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This alien legacy: the origins of 'sodomy' laws in British colonialism

Human Rights Watch

Editors' Note: This version of the original 2008 report has been substantially edited to reduce the length, including via removal of chapter III and without additions. Omitted text is shown by '[…]'. Readers are strongly encouraged to also consult the original full report, available online from Human Rights Watch (2008a) at www.hrw.org/reports/2008/12/17/alien-legacy-0 (accessed 10 July 2012).

I. Introduction

Three trials

In 2008, a case stood unresolved before *India*'s High Court, calling for reading down Section 377 of the Indian Penal Code. That provision, almost 150 years old, punishes 'carnal intercourse against the order of nature with any man, woman or animal' with imprisonment up to life.[1] This law, understood to criminalise consensual homosexual conduct, allows the state to invade the lives and intimacies of millions of adult Indians.

Five years earlier in the long-running case, India's Ministry of Home Affairs had submitted an affidavit supporting Section 377. It said: 'The law does not run separately from society. It only reflects the perception of the society ... When Section 377 was brought under the statute as an act of criminality, it

1 As explained below, most law derived from British colonialism makes no distinction between homosexual acts committed with or without consent, or between homosexual acts committed by adults as opposed to adults' abuse of children. Therefore, the petition aims to 'read down' rather than strike down the law. It asks the Court to state that consensual homosexual acts between adults are no longer criminal under the provision, while leaving intact Section 377's application to non-consensual acts and to children – until India passes a modern, gender-neutral rape law, and provides express legal protection for male children against sexual abuse.

responded to the values and mores of the time in the Indian society'. The ministry claimed that, by comparison to the United Kingdom and the United States of America, 'Objectively speaking, there is no such tolerance to [the] practice of homosexuality/lesbianism in the Indian society'. (High Court of New Delhi 2005).

This was sheer amnesia. Section 377, at its origin, did not respond to Indian society or its 'values or mores' at all. British colonial governors imposed it on India undemocratically. It reflected only 'the British Judeo-Christian values of the time', as the petitioners in the case told the court in reply (High Court of New Delhi 2005; see also Baudh 2008). Indeed, on 16 August 2008 – the 61st anniversary of India's freedom – the law's opponents marched in Mumbai and demanded the UK government 'apologise for the immense suffering that has resulted from their imposition of Section 377. And we call on the Indian government to abandon this abhorrent alien legacy … that should have left our shores when the British did'. (Taylor 2008). They chose the day because while 'India had got its independence from the British on this date in 1947, queer Indians were still bound by a British Raj law'. (QueerAzaadi 2008).

In a second case in the same month, in *Malaysia*, a court arraigned Anwar Ibrahim, former deputy prime minister and now a leader of the opposition. He stood charged with sexual relations with a male former aide, under Section 377 of Malaysia's penal code, which also criminalises 'carnal intercourse against the order of nature'.

It was Anwar's second trial for what the Malaysian press universally called 'sodomy'. Like the first charges, nine years earlier, these showed every sign of a political frame-up. Anwar had been preparing to return to political life in a parliamentary by-election when the allegations broke. If Malaysia's government believed, as India's apparently did, that the colonial-era law mirrored deep social prejudices, then the case was a perfect tool to discredit him.

Yet according to an opinion poll, two thirds of Malaysians thought politics lurked behind the charges, and only one third believed the criminal justice system could handle Anwar's case fairly (Human Rights Watch 2008b). Regardless of how Malaysians felt about homosexual conduct, they did not trust the government to administer the law. The state's handling of the evidence fed suspicions. Police had sent the man who filed the complaint to a hospital, for anal examinations designed to prove the charges: standard procedure in many countries. Embarrassingly, however, the tests – later leaked on the internet – apparently found no proof. The government vacillated, too, between charging Anwar with consensual and non-consensual 'sodomy'. The uncertainty came easy. The law had only relatively recently made a distinction between the two – and it still provided virtually identical punishments, regardless of consent.

A third case came in *Uganda*, where three members of an organisation defending lesbian, gay, bisexual, and transgender (LGBT) people's rights faced trial. They had staged a peaceful protest at an AIDS conference in

Kampala, drawing attention to the government's refusal to respond to the pandemic among the country's lesbian, gay, bisexual, and transgender (LGBT) communities. Police promptly arrested them and charged them with criminal trespass.

Seemingly the case had nothing to do with 'sodomy' or sex, but over it hung the shadow of Uganda's law punishing 'carnal knowledge against the order of nature'. That law, Section 140 of the criminal code, was also a British colonial inheritance, though in 1990 legislators had strengthened it, raising the highest penalty to life imprisonment. The government used the revised law to harass both individuals and activists who were lesbian or gay, censoring their speech, threatening them with prison, raiding their homes. Officials also relied on the law to explain, or excuse, their failure to support HIV/AIDS prevention efforts among LGBT people – the inaction that sparked the protest. Four years earlier, the minister of information had demanded that both the United Nations and national AIDS authorities shut out all LGBT people from HIV/AIDS programs and planning. He cited the law against homosexual conduct (*The Daily Monitor* 2004).

[…]

There was no doubt, then, that the 'trespass' charges against the protesters aimed not just to suppress dissent, but to send a message that some people – 'sodomites', violators of the 'carnal knowledge' law – should not be seen or heard in public at all. President Yoweri Museveni, who had campaigned against LGBT people's rights for a decade, reinforced that message at every opportunity. He called homosexuality 'a decadent culture … being passed by Western nations', warning: 'It is a danger not only to the [Christian] believers but to the whole of Africa' (New Vision 2008a). He praised Ugandans for 'rejecting' it, and claimed that 'having spinsters and bachelors was quite alien to Ugandan traditions' (New Vision 2008b).

[…]

The atmosphere crackled with explosive menace. Hundreds marched in 2007 to threaten punishment for LGBT people, calling them 'criminal' and 'against the laws of nature' (Human Rights Watch 2007c). Yet government ministers still warned that tougher anti-gay measures were needed. 'Satan,' one said, 'is having an upper hand in our country'.[2]

Colonial laws and contemporary defenders

More than 80 countries around the world still criminalise consensual

2 James Nsaba Butoro, ethics and integrity minister in the Museveni government, quoted in *New Vision* (2007).

homosexual conduct between adult men, and often between adult women.[3]

These laws invade privacy and create inequality. They relegate people to inferior status because of how they look or who they love. They degrade people's dignity by declaring their most intimate feelings 'unnatural' or illegal. They can be used to discredit enemies and destroy careers and lives. They promote violence and give it impunity. They hand police and others the power to arrest, blackmail, and abuse. They drive people underground to live in invisibility and fear.[4]

More than half those countries have these laws because they once were British colonies.

This report describes the strange afterlife of a colonial legacy. It will tell how one British law – the version of Section 377 the colonisers introduced into the Indian Penal Code in 1860 – spread across immense tracts of the British Empire.

Colonial legislators and jurists introduced such laws, with no debates or 'cultural consultations', to support colonial control. They believed laws could inculcate European morality into resistant masses. They brought in the legislation, in fact, because they thought 'native' cultures did not punish 'perverse' sex enough. The colonised needed compulsory re-education in sexual mores. Imperial rulers held that, as long as they sweltered through the promiscuous proximities of settler societies, 'native' viciousness and 'white' virtue had to be segregated: the latter praised and protected, the former policed and kept subjected.

Section 377 was, and is, a model law in more ways than one. It was a colonial attempt to set standards of behaviour, both to reform the colonised and to protect the colonisers against moral lapses. It was also the first colonial 'sodomy law' integrated into a penal code – and it became a model anti-sodomy law for countries far beyond India, Malaysia, and Uganda. Its influence stretched across Asia, the Pacific islands, and Africa, almost everywhere the

3 An exact number is hard to calculate. Almost none of these laws mention 'homosexuality' (a term only coined in 1869) or homosexual acts; the terminology differs between legal systems and (as the discussion of the original meanings of 'sodomy' in chapter II below shows) is sometimes difficult to interpret. For instance, Egypt is often excused from lists because its law punishes the 'habitual practice of debauchery [*fujur*]', even though domestic jurisprudence since the 1970s has established that this term refers to consensual sex between men. The best reference work on the subject is Ottosson (2008),

4 The principle that criminalising consensual same-sex sexual conduct violates basic human rights was laid down by the UN Human Rights Committee – which interprets and monitors compliance with the International Covenant on Civil and Political Rights (ICCPR) – in the 1994 case of *Toonen v. Australia*. The Committee found that sexual orientation is a status protected against discrimination under articles 2 and 26 of the ICCPR.

British imperial flag flew.

> In *Asia and the Pacific,* colonies and countries that inherited versions of that British law were: Australia, Bangladesh, Bhutan, Brunei, Fiji, Hong Kong, India, Kiribati, Malaysia, Maldives, Marshall Islands, Myanmar (Burma), Nauru, New Zealand, Pakistan, Papua New Guinea, Singapore, Solomon Islands, Sri Lanka, Tonga, Tuvalu, and Western Samoa.
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> In *Africa,* countries that inherited versions were: Botswana, Gambia, Ghana,[5] Kenya, Lesotho, Malawi, Mauritius, Nigeria, Seychelles, Sierra Leone, Somalia, Swaziland, Sudan, Tanzania, Uganda, Zambia, and Zimbabwe.[6]

Among these, only New Zealand (in 1986), Australia (state by state and territory by territory), Hong Kong (in 1990, before the colony was returned to China), and Fiji (by a 2005 high court decision) have put the legacy, and the sodomy law, behind them.

Other colonial powers had far less impact in spreading so-called sodomy laws. France decriminalised consensual homosexual conduct in 1791.[7] (It did,

5 The Ghanaian code differs from other British-derived Penal Codes in Africa in that consensual 'buggery', while a crime, is defined only as a misdemeanor. Ghanaian law does not derive directly from the Indian Penal Code (or the Queensland Penal Code) – as do most other British-African codes, as explained below. Its ancestor was a draft prepared for Jamaica by the liberal British jurist R.S. Wright, who was heavily influenced by the libertarian ideals of the philosopher John Stuart Mill. (Mill famously wrote that 'the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others' (Mill 1974, p. 68). Wright's draft code was never applied in Jamaica but became the basis for Ghanaian law (Friedland 1981).

6 *South Africa*, although taken over by the British in 1806, retained the Netherlands' common law, known as 'Roman-Dutch' – which also criminalised 'sodomy'. This common-law offence was finally struck down by the Constitutional Court of the post-apartheid country in 1998. (The Netherlands itself decriminalised sodomy in 1809, when Napoleon annexed it. In one of the typical paradoxes of colonial law, this was three years too late to affect the Netherlands' one time African colony, which kept Roman-Dutch law in its pre-1806 form and hence retained the crime.) Roman-Dutch law came to what is now Namibia when, as the territory of South-West Africa, it became a South African mandate in the wake of World War I. It remains Namibia's common law, and sodomy is still a crime there. The same is true of Zimbabwe, which began its colonial existence as a possession of Cecil Rhodes' Cape Town-based British South Africa Company. However, Roman-Dutch law in colonial Rhodesia as well as modern Zimbabwe has been interpreted by judges trained in British common law, and the understanding of sexual offences there has been heavily affected by the Sec 377 tradition. For a fuller discussion, see Long (2003).

7 Napoleon's armies then brought decriminalisation to the conquered Netherlands, and thus to most of its colonies.

however, impose sodomy laws on some French colonies as means of social control, and versions of these survive in countries such as Benin, Cameroon and Senegal.) Germany's notorious Paragraph 175 punished homosexual acts between men from Bismarck's time till after the Nazi period.[8] German colonies were few, however, and the legal traces of its presence evanescent.[9]

This report does not pretend to be a comprehensive review of 'sodomy' and European colonial law. It concentrates on the British experience because of the breadth and endurance of its impact. Nor does this report try to look at the career of 'sodomy' and law in all the British colonies. For clarity, it focuses on the descendants of India's Section 377. (Britain's Caribbean possessions received the criminalisation of 'buggery' in British law, but by a different process relatively unaffected by the Indian example. They are not discussed here: Human Rights Watch 2004a.)

As Britain tottered towards the terminal days of its imperial power, an official recommendation by a set of legal experts – the famous Wolfenden Report of 1957 – urged that 'homosexual behaviour between consenting adults in private should no longer be a criminal offence'. The report said:

> The law's function is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others ... It is not, in our view, the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behaviour. (Committee on Homosexual Offences and Prostitution 1963)

England and Wales decriminalised most consensual homosexual conduct in 1967.[10] That came too late for most of Britain's colonies, though. When they won independence in the 1950s and 1960s, they did so with the sodomy laws still in place.

Few of those independent states have undertaken repeal since then. This flies in the face of a growing body of international human rights law and precedents demanding that they do so. They disregard, too, the example of formerly colonised states like Ecuador, Fiji and South Africa that have actually enshrined protections for equality based on sexual orientation in their constitutions.

Still more striking is how judges, public figures, and political leaders have, in recent decades, defended those laws as citadels of nationhood and cultural authenticity. Homosexuality, they now claim, comes from the colonising west. They forget the west brought in the first laws enabling governments to forbid and repress it.

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8 East Germany eliminated it in 1957 and West Germany in 1969.

9 Most of its colonies passed to Britain, France, or Belgium after the First World War.

10 Scotland followed in 1980, and Northern Ireland in 1982.

Addressing the sodomy law in 1983, India's Supreme Court proudly declared that 'neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking'. (*Fazal Rab Choudhary v. State of Bihar* 1983, p. 323)

[…]

Opponents of change have mounted the same argument elsewhere. While Hong Kong was still a British colony, its authorities fought Wolfenden-like law reforms (Petersen 1997). Commissions deputed to investigate the issue heard opinions such as 'Homosexuality may be very common in Britain, but it is definitely not common in Hong Kong. Even if it is, it is still wrong to legalise activities that are in clear breach of our morals'.[11] Only in 1990, after long advocacy by the LGBT community, did the colony decriminalise consensual homosexual sex.[12]

After fiery debate, Singapore's government refused to rid itself of its colonial law against homosexual conduct in 2007. The supporters of this position cited the 'communal cohesiveness' that the British statute supposedly defended.[13] A petition to the prime minister called the law, forced on the colony decades before, 'a reflection of the sentiments of the majority of society … Repealing [it] is a vehicle to force homosexuality on a conservative population that is not ready for homosexuality'. (Keep377a.com 2008). In November 2001, the then prime minister of neighbouring Malaysia, who had encouraged Anwar Ibrahim's first 'sodomy' trial, blamed homosexuality on the former colonial power: 'The British people accept homosexual [government] ministers,' he said. 'But if they ever come here bringing their boyfriend along, we will throw them out. We will not accept them'. (Human Rights Watch 2002a, 'Lesbian, Gay, Bisexual and Transgender Rights' p. 684).

Extreme and extraordinary, however, have been the law's defences from sub-Saharan Africa. Zimbabwe's Robert Mugabe launched the long ferocity in the early 1990s, vilifying lesbians and gays as 'un-African' and 'worse than dogs and pigs'. 'We are against this homosexuality and we as chiefs in Zimbabwe should fight against such Western practices and respect our culture,' he berated crowds (quoted in Human Rights Watch/International Gay and Lesbian Human Rights Commission 2003, p. 23). President Daniel Arap Moi of Kenya blasted homosexuality as 'against African tradition and biblical teachings. We

11 Submission from General Association of Kowloon District Association (quoted in The Law Reform Commission of Hong Kong 1982), (The Law Reform Commission, however, supported the Wolfenden principles).

12 It however retained a discriminatory age of consent – 14 for heterosexual sex, 21 for sex between men – and a draconian punishment of imprisonment up to life for gay men who broke it, as against five years for heterosexuals. This was only overturned in court in 2006.

13 Mohammed Aidil in *Juris Illuminae* (2007).

will not shy away from warning Kenyans against the dangers of the scourge' (Sipho and Otieno 1999). In Zambia, a government spokesman proclaimed in 1998 that it was 'un-African and an abomination to society which would cause moral decay'; the vice-president warned that 'if anybody promotes gay rights after this statement the law will take its course. We need to protect public morality' (quoted in Human Rights Watch/International Gay and Lesbian Human Rights Commission 2003, p. 39).

Some reasoned voices spoke up. Nelson Mandela, steering a country proud of its human rights reforms, told a gathering of southern African leaders that homosexuality was not 'un-African', but 'just another form of sexuality that has been suppressed for years … Homosexuality is something we are living with' (Sipho and Otieno, 1999). Over the years, though, the desperate defence of western mores in indigenous clothing grew more enraged, and influential. Nigeria's President Olusegun Obasanjo perorated to African Bishops in 2004 that 'homosexual practice' was 'clearly un-Biblical, unnatural, and definitely un-African'. A Nigerian columnist echoed him, claiming those who 'come in the garb of human rights advocates' are 'rationalising and glamorising sexual perversion, alias homosexuality and lesbianism … The urgent task now is to put up the barricades against this invading army of cultural and moral renegades before they overwhelm us' (Olawunmi 2004).

From Singapore to Nigeria, much of this fierce opposition stemmed from Christian churches – themselves, of course, hardly homegrown in their origins. Archbishop Peter Akinola, head of the Anglican Church of Nigeria, has threatened to split his global denomination over some Western churches' acceptance of lesbians and gays. He acknowledges that the missionaries who converted much of Africa in colonial days 'hardly saw anything valid in our culture, in our way of life' (Timberg 2005). Yet he also interprets the most stringent moral anathemas of the missionaries' faith, along with an imported law against homosexuality, as essential bulwarks of true African identity.

But the embrace of an alien legal legacy is founded on falsehood. This report documents how it damages lives and distorts the truth. *Sodomy laws throughout Asia and sub-Saharan Africa have consistently been colonial impositions.* No 'native' ever participated in their making. Colonisers saw indigenous cultures as sexually corrupt. A bent towards homosexuality supposedly formed part of their corruption. Where pre-colonial peoples had been permissive, sodomy laws would cure them – and defend their new, white masters against moral contagion.

Chapter ll of the full report traces the history of Britain's law on 'sodomy', or 'buggery', from its medieval origins to the 19th-century attempt to rationalise the chaos of common law. The draft Indian Penal Code, the first experiment in producing a criminal code anywhere in the Empire, was a test of how systematising law would work. Colonial officials codified sodomy as a criminal offence – and refined its meaning – in the process of writing comprehensive

codes. This began in India, and travelled from Nigeria to the Pacific in the imperial bureaucrat's baggage.

[…]

Chapter lV [of this report] traces how courts, under colonialism and in the newly independent states, interpreted the vague language laid down in the colonial codes. Key themes emerge.

- *First,* judges tried to bring an ever wider range of sexual acts within the laws' punitive reach: descending, while doing it, into almost-comical obsessions with orifice and organ, desire and detail.

[…]

- British provisions on 'gross indecency' gave police opportunities to arrest people on the basis of suspicion or appearance. And they were an opening for governments looking to criminalise sex between women as well.

Chapter V [of this report] concludes by looking at the actual effects of sodomy laws in these countries. They do not aim just at punishing acts. They post broad moral proclamations that certain kinds of people, singled out by presumption and prejudice, are less than citizens – or less than human.

Eliminating these laws is a human rights obligation. It means freeing part of the population from violence and fear. It also means, though, emancipating post-colonial legal systems themselves from imported, autocratically imposed, and artificial inequalities.

II. 'Sodomy', colonialism and codification

The laws that the Europeans brought dragged a long prehistory behind them. The first recorded mentions of 'sodomy' in English law date back to two medieval treatises called *Fleta* and *Britton.* They suggest how strictures on sex were connected to Christian Europe's other consuming anxieties.[14]

Fleta required that 'Apostate Christians, sorcerers, and the like should be drawn and burnt. Those who have connections with Jews and Jewesses or are guilty of bestiality or sodomy shall be buried alive in the ground, provided they be taken in the act and convicted by lawful and open testimony' (quoted in Moran 1996, p. 213, n. 2). *Britton,* meanwhile, ordered a sentence of burning upon 'sorcerers, sorceresses, renegades, sodomists, and heretics publicly convicted' (quoted in Bailey 1955, p. 86. See also Goodrich 1976). Both

14 *Fleta, seu Commentarius Juris Anglicani*, was a Latin survey of English law produced in Edward I's court in 1290 (allegedly written while the out-of-favor author served time in Fleet prison, accounting for its name: Richardson and Sayles 1955). *Britton* was composed somewhat later, and in Norman French (Brunner 1888; Carson 1914).

treatises saw 'sodomy' as an offence against God. They classed it, though, with other offences against ritual and social purity, involving defilement by Jews or apostates, the racial or religious Other.

The grab-bag of crimes was telling. It matched medieval law's treatment of 'sodomy' elsewhere in Europe. The offence was not limited to sexual acts between men, but could include almost any sexual act seen as polluting. In some places it encompassed intercourse with Turks and 'Saracens' as well as Jews (Long 2003, p. 260; see also Greenberg 1988, pp. 274–92).

In part, this traced to an old strain in Christian theology that held sexual pleasure itself to be contaminating, tolerable only to the degree that it furthered reproduction (specifically, of Christians).[15] More cogently, though, it reflected increasing fears in the advancing Middle Ages about pollution and defilement across social boundaries. The historian R.I. Moore (1987) finds in the 11th and 12th centuries the birth of a 'persecuting society' in Europe, targeting various enemies within – Jews, lepers, heretics, witches, prostitutes, and 'sodomites' —who threatened purity and carried contamination, and had to be cast out and controlled (see also Douglas 2002). Periodic bursts of repression against these and other groups characterised European law for centuries to follow. 'Sodomy' was pollution. Punishing it marked out racial and religious identity. The urgency British authorities later showed in transplanting 'sodomy' laws into colonial contexts – even before they were fully codified at home – may reflect the legal category's origins. It was a way of segregating the Christian, European self from alien entities that menaced it with infection.

In England, King Henry VIII's break with the Catholic Church in the 16th century led to revising much of the country's common law – simply because offences that had formerly been tried in church courts now had to be heard in secular ones. Many sexual offences were among them. A 1533 statute, therefore, reiterated the criminalisation of 'sodomy' as a state rather than Church concern. Under the name of the 'detestable and abominable Vice of Buggery committed with mankind or beast', it was punished by death.[16] In

15 Christian precepts on sexual practice and sexual imagination were refined in patristic literature between the 1st and 8th centuries AD. The emphasis was on minimising pleasure and maximising procreative possibility in sexual activity. All acts of intercourse, including heterosexual vaginal intercourse outside the 'missionary' position, were graded as 'unnatural' to the degree that pleasure superseded the purely procreative functions of the sexual act (Brundage 1993).

16 The word 'buggery' derived by way of the French '*bougre*' from the medieval Bogomil heresy, which flourished in Bulgaria. Again, sexual and religious (and racial) 'deviance' were intimately associated (Bailey 1955, pp. 147–49; Hyde 1970). The law was repealed 20 years later with the return of Catholicism under Queen Mary, as sexual offences moved back to the jurisdiction of ecclesiastical courts; it was re-enacted under the Protestant Queen Elizabeth I in 1563. See also Kenneth Borris (2004).

one form or another, this law persisted until 1861. The last known execution for 'buggery' in England was in 1836 (Hyde 1970, p. 142).

The sense of the mysterious, polluting power of 'sodomy' or 'buggery' complicated the prosaic legal task of coming up with definitions. Precision was dangerous because it flirted with contamination. The jurist Edward Coke, in his 17th-century compilation of English law, wrote that 'Buggery is a detestable, and abominable sin, amongst Christians not to be named'. He stressed the foreign derivation of the term —— 'an Italian word' – as well as the act itself: 'It was complained of in Parliament, that the Lumbards had brought into the realm the shamefull sin of sodomy, that is not to be named'. He nonetheless named it as 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' (Coke 1797, Cap. X, 'Of Buggery, or Sodomy', p. 58). Coke specified that anal sex between two men or a man and a woman, along with bestiality, were comprised by the term.

Describing 'sodomy' precisely was risky, to be avoided. In an 1842 British court case that involved a man accused of committing 'nasty, wicked, filthy, lewd, beastly, unnatural and sodomitical practices' in the vicinity of Kensington Gardens, the defence objected that the adjectives gave no indication of what the crime actually was.[17] The vagueness became more an issue as, in the 19th century, reformers set about codifying and imposing order on the chaos of British common law and statute law. The Offences Against the Person Act in 1861 consolidated the bulk of laws on physical offences and acts of violence into one 'modern', streamlined statute – still the basis for most British law of physical assault. It included the offence of (consensual and nonviolent) 'buggery', dropping the death penalty for a prison term of ten years to life.

Less well known is that codifying sexual offences began far earlier, in 1825, when the mandate to devise law for the Indian colony was handed to the politician and historian Thomas Babington Macaulay. Macaulay chaired the first Law Commission of India and was the main drafter of the Indian Penal Code – the first comprehensive codified criminal law produced anywhere in the British Empire (Friedland 1992, p. 1172).

[…]

Fears of moral infection from the 'native' environment made it urgent to insert anti-sodomy provisions in the colonial code. A sub-tradition of British imperialist writing warned of widespread homosexuality in the countries Britain colonised. The explorer Richard Burton, for instance, postulated a

17 The judges agreed that the invective in the indictment was unspecific. They concluded, however, that simply adding the term 'buggery' would have the effect of 'shewing the intention implied by the epithets'. R v. Rowed (cited in Moran 1996, pp. 38 ff.)

'Sotadic Zone' stretching around the planet's midriff from 43 degrees north of the equator to 30 south, in which 'the Vice is popular and endemic … whilst the races to the North and South of the limits here defined practice it only sporadically amid the opprobrium of their fellows' (quoted in Aldrich 2003, p. 31).[18]

The European codifiers certainly felt the mission of moral reform – to correct and Christianise 'native' custom. Yet there was also the need to protect the Christians from corruption. Historians have documented how British officials feared that soldiers and colonial administrators – particularly those without wives at hand – would turn to sodomy in these decadent, hot surroundings. Lord Elgin, viceroy of India, warned that British military camps could become 'replicas of Sodom and Gomorrah' as soldiers acquired the 'special Oriental vices' (quoted in Hyam 1990, p. 116; see also Hyam 1986).

Macaulay finished a draft Indian Penal Code in 1837, though Indian resistance and English hesitation meant that an approved version did not come into force until 1860. Introducing the text in an 1837 speech, he discussed the clauses in detail – except when, reaching his version of the anti-sodomy provision, he showed a traditional discomfort that drafters had to speak to such distasteful issues:

> Clause 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said … [We] are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision. (Indian Law Commission 1837, pp. 3990–91)

Despite this, however, Macaulay tried in fact to rationalise the British offence of 'buggery'. All the old vagueness around the term called out for clarification, and the colonies were the place to put this into practice. Macaulay came up with a broader definition of the violation of the 'order of nature', involving any kind of offending 'touch'. But he introduced a new axis of classification, according to whether the act was consensual or not – something never relevant in the old crime of 'buggery'. He chose to impose fresh language on India. Two clauses pertained to 'Unnatural Offences', distinguished by the element of consent:

> Cl. 361 Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is *by his own consent*_touched by any person, for the purpose of gratifying unnatural lust, shall be

18 Or, as Lord Byron theorised about a similar but heterosexual 'vice': 'What men call gallantry, and Gods adultery/Is much more common where the climate's sultry'. *Don Juan*, Canto I, stanza 63 (Byron 2004).

> punished with imprisonment … for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine.
>
> Cl. 362 Whoever, intending to gratify unnatural lust, touches for that purpose any person *without that person's free and intelligent consent*, shall be punished with imprisonment … for a term which may extend to life and must not be less than seven years, and shall also be liable to fine. [emphasis added]

The 'injunction to silence' (Moran 1996, p. 33) that Coke and other jurists had promoted around the vocabulary of 'sodomy' continued to be powerful, however. When the final draft of the Indian Penal Code came into force in 1860, the 'Unnatural Offences' section was modified. The ultimate, historic text – which, in one form or another, influenced or infested much of the British Empire – read:

> Section 377: Unnatural offences – 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 … for a term which may extend to 10 years, and shall be liable to fine.
>
> Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this Section.

The reasons for the change remain unclear, but its effects are evident. On the one hand, this version went back to the outlines of the old standard of 'buggery', replacing the reference to 'touching' with the criterion of 'penetration'. There were still plenty of ambiguities (including the question of what had to penetrate what). These in turn let future colonial and post-colonial jurists redefine what these provisions actually punished.

On the other hand, the attempt to organise the offence around the axis of consent/non-consent was dropped. In principle, stipulating that the act had to be 'voluntary' meant the victim of forcible 'carnal intercourse' could not be criminalised. But the other actor received the same punishment, and was guilty of the same offence, whether the act was forcible or not. Despite the code's modern pretensions, the provision offered no differing standard of harm based on the use of force.

Thus the separate Penal Code provision addressing rape (Section 375) remained restricted to a man's rape of a woman. No distinct criminal offence was entailed in a man's sexual assault on another man; it was simply lumped with consensual offences in Section 377. Section 377 also had no separate provision or protection prohibiting an adult male from having sexual relations with a male child. That offence, too, was contained in 377 without distinction.[19]

19 Meanwhile, a man who had sexual relations with a girl under ten was guilty of statutory rape; the age was raised to 12 in 1891, 14 in 1925 and 16 in 1940 (One India 2008).

As a result, India – along with other countries from Zambia to Fiji with legal systems affected by the Indian Penal Code – was left without laws fully covering rape or child protection. To the drafters, the act of 'sodomy' itself was so horrible that the harm seemed uniform: regardless of the other party's age, and regardless of whether he consented or not.

[…]

Section 377 was exported to, and modified in other British colonies, and reinterpreted by their courts. Two themes emerge. They show again how colonial law was a field for exploring the meaning of an old British standard.

- By defining 'carnal knowledge' in terms of penetration, the Indian Penal Code language limited the act and left open the possibility that only the penetrating party might be guilty. As the law was applied in British colonies in subsequent years, one project was to redefine the scope of 'penetration' — and ensure the provision would criminalise as broad a range of acts, and partners, 'against the order of nature' as possible.
- The absence of the factors of age or of consent in the law meant that consensual homosexual conduct was legally indistinguishable from rape or pedophilia. Thus the figure of the 'homosexual' could easily be linked and assimilated – in popular thinking as well as before the law – to violent sexual criminals.

[…]

British law at home underwent a further refinement in 1885, during a revision of laws on the 'protection of women, girls [and] the suppression of brothels'. Henry Labouchere, a member of Parliament, introduced an amendment so unrelated to the debate that it was almost ruled out of order. When finally passed, it punished 'Any male person who in public or private commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person', with two years at hard labor. 'Gross indecency' was a broad offence designed to include virtually all kinds of non-penetrative sexual acts between two men. Unlike the 1861 'buggery' law, the Labouchere Amendment also explicitly extended to private acts. The press quickly dubbed it the 'blackmailer's charter'. Oscar Wilde was convicted under its terms in 1895 (Hyde 1962, pp. 12–13).

Labouchere's law acknowledged that two men could practice many other sexual acts than 'sodomy'. A society ambitious to extirpate such acts needed an express acknowledgement of its power over privacy, and a wider criminal framework to punish them.

Labouchere's provision came too late to be introduced in the Indian Penal Code itself. However, subsequent colonial codes incorporated versions of it,

including codes that derived from the IPC. It appeared in the Sudanese Penal Code in 1899, and in the influential penal law of Queensland in the same year. Malaysia and Singapore received the gross indecency provision jointly through an amendment in 1938.[20] Moreover, as explained below, subsequent jurisprudence in India (particularly the *Khanu* judgment) expanded the scope of 'unnatural offences' to include what would otherwise have been 'gross indecency' under British law. Further, though Labouchere's innovation only spoke of male-male sex, some governments have made 'gross indecency' apply to sex between women – by dropping the 'male' before 'person' (as detailed below in chapter IV).

The Indian Penal Code became the model for British colonies' legal systems throughout most of Asia and Africa. Each territory took over the newest version, one legal historian writes, 'improving and bringing them up to date, and the resulting product [was] then used as the latest model for an enactment elsewhere' (Morris 1974). The Straits Settlement Law of in 1871, covering territory that today encompasses Singapore, Malaysia, and Brunei, effectively duplicated the IPC (Chan 2004). Between 1897 and 1902 administrators applied the Indian Penal Code in Britain's African colonies, including Kenya and Uganda (Read 1963). Some British residents complained about the undemocratic character of the codes. British East Africans, for instance, protested a policy of placing 'white men under laws intended for a coloured population despotically governed' (Morris, 1974, p. 13).

The Sudanese Penal Code of 1899 also adapted the IPC, but shows a different strain in codifying 'unnatural offences'. It reintroduced, uniquely among British colonies, the axis of consent and a form of differentiation by age. Its version of Section 377 reads:

> S. 318 Whoever has carnal intercourse against the order of nature with any person *without his consent,* shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine; provided that a consent given by a person below the age of sixteen years to such intercourse by his teacher, guardian or any person entrusted with his care or education shall not be deemed to be a consent within the meaning of this section [emphasis added]. (Gledhill 1963, p. 443)

20 Sec 377A was introduced into the Singapore Penal Code by Sec 7 of the Penal Code (Amendment) Ordinance 1938 (No 12 of 1938). The reason, as stated in the Proceedings of the Legislative Council of the Straits Settlements in 1938 was to '[make] punishable acts of gross indecency between male persons which do not amount to an unnatural offence within the meaning of s 377 of the Code': p. C81, April 25, 1938. See microfiche no 672, Straits Settlements Legislative Council, Proceedings (SE 102), Vol. 1938 (Central Library Reprographic Dept, National University of Singapore).

Similarly, while the Sudanese code adopted the 'gross indecency' provision, it only punished it when non-consensual (Gledhill 1963, p. 444, Sec 319). These distinctions were lost after independence, however, when in 1991 Sudan's government imposed a *shari'a*-inspired penal code.[21]

The Penal Code of the Australian colony of Queensland (QPC) was drafted in 1899 by the colony's chief justice, Sir Samuel Griffith (Friedland 1992, p. 1177).[22] It came into force in 1901 and was the second most influential penal code after the IPC, especially in British Africa. The QPC introduced into the IPC's version of 'unnatural offences' the category of the 'passive' sexual partner – the one who 'permits'. Section 208 read:

> Any person who —
>
> (a) has carnal knowledge of any person against the order of nature; or
>
> (b) has carnal knowledge of an animal; or
>
> *(c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years* [emphasis added].

This eliminated one of the ambiguities in the IPC, making clear that both partners in the act were criminal. The QPC also widened the ambit beyond 'penetration', by introducing an independent provision for 'attempts to commit unnatural offences'.[23] Thus any sexual act or approach not resulting in penetration could be called an 'attempt'.

Outside Australia, the QPC first took root in Papua New Guinea. The

21 The Sudanese Penal Code of 1991, Sec 148, 'Sodomy: (1) Any man who inserts his penis or its equivalent into a woman's or a man's anus or permitted another man to insert his penis or its equivalent in his anus is said to have committed Sodomy; (2) (a) Whoever commits Sodomy shall be punished with flogging one hundred lashes and he shall also be liable to five years imprisonment; (b) If the offender is convicted for the second time he shall be punished with flogging one hundred lashes and imprisonment for a term which may not exceed five years. (c) If the offender is convicted for the third time he shall be punished with death or life imprisonment' As chapter V discusses below, in a number of countries – Pakistan and Nigeria among them – the modern resurgence of supposedly shari'a-influenced or -derived laws has not so much revived 'indigenous' legal values as further entrenched colonial ones. This toxic mix is an important topic in its own right, but beyond the scope of this report.

22 It was based on an earlier proposal from 1878.

23 Unnatural offences themselves continued to be defined by penetration, as in Sec 6: 'Carnal Knowledge: When the term "carnal knowledge" or the term "carnal connection" is used in defining an offence, it is implied that the offence, so far as regards that element of it, is complete upon penetration'. However, Sec 2–9 of the QPC reads that 'Any person who attempts to commit any of the crimes defined in the last preceding section is guilty of a crime, and is liable to imprisonment with hard labor for seven years'.

chief justice of Northern Nigeria, H.C. Gollan, then decided to adopt it as the model for his colony's penal code, which came into force in 1904. It then became the subject of bureaucratic battles between colonial administrators; officials in Southern Nigeria were divided between proponents of the QPC and supporters of the Indian Penal Code.[24] The former finally won out. In 1916, two years after Nigeria combined into a single colony, a common criminal code based on the QPC was adopted (Morris 1970; see also Adewoye 1977).

That process reveals a point. Despite the claims of modern political leaders that anti-sodomy laws represent the values of their independent nations, the Queensland Penal Code spread across Africa indifferently to the will of Africans.

The whims, preferences, and power struggles of bureaucrats drove it. After the Criminal Code of Nigeria was imposed, colonial officials in East Africa – modern Kenya, Uganda, and Tanzania – moved gradually to imitate it. A legal historian observes that the 'personal views and prejudices' of colonial officials, rather than any logic or respect for indigenous customs, led to replacing IPC-based codes with QPC-based codes in much of the continent (Morris 1974, p. 6).

The versions of 'unnatural offences' that spread with the QPC now encompassed a variety of acts: they punished a passive partner in sodomy, attempts at sodomy, and also 'gross indecency'. For instance, Uganda's Penal Code provided that:

> S. 140: Any person who (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or(c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years.
>
> S. 141 Any person who attempts to commit any of the offences specified in the last preceding section is guilty of a felony and is liable to imprisonment for seven years.
>
> S.143 Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.

Nigeria did offer variations from the trend. Its version narrowed 'carnal knowledge' to exempt sex between 'a husband and wife', making clearer what it understood by the 'order of nature'.[25] The law zeroed in towards its primary

24 Broader issues than 'unnatural offences' divided supporters of the two codes. The QPC was heavily inflected by European civil law, particularly the Italian Penal Code, and omitted the common-law requirement of *mens rea*, or criminal intent.

25 Sec 6: '"Unlawful carnal knowledge" means carnal connection which takes place otherwise than between husband and wife'.

focus on sex between men.[26]

Three generalisations arise from the confused history of 'carnal knowledge' in colonial penal codes.

- The anti-sodomy provisions that contemporary politicians defend as part of indigenous values never drew on local customary law, nor were they drafted through a deliberative process. Colonial officers devised and imposed them. They saw the sex laws as necessary precisely because they viewed local cultures as lax, a haven for 'unnatural offences'.
- Colonial authorities continuously grappled with terms and definitions, trying to arrive at both adequate language and common understandings around 'unnatural offences. But they did so under the shadow of a moral anxiety about the effects of debate, an injunction to silence that helped justify autocratic lawmaking with no discussion among the 'subject' peoples.
- Redefinition tended to widen the scope of the law – and to criminalise not just sexual acts, but a kind of person.

[…]

IV. Interpreting sodomy laws: the scope expands

Forensic medical exams display the particularity to which the state descends when it tries to parse out the specifics and the evidence of sexual acts. The story of how courts in the colonial period and beyond interpreted the various versions of Section 377 also shows state authorities stuck in morasses of sexual detail. Together, they exhibit the logical gymnastics states get into in defining the line between permissible and punishable sexual acts – and trying to keep a rationale for the distinction.

One distinction that never mattered much, in 'unnatural offences', was the axis of consent. Most of the surviving jurisprudence under colonialism and since independence (what reached the law reports were largely cases on

26 Later, in 1960, during the waning days of colonial rule, the territory of Northern Nigeria chose to have a separate Penal Code, independent of the new country's Federal Criminal Code. It took as a basis the Sudanese Penal Code of 1899, ironically based on the IPC, which Northern Nigeria had earlier rejected (Morris 1970, p. 153). However, the fact that the Sudanese code had decriminalised consensual sodomy did not go unnoticed – or unchanged. The Northern Nigeria Penal Code reverted back to the old consent-neutral definition from the Indian Penal Code. To multiply confusion, though, the drafters neglected to make the same change to the 'gross indecency' provision, which remained applicable only to non-consensual activities (Gledhill 1963, p. 444).

appeal, undoubtedly representing only a fraction of convictions) deals with charges of non-consensual sodomy. Nearly universally – as one Zimbabwean legal expert writes – the fact that 'an assault (possibly violent) has taken place is of secondary importance' to the court (Phillips 1999, p. 193). The law's silence on consent translates into judges' indifference to the victim. It also reaffirms that 'the non-existence of a victim', where there was consent, is no hindrance to prosecution (Phillips 1999, p. 193).

This chapter will show:

- First, investigating the details of sexual acts led to further expanding the scope of acts covered by Section 377. The law came to recognise broader categories of 'sexual perversion', and while that extended into acts committed by heterosexual couples, the 'sodomite' or 'catamite' or 'homosexual' was at the centre of its meaning.

[…]

- British law never punished sex between women – and hence British colonialism never imported criminal penalties for it. However, the breadth of the British 'gross indecency' provision has given states an opening to penalise lesbians as well.

Jurisprudence: from 'crimes against nature' to communal values

In 1930s India, police captured a young man called Ratansi while he and another man were trying to have sex. In court, Ratansi did not deny it. The furious judge called him a 'despicable specimen of humanity', addicted to the 'vice of a catamite' on his own admission (*Noshirwan v. Emperor* 1934, p. 206). It was not just the act in isolation that appalled the court: it was the contemptible class of person. Yet the judge could not punish the two accused: they were caught before they could finish the act. A gap yawned between his repulsion at the arrested men, and the evidentiary limits his understanding of the statute demanded. Conviction required penetration, and physical or other proof.

Much of the later jurisprudence around Section 377, in the many places where it was enforced, would try to close that gap: to re-draw the sexual map of 'immorality' and cram a sufficiently wide range of acts within the criminal compass, so that no 'despicable specimen of humanity' would be acquitted. What counted as 'unnatural' and, as one commentator observes, 'what counted as penetration continued to be an ongoing, arbitrary, and unsystematic discussion' across courts and countries (Bhaskaran 2002, p. 20).

'Carnal intercourse against the order of nature' had never been precisely defined. One of the first Indian cases to reach the law reports on appeal, though, reflected what was probably the usual judicial understanding. The phrase meant anal sex, since 'the act must be in that part where sodomy is

usually committed'. (*Government v. Bapoji Bhatt* 1884, p. 280) [27]

The 1925 Indian case of *Khanu v. Emperor* (1925, p. 286) took the first step towards redrawing the boundaries of Section 377. It became, for a long time, the guiding judgment on interpreting 377 through British colonies in South Asia, East Asia, and East Africa. The case involved forcible oral sex between an adult male and a minor. The non-consensual nature of the act played no role in the appeals decision. The only question that concerned the court was whether oral sex was an unnatural carnal offence under Section 377.

Khanu said yes. 377 was not limited to anal sex (*Khanu v. Emperor* 1925, p. 286). It cited two lines of reasoning.

The first defined the order of nature in sex as 'the possibility of conception of human beings': oral sex was legally like anal sex in that it was not reproductive. The colonial court's complete divorce from the Indian context – its reliance on purely European traditions of sexual propriety, which conflated nature with procreation – could not have been clearer. Nor did the court consider that other forms of penetrative sex (for instance, using birth control) also foreclosed the 'possibility of conception'. [28]

The second line of thinking redefined penetration. The court defined 'carnal intercourse' as

> a temporary visitation to one organism by a member of the other organism, for certain clearly defined and limited objects. The primary object of the visiting organism is to obtain euphoria by means of a *detente* of the nerves consequent on the sexual crisis. But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity (*Khanu v. Emperor* 1925, p. 286).

As long as there is an orifice (the mouth) to enclose the 'visiting member', there can be carnal intercourse. When it cannot lead to procreation, there is an 'unnatural offence' (*Khanu v. Emperor* 1925, p. 286).[29]

Khanu opened the way to bringing other acts under the scope of Section 377. For example, a 1961 case from East Pakistan (present-day Bangladesh) found that the identical provision in the Pakistan Penal Code criminalised

27 The appellant was charged under Sec 377 on allegations of oral sex with a minor.

28 At the same time the colonial court in *Khanu* defined 'unnatural' sex as non-procreative sex, contraception was legal in Britain. Marie Stopes opened Britain's first family planning clinic in 1921, four years before *Khanu*. Birth control had never been criminalised in the home country, though distributing information on contraception risked obscenity charges through the 19th century (Brandser 2004).

29 The *Khanu* court still found oral sex 'less pernicious than the sin of Sodom'. Its peculiar reasons were that 'It cannot be practiced on persons who are unwilling. It is not common and can never be so' – and, most notably, 'it cannot produce the physical changes which the other vice produces'.

what it called 'thigh sex' (*Muhammad Ali v. The State* 1961, p. 447). The court followed the penetration-specific definition of *Khanu* and held that 'the entry of the male organ of the accused into the artificial cavity between the thighs of [the other partner] would mean penetration and would amount to carnal intercourse'.

The post-independence Indian case of *Lohana Vasantlal* also followed and modified the *Khanu* decision (*Lohana Vasantlal Devchand v. The State* 1968, p. 252). On the facts, much like *Khanu*, it involved three men who forced an underage boy to have anal and oral sex with them. However, the judgment neglects the injury caused to the boy who was forced to undergo the sexual act: there is no discussion of coercion. Instead the court concentrated on including oral sex under 377. As with other appealed cases involving coerced sex, the court's reasoning would apply seamlessly to consensual acts.

Lohana Vasantlal agreed with *Khanu* in finding oral sex unnatural: the 'orifice of the mouth is not according to nature meant for sexual or carnal intercourse' (*Lohana Vasantlal Devchand v. The State* 1968, p. 252). The court applied two tests. Its main source, tellingly, came from the UK: the eminent British sexologist Havelock Ellis. Following him, it argued that oral sex might be permissible if it was part of foreplay leading to 'natural' (vaginal) sex: 'If the stage of the aforesaid act was for stimulating the sex urge, it may be urged that it was only a prelude to carnal intercourse'(ibid). However, again citing Ellis, it found that when forms of sex play cease being 'aids to tumescence' and 'replace the desire of coitus', then 'They became deviations … and thus liable to be termed "perversions"'(ibid.). The *Lohana* court also developed an 'imitative test' for sex acts. For example, oral sex imitated anal sex in terms of penetration, orifice, enclosure and sexual pleasure. Therefore it could also be punished under Section 377.

K. Govindan, a 1969 Indian case, used the 'imitative test' from *Lohana* to arrive at the same conclusion as the court in former East Pakistan on 'thigh sex': if 'the male organ is "inserted" or "thrust" between the thighs, there is "penetration" to constitute unnatural offence' (*State of Kerala v. K. Govindan* 1969, p. 20).

The judge in *Khanu* had said, 'I doubt if mutual cheirourgia would be' a form of 'carnal intercourse' – turning to Greek to dredge up a euphemism for masturbation (*Khanu v. Emperor* 1925, p. 286).[30] However, a court moved mutual masturbation under the ambit of Section 377 in the Indian case of *Brother John Antony v. State*[31] (1992, p. 1352). In this case, again, allegations of coercion were of no interest to the court. The judgment instead delves into the 'sexually perverse', analysing and analogising practices like 'tribadism',

30 Cheirourgia, in Greek, means 'work done by hands'.

31 The case involved charges of oral sex and mutual masturbation against a boarding school teacher.

'bestiality', 'masochism', 'fetishism', 'exhibitionism' and 'sadism' (ibid. p. 1353). Using the imitative test, it concluded that mutual masturbation falls within 377, as 'the male organ of the petitioner is said to be held tight by the hands of the victims, creating an orifice-like thing for manipulation and movement of the penis by way of insertion and withdrawal' (ibid).

In Singapore, two cases from the 1990s – *PP v. Tan Kuan Meng* (1996, p. 16) and *PP v. Kwan Kwong Weng* (1997, p. 697) – followed the distinction (between 'prelude to' and 'substitute for' the act of 'natural' sex) that *Lohana* had laid down. Each of these 377 trials involved a woman's allegation that a man had forced her to have oral sex. The court in *Kwan Kwong Weng* defined the crime as 'fellatio between a man and woman, whether the woman consented or not, which was totally irrelevant' (ibid. para 12).

Kwan Kwong Weng weighed current mores among heterosexuals, taking note of 'statistical evidence … of these forms of oral sex being practised in Singapore. We cannot shut our minds to it' (ibid. para 30). The court granted 'it is a fact of life that foreplay occurs before copulation'. And it held that 'when couples engaged in consensual sexual intercourse willingly indulge in fellatio and cunnilingus as a stimulant to their respective sexual urges, neither act can be considered to be against the order of nature. In every other instance the act ... will be ... punishable' (ibid. para 28).

Heterosexual oral sex was thus like a middling restaurant in the motorists' guide: worth a detour, but never, ever deserving a journey in itself. Heterosexuals, though, had a legal leeway for oral sex that was denied to homosexuals. They could claim that 'natural', vaginal sex was somewhere off in distant view, the long-planned destination after a diversion to a different orifice.

However, both *Lohana* and *Kwan Kwong Weng* subtly undermined the foundations of the old *Khanu* ruling, by quietly discarding the 'procreation' justification. The judge in *Kwan Kwong Weng* accepted implicitly (as the statistics before the Singapore court suggested) that people have sex for pleasure in and of itself – a major judicial concession.

This opened again the question: how confidently can the law distinguish between 'natural' and 'unnatural'? The lack of a self-evident standard in the *Kwan Kwong Weng* case ultimately led to a renewed push in Singapore for reforming the colonial-era provision. That push was given force by more prosecutions of heterosexuals for oral sex. In 2004, Singapore courts sentenced a former policeman to two years in prison for having oral sex with a teenage girl.[32] One judge spoke of 'certain offences that are so repulsive in Asian culture … There are countries where you can go and suck away for all you are worth. […] But this is Asia' (quoted in Baker 2004).

32 First press accounts suggested that she was 16, above the legal age of consent for (vaginal) sex, and had consented. Later reports, however, suggested she was 15. 'Singapore Reviews Oral Sex Law', *BBC News*, January 6, 2004.

'Asia' was not as conservative as the judge thought. Criminalising *homosexual* acts was one thing; criminalising *heterosexual* acts by now sparked outrage. Press and public opinion rebelled at the presumption that straight 'sucking' was alien to Singapore. Under pressure, the government launched a review of the law. Officials said from the beginning it would aim to decriminalise consensual oral sex between men and women, but leave all oral sex between men banned (Chan 2004).

That was what happened. The review eventually turned into a revision of the entire Penal Code; but homosexual conduct was the only real dispute. The government willingly discarded the 'carnal intercourse' provision of the law, which included heterosexual conduct. A battle line formed, though, at Section 377A –the old Labouchere Amendment text, criminalising 'gross indecency' between men. Human rights activists launched a petition to eliminate the ban on consensual homosexual conduct, as well as liberating heterosexuals; it gained thousands of signatures. LGBT advocates courageously joined in public debate. Yet in 2007, the government at last determined to cling to Section 377A.

Prime Minister Lee Hsien Loong voiced personal sympathy for gay citizens: 'We … do not want them to leave Singapore to go to more congenial places to live'. But, he added, 'homosexuals should not set the tone for Singapore society':

> Singapore is basically a conservative society. The family is the basic building block of our society. It has been so and, by policy, we have reinforced this and we want to keep it so. And by 'family' in Singapore, we mean one man one woman, marrying, having children and bringing up children within that framework of a stable family unit (Yawningbread.org 2007a).

Despite the reference to procreation, one thing was clear in the debate: the criterion of 'nature' had basically been thrown out the window. If heterosexual oral sex could be legally seen as natural in itself – despite its lack of any connection to 'having children' – there was no coherent basis for calling oral sex between two men 'unnatural'.[33]

[…]

Even the most virulent defenders of Section 377A argued not by appealing to the 'natural', but by theorising about community values. One parliamentarian declaimed:

33 Lee Kuan Yew, the powerful former prime minister, made the shift from nature-based to culture-based arguments explicit, telling supporters: 'You take this business of homosexuality. It raises tempers all over the world, and even in America. If in fact it is true – and I have asked doctors this – that you are genetically born a homosexual because that's the nature of the genetic random transmission of genes, you can't help it. So why should we criminalise it? But', he went on, 'there's such a strong inhibition in all societies … ' S*traits Time*, April 23, 2007 (Yawningbread.com, 2007b).

> If we seek to copy the sexual libertine ethos of the wild wild West, then repealing s377A is progressive. But that is not our final destination. The onus is on those seeking repeal to prove this will not harm society … We have no need of foreign or neo-colonial moral imperialism in matters of fundamental morality. Heterosexual sodomy unlike homosexual sodomy does not undermine the understanding of heterosexuality as the preferred social norm (The Online Citizen 2007).[34]

Yet relying on a 'preferred social norm' actually undermined the original foundations of the law, based on belief that 'sodomy' was 'against the order of nature', not just the order of a particular society. And – most importantly – foreign 'moral imperialism in matters of fundamental morality' was exactly what had brought the law to Singapore in the first place.

The Singapore story tears off the mask. It shows that Section 377's central focus, despite the heterosexual acts it had always punished, lay in eliminating homosexual conduct. It also shows, though, how tenuous the case for that purpose had become. 'Nature' was no longer a credible justification. The mores of particular societies were all that was left. As a Malaysian court had declared in 1979 (addressing a wife's claim that her husband had sexual relations with other men): 'Such despicable conduct though permitted among some Westerners should not be allowed to corrupt the community's way of life' (*Lim Hui Lian v. CM Huddlestan* 1979, p. 134).

[…]

Elsewhere too, though, invoking a vague set of 'national' or 'cultural' norms became the main defence of the colonial-era sodomy laws. […] Now it was the west that threatened to corrupt indigenous standards.

A 1999 verdict from Zambia indicates how sour and weak the argument around 'nature' had turned, and at the same time how unconvincing the appeal to popular beliefs could be. The judge in a local court faced with charges that a man had oral sex with other men, approached them through a muddle of theology and anatomy:

> Surely the mouth is not the same as a vagina. God gave specific functions to each organ … The mouth is for eating etc., and the vagina is for both sex and urinating. … Accused couldn't change God's desire. For behaving in the way he did, he implied God made a mistake [in] his distribution of functions.

Yet the conclusive factor for the judge, as he studied the accusation under a British law brought to Zambian territory by colonial invaders less than a hundred years before, was: 'Accused's behavior is alien to the African custom' (Human Rights Watch/IGLHRC, 2003, pp. 91–92).

34 She also warned ominously, 'To those who say that 377A penalises only gays not lesbians, note there have been calls to criminalise lesbianism too'.

[…]

'Gross Indecency' and Criminalising Lesbians

'Gross indecency' in British-derived penal codes is highly elastic. A Singapore court has stated its meaning depends 'on what would be considered grossly indecent by any right-thinking member of the public' (*NG Huat v. PP* 1995, p. 783).[35] Just slightly more specifically, a 1998 amendment to the Tanzanian Penal Code clarified that gross indecency included any act that 'falls short of actual intercourse and may include masturbation and indecent behaviour without any physical contact'.[36] Thus two men kissing, holding hands, sleeping together, or conceivably even looking at one another with sexual intent, could break the law.

On the one hand, 'gross indecency', like its British ancestor the Labouchere Amendment, only targets acts between men – as opposed to 'carnal knowledge', which could, at least as originally interpreted, also include heterosexual acts. On the other, unlike 'carnal knowledge', gross indecency does not entail penetration. In practice it was used to root out men who have sex with men who were caught in non-sexual circumstances, allowing arrests wherever they gathered or met – parks and railway stations, bathhouses and bars, and private homes and spaces. And unlike 'carnal knowledge', the absence of penetration meant a lower standard of proof. No forensic tests or flower-shaped anuses were needed.

The usefulness of 'gross indecency' in convicting men for homosexual conduct comes clear in the 1946 Singapore case of *Captain Marr* (Rex v. Captain Douglas Marr, p. 77). A naval officer faced charges of committing gross indecency with an Indian man. There were no witnesses, but police found the Indian's shirt in the captain's room. Such circumstantial evidence persuaded the court to convict.

The authorities are free to infer 'gross indecency' from any suspicious activity. The term is insidious, a legal bridge between 'unnatural' sexual acts and the associated identity of a certain kind of person: the 'homosexual' as a criminal offender. Homosexuality becomes a crime of the 'personal condition'. This broader understanding of 'unnatural acts' permits state and police harassment on a wider scale. A homosexual need not be caught in the act: presumptions fed by prejudice, or stereotypes of attire, manner, or association,

35 An X-ray technician was charged with 'gross indecency' for allegedly touching the chest, nipples and buttocks of a patient.

36 Section 3 of the Sexual Offences Special Provisions Act (Act no. 4 of 1998), passed by the Parliament of the United Republic of Tanzania, amended several provisions relating to sexual offences of the Tanzanian Penal Code, including the definition of gross indecency.

are enough (*Hoyle v. Regiman* 1957).[37]

'Gross indecency' has been used to extend criminal penalties to sex between women. Lesbian sex had never been expressly punished in English law. The colonial court in *Khanu* excluded it from 'carnal knowledge' because a woman lacked a penis. A recent Ugandan commentary explains that 'women who perform sexual acts on each other are not caught by the current law because they do not possess a sexual organ with which to penetrate each other'. (Tibatemwa-Ekirikubinza 2005, p. 97). Non-penetrative sex is not 'real' sex (Tamale 2003).

Between men, however, it was seen as something sex-like enough to be 'grossly indecent'. There was no reason the same logic could not extend to women. Some modern governments did want lesbian acts and identities moved under the criminal law. They found their chance through public debate about reforming rape laws. In the late 1980s the Malaysian women's movement campaigned for a new, gender-neutral definition of rape, as well as for criminalising marital rape (Beng Hui 2006). Partially in response to their lobbying, the legislature in 1989 moved to amend the Penal Code.[38]

In the end, however, legislators ignored the calls to modernise law on rape, and instead turned their scrutiny to Section 377. Their comprehensive re-write divided the Section into five different parts, while broadening its meaning and reach more than ever before. Their excuse? They could make rape effectively gender-neutral by adding a new crime of non-consensual 'carnal intercourse against the order of nature'.[39] The new provision also offered limited protection

37 A 1957 Ugandan case showed how stereotype and presumption – about relations between the races, as well as sex itself – could also serve as conclusive evidence in cases of 'sodomy'. A British officer had given a 'native' herdsman one shilling and some sugar as gifts. The unusualness of this 'special favor' across the power divide created a presumption of sodomy, leading to the officer's arrest (*Hoyle v. Regiman* 1957).

38 Criminal Code (Amendment) Act 1989 (Act A727).

39 The punishment – five to 20 years' imprisonment – remained almost the same as for consensual homosexual acts, but was equivalent to the punishment for a man's rape of a woman: 377A.Carnal intercourse against the order of nature. Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature. Explanation: Penetration is sufficient to constitute the sexual connection necessary to the offence described in this section. '377B. Punishment for committing carnal intercourse against the order of nature. Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping. 377C. Committing carnal intercourse against the order of nature without consent, etc. Whoever voluntarily commits carnal intercourse against the order of nature on another person without the consent, or against the will, of the other person, or by putting other person in fear of death or hurt to the person or any other person, shall be punished with imprisonment for a term of not less than

for children against sexual abuse.[40] But the two most significant changes were:

- For the first time in a British-derived legislative provision, 'carnal intercourse' was expressly defined as both anal and oral sex.
- In a vengeful and almost parodic response to the demands of women's rights activists, the offence of 'gross indecency' was made gender-neutral.[41] It could now be applied to heterosexual couples – and also to lesbian and bisexual women. [42]

A similar, regressive rape law change occurred in Sri Lanka. Falling back on religious and communal values, the state rejected women's rights activists' demands to legalise abortion, criminalise marital rape, and make the crime of rape gender-neutral. However, it did amend the 'gross indecency' provision to make it gender-neutral and apply to sex between women (Tambiah 1998).[43]

Meanwhile, in Botswana, legislators put gender-neutral language in both the 'carnal knowledge' and 'gross indecency' provisions of the British-derived Penal Code, in a general revision aiming at gender equity in 1998 (Long 2003, pp. 272–274).

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five years and not more than twenty years, and shall also be liable to whipping'.

40 The provisions on 'carnal intercourse' continued to make no distinction between adults and children. The only specific protection for children was in the new 377E. 'Inciting a child to an act of gross indecency: Any person who incites a child under the age of fourteen years to any act of gross indecency with him or another person shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to whipping'. However, the punishment for sexual relations with a girl under 16 (under 'Rape', Sec 375) is substantially higher, including imprisonment from five to 20 years. Penetrative rape of male children remained without specific mention in the code.

41 'Sec 377D: Outrages on decency: Any person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be punished with imprisonment for a term which may extend to two years'.

42 Courts have been slow to adopt this interpretation, however. As late as 1998 a court still held that the purpose of Sec 377D was to punish 'gross indecency' between men alone. (S*ukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* 1998, p. 742). Meanwhile, the introduction of Islamic (Syariah) law in Malaysia has also created new or parallel sexual offences. Some states have passed Syariah Enforcement enactments, punishing not only *Liwat* – sodomy – but also *Musahaqah*, defined as 'sexual relations between female persons' and punished with three years' imprisonment, fines, or whipping: see, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Sec 26.

43 One activist argues that 'the criminalisation of lesbianism' in Sri Lanka derives not just from a 'lack of clarity' about how to classify sexual behaviour before the law, but also from the stigma created by the 'confusion between male homosexuality and pedophilia' (Tambiah 1998).

V. Conclusion: the emancipatory potential of decriminalisation

What are so-called 'sodomy' laws for?

South Africa's Constitutional Court justice Albie Sachs, concurring with the historic decision to overturn his country's law against sodomy, wrote:

> It is important to start the analysis by asking what is really being punished by the anti-sodomy laws. Is it an act, or is it a person? Outside of regulatory control, conduct that deviates from some publicly established norm is usually only punishable when it is violent, dishonest, treacherous or in some other way disturbing of the public peace or provocative of injury. In the case of male homosexuality however, the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than because of its proven harm .. . Thus, it is not the act of sodomy that is denounced … but the so-called sodomite who performs it; not any proven social damage, but the threat that same-sex passion in itself is seen as representing to heterosexual hegemony (*National Coalition for Gay and Lesbian Equality v. Minister of Justice and Others* 1999, p. 188).

The legal scholar Dan Kahan writes that 'Sodomy laws, even when unenforced, express contempt for certain classes of citizens' (Kahan 1999, p. 413). This contempt is not simply symbolic. Ryan Goodman, in exhaustive research based on interviews with lesbian and gay South Africans before the sodomy law was repealed, found the statutes have multiple 'micro-level' effects. These impacts are independent of occasions when the law is actually enforced. To the contrary: even without direct enforcement, the laws' malign presence on the books still announces inequality, increases vulnerability, and reinforces second-class status in all areas of life.

The laws 'disempower lesbians and gays in a range of contexts far removed from their sexuality (for example, in disputes with a neighbour or as victims or burglary)', Goodman writes. They influence other areas of knowledge: 'the criminalisation of homosexual practices interacts with other forms of institutional authority, such as religion and medicine'. The statutes empower social and cultural arbiters to call the homosexual a criminal. Goodman concludes that 'The state's relationship to lesbian and gay individuals under a regime of sodomy laws constructs … a dispersed structure of observation and surveillance. The public is sensitive to the visibility of lesbians and gays as socially and legally constructed miscreants' (Goodman 2001).

This report suggests that the colonial-era sodomy laws ultimately became, not punishments for particular acts, but broad instruments of social control. They started as invaders' impositions – an alien framework to subdue subject populations – and have morphed over time into alleged mirrors of a supposedly originary moral sense. States use them today to separate and brutalise those beyond those postulated primal norms. They are terms of division and tools of power.

The real impact of sodomy laws – the way they single out people for legal retaliation, and make them ready victims of other forms of violence and abuse – appears in stories from six countries addressed in this report.

India

In July 2001, police in Lucknow arrested four staff members from two organisations that combated HIV/AIDS among men who have sex with men. The HIV/AIDS outreach workers from Naz Foundation International (NFI)'s Lucknow office and from Bharosa Trust were charged under Section 377 as well as with criminal conspiracy and 'sale of obscene materials': the police interpreted distributing information about AIDS prevention as running a gay 'sex racket'.

They were jailed for 47 days. A Lucknow judge denied them bail, accusing them of 'polluting the entire society'. The prosecutor in the case called homosexuality 'against Indian culture' (Human Rights Watch 2002b).

[…]

Pakistan

In late 2006, in Faisalabad, Shumail Raj and Shehzina Tariq married in a ceremony that Tariq described as 'a love marriage'. Born a woman, Shumail Raj identified himself as a man.

The case led to a full-blown public panic, coursing through the media and eventually the courts. Raj had undergone two operations to alter his physical appearance to match the gender he lived in. Headlines nonetheless called them a 'she-couple', a 'same-sex couple', and two 'girls' or 'lesbians', and described – and dismissed – their union as the country's first same-sex marriage (Stern 2007).

Shehzina Tariq's father complained to police about the marriage, and they launched an investigation, invoking Section 377. Hauled before the High Court in Lahore, the couple told officials that Raj was a man.

A court-appointed panel of forensic doctors had, in the end, to try to settle the issue of legal identity (Stern 2007).

[…]

Prosecutors chose ultimately not to try the pair under 377; the uncertainty over Raj's gender joined with the legal ambiguity over whether the law could be used against what officials now saw as a lesbian relationship. Clearly, though, the stigma the provision created helped set off the investigation and sustain hysterical public pressure. On May 28, 2007, a court sentenced the couple to three years' imprisonment for perjuring themselves – for saying in court that Shumail Raj was a man. The judge called the sentence 'lenient' (The News 2007; Izam 2007).

Sri Lanka

Extending criminal penalties in 1995 to include sexual acts between women led to an increased atmosphere of stigma and menace. The leader of an LGBT support group has reported having to leave the country for a time because of death threats (quoted in Arnold 2005). *In 2000, when a lesbian conference was held on the island, a newspaper printed a letter to the editor urging the participants be raped, 'so that those wanton and misguided wretches may get a taste of the zest and relish of the real thing'.*

The Press Council, a state body, rejected a complaint against the paper, citing the fact that 'Homosexualism is an offence in our law. Lesbianism is at least an act of gross indecency and unnatural'. It stated:

> *Lesbianism itself is an act of sadism and salacious. Publication of any opinion against such activities is not tantamount to promoting sadism or salacity, but any publication which supports such conduct is an obvious promotion of all such violence, sadism, and salacity. Therefore, the complainant is the one who is eager to promote sadism and salicity, not the respondents.*

The Council instead slapped a fine on the complainant, one of the conference's organisers (International Gay and Lesbian Human Rights Commission 2008).

Singapore

Singapore police periodically use its laws on homosexual conduct to raid gay gathering places, including saunas: one raid in 2001 led to four men being charged initially under Section 377A, though the charge was later moved under Section 20 of the Miscellaneous Offences (Public Order and Nuisance) Act. The men received a substantial fine.[44] *Further raids took place in April 2005 (*Utopia-Asia.com 2005; Topix.com 2005).[45]

[…]

Uganda

For years, Uganda's government has used the criminalisation of homosexual conduct to threaten and harass Ugandans. In 1998, President Yoweri Museveni told a press conference, 'When I was in America, some time ago, I saw a rally of 300,000 homosexuals. If you have a rally of 20 homosexuals here, I would disperse it'. True to his word, when (inaccurate) press reports the next year recounted a wedding between two men in Uganda, Museveni told a conference on reproductive health, 'I have told the CID [Criminal Investigations Department] to look for homosexuals, lock

44 600 Singapore dollars, the equivalent of about US$400 at the time (Yawningbread.org 2001).

45 Email to Human Rights Watch from a Singapore activist, November 20, 2008.

them up, and charge them'. Police obediently jailed and tortured several suspected lesbians and gays; most later fled the country (Human Rights Watch/IGLHRC 2003, pp. 50–51).

Similarly, in October 2004, the country's information minister, James Nsaba Buturo, ordered police to investigate and 'take appropriate action against' a gay association allegedly organised at Uganda's Makerere University. On July 6, 2005, the government-owned New Vision newspaper urged authorities to crack down on homosexuality. […] That month, local government officers raided the home of Victor Mukasa, an activist for LGBT people's human rights and chairperson of Sexual Minorities Uganda (SMUG). They seized papers and arrested another lesbian activist, holding her overnight (Human Rights Watch 2006).

LGBT activists held a press conference in Kampala in August 2007, launching a public campaign they called 'Let Us Live in Peace'. The next day, Buturo, now ethics and integrity minister, told the BBC that homosexuality was 'unnatural'. He denied police harassment of LGBT people, but added menacingly, 'We know them, we have details of who they are'. Four days later, the press announced that the attorney general had ordered lesbians and gays arrested. 'I call upon the relevant agencies to take appropriate action because homosexuality is an offense under the laws of Uganda', he reportedly said. 'The penal code in no uncertain terms punishes homosexuality and other unnatural offenses' (Human Rights Watch 2007b).

[…]

Nigeria

Arrests under Nigeria's federal sodomy law happen steadily, as local headlines suggest: 'Paraded by Police for Homosexuality, Married Man Blames "Evil Spirit" For His Unholy Act' (The Sun 2003); or 'Caught in the Act: 28–yr-old Homosexual Arrested by OPC While in Action'."[46]

Most of Nigeria's Northern provinces now have their own penal codes. These combine principles of Islamic law with elements of the Northern Nigeria Penal Code adopted at the time of independence.[47]

The penal codes of Kano and Zamfara states have simply taken over the language of the British colonial provisions on 'carnal intercourse against the order of nature', and put it under the shari'a-esque heading of 'sodomy (liwat)'. They provide punishments of 100 lashes for unmarried offenders, and death by stoning for married ones. The Zamfara Penal Code also criminalises 'lesbianism (sihaq)',

46 *Sunday Punch* (2003), with picture of the man's face, showing only his eyes blacked out.

47 The entire concept of codification is alien to the spirit and history of *shari'a* law, which traditionally is embodied in the scattered rulings of jurists in the four Sunni schools. That *shari'a* advocates in northern Nigeria have turned to imposing full-fledged codes further reveals how the colonial legacy persists.

punishing it with up to 50 lashes and six months' imprisonment:

> *Whoever being a woman engages another woman in carnal intercourse through her sexual organ or by means of stimulation or sexual excitement of one another has committed the offence of Lesbianism. … The offence is committed by the unnatural fusion of the female sexual organs and or by the use of natural or artificial means to stimulate or attain sexual satisfaction or excitement.*[48]

Courts in the north have handed down death sentences for homosexual conduct under the combined shari'a-and-colonial codes, though there have been no accounts of executions – yet.

[…]

*Although draconian provisions were in place at federal and state levels, Nigeria's government tried to go further. In January 2006, the president's office proposed new legislation called the 'Same Sex Marriage (Prohibition) Act'. That was a misnomer: the bill's reach went far beyond marriage. It would punish any 'publicity, procession and public show of same sex amorous relationship through the electronic or print media physically, directly, indirectly or otherwise', and adoption of children by lesbian or gay couples or individuals. It dictated five years' imprisonment for anyone, including a cleric, who abetted a same-sex couple in marrying – and for any person ' involved in the registration of gay clubs, societies and organisations, sustenance, procession or meetings, publicity and public show of same sex amorous relationship directly or indirectly in public and in private'. In addition to condemning to prison human rights defenders who address issues of sexuality, the bill could be used to jail even lesbian or gay couples holding hands (*Human Rights Watch 2007a).

Despite a push to rush the bill through the National Assembly in early 2007, it eventually died without a vote. It could, however, be revived at any time. In international arenas, Nigeria has continued its campaign, openly calling for killing people who engage in homosexual conduct. At the UN Human Rights Council in September 2006, Nigeria ridiculed 'the notion that executions for offences such as homosexuality and lesbianism is [sic] excessive'. Its diplomat said: 'What may be seen by some as disproportional penalty in such serious offences and odious conduct, may be seen by others as appropriate and just punishment' (ARC International 2006).

It is appropriate to end with Nigeria, because the 2006 bill – criminalising all aspects of lesbian and gay identity and life – culminated the arc that Macaulay's Indian Penal Code began. Its all-embracing provisions would render the bill uniquely severe among the world's anti-gay laws. The trajectory from punishing acts to repressing a whole class of persons was complete.

The paradox remains that a democratic government promoted this

48 Article 135 of the Zamfara Penal Code, www.zamfaraonline.com/sharia/chapter08.html (accessed 25 Aug. 2008). See also Human Rights Watch (2004b).

repressive legislation as part of indigenous values, although it actually extended old, undemocratic colonial statutes. 'Basically it is un-African to have a relationship with the same sex,' the Nigerian minister of justice said in 2006. A national newspaper intoned, 'This progressive legislation is expected to put a check on homosexuality and lesbianism, a deviant social behaviour fast gaining acceptance in Western countries'. (IRIN Africa 2006).

Sodomy laws encourage all of society to join in surveillance, in a way congenial to the ambitions of police and state authorities. That may explain why large numbers of countries that have emerged from colonialism have assumed and assimilated their sodomy laws as part of the nationalist rhetoric of the modern state. Authorities have kept on refining and fortifying the provisions, in parliaments and courts – spurred by the false proposition they are a bulwark of authentic national identity.

The authoritarian impulse behind legal moves like Nigeria's also points, though, to the emancipatory potential of decriminalising consensual homosexual sex.

The campaigns for law reform are not merely for a right to intimacy, but for the right to live a life without fear of discrimination, exposure, arrest, detention, or harassment. Reform would dismantle part of the legal system's power to divide and discriminate, to criminalise personhood and identity, to attack rights defenders, and to restrict civil society.

Removing the sodomy laws would affirm human rights and dignity. It would also repair a historical wrong that demands to be remembered. The legacy of colonialism should no longer be confused with cultural authenticity or national freedom. An activist from Singapore writes: 'It's amazing,' that millions of people 'have so absorbed Victorian prudishness that even now, when their countries are independent – and they are all happy and proud they're free from the yoke of the British – they stoutly defend these laws'. He concludes, 'The sun may have set on the British Empire, but the Empire lives on' (Yawningbread.org 2004). These last holdouts of the Empire have outlived their time.

Recommendations

To all governments, including those that inherited British colonial laws criminalising homosexual conduct:

- Repeal all laws that criminalise consensual sexual activity among adult people of the same sex.
- Ensure that criminal and other legal provisions of general application are not used to punish consensual sexual activity among adults of the same sex.
- Pass laws defining the crime of rape in a gender-neutral way so that the rape of men by men, or of women by women, is included in the

definition and subject to equal punishment.

- Pass laws expressly criminalising the rape or sexual abuse of children.
- Consistent with the principle of non-discrimination, ensure that an equal age of consent applies to both same-sex and different-sex sexual activity.
- Repeal any law that prohibits or criminalises the expression of gender identity, including through dress, speech or mannerisms, or that denies individuals the opportunity to change their bodies as a means of expressing their gender identity.

To the Commonwealth Secretariat:

- Consistent with the 1971 Singapore Declaration of Commonwealth Principles, which affirms 'the liberty of the individual', 'equal rights for all citizens', and 'guarantees for personal freedom', condemn and call for the removal of all remaining British colonial laws that criminalise consensual sexual activity among adult people of the same sex.
- As part of Commonwealth programs to help member nations implement international obligations in their laws, promote the decriminalisation of consensual, adult homosexual conduct.
- Also as part of these programs, develop models for gender-neutral legislation on rape and sexual abuse, and for the protection of children.
- Integrate issues of sexual orientation and gender identity into all human rights educational and training activities, including the Commonwealth Human Rights Training Programme for police.

To the United Nations and its human rights mechanisms:

- Consistent with the decision of the UN Human Rights Committee in the 1994 decision of *Toonen v. Australia,* condemn and call for the removal of all remaining laws that criminalise consensual sexual activity among adult people of the same sex, as violations of basic human rights to privacy and equality.

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