level criminal and anti-discrimination laws, and (d) the development by the Supreme Court of its views on privacy and equality. An attempt to restore the previous system had no chance of success, for repealing such prohibitions had not simply become credible (ripe) but inevitable (overripe). Strategically, it was necessary to move on to the next issue, which by the time of the *Lawrence* decision was not anti-discrimination laws (most states already had them), but the recognition of same-sex relationships through ascription, registered partnerships or the extension of marriage. In the 2004 election, George W Bush said that state governments could extend their laws if they wanted. He was conceding state-level registered partnership laws in order to hold onto heterosexual-only 'marriage.' Michael J. McManus, President of Marriage Savers, a U.S. non-governmental organization, echoed Bush, saying, "Homosexuals have a right to live any way they wish, but they do not have the right to redefine marriage for the whole culture."<sup>108</sup>

In December 2008, many observers were startled by a statement from the Vatican. Sixty-six countries had agreed to support a statement in the U.N. General Assembly supporting LGBT rights. The Vatican strategically indicated that it was opposed to discrimination against homosexuals and did not support continuing anti-homosexual criminal laws. But it opposed the U.N. statement for some of its broad wording that it said would support the recognition of same-sex marriage. For credibility, the Vatican was prepared to drop other more preliminary issues and move to the marriage issue, which was now its major concern.

## *2. The Results of Serious Enforcement*

There is another argument against serious enforcement of anti-homosexual criminal laws. It can provoke a backlash. It did in some of the countries for which we have information.

The years after World War II saw increased actions by police and state authorities in Western countries.

Purges of homosexuals from state bureaucracies, crackdowns on gay meeting places, and depictions of the homosexual threat posed to the

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<sup>107</sup> *Eskridge Passions, supra*, note 4 at 379.

<sup>108</sup> Gay Marriage to End "Culture Wars"?, forwarded by Human Rights Watch, September 21, 2008, <http://www.virtueonline.org/portal/modules/news/article.php?storyid=8627>.

nation's security and children developed at the same time in many European countries [as well as in the United States], whether ruled by left-wing Social Democratic regimes or by right-wing Christian Democratic regimes, as well as in Australia and New Zealand and elsewhere.<sup>109</sup>

Gays were banned from government and military jobs. Entrapment was used in parts of the U.S. Police raids on gay venues occurred sporadically. This increased oppression led to countervailing campaigns for decriminalization.

Why was there this post-war repression? Was it an attempt to reverse some developments which the wartime segregation of the sexes had produced? The women's movements remember the entry of women into factory work during the war and their exile to the suburbs thereafter. The gay and lesbian movements remember the "coming out under fire" of men and women in their segregated groupings within the military, who went on to found gay and lesbian communities in the larger cities after their return.<sup>110</sup>

### 3. *The United Kingdom in the 1950s*

Some police forces in the U.K. began to take the criminal law seriously and to attempt systematic enforcement. Only some forces did this and even those police may not have acted consistently over time.<sup>111</sup> Police seized dairies and address books, and compelled individuals to name their homosexual friends and contacts. The result was dramatic trials of groups of men. In this way, arrests of individuals for some public offence led to the prosecution of scores of others for private activities.

A 'vicious clique' of twenty-eight tracked by police through a single address book appeared before a judge in Birmingham in August 1954. What a judge described as a 'festering sore in the county of Surrey' – fifteen men in Dorking – was exposed after a policeman followed up names and numbers left 'on a wall in a public place'. At Chippenham in Wiltshire in 1956, 'a web of vice' involving nineteen men who had sometimes 'dressed as women' and 'indulged flagrantly in certain

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<sup>109</sup> Elizabeth Povinelli, George Chauncey, "Thinking Sexuality Transnationally" (1999) 5 GLQ, A Journal of Lesbian and Gay Studies 439 at 443. In 1951, the British spies Guy Burgess and Donald MacLean defected to the USSR having betrayed American secrets, illustrating concretely that homosexuals could be security risks.

<sup>110</sup> See Alan Berube, *Coming Out Under Fire*, (Free Press, 1990) for the classic U.S. account of this phenomenon.

<sup>111</sup> Cook, *supra*, note 19 at 170.

practices' at parties were brought to justice. A judge told eleven men from Evesham that they had 'brought dishonour on the neighborhood'.<sup>112</sup>

In a sensational high-profile case in 1954, the aristocrat Edward Douglas Scot Montagu, his cousin Michael Pitt Rivers, and the journalist Peter Wildeblood were convicted and imprisoned for acts involving two boy scouts and two Royal Air Force men.<sup>113</sup>

Court cases involving sodomy, gross indecency and indecent assault had risen – from 719 in 1938 in England and Wales to 2,504 in 1955. This figure for one year compares with the total of 8,921 cases for the whole of the nineteenth century.<sup>114</sup>

...the level of prosecutions and the articles about 'evil men' and 'sex perverts' made the first half of the 1950s a period of real anxiety for many men. Cases like that of Wildeblood are mentioned almost universally by men interviewed about the 1950s... John Alcock remembers being 'very frightened'. ... 'We thought we were all going to be arrested and there was going to be a big swoop. The newspapers were full of it. I got so frightened that I burnt all my love letters from Hughie'. ... 'I never kept the names and addresses of my Brighton friends written down', Dennis observed, 'it was in my head but I never wrote it down on anything and I would certainly never dream of keeping a diary...'<sup>115</sup>

One individual told his story:

I lived in the West country in a very conservative seaside town. ...and one particular member of our gay community was caught cottaging by the police [cruising in a public toilet]. They threatened him with ten years in prison if he didn't tell them the names of all the gay men who lived in the area. So he went round in a police car to everywhere we worked or lived and a dozen of us ended up at the quarter sessions of the Exeter Assizes. ... When it came to sentencing it was rather frightening... They were sending people down – to prison – for four to six years. We were just shaking in our shoes wondering what was going to happen. Fortunately we were put on probation.<sup>116</sup>

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<sup>112</sup> *Cook, supra*, note 19 at 168.

<sup>113</sup> *Cook, supra*, note 19 at 168,169.

<sup>114</sup> *Cook, supra*, note 19 at 169.

<sup>115</sup> *Cook, supra*, note 19 at 170.

<sup>116</sup> Interview by Hugh David quoted in *Cook, supra*, note 19 at 171.

What was the result of this rather horrifying surge in police activity? Public opinion shifted.

1. In 1954 the Church of England published a report on the 'problem of homosexuality,' focused on the misery and anxiety being inflicted by police activity. The report advocated the legalization of sex between consenting men and an equal age of consent. It condemned the existing law for leading to blackmail and suicide.
2. The Hampstead and Highgate Express newspapers announced that they would not cover court cases involving homosexuals 'because of the misery that was caused.'
3. The Sunday Times in 1954 called for an enquiry, saying the law was not in accord with a large mass of public opinion.
4. In 1954, the government set up the Wolfenden Committee to examine the laws on homosexuality and prostitution. It reported in 1957 recommending decriminalization.
5. Peter Wildeblood published two books, *Against the Law* and *A Verdict on You All*, both in 1955, which gave a vivid account of his treatment.
6. In 1958, the small, elite Homosexual Law Reform Society was established to lobby for reform.
7. Two films on Oscar Wilde appeared in 1960. In 1961, Dirk Bogart starred in the film *Victim*, a story of blackmail and suicide. Sympathetic novels were published. TV documentaries were broadcast in 1965 and 1967.
8. The North-West Homosexual Reform Committee was founded in 1964, which became the Committee for Homosexual Equality in 1969 and the Campaign for Homosexual Equality in 1971. CHE became the first major national organization of homosexuals.
9. The *Sexual Offences Act* of 27 July 1967 decriminalized homosexual acts in private for those over 21. The Act did not apply to Scotland, Northern Ireland, the Channel Islands, the merchant navy or the armed forces.

#### *4. The United States*

People involved with the post-war gay and lesbian movements in the United States recounted stories of firings by government and other employers, lost security clearances, and police entrapment. Bars could lose their liquor licenses. Gay venues often paid regular bribes to police. Actual raids on steam baths and bars were irregular. Police harassment of the Stonewall Bar in New York City in June 1969 prompted three nights of rioting. Patrons fought back, and the event became a symbol of a new resistance to oppression. Police activity had provoked

a reaction. The “gay liberation” movement was born, and “pride parades” started the following year on the anniversary of the riot. In Asia, such parades now occur annually in Hong Kong, India, Japan, Republic of Korea, the Philippines, Taiwan, and Thailand.

### *5. Canada*

Decriminalization had occurred in Canada in 1969 as an elite reform, not as a reaction to increased police repression or in response to homosexual activism. With criminal law reform in place, the public legal issue became the inclusion of “sexual orientation” in provincial anti-discrimination laws dealing with employment and public services. Two key events in Canada were the raid on the Truxx bar in Montreal in 1977 and raids on gay saunas in Toronto in 1978 and 1979. These and other arrests in the period seemed a serious breach of a stable situation of police tolerance of gay bars and saunas, so long as they remained relatively marginalized. The raids provoked large public protest demonstrations against the police.<sup>117</sup>

When the bawdy house law was used for the first time against a gay bar in the 1977 Truxx raid, the massive demonstration in response was enough to convince the new Parti Quebecois government to amend the Human Rights Charter. Quebec thus became the first major jurisdiction in North America to protect its citizens against discrimination on the basis of sexual orientation.<sup>118</sup>

## **VII. AND ASIA?**

Criminal prohibitions are now gone in Europe and most of the Americas, and legal systems increasingly bar discrimination and give some recognition to same-sex relationships. But in the former British colonies in the Caribbean, Asia and Africa, some version of 377 lives on, with only a few exceptions. In Asia, reform of criminal laws has been attempted in India, Hong Kong, Singapore, and Nepal. By the beginning of 2009, decriminalization had occurred only in Hong Kong and Nepal.

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<sup>117</sup> Tom Warner, *Never Going Back* (Toronto: University of Toronto Press, 2002) 108-118.

<sup>118</sup> Displayed text, part of *The History of Gay Montreal*, an exhibit held at the time of the Out Games, Montreal, August, 2006. Customers had been charged with being a ‘found-in’ in a house of prostitution.

## A. India

India is a very plural society, with many issues of religion, caste, class, tribal status, region and sex in active discussion. Sexual orientation issues may now have a foothold in national debates on social and political issues, but precariously. The major recent events seem to be:

1. In 1998, violent right-wing Hindu protests occurred against the English language film *Fire*, made in India by an overseas Indian director, and featuring a lesbian relationship. Theatres were attacked and posters defaced in many parts of India. This was a national agitation. It was followed a couple of years later by protests over a second film, *The Girlfriend*, which depicted a lesbian as a manic killer.
2. A number of individual health workers doing HIV/AIDS education and prevention work for Naz Foundation and Bharosa Trust in Lucknow, the capital of the state of Uttar Pradesh, were arrested in July 2001. Police argued that their AIDS work promoted homosexuality in contravention of the law. The health workers were detained in jail for a number of weeks, before they were released and charges were dropped. There was extensive national publicity.
3. A legal challenge to Article 377 was launched in 2002, prompted by the Lucknow arrests. The government of India filed a statement that the law reflected Indian social attitudes and was not out of line with the laws in over 80 other countries. The government's National Aids Control Organization filed a statement supporting the challenge by saying that Article 377 made its work more difficult. At one point, the court case was rejected on the basis that the plaintiffs lacked 'standing' to pursue the case. That ruling was reversed by the Supreme Court and the matter sent back for trial. Final arguments in the trial were completed in January 2009.
4. A killing of an upper-middle class gay man at his parent's home in a posh suburb of New Delhi was given extensive coverage in popular media. It revealed a bit of gay life in a privileged upper class milieu.
5. In 2006, police in Lucknow entrapped a number of men by posing as gay on a gay chatline. One individual, under threats, identified others. The police lied about the circumstances of the arrests, suggesting there had been public activity in a park. In the end, charges were dropped. The events got media coverage.
6. In 2007, a number of celebrities signed a letter supporting the challenge to Article 377. Vikram Seth, a famous author, was the lead signatory, and he spoke publicly as a gay man about his objections to the law. Liberal media began to support decriminalization.

7. In April 2008, Sweden questioned India in the UN Human Rights Council on the retention of 377. The Solicitor General of India, G. E. Vahanvati, replied suggesting that the section originated in British concerns about their citizens coming to India in the 19<sup>th</sup> century, sometimes as members of the army, and taking advantage of more relaxed local sexual attitudes. To counter this, the section was introduced, and though, he said, it reflects a Western concept, it has remained in the *Penal Code*. He noted the court challenge underway in India to the section.<sup>119</sup>

In complex, fractious India, these events do not seem to have been enough to put law reform firmly on a national reform agenda. What attention there is has been focused on the court challenge for legislative repeal seems highly unlikely.

## **B. Hong Kong**

There have been LGBT non-governmental organizations in Hong Kong since 1986 when a medical doctor founded the Ten Percent Club. After decriminalization in 1991, the number of organizations increased. Gay saunas have existed in Hong Kong for many years, though such places typically have little public visibility. Gay bars have existed openly for perhaps fifteen years. Activists are visible. Small annual pride parades began in 2005.

Human rights were a major issue in discussions leading up to the reversion of the colony to China in 1997. Hong Kong enacted a *Bill of Rights* based on the *International Covenant on Civil and Political Rights*, which, because of Britain's signature, applied in the territory. This was followed in 1991 by the decriminalization of consensual homosexual acts, though the reform, as in Britain, established an unequal age of consent. In 1995-6, the Hong Kong Government issued a consultation paper on a general anti-discrimination law. Anna Wu, a member of the Legislative Council, proposed an *Equal Opportunities Bill* that would have outlawed discrimination on a number of grounds, including sexual orientation. The Hong Kong government responded with two bills dealing with gender and disability. They were enacted. An Equal Opportunities Commission enforces those laws.

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<sup>119</sup> Dhananjay Mahapatra, "UN body slams Indian on rights of gays" *The Times of India*, 24 April 2008). The account is at variance with what we know of the drafting of the *Indian Penal Code*, but there may have been a link. State regulated brothels for British army personnel were established in India to prevent soldiers picking up "special Oriental vices" and becoming "replicas of Sodom and Gomorrah." See Suparna Bhaskaran, "The Politics of Penetration" in Ruth Vanita ed., *Queering India: Same Sex Love and Eroticism in Indian Culture and Society* (Routledge, 2002) 15 at 17.

LGBT groups mounted a campaign. 10,000 letters supported a bill on sexual orientation discrimination. But a counter-campaign, largely by conservative Christian groups, produced 80,000 letters. A bill went to a vote just before reversion and was defeated by 29 votes to 27 – a very narrow loss.

The *Basic Law*, the post-reversion constitution for Hong Kong enacted by the National Peoples Congress, confirmed that the *International Covenant on Civil and Political Rights* would continue to apply in Hong Kong, though it had not, at that time, been signed by China itself. Matters of human rights were specified as within the jurisdiction of the Hong Kong Special Administrative Region. Any law implementing the *International Covenant* would have priority over other enactments. When a Court of First Instance ruled in 2005 that the *Bill of Rights* was a law implementing the *International Covenant*, this gave the *Bill of Rights* a constitutional status superior in force to other Hong Kong laws.<sup>120</sup> The case challenged the unequal age of consent for homosexual sexual activity. The Court of First Instance ruled that the general equality provision in the *Bill of Rights* invalidated the discrimination.<sup>121</sup> This conclusion was in line with the UN Human Rights Committee decision in *Toonen v Australia*, which found a Tasmanian criminal law in violation of the provisions of the *International Covenant*.<sup>122</sup> The Court of First Instance was upheld by the Court of Appeal in 2006.<sup>123</sup> A more recent decision in July 2007, by the Court of Final Appeal invalidated another provision, which had different rules on what constituted a “public” place in sections on homosexual and heterosexual activity.<sup>124</sup>

The issue of banning discrimination on the basis of sexual orientation continues. Two UN treaty bodies, dealing with the two major international human rights covenants, have urged Hong Kong to prohibit discrimination. A non-binding code of conduct was issued by the Home Affairs Bureau in 1996. In 2004, the new Deputy Secretary for Home Affairs, Stephen Fisher, met with LGBT representatives and set up a Gender Identity and Sexual Orientation Unit to handle discrimination complaints, though it has no adjudicative powers. Fisher also set up a Sexual Minorities Forum with members from LGBT organizations. The forum has discussed a number of issues, including immigration issues for same-sex couples, sex reassignment surgery, social services, sex education and human rights education. The government’s Sexual Minorities Forum is unique in Asia in that it hosts a public dialogue between activists and government officials. Fisher also initiated a survey on public attitudes towards homosexuality.

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<sup>120</sup> *Leung v Secretary for Justice*, [2005] HKCFI 494.

<sup>121</sup> *Leung v Secretary for Justice*, [2005] HKCFI 713.

<sup>122</sup> (1994) CCPR/C/50/D/488/1992.

<sup>123</sup> *Leung v Secretary for Justice* [2006] HKCA 360.

<sup>124</sup> *Secretary of Justice v Yau Yuk Lung Zigo* [2007] HKCFA 50.

Hong Kong, like Taiwan, South Korea and Singapore, has active conservative Christian groupings that oppose reform. This gives political debates an American flavor. Reform is actively contested and religious and family-based arguments are strongly put forward. But some reforms have happened and public debate continues.

### **C. Singapore**

Singapore is phenomenal. It is small and lacks natural resources. The island even lacks adequate drinking water, forced to import water from neighboring Malaysia and recycle waste-water. But through tenacity and hard work, it has prospered. The majority population is Chinese, with Malay and Indian minorities. Christians account for 15% of the population, and, it is said, a majority of them are fundamentalist or charismatic Christians. They are influential in Singapore politics much beyond their numbers.<sup>125</sup>

We have good information on recent patterns of enforcement in Singapore.<sup>126</sup> Prosecutions have been concerned with public activity, underage partners, sexual assault or extortion. There are no cases of police entrapment after 2004. Cases since 2001 only involve minors or extortion. Government figures gave the number of prosecutions for the years 2002 to 2006 as 25, 11, 13, 4 and 7.

There are other issues. Singapore refuses to grant legal status to LGBT NGOs, which technically bars them from operating. Controls on the media limit LGBT news. Public demonstrations are banned or strictly controlled. The government bans positive images of homosexuals. The gay Christian singers Jason and deMarco were banned. In 2008, a cable television channel was fined when a home decoration program featured a nursery in the home of a lesbian couple with an adopted baby. The Media Development Authority (MDA) said that the program “normalizes and promotes a gay lifestyle.”<sup>127</sup> In February 2009, Singapore television censored the annual Academy Awards broadcast from Los

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<sup>125</sup> International Gay and Lesbian Human Rights Commission, “Singapore: Religious homophobia, gay activism and repealing the sodomy law” (10 September 2007). Interview with three Singaporeans by Grace Poore, <http://www.iglhrc.org/cgi-bin/iowa/article/publications/reportsandpublications/465.html>.

<sup>126</sup> We have reports from the Straits Times newspaper and government figures on prosecutions. Mohan Gopalan has compiled a list of section 377A cases (the gross indecency provision), expanding an earlier list prepared by Lynette Chua. See Mohan Gopalan, “A heftier list of s.377 cases” *Yawning Bread* (May 2007), [http://www.yawningbread.org/guest\\_2007/guw-136.htm](http://www.yawningbread.org/guest_2007/guw-136.htm). Also see Alex Au, “Why 377A is redundant” *Yawning Bread* (May 2007), [http://www.yawningbread.org/arch\\_2007/yax-749.htm](http://www.yawningbread.org/arch_2007/yax-749.htm). In contrast, our information on India does not include trial level decisions. They are routinely not found in the law reports used by lawyers and judges.

<sup>127</sup> “Singapore TV station fined S\$15,000 for showing a “normal” gay family” *fridae.com* (25 April 2008), <http://www.fridae.com/newsfeatures/article.php?articleid=2216&viewarticle=1>.

Angeles, cutting parts of the speeches about the film on the gay politician Harvey Milk. A Channel 5 manager said the MDA code “explicitly disallows content that sympathizes with, promotes or normalizes such a lifestyle...”<sup>128</sup>

Former Prime Minister Goh ended the official ban on government employment of gays and lesbians, giving a good secular medical explanation for homosexuality. “Some of us are born this way”, he said, “and some of us are born that way”. Similar language was used in the debates on law reform in 2007 by founding Prime Minister Lee Kuan Yew (still in the cabinet as Minister Mentor) and his son, current Prime Minister Lee Hsien Loong.

Singapore has a few gay bars. They have been operating openly for perhaps a decade. Gay saunas have been in business since about 2001. Probably the leading gay news source in Asia is the online magazine *fridae.com*. It is a Singapore operation, but based in Hong Kong, outside the reach of the Singapore government.<sup>129</sup>

Local activist entrepreneurs began a Singapore-based gay ‘circuit party’ in 2001 coinciding with the country’s National Day. It was held on Sentosa Island, a park venue open for use by various groups. Wrapped in the Singapore flag, the Nation parties became bigger and bigger every year, drawing gay men from the region. Nation 04 in 2004 was, however, far too successful. 8,000 people were there, up from 1,500 in 2001. It was publicized in the *South China Morning Post*, the *Asian Wall Street Journal*, the *Far Eastern Economic Review*, *Time* magazine and numerous newspapers – but not a word in local Singapore papers. The event had become too big, too public. Singapore denied licenses for future Nation-style parties. The lid was back on the pot. The Nation party moved to Phuket in Thailand for the next couple of years, openly welcomed by the governor of that very tourist-oriented province.

Singapore is the best example of a jurisdiction with the trinity of (a) criminal prohibition, (b) social disapproval but (c) little actual police enforcement of the law. It is unique in that politicians in 2007 publicly discussed and affirmed this policy while hinting that the law might change at some time in the future. Politicians acknowledged and defended a pattern which was the unacknowledged reality in the rest of 377 Asia.

Singaporean politicians in 2007 were talking a lot about homosexuals. They had decided to reform the criminal law on a number of points. In 2006, a police officer had been prosecuted for oral sex with a teenager. This was highly controversial in Singapore, for it made it clear to the public that certain heterosexual sex acts between consenting adults in private were caught by the penal code. The result was an announcement in November 2006 that a reform of

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<sup>128</sup> Rex Wockner, “Singapore censors Oscars”, *San Francisco Bay Times*, 5 March 2009, [http://www.sfbaytimes.com/?sec=article&article\\_id=10222](http://www.sfbaytimes.com/?sec=article&article_id=10222).

<sup>129</sup> The author has written an occasional column for *fridae.com* since 2005.

the criminal law was planned, among other things, to repeal 377 while leaving in place 377A, the section that prohibited acts of gross indecency between males. This would end the prohibition on heterosexual oral and anal sex. This initial proposal was accompanied by an explanatory note by the Ministry of Home Affairs, which said in part:

The law on sexual offences deals with sexual relationships and embodies what society considers acceptable or unacceptable behaviour. When it comes to homosexual acts, the issue is whether Singaporeans are ready to change laws to bring them in line with heterosexual acts. Singapore remains, by and large, a conservative society. Many do not tolerate homosexuality, and consider such acts abhorrent and deviant. Many religious groups also do not condone homosexual acts. That is why the Government is neither encouraging nor endorsing a homosexual lifestyle and presenting it as part of the mainstream way of life.

There was an assurance that the government “would not be proactive in enforcing the section against adult males engaging in consensual sex with each other in private...”<sup>130</sup> These themes – that Singapore is a conservative society, and the government will not be proactive in enforcing the law – were constantly repeated by politicians in 2007.

In February 2007, the small Worker’s Party, the main opposition party, indicated that it was divided on the issue of homosexual law reform, and would make no submissions on the issue.<sup>131</sup> In March, the National Council of Churches commended the government for its plan to retain 377A, calling homosexual acts “sinful, abhorrent and deviant”. It called for criminal prohibitions to be extended to lesbian acts.<sup>132</sup> In April, the Law Society of Singapore supported the “separation of law and morals.”

Moreover, the assurance given by [the Ministry of Home Affairs] in the Explanatory Notes to Proposed Amendments to the Penal Code that were initially issued by MHA that prosecutions will not be proactively prosecuted under this section is an admission that the section is out-of-step

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<sup>130</sup> “Singapore to legalise anal, oral sex – but only for heterosexuals” *fridae.com* (9 November 2006), <http://www.fridae.com/newsfeatures/article.php?articleid=1800&viewarticle=1>

<sup>131</sup> “Singapore’s main opposition party declines to take up gay sex issue” *fridae.com* (9 February 2007), <http://www.fridae.com/newsfeatures/article.php?articleid=1853&viewarticle=1&searchtype=all>.

<sup>132</sup> “Council of Churches commends Singapore” *fridae.com* (12 March 2007), <http://www.fridae.com/newsfeatures/article.php?articleid=1874&viewarticle=1>.

with the modern world. The retention of unprosecuted offences on the statute book runs the risk of bringing the law into disrepute.<sup>133</sup>

They considered the question of the constitutionality of 377A, but reached no conclusion on its validity.<sup>134</sup>

Founding Prime Minister, now Minister Mentor Lee Kuan Yew gave a number of interviews in which he supported a genetic explanation for homosexuality and suggested that there was no rational basis for a criminal prohibition. But he suggested that reform was probably some ways off. In one interview in April, he expressed a fear that Singapore might become “a quaint, a quixotic appendage of the world” if it bucked international trends, such as decriminalization, for too long.<sup>135</sup>

In August 2007, local activists planned a series of events under the title IndigNation, as they had each year since the banning of the large gay ‘Nation’ parties. In the context of Singapore, this was provocative activism. A photography exhibition of gay men kissing was banned. A public talk by this author was banned, the first time a foreign speaker had been banned from giving a public talk in Singapore in five years. In September, the Minister of State for Law and Home Affairs, Professor Ho Peng Kee, answering a question in parliament, justified the ban:

Our laws are an expression and reflection of the values of our society and any public discourse in Singapore on such matters should be reserved for Singaporeans. Foreigners will not be allowed to interfere in our domestic political scene, whether in support of the gay cause or against it.<sup>136</sup>

The Reverend Troy Perry, founder of the U.S. based Metropolitan Community Church denomination, was also banned from speaking in August.

As we have seen, actual systematic attempts to enforce anti-homosexual criminal laws are rare. And when police activism has occurred in a serious way in the post-war period (as in Britain, the US and Canada), it tended to destabilize the situation by provoking an activist reaction and perhaps some public support for gays and lesbians. Singapore knows enough to avoid any provocation. It limits

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<sup>133</sup> Law Society of Singapore, Executive Summary of Council's Report on the Proposed Amendments to the Penal Code, 2007, [http://www.lawgazette.com.sg/2007-5/exec\\_summary.htm](http://www.lawgazette.com.sg/2007-5/exec_summary.htm).

<sup>134</sup> “Retention of gay sex laws cannot be justified” *fridae.com* (12 April 2007), <http://www.fridae.com/newsfeatures/article.php?articleid=1895&viewarticle=1>.

<sup>135</sup> ““No option” but to decriminalize gay sex, says MM Lee” *fridae.com* (25 April 2007), <http://www.fridae.com/newsfeatures/article.php?articleid=1907&viewarticle=1&searchtype=all>. “No prying on gays but no marriages either”, *The Straits Times*, 2 July 2007).

<sup>136</sup> “Foreigners not allowed to be part of gay rights debate in Singapore” *fridae.com* (19 September 2007), online: *Fridae*, <http://www.fridae.com>.

policing and prosecutions to cases involving public activity, lack of consent or the involvement of minors. In 2007, Singapore repealed the “carnal intercourse” section while retaining the male-only “gross indecency” provision. Heterosexuals were liberated. Gay issues continued to be contained.

#### **D. Nepal**

A young brahmin, Sunil Babu Pant, returned to Nepal after studying engineering in Belarus. He sought out gay contacts in his home country and began AIDS prevention work among transgender metis, a number of whom were involved in street prostitution. Metis were subject to extensive discrimination and police violence. In 2001, Sunil Pant founded the Blue Diamond Society (BDS), the first LGBT organization in Nepal. He asked about the legal situation and was told there was no criminal prohibition. The Nepal criminal code did prohibit “unnatural” sexual acts, but in a section of the criminal code devoted to bestiality. Police were not using the section to prosecute gay men or metis.

The BDS publicized police violence against metis, gaining local visibility and some international recognition in the process. Nepal, a very poor country, had been in turmoil with a long ‘Maoist’ insurgency. That ongoing civil war was seemingly resolved by an agreement that led to elections in 2008. Sunil Pant was elected to the interim legislature on the party list of the small Communist Party of Nepal (United). Three parties had included LGBT issues in their party platforms (the Maoists, who won the most seats, the Nepal Congress, and the small CPN (United). Pant campaigned as a gay man and on behalf of metis. He attributes the five seats that his party won to LGBT support. In South Asian terminology, the CPN (United) had found a ‘vote bank’ that had not previously been tapped.

A lawyer acting on his own behalf had brought a legal challenge to the BDS on the basis that homosexuality was illegal in Nepal. But that challenge never came to trial, though hearings were scheduled a number of times. In response, the BDS and three other organizations brought an action of their own for a declaration that LGBT people in Nepal were entitled to constitutional rights. The case was taken up by a Nepalese lawyer acting for the International Commission of Jurists (ICJ). The ICJ itself filed an impressive supporting brief, full of information on developments in the West and in international law. Nepal had signed most of the core UN human rights treaties, and Nepalese law said that these international obligations overrode any contrary provisions in domestic law.

The result was a dramatic judgment in December 2007, based on the simple proposition that homosexuals and third sex people were “natural” persons, and thus entitled to a full range of human rights. Many months later, a full

judgment and its English translation were issued.<sup>137</sup> The court ruled that the criminal law provision did make homosexual acts illegal, but found that the prohibition was in conflict with constitutionally protected human rights. It ordered the government to recognize ‘third sex’ people. It ordered the establishment of a committee to advise the government on how to recognize same-sex relationships, possibly through the extension of marriage. The lawyer for the BDS was named by the court to be a member of the committee. In a period of rapid social and legal change, the court had responded positively to detailed information about new Western and international legal standards.

### VIII. CONCLUSIONS

As we have seen, the historical origins of the criminal law prohibitions are religious. The prohibition in the book of Leviticus had a very surprising impact. It moved into early Christianity, though the food laws and circumcision did not. It continued into Roman law and ecclesiastical law, before becoming a legal standard throughout Europe. In the early 19<sup>th</sup> century, the criminal law prohibition was dropped in France, the Netherlands, Belgium, Spain, Italy and Portugal. We seem to have no account as to why France made the change, which was then copied in the other countries named. We cannot assume any greater tolerance in the reformed countries, just the copying of the new *Napoleonic Code*. The story of the *Indian Penal Code* of 1860 is similar. We have no account of why the ‘buggery’ law was retained (in rewritten form). It was not rethought. Inertia meant that it would continue in the first systematic codification of criminal law to be enacted in the British Empire. The spread of 377 to half the world was simply the copying of the new code. The intellectual incoherence of this history, as far as the issue of same-sex activity is concerned, is amazing.

There are many societies that have shown some tolerance for sexual and gender diversity in historic periods. China and Japan are striking examples. When the Canadian government commissioned an expert report on same-sex marriage for use in domestic litigation, it was startled to be told that same-sex marriage had a long history of recognition in past periods in China. It was expecting a report that said the idea was historically novel. But Brent Hinch’s recently published study, *Passions of the Cut Sleeve*, gave access in English to this part of Chinese history.<sup>138</sup> The Canadian government did not suppress the expert report. It forms part of the public record in the Canadian litigation.

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<sup>137</sup> *Sunil Babu Pant v Nepal*, December 21, 2008, Supreme Court of Nepal, Justices Balram and Pawan Kumar Ojha, Order Writ No 917 of 2064 (2007AD), [http://www.sxpolitics.org/mambo452/index.php?option=com\\_content&task=view&id=198](http://www.sxpolitics.org/mambo452/index.php?option=com_content&task=view&id=198).

<sup>138</sup> Brent Hinch, *Passions of the Cut Sleeve*, (University of California Press, 1990).

We have various historical and ethnographic accounts of tolerance or acceptance of homosexual activity (a) among elites (emperors, court figures, leading artists), (b) in special religious or ritual contexts, (c) in highly gendered relationships when one party presents himself or herself as of the opposite sex or (d) in age-stratified transitional relationships when the older figure is married and the younger figure will marry. Each of these patterns, while accepting homosexuality, actually limits or confines the situations in which it is acceptable. A prohibition, such as that found in Leviticus, had a parallel role in confining or marginalizing same-sex relationships (forcing them underground, or ‘in the closet’). What we lack in the historical record are examples of social recognition and acceptance of ongoing same-sex relationships that are reasonably egalitarian in gender and role. We lack such stories for ordinary people living ordinary lives.

In each of the particular stories of limited tolerance (or prohibition) described above, the social context was one in which procreation was highly important for the economies of families, villages and wider communities. With industrialization, societies moved beyond this rational preoccupation with reproduction. In these newer economies, population numbers increased sharply, ending fears of depopulation. In time, overpopulation became a recurrent fear. Industrialization and urbanization produced societies in which many individuals could live their lives free of the constraints of their natal families and home villages. It became possible for ordinary people to choose their partners, whether the choice was heterosexual or homosexual. This opened up the possibility of society recognizing same-sex couples as part of society. No longer was this a possibility only for emperors, elites and artists.<sup>139</sup> Campaigns for reform, both for decriminalization and for new anti-discrimination laws, were focused on the plight of individuals. A major shift took place when societies and legal systems began to give recognition to same-sex relationships.

When do ordinary same-sex couples start to be recognized as couples in modern societies? We can date this in terms of law. The first example seems to be a 1979 regulation in the Netherlands that recognized same-sex partners in a law dealing with successor tenancy rights to rent controlled apartments. In 1989, Denmark enacted its *Registered Partnership Act*, which accorded most of the rights and obligations of marriage to same-sex partners who chose to register. The law was widely copied in other parts of Europe. Also, in 1989, the New York Court of Appeals recognized same-sex partners, again in the context of

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<sup>139</sup> Change has been slow, for (a) homosexuals are a relative small minority, (b) they are dispersed among the larger population, (c) they have no natural institutions of their own that could support a leadership (such as their own schools or churches), (d) the ability to ‘pass’ gives individuals a way of dealing with stigma that runs counter to organizing for change, and (e) discussion of sexual issues or sexual variation seems difficult in all societies.

successor tenancy rights.<sup>140</sup> Since that time, Western legal systems have (a) repealed the remaining criminal prohibitions, (b) enacted anti-discrimination laws and (c) begun to recognize relationships either by ascription, registration or the extension of marriage.

There is a larger agenda than simply decriminalization. Criminal prohibitions, even if unenforced, are barriers to progress on these other issues. Gradually and fortunately, the prohibitions are disappearing.

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<sup>140</sup> *Braschi v. Stahl*, (1989) 74 N.Y. 201, 543 N.E. 2d 49.