LECTURE III
CRIMINAL LAW: THE GATEWAY

Criminal Law and Same-Sex Acts

This third lecture extends the ground so far traversed by examining in more detail the laws that criminalise of homosexual conduct. The criminalisation of *private*, *consensual* same-sex sexual activity between *adults* (a composite notion that I will refer to as "same-sex acts") has been sustained by the underlying social mores of many, but not all, societies and by lawmakers with the power to impose the public criminal law upon a subject population. Today, same-sex acts are criminalised in about 80 countries. Half of them are territories formerly ruled by Britain. The crime in question does not cause physical insecurity, damage to property or harm to any other member of the society not directly involved in the same-sex act. Normally at least, there is no complaining victim. To this extent the application of the criminal law is unusual, and potentially disproportionate, resting as it does not on harm to specified others but on an affront to the suggested moral sensibilities of society as a whole.

One question should be kept in mind as this topic is considered. To what extent are a majority of the people, who prefer to live in a particular moral environment, entitled to oblige a minority who disagree to conform to their conception of what is socially acceptable in matters of private sexual intimacy? It is the assertion of an entitlement to invoke criminal punishments in such cases that was central to the emergence of the crime of sodomy – and of its more recent variant "gross indecency".

I propose to examine in more detail the historical basis of the sodomy and gross indecency offences and their adoption throughout the British Empire. I will then discuss the current state of offences involving same-sex acts in various jurisdictions. Finally, I will reflect on the abolition of such offences, either by legislative or by judicial action.

English Law in the Middle Ages

The idea of an offence of sodomy originated in the scriptural texts of the Abrahamic religions – Judaism, Christianity and Islam. Yet, the sodomy offence, as it is normally expressed, did not fully emerge in our legal tradition until the development of the common law in medieval England. It is necessary to trace the emergence of the offence in England because it was the criminal law of England that was transplanted in England's colonies and settlements, including in India and Australia.

The central concept informing the criminalisation of sodomy was the idea that non-procreative sexual acts offended the Christian moral principles upon which the English kingdom was founded.[1] In medieval times, the notion of a separation between the Church and the State had not yet developed. The Church had its own courts to try and punish ecclesiastical offences. Those offences involved acts that were perceived as endangering social purity, defiling the kingdom and disturbing the racial or religious order of things. Sodomy (or "buggery" as it was also known) was conflated with bestiality, although the latter expression was usually confined to intercourse with an animal. It was among the most serious of criminal infractions precisely because it did not involve only an individual victim but was seen as extending to an offence against the entire society.[2]

A survey of the English laws, written in Latin in 1290 during the reign of Edward I, mentions sodomy.[3] The description of the crime involved sexual conduct attributed to the men of Sodom who had attracted the wrath of the Lord and suffered the destruction of their city for engaging in carnal same-sex acts.[4] In another description of the early English criminal laws, written in Norman French, the punishment of burning alive was

---

[1] An excellent review of the legal developments collected in this lecture appears in Human Rights Watch, *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism*, New York, December, 2008 ("Human Rights Watch"), and D. Saunders, "377 – And the Unnatural Afterlife of British Colonialism", unpublished paper for 5th Asian Law Institute Conference, National University of Singapore, May 22, 2008.

[2] Human Rights Watch, 13.

[3] Fleta, *Seu Commentarius Juris Angicani* was a survey of English law produced in the Court of Edward I in 1290 (Ed. and trans. H.G. Richardson and G.O. Sayles, London, Quaritch, 1955). See also Human Rights Watch, 13.

[4] *Genesis*, 13, 11-12, 19, 5.

recorded for "sorcerers, sorceresses, renegades, *sodomists* and heretics publicly convicted".[5] Because sodomy was perceived as an offence against God's will, the consequence for those found guilty was a sentence involving a most painful death.

Initially, it seems, the offence was not limited to sexual acts between men. It could include any sexual conduct deemed irregular and it extended to sexual intercourse with Turks and "Saracens", as well as with Jews and Jewesses.[6] Although the ideas were traceable to the Old Testament, and Jewish rabbinical law, the offences were further reinforced by Christian teaching which associated sexual acts with shame and accepted such acts only if they were procreative.[7] Sodomy was thus a form of social pollution. The history of the eleventh and twelfth centuries in England (and Europe generally) included many instances of repression targeted at social polluters, such as Jews, lepers, heretics, witches, prostitutes and sodomites.[8] This remained the case in England throughout the Middle Ages.

Statutory Enactments in England: Four Centuries

A significant change came about in the sixteenth century, following the severance by Henry VIII of the link that had to that time existed between the English church and the Bishop of Rome. Common law crimes were consequently revised and expressed in statutory form. This required the trial of previously ecclesiastical crimes in secular courts which represented a manifestation of the authority of the English State over the Christian Church. A statute of 1533, provided for the crime of sodomy, under the description of the "detestable and abominable Vice of Buggery committed with mankind or beast". The offence was punishable by death. Although this statute was repealed during the reign of the Catholic Mary I (so as to restore the jurisdiction of ecclesiastical

[5] Britton's description is explained in H. Brunner, *The Sources of the Law of England* (Trans. Williams Hastie, Edinburgh, T.T. Clark 1888). See also H.L. Carson, "A Plea for the Study of Britton" 23 *Yale Law Journal* 664 (1914).

[6] D.F. Greenberg, *The Construction of Homosexuality*, Chicago, Uni of Chicago, 1988, 274ff.

[7] Cf. J.A. Brundidge, *Sex, Law and Marriage in the Middle Ages: Collected Studies*, Aldershot, Variorum, 1993.

[8] R.I. Moore, *The Formation of a Persecuting Society*, London, Blackwell, 1987. See also M. Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo*, London, Routledge, 2002. See also generally Human Rights Watch, 13-14.

courts in such matters), it was re-enacted by the English Parliament in 1563 after the accession of Elizabeth I.[9] This statutory offence survived unchanged in England until 1861 when the *Offences against the Person Act 1861* (GB) replaced the death penalty for buggery with life imprisonment or a "term [of imprisonment] of not less than ten years".

In addition to the creation in the sixteenth century of a statutory offence of sodomy, the common law, in tandem, generated a bewildering array of offences for other forms of same-sex acts which fell short of penetration. Various acts were deemed to be "attempts" to commit sodomy under English law.[10] Thus, at least by 1699, mere invitations to commit sodomy were held to be "inciting and soliciting" the offence; while any form of participation as a passive partner could result in a charge of "suffering and permitting" someone to sodomise another.[11]

The statutory efforts to encroach upon the sexual lives of homosexual, bisexual and transgender men crystallised in England with the enactment of the *Criminal Law Amendment Act 1885* (GB). Section 11 of that Act, known as "Labouchère's amendment" (after Henry Labouchère MP who introduced the provision) for the first time made any act of "*gross indecency*" between males a misdemeanour offence. The effect of the provision was to be that, *any* intimacy and/or sexual activity between men, in public or private, was criminalised. Consent was no defence. The age of the participants or the private occasion of their acts took place was irrelevant to the offence. Authorities could now broadly rely on this vague, newly undefined law to prosecute male accused where the elements of sodomy could not be proved. The Labouchère amendment was slipped into the Bill late one evening when the House of Commons was sparsely attended, ensuring that the provision was not even debated or separately

[9] M. Hyde, *The Love That Dared Not Speak Its Name: A Candid History of Homosexuality in Britain*, Boston, Little Brown, 1970. The *Buggery Act* 1533, after its original repeal, was re-enacted as the *Buggery Act* 1563 during the reign of Elizabeth I.

[10] H.G. Cocks, "Secrets, Crimes and Diseases, 1800-1914" in M. Cook (ed), A Gay History of Britain (2007) 110.

[11] H.G. Cocks, "Secrets, Crimes and Diseases, 1800-1914" in M. Cook (ed), A Gay History of Britain (2007) 111.

voted on. The provision came to be described by lawyers as the "Blackmailer's Charter".[12]

The law in England, so described, was actively enforced and prosecutions vigorously pursued. During the period 1806 to 1900, after reliable records were maintained on these offences, 8,291 men were indicted for sodomy, gross indecency or other "unnatural misdemeanours" in England and Wales.[13] On average, over 90 men were indicted for homosexual offences each year. An additional third of that figure were brought before the Magistrates' Court. Between 1806 and 1861 (when capital punishment for buggery was abolished),[14] 404 men were sentenced to death. Fifty-six men were actually executed in England for the offence. The remainder who were convicted were imprisoned or transported to Australia for life.[15]

The hostility towards same-sex acts provided a fertile ground for the great legal minds of English legal history. The text writers of English law denounced sodomy and all its variations in the strongest possible terms. Yet, paradoxically, any detailed description of the offence was usually avoided in order to protect public morals in case "discussing it, or admitting its existence, might mean that its perverse attractions might be advertised to the unwary or to those, like the young or poor, who are not morally self-possessed".[16] This imperative extended to the wording of the statutory provisions themselves. Sodomy remained the "nameless offence" – acrimoniously condemned, albeit in hushed, vague and biblical euphemisms. Hence, the famous English jurist Edward Coke declared:

> Buggery is a *detestable* and *abominable* sin, amongst Christians *not to be named*. ... [It is] committed by carnal knowledge against the ordinance of the Creator and order of

[12] D. Hugh, *On Queer Street: a social history of British homosexuality, 1895-1995*. (1997) 17.

[13] H.G. Cocks, "Secrets, Crimes and Diseases, 1800-1914" in M. Cook (ed), A Gay History of Britain (2007) 109.

[14] Hyde, supra, 142. See Human Rights Watch, 13-14.

[15] H.G. Cocks, "Secrets, Crimes and Diseases, 1800-1914" in M. Cook (ed), A Gay History of Britain (2007), 109.

[16] H.G. Cocks, "Secrets, Crimes and Diseases, 1800-1914" in M. Cook (ed), A Gay History of Britain (2007), 113.

nature, by mankind with mankind, or with brute beast, or by womankind with brute beast.[17]

Similarly, when William Blackstone wrote his *Commentaries on the Laws of England*, he too included the "*abominable* crime" amongst the precious legacy of English law. When the American colonists severed their allegiance to the British Crown in 1776, Blackstone's *Commentaries* continued to have a profound influence on the development and expression of the criminal law in the American settlements and elsewhere where they became known as "crimes against nature".[18] The stage was thus set for the introduction of the crime into many other British colonies where there were sometimes few Christian subjects and still fewer descendants from the British Isles.

Colonial Extension of the Sodomy Offence

Virtually no jurisdiction, which at some stage between the fifteenth and the twentieth centuries came under British rule, escaped the influence of English criminal law and, specifically, of the anti-sodomy offence that formed part of that law. The British Empire was an organisational model of governance and social control. At the heart of such governance and control an ordered system of criminal and other public law was essential. What better criminal laws could the Imperial authorities at Westminster donate to their colonies, territories and peoples than to provide them with criminal laws similar to those observed and enforced in England itself?

The result of this historical development is that the anti-sodomy laws came swiftly to be imposed, or adopted, in the many jurisdictions of the British Empire. At its height, this

[17] E. Coke, *The Institutes of the Laws of England* (3rd part), cap. X, *Of Buggery, or Sodomy*, 1797, 58 (emphasis added). This clearly derives from the Biblical references: "Thou shalt not lie with mankind as with womankind: it is abomination" (*Leviticus* 18:22); and "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them" (*Leviticus* 20:13). The word "abomination", from the King James version, has been translated as "detestable" in other versions.

[18] W. Prest, *Blackstone and His Commentaries: Biography, Law, History*, Hart, Oxford, 2009, 3. The legal requirements of the crime of sodomy (or buggery) ordinarily required evidence of penetration of the body of another, although emission of semen was not required. *R v Reekspear* (1823) 1 *Mood*. 342; *R v Cozins* (1834) 6 C&P 351 per Park J; *R v Cox* (1832) 1 *Mood*. 337. In most, but not all jurisdictions, the act required penetration of the anus by another, usually a man. Thus penetration of a child's mouth was held not to be sodomy in England: *R v Jacobs* (1817) R & R 331; *Russell on Crime* (Ed. JWC Turner), (Stevens & Sons, 1964, 735-736).

empire extended to a quarter of the land surface of the world, and held under its control about a third of world's people.

Developments in nineteenth-century Europe, however, demonstrated that there were alternatives to the exported Criminal Codes of Whitehall. In France, the Napoleonic codifiers undertook a complete revision and re-expression of the criminal laws of France in the early nineteenth century. This was an enterprise that Napoleon, correctly, predicted would outlive his imperial battle honours. One result was that the sodomy offence, which had also existed since medieval times in royal France, and was only repealed during the Revolution in 1793, was omitted from the *French Penal Code* of 1810.

This omission proved influential. The French code quickly spread to the countries in which derivative penal codes were adopted after the French model. In the Netherlands, Belgium, Spain, Portugal, Scandinavia, Germany and Russia, sodomy was removed from the criminal lexicon. Later, when Japan and China adopted penal codes derived from the European model, sodomy was not mentioned. The same was to hold good in the colonies of the foregoing nations. Some of the colonies of these nations, for local reasons, later departed from the original Napoleonic template and re-introduced sodomy offences. However, this was the exception rather than the rule.[19] The consequence has been that, since the nineteenth century, comparatively few of the colonies of the European empires, other than the British, imposed criminal sanctions specifically on same-sex acts. The existence of such offences has been a peculiar inheritance of British rule and of Islamic societies influenced by Sharia law. Such law, in its turn, traced its contents to scriptural texts, which in turn, derived from the same Judeo-Christian-Islamic sources that, in their Christian manifestation, had informed the medieval laws of England.

[19] Thus French colonies such as Benin (originally Dahomey), Cameroon and Senegal adopted such laws, possibly under the influence of their British ruled neighbours. Germany, in Bismarck's time, adopted par.175 of the *Penal Code*. This survived the Third Reich, being eliminated by the German Democratic Republic in 1957 and by the Federal German Republic in 1969. It has no place in modern German Criminal law.

At about the same time as the Napoleonic codifiers brought about change in France and its colonies, an equivalent movement for the codification of the English criminal law began to gain momentum in Britain. One champion of this movement was Jeremy Bentham. Bentham was a jurist and philosopher who espoused the principle of utility, namely, that the attainment of the greatest measure of happiness in society was the sole permissible object both of the legislator and the ethicist.[20] Bentham was highly critical of the anachronistic morality that he saw as present in the writings of Blackstone. In his *A Fragment on Government* (1776) and *An Introduction to the Principles of Morals and Legislation* (1789), Bentham strongly criticised Blackstone for his complacency about the contents of the law of England as he had presented it. Bentham also criticized Blackstone's antipathy to reform where legal change and modernisation were so manifestly needed.

Encouraged by the contemporary legal reforms in France, Bentham urged a reconsideration of those forms of conduct that should, on utilitarian principles, be regarded as punishable offences under the criminal laws of England. He continued to urge the acceptance of the utilitarian principle to justify criminal punishment. It was a necessary evil, justified only if the sanction was likely to prevent, at the least cost in human suffering, greater evils arising from conduct defined as criminal. Bentham died in 1832. However, his writings profoundly influenced the thinking of a number of disciples, including John Stuart Mill, author of an influential text *On Liberty* (1859). Mill, like Bentham, urged the replacement of the out-dated and chaotic arrangements of the common law of crime by modern criminal codes, based on scientific principles aimed at achieving social progress in order to enable humanity, in Bentham's words, "to rear the fabric of human felicity by the hands of reason and of law".[21] However, with the sodomy laws and other such offences intact, imperial codification was to have the opposite effect. It helped to spread the sodomy laws and same-sex hostility throughout the British Empire.

---

[20] H.L.A. Hart, *Jeremy Bentham* in A.W.B. Simpson (Ed), *Biographical Dictionary of the Common Law* (Butterworths, London, 1984) 44.

[21] H.L.A. Hart, *Jeremy Bentham* in A.W.B. Simpson (Ed), *Biographical Dictionary of the Common Law* (Butterworths, London, 1984), 45. See also J. Anderson, "*J.S. Mill*" in AWB Simpson, *ibid*, 364-5.

In England the proposal that the common law offences should be codified faced resistance from the English legal profession and ultimately it failed in Britain itself. Yet what could not be achieved in England, was enthusiastically implemented in the British colonies. Five principal models were drawn up by the Colonial Office in London and applied in different parts of the British Empire according to the changing attitudes and preferences that prevailed at the time. In chronological order, the codifications on offer were:

- The Elphinstone Code of 1827 for the Presidency of Bombay in India.[22]
- The *Indian Penal Code* of 1860 (which came into force in January 1861), known as the Macaulay Code, after Thomas Babington Macaulay, its principal author.[23]
- The Fitzjames Stephen Code, based on the work of Sir James Fitzjames Stephen, including his *A General View of the Criminal Law* (1863) and *Digest of the Criminal Law* (1877).[24]
- The Griffith Code, named after Sir Samuel Hawker Griffith, Premier of the Queensland colony and later Chief Justice of the Queensland Supreme Court and the first Chief Justice of the High Court of Australia. Griffith drafted his Criminal Code, adopted in Queensland in 1901, drawing additionally on the Italian Penal Code and the Penal Code of New York.[25]
- The Wright Penal Code, based on a draft penal code prepared for Jamaica by the liberal British jurist R.S. Wright, who had been heavily influenced by the ideals of John Stuart Mill. Wright's draft code was never enacted in Jamaica.

[22] H.L.A. Hart, *Jeremy Bentham* in A.W.B. Simpson (Ed), *Biographical Dictionary of the Common Law* (Butterworths, London, 1984), 45.

[23] M.B. Hooker, "*Macaulay*" in A.W.B. Simpson (Ed), *Biographical Dictionary of the Common Law* (Butterworths, London, 1984) 330.

[24] S. Uglo, "*Stephen*" in A.W.B. Simpson (Ed), *Biographical Dictionary of the Common Law* (Butterworths, London, 1984) 486.

[25] A.C. Castles, "*Griffith*" in A.W.B. Simpson (Ed), *Biographical Dictionary of the Common Law* (Butterworths, London, 1984) 217.

However, it became the basis for the criminal law of the Gold Coast (renamed Ghana, on its independence from Britain in 1957).[26]

Although there were variations in the concepts, elements and punishments for the respective same-sex offences in the different colonies, provinces and settlements of the British Empire, a common theme prevailed. Same-sex activity was morally unacceptable to the British rulers. The local population were not usually consulted. Their pre-existing laws (if any) were not determinative or even influential in this respect. According to the several codified provisions on offer, laws to criminalise and punish same-sex activity were simply a universal feature of British imperial rule. In the colonies, the British settlers, administrators and military, if they ever thought about it, would probably have shared many of the prejudices and attitudes of the rulers. In many territories in Asia, Africa, the Caribbean, the South Pacific and elsewhere, where the laws were imposed and enforced, there was no clear pre-existing culture or tradition which required the punishment of such offences. They were simply imposed to stamp out the identified "vice" and "viciousness" amongst native peoples which the British rulers themselves found, or assumed, to be intolerable in a properly governed society over which they presided.

One of the preoccupations of at least some of the colonial masters was to protect the population from the corrupting influence of the "natives" who were commonly viewed as morally lax, providing a hotbed of homosexual practices. Hence explorers such as a Richard Burton wrote of a zone 43 degrees north of the equator and 30 degrees south where "the Vice is popular and endemic … whilst the races to the North and South of the limits here practise it only sporadically amid the opprobrium of their fellows."[27] The warm rays of tropical sunlight were apparently thought to blame for homosexual "laxity". The missionary zeal of some of the colonial masters to Christianise the local populations was also combined with elements of racism and an anxiety to protect their

[26] M.L. Freeland, "R.S. Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law" (1981) 1 *Oxford Journal of Legal Studies* 307.

[27] R. Aldrich, *Colonialism and Homosexuality* (2003) 31.

own administrators and soldiers without wives from any temptations that might arise in a decadent over-heated climate. Lord Elgin, Viceroy of India, warned that if such laws were not enforced, British military camps could become "replicas of Sodom and Gomorrah", as soldiers adopted the "special Oriental vices".[28] Now it was not just the heat and sun that caused same-sex activity to spread. It was the supposed special laxness of Orientals and their inclination to vice – a singularly racist and condescending attitude.

The most copied of the codification templates was Macaulay's *Indian Penal Code* (IPC). The relevant provision appeared in Ch. XVI, titled "Of Offences Affecting the Human Body". Within this chapter, section 377 appeared, categorised under a sub-chapter titled "Of Unnatural Offences". The provision ultimately read:

> 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 of either description for a term which may extend to 10 years and shall also be liable to fine.
>
> Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

This provision of the IPC was copied in a large number of British territories including Malaysia, Singapore, Zambia and Fiji, among others. The effect of the provision was that sexual activities identified as being "against the order of nature" violated human integrity and polluted society to the extent that, even if the "victim" claimed that they had consented to it, the participants were both of an age to consent, and the act was performed in private, it was still punishable because more than the individual's will or body was at stake. Victims of unconsensual male-on-male rape and offences against male child victims, unable in law to give consent, were not distinguished. Legally,

[28] R. Hyam, *Empire and Sexuality: The British Experience* (1990) 116; R Hyam, "Empire and Sexual Opportunity" (1986) 14 *Journal of Imperial and Commonwealth History* 34-89.

consensual, adult, private same-sex acts were equated to the conduct of violent sexual criminal offences.

The alternative Griffith Penal Code, introduced in Queensland, (QPC) was not only the basis for the provisions of the criminal codes in those jurisdictions of Australia which opted for a code (Western Australia, Tasmania and eventually the Northern Territory). It was also widely copied outside Australia, not only in the neighbouring territory of Papua New Guinea (where it effectively remains in force today), but also in many jurisdictions of Africa, including: present-day Nigeria, Kenya, Uganda and Tanzania which had initially adopted the IPC. The QPC introduced into the IPC's template a particular notion stigmatising the category of "passive" sexual partners who "permit" themselves to be penetrated by another male. Thus, s208 of the QPC provided:

> 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 14 years.[29]

This language ("person") not only extended its provisions to women participants, but cleared up an ambiguity originally appearing in the IPC. It made it clear that *both* partners to the same-sex act were liable to conviction, including the "passive" partner who *permitted* the act. It also widened the ambit beyond "penetration" by introducing an independent provision widening criminal liability to "attempts to commit unnatural offences". [30]

In some jurisdictions of the British Empire and Commonwealth, when anomalies in the legislation were pointed out, provisions were enacted (as in Nigeria and Singapore) to

[29] Human Rights Watch, 22.

[30] QPC, ss 6 and 29. See Human Rights Watch, 23.

exempt sexual acts between "a husband and wife" or (as in Sri Lanka) to make it clear that the unspecified offences, carnal acts against the "order of nature" extended to sexual activities between women. In all jurisdictions where the criminal codes of the British Empire were exported, long-lasting damage occurred to the homosexual, bisexual and transgender minorities of the population. They were required to repress who they were for fear of facing criminal prosecution and severe sanctions. Those who did not repress the sexual features of their nature were exposed to severe criminal punishment, where convicted. Social hostility, discrimination, violence and blackmail were encouraged by this state of the criminal law.

The Wolfenden Report of 1957

In the twentieth century, as the colonial codification project was extended, legally enforced sexual repression intensified. For instance, in England, in 1922, the Bow Street Magistrates' Court in London heard about 70 such cases. By 1952 this had risen to 264 cases a year. Between 1942 and 1947, arrests for same-sex offences in London's West End tripled from 211 to 637 per year. At the height of active enforcement in the post-war years of the 1950s, 1,069 homosexual men were imprisoned in England and Wales. The average age of the prisoners was 37 years.[31] Features of that time included police *agents provocateurs*, King's or Queen's Evidence, which offered immunity for anyone willing to testify against another, oppressive official searches, and blackmail or intimidation. Such techniques were regularly used to increase the number of convictions. A number of high profile men were ensnared in English witch hunts against homosexuals. These included great contributors to the arts and sciences such as Oscar Wilde, Sir John Gielgud and mathematician and *Enigma* code-breaker Alan Turing, who was chemically castrated in lieu of a prison sentence, ultimately leading to his suicide two years later.[32]

[31] Patrick Higgins, *Heterosexual Dictatorship: Male Homosexuality in Postwar Britain* (1996) 56.

[32] In an unusual act of contrition for this prosecution, Alan Turing, received a retrospective pardon from Queen Elizabeth II in December 2013.

The first sign that this tide of official repression might be reversed in the United Kingdom was the publication in 1957 of the landmark *Report of the Committee on Homosexual Offences and Prostitution.* The report became known as the "Wolfenden Report" after Sir John (later Lord) Wolfenden who chaired the Committee. It recommended that "homosexual behaviour between consenting adults in private should no longer be a criminal offence". The Committee stated its view about the proper objects and purposes of the criminal law in the following terms:

> It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined … [to] preserve public order and decency, to protect the citizen from what is offensive and injurious and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable.[33]

Critically, the Committee reasoned that:

> [U]nless a deliberate attempt is made by a society, acting through the agency of law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.[34]

This principle, combined with the later influence of international human rights law, resulted in a change to the criminal law in the United Kingdom. It was a change that was to come to influence the law in a number (but by no means most) of the colonies and former colonies of Britain.

---

[33] United Kingdom, Home Office, *Report of the Committee on Homosexual Offences and Prostitution*, Cmnd 247, HMSO (1957) 10.

[34] United Kingdom, Home Office, *Report of the Committee on Homosexual Offences and Prostitution*, Cmnd 247, HMSO (1957) 187-188.

The initial response to the Wolfenden Report of the then Conservative Government in Britain was a government declaration that the community was "not yet ready" to accept the amendments proposed by the Committee. It was said that such a change was "inconsistent with local moral values", that the "churches or religious leaders are opposed"[35] and that "reform on this subject is not a priority". Reform was stalled in Britain for a further decade.

However, the first concrete step towards reform in England and Wales occurred when the *Sexual Offences Act 1967* (GB) was enacted. That Act decriminalised sodomy and gross indecency laws to a limited extent by making an exception for defined homosexual acts. This exception was, at first, subject to three strict conditions, namely, that the sex involved was consensual; that it was between two men only acting in private; and that only persons over the age of 21 years were involved. Anomalies continued to persist such as an unequal age of consent provided by the law (16 years in relation to heterosexuals) and by the cap on the number of parties permitted to partake (which did not exist for heterosexuals). Scotland followed a similar path to reform in 1980 with the enactment of the *Criminal Justice (Scotland) Act 1980* (GB).

By 1980, many of the British colonies had secured their political independence from Britain, Legislative repeal of the old sodomy laws took place progressively in the old Dominions such as Canada, New Zealand and several States of Australia. However, in other jurisdictions, it was not reform by legislation but by judicial enforcement of human rights principles that commonly helped to achieve change. An appeal to basic principles and to rational limits on the ambit of the criminal law is effectively a modern application of the concept for which John Stuart Mill had argued. Writing on "social liberty" over a hundred years previously, Mill had advocated the establishment of a system of "constitutional checks" since:

[35] This appears to be disputable as the Wolfenden Committee recommendations were supported by the Archbishop of Canterbury, Dr Geoffrey Fisher who stated "[t]here is a sacred realm of privacy … into which the law, generally speaking, must not intrude. This is a principle of the utmost importance for the preservation of human freedom, self-respect and respectability".

> [s]ociety can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practises a social tyranny more formidable than many kinds of political oppression, since though not usually upheld by extreme penalties, it leaves fewer means of escape, penetrating more deeply into the details of life, and enslaving the soul itself.[36]

Against this background, I now address the ways in which three fundamental rights of privacy, equality/non-discrimination and dignity have gradually been invoked by national constitutional and regional human rights courts to overturn sodomy and gross indecency laws. While the trend of jurisprudence is overwhelmingly in favour of decriminalisation, pockets of resistance remain. I will describe some of the leading decisions, mentioning again the *Naz Foundation Case* in India. I will refer to some encouraging and some disappointing judicial outcomes and offer a few projections about the future.

Privacy and Judicial Protection

In 1981, the European Court of Human Rights published its decision in *Dudgeon v United Kingdom*.[37] The Court held that Northern Ireland's criminal legislation on same-sex acts violated the right to privacy contained in Article 8 of the *European Convention of Human Rights*. The findings of the Wolfenden Report were highly influential and extensively cited in this decision. It chartered the way in which expressions of a gay sexuality and identity have become widely recognised as conduct that was human rights protected. A legal right to a private space to express one's sexuality was confirmed for the first time in *Dudgeon*. This outcome was ultimately adopted by the Council of Europe so as to apply to all member states.[38] In terms of litigation, *Dudgeon* was the key case about the issue of criminalisation. It was the first to succeed under human rights law anywhere in the world. Subsequently, *Dudgeon* formed the basis for a series

[36] J.S. Mill, *On Liberty* (Penguin, London, republished 2006) 10-11.

[37] (1981) 4 EHRR 149 ("*Dudgeon*").

[38] *Dudgeon* led to the *Homosexual Offences (Northern Ireland) Order 1982* which brought Northern Ireland in line with the rest of the United Kingdom.

of additional decisions in Europe, including *Norris v Republic of Ireland* (1988)[39] and *Modinos v Cyprus* (1993).[40] Indirectly, this series of discussions influenced legislative repeal of same-sex criminal laws. In December 2013, under the prospect of court proceedings, the legislature of the Republic of Northern Cyprus voted to repeal the criminal provision, inherited from the period of British rule. Upon this repeal, the last European law criminalising consenting adult, private same-sex acts was terminated.

Attempts to uphold a constitutional right to privacy initially failed in the United States of America. In 1986, the Supreme Court of that country in *Bowers v Hardwick* (1986)[41] dismissed a challenge to the sodomy law of the State of Georgia. While a right to privacy is not an express and freestanding right in the United States Constitution *per se*, a measure of privacy protection has been implied from the due process clause of the Fourteenth Amendment to the United States Constitution concerning life and liberty. However, the majority in *Bowers* based their ruling largely on the "ancient roots" of the offence. They cited Blackstone's denunciation of the crime as one worse than rape and "not fit to be named".[42]

In a compelling dissent in *Bowers,* Justice Blackmun was critical of his fellow judges for an "almost obsessive focus on homosexual activity". He favoured rather than acknowledging the principled jurisprudence previously expressed by the Court protective of the constitutional right to privacy.[43] On the "morality grounds" relied on by the majority, Justice Blackmun wrote:

---

[39] (1988) 13 EHRR 186 ("*Norris*").

[40] (1993) 16 EHRR 485 ("*Modinos*").

[41] 478 US 186 (1986) ("*Bowers*"). Writers have drawn a comparison between the decision and reasoning of the Supreme Court of the United States in *Bowers* and the decision and reasoning of the Supreme Court of India in *Koushal*. See R. Wintemute, Case Note: Supreme Court of India Upholds as Constitutional the Penal Code Section Banning "carnal intercourse against the Order of Nature", *Lesbian/Gay Law Notes*, New York, Jan 2014 (India's *Hardwick"*)

[42] *Bowers,* per Burger CJ in a separate concurring decision.

[43] *Bowers,* per Blackmun J.

> That certain, but by no means all, religious groups condemn the behaviour at issue gives the State no licence to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends, instead, on whether the State can advance some justification for its law beyond its conformity to religious doctrine.[44]

Following the decision in *Bowers,* new litigants became more sophisticated in their submissions. In *National Coalition of Gay and Lesbian Equality v Minister of Justice and others* (1998), a broader conception of privacy was formulated before the Constitutional Court of South Africa. That court extended privacy beyond protection only of physical space to one that protected the ability to make private and autonomous decisions and choices in important respects, including about one's own sexual and personal relationships. Justice Ackermann writing for the majority, observed:

> Privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.[45]

Justice Sachs concurred in separate reasons. He held that the constitutional right to privacy in South Africa was based on "the notion of what is necessary to have one's autonomous identity … What is crucial is the *nature* of the activity, not its *site*".[46]

In 2003, the Supreme Court of the United States agreed to reconsider its earlier decision in *Bowers.* The reconsideration arose in *Lawrence v Texas* (2003).[47] In the result, the Court overruled *Bowers.* It adopted a broader conception of privacy, similar to

---

[44] *Bowers*, per Blackmun J

[45] *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others*, 1998 (6) BCLR 726 (W) ("*National Coalition*").

[46] *National Coalition,* at [117] (emphasis added).

[47] 539 US 558 (2003) ("*Lawrence*").

that expressed in South Africa in the *National Coalition Case*. Justice Kennedy, writing the majority opinion, on behalf of the Court, expressed the principle that he upheld in the case in the following terms:

> Freedom extends beyond spatial bonds. Liberty presumes an autonomy of the self that includes freedom of thought, belief, expression and certain intimate conduct. The instant case involves the liberty of the person both in its spatial and in its more transcendent dimensions.[48]

The Supreme Court of the United States went on to find a basic constitutional flaw in the sodomy offence:

> [It can involve] the most private human conduct, sexual behaviour, and in the most private of places, the home. The statutes seek to control a personal relationship … within the liberty of persons to choose without being punished as criminals.[49]

In *Nadan and McCoskar v The State* (2005),[50] the High Court of Fiji also confirmed that privacy was not just the right to be left alone. It could now be seen as including the positive right to "express your personality and make fundamental decisions about your intimate relationships without penalization". Citing the Wolfenden Report with approval, Justice Winter held:

> The way in which we give expression to our sexuality is the most basic way we establish and nurture relationships. Relationships fundamentally affect our lives, our community, our culture, our place and our time. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct risks relationships, risks the durability of our compact with the State and will be a breach of our privacy.[51]

---

[48] *Lawrence,* at 562.

[49] *Lawrence,* at 567.

[50] *Nadan and McCoskar v The State* [2005] FJHC 500 ("*Nadan and McCoskar*").

[51] *Nadan and McCoskar*, ibid.

It was at this stage in the history of the judicial consideration of constitutional challenges to the sodomy offence that the *Naz Foundation* Case[52] came before the Delhi High Court. That Court held, as the United States Supreme Court had earlier done in *Lawrence,* that the privacy right was to be implied from the *Constitution of India*, relevantly from the right to "life" in Article 21 of the Indian Constitution. The Delhi High Court based its analysis upon pre-existing Indian jurisprudence, whilst noticing the existence of international analogies. Upon this basis, the Court held that the constitutional privacy right in India extended to autonomy in same-sex acts. In doing so, the Court restated the basis of the privacy right as flowing from the right to life itself:

> The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfilment, grow in self-esteem, build relationships of his or her choice and fulfil all legitimate goals that he or she may set.[53]

However, the Supreme Court of India in *Koushal*[54] reversed this decision. The Justices constituting the Court rejected the constitutional arguments and held that, if the sodomy offence in s377 IPC were to be nullified, this had to be done by legislative amendment or repeal not by the courts. Whilst each of the United States, South African and Fijian decisions necessarily rested on local constitutional provisions and analysis, the basically similar reasoning in each of them adds to the strength of each decision. Of course, the outcome will in each challenge depend on the local constitutional text and doctrine. However, sexual expression is far more than physical sexual acts. Sexual intimacy is inextricably linked to the development of sustaining human relationships and personal feelings of identity and self-worth. And these, most recent constitutional decisions have held, fall outside the bounds of permissible State interference because of higher constitutional guarantees.

---

[52] (2009) DLT 277 [2009] 4 LRC 838; ("*Naz Foundation").*

[53] *Naz Foundation* at [48].

[54] *Koushal v Naz Foundation*, Supreme Court of India, unreported, 11 December 2013, Civil Appeal 15436 of 2009)

Equality and Non-Discrimination before the Courts

Unlike privacy, the right to equality before the law equal protection of the law and non-discrimination were not immediately mentioned in the jurisprudence of the courts in cases concerned with same sex offences. The European Court of Human Rights in *Dudgeon* declined to base its decision on such rights although they were raised in argument. One early view of the privacy right suggested that an overreliance upon it could, in some ways, subvert the very goal of ensuring the full dignity of homosexuals and other sexual minorities as equals in society. It could do this by reinforcing the idea that homosexuality was something reduced to the physical acts of sex alone, tolerated only so long as its manifestation and expression were hidden behind closed doors. This point was made by Professor Edwin Cameron of South Africa, writing before to his elevation to the courts of that country and quoted by Justice Ackermann in the *National Coalition case*:

> [T]he privacy argument may subtly reinforce the idea that homosexual intimacy is shameful or improper: that it is tolerable so long as it is confined to the bedroom – but that its implications cannot be countenanced outside. Privacy as a rationale for constitutional protection therefore goes insufficiently far, and has appreciable drawbacks even on its own terms.[55]

When these concerns were raised by Edwin Cameron, it was not anticipated that such a progressive conception of privacy would be adopted in cases such as *National Coalition*, *Lawrence* or *Nadan,* each invoking fundamental notions of personal autonomy. Nevertheless, it took until 1994, in the communication in *Toonen v Australia,* for the first authoritative decision by the United Nations Human Rights Committee (HRC) to declare that the sodomy laws of the Australian State of Tasmania violated Australia's obligations under the *International Covenant of Civil and Political Rights*. Significantly, the HRC based its conclusion not only upon right to privacy (Article 17

[55] E. Cameron, "Sexual Orientation and the Constitution: A Test Case for Human Rights (1993) 110 SALJ 450 at 464, quoted in *National Coalition,* at [29] per Ackermann J.

ICCPR) but also, for the first time, upon the right to non-discrimination expressed in Article 2(1), specifically on the protected ground of "sex".[56]

No difficulty arose when a case challenging the sodomy offence came before the Constitutional Court of South Africa in 1996. The South African post-Apartheid Constitution had included, for the first time, "sexual orientation", as an expressly prohibited ground of discrimination. Discrimination was therefore quite readily established in the circumstances of the *National Coalition Case*. The inclusion of the specific protection for sexual orientation had been strongly supported by Nelson Mandela and by Archbishop Desmond Tutu, leaders of the new nation. President Mandela expressed support for a prohibition on such discrimination from the time he first came into office in 1994 – even before the adoption of the new constitutional principle. In finding that the conduct impugned in the *National Coalition Case* met the requisite threshold of *unfair* discrimination, the Court had to analyse the impact of the challenged laws. The South African Court held that the sodomy laws reinforced existing social prejudices and had a severe impact "affecting the dignity, personhood and identity of gay men at a deep level".[57]

In *Lawrence*, in the Supreme Court of the United States, only Justice O'Connor (concurring with separate reasons) engaged fully with the arguments based on the Equal Protection clause of the United States Constitution. The argument for the State of Texas had contended that the law did not discriminate against persons because it applied only to *conduct* and not to homosexual *persons,* as such. However this submission was rejected became "the conduct targeted by this law is conduct that is closely correlated with being homosexual".[58] For Justice O'Connor, the state "cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law".[59]

---

[56] *Toonen,* at [8.7].

[57] *Naz Foundation,* at [104].

[58] *Lawrence*, at 583 per O'Connor J.

[59] *Lawrence*, at 584 per O'Connor J.

In *Nadan and McCoskar*, the High Court of Fiji was faced with a gender neutral sodomy provision. Ostensibly the impinged crime applied to both men and women of any sexual orientation. Since the State was unable to offer any evidence of prosecution of the offence against heterosexual couples for acts that were regarded as "against the order of nature", the Court accepted that the offences were "selectively enforced, primarily against homosexuals". Consequently, the Fiji Court held that such unequal treatment on grounds of sexual orientation was repugnant to the equality provisions of the Fijian Constitution. The impugned provisions were therefore held invalid insofar as they punished males and not females for consensual, private sexual acts.[60]

Similarly to the finding of Justice O'Connor in *Lawrence*, the Delhi High Court in *Naz Foundation*, held that the disproportionate impact that s377 IPC caused to homosexuals in India, was unfair, unreasonable and violated both the equality and the non-discrimination provisions of the Indian Constitution. This was so despite the fact that the section was facially neutral and ostensibly targeted sexual acts rather than sexual identities.[61] In reasoning in this way, the Delhi High Court also accepted the analysis of the UN Human Rights Committee in *Toonen* that an analogy existed between discrimination on the grounds of sexual orientation and discrimination on the protected ground of "sex".[62] This analysis was later disapproved by the Supreme Court of India in *Koushal*. However, with respect, the argumentation of the Delhi High Court appears more consistent with most modern judicial analyses of this issue.

Dignity and Equality before the Courts

If the privacy right alone is philosophically limiting, as Edwin Cameron warned, the overarching right to dignity arguably captures better the full extent of the humanity of the homosexual person, perhaps to an even greater than the right to equality or non-discrimination. However, the notion of human dignity can sometimes also prove to be

[60] *Nadan and McCoskar*.

[61] *Naz Foundation,* at [94], [98]

[62] *Naz Foundation,* at [104].

elusive. In the South African Constitution, it is a fully justiciable right contained in section 10 of the Constitution. That provision requires the Court "to acknowledge the value and worth of all individuals as members of our society". Hence, in *National Coalition*, Justice Ackermann noted:

> Dignity is a difficult concept to capture in precise terms. At its least, it … requires us to acknowledge the value and worth of all individuals as members of our society … [The] symbolic effect [of the sodomy offence] is to state that, in the eyes of our legal system, all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic … [G]ay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is a part of their experience of being human … [This] builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes gay men degrades and devalues gay men in our broader society. As such, it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.[63]

Similar sentiments were highlighted by the Delhi High Court in *Naz Foundation* with regard to the expression "dignity of the individual" that appears in the Preamble to the Indian Constitution:

> At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognises a person as a free being who develops his or her body and mind as he or she sees fit. At the root of the dignity is the autonomy of the private will and a person's freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity and his value as a person, irrespective of the utility he can provide to others.[64]

---

[63] *National Coalition,* at [28]. See also Leila Seth, "India: You're Criminal if Gay", *The New York Review of Books*, March 20, 2014

[64] *Naz Foundation,* at [26]. See comment Tarunabh Khaitan, "Reading *Swaraj* into Article 15: A New Deal for all Minorities" (2009) 2 NUJSL Rev, 419 at 432.

Dignity also underpins other substantive rights. As noted by Justice Ackermann, the rights to equality and dignity are closely related, as are the rights to dignity and privacy.[65] Justice Sachs likewise conceived dignity as intertwined with equality. He held that the sodomy laws, by denying "full moral citizenship in society because you are what you are, impinge on the *dignity* and self-worth of the group". Recalling South Africa's history with Apartheid, Justice Sachs noted that "[a]t the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a social group".[66]

In *Lawrence v Texas*, the Supreme Court of the United States made it clear that personal autonomy over personal, private matters was a key element of human dignity. It was important, as such, for constitutional reasons:

> It suffices for us to acknowledge that adults may choose to enter upon this relationship [between adult homosexual persons] in the confines of their homes and their own private lives and still retain their *dignity* as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[67]

The inter-relationship between equality and dignity was also analysed by Justice Winter of the High Court of Fiji:

> What the Constitution requires is that the Law acknowledges difference, affirms dignity and allows equal respect to every citizen as they are. The acceptance of difference celebrates diversity. The affirmation of individual *dignity* offers respect to the whole of society. The promotion of equality can be a source of interactive vitality. The State that

[65] *National Coalition,* at [30].

[66] *National Coalition,* at [129].

[67] *Lawrence v Texas*, United States Supreme Court, 539 US 558 (2003) ("*Lawrence*") (emphasis added).

> embraces difference, dignity and equality does not encourage citizens without a sense of good or evil but rather creates a strong society built on tolerant relationships with a healthy regard for the rule of law. A country so founded will put sexual expression in private relationships into its proper perspective and allow citizens to define their own good moral sensibilities leaving the law to its necessary duties of keeping sexual expression in check by protecting the vulnerable and penalizing the predator.[68]

In *Naz Foundation*, the Delhi High Court had noted that the recognition of equality could foster the right to dignity. It held that:

> Where society can display inclusiveness and understanding, such persons can be assured of a life of *dignity* and non-discrimination.[69]

By inference, the Supreme Court of India in *Koushal* rejected this analysis. It is perhaps unsurprising that the courts of South Africa, the United States and Fiji recognised the centrality of human dignity. Each of these societies has recently struggled with racism. Each lives with the reality of coexistence within a plurality of races, religions and creeds. Each of these jurisdictions has understood, more than most, the value of the *inclusiveness* within society rather than the mere toleration of the minority individual in the broader fabric of society. The Supreme Court of India, however, was not convinced by this analysis. Its reasoning is hard to pin point because so brief and imprecise. Essentially the appeal was decided on the functional issue. For the Supreme Court, any correction was the province of the legislature not the courts.

Judicial Resistance

To the hopeful signs evident in the reasoning of judges in South Africa, the United States and Fiji, described above, must now be noted a number of countries where the legislature has been silent and where the constitutional courts have still denied relief. Courts now in four countries, namely Zimbabwe, Botswana, Singapore and most

[68] *Nadan & McCoskar* (emphasis added).

[69] *Naz Foundation,* at [130]-[132] (emphasis added).

recently India have resisted the trend that I have outlined. It is important to mention that an appeal is still pending in Singapore against an adverse decision reached in that jurisdiction. The appeal in India has only recently been decided and may yet be subject to a "curative" application within the Supreme Court or to later reversal, just as happened in the United States when, within 15 years, the Supreme Court in *Lawrence* held that *Bowers* had been wrongly decided.

In the four foregoing countries, the relevant court has dismissed the challenges to the constitutionality of the sodomy offence largely on the legal grounds that any invalidation was a matter for the legislature. The privacy right has been held unavailable for various reasons, such as non justiciability or simply the assertion that relief was not available under the relevant Constitution. A significant basis for dismissal of the challenges in all four jurisdictions has been a high level of deference paid to the perceived moral attitudes of the majority of the populations concerned, which were judged to be better reflected by the legislature than by the courts.

In *Banana v State* (2000),[70] the Supreme Court of Zimbabwe, by a majority of 3:2, rejected the argument that a constitutional right to privacy, under the Constitution, applied to the common law crime of consensual sodomy between male adults in private. Writing for the majority, Justice McNally held that what was in issue was the unlawfulness of the discrimination against homosexual, *as against* heterosexual, men to express their sexuality. However, the protected grounds of non-discrimination on account of "sex" and "gender", appearing in section 23 of the Constitution of Zimbabwe, were considered inapplicable to discrimination on the ground of sexual orientation. He held that an express ground of forbidden discrimination on the basis of sexual orientation would be required (along the lines of the South African Constitution) to justify the court upholding such an argument.[71] Justice McNally rejected any force in the argument of discrimination on the grounds that neither men, nor passive women, who engaged in acts of heterosexual sodomy were being penalised. He saw that argument

[70] *Banana v State* [2000] 4 LRC 621 ("*Banana*").

[71] *Banana, ibid*, at 672.

as “entirely lacking in common sense and real substance”. Instead, Justice McNally asked himself three remarkable questions: “How often does it happen that men penetrate women per anum? How often, if it does happen, is it the result of a drunken mistake? Or an excess of sexual experimentation in an otherwise acceptable relationship?”[72]

In the alternative, the majority in *Banana* reasoned that “it is not the function or right of this court, undemocratically appointed as it is, to seek to modernise the social mores of the state or of society at large”.[73] Justice McNally (with Justices Muchechetere and Sandura concurring) relied heavily on the then authority of the United States Supreme Court *Bowers v Hardwick*, later overruled. He drew from that decision his own conclusion that “it cannot be said that public opinion has so changed and developed in Zimbabwe that the courts must yield to that new perception and declare the old law obsolete”.[74] It was pointed out that Zimbabwe is broadly speaking, a conservative society in matters of sexual behaviour. In matters of constitutional interpretation, he reasoned, the Court should be “guided by Zimbabwe’s conservatism in sexual matters”.[75]

In a strong dissent, Chief Justice Anthony Gubbay (with Justice Ebrahim concurring) concluded that the common law offence of sodomy discriminated on the grounds of “gender”. After comprehensively canvassing the authorities including *Toonen*, *Dudgeon*, *National Coalition*, and noting the criticisms already then being voiced of *Bowers v Hardwick*, the dissenters held that the Zimbabwean sodomy law, even if it had any other objective aside from merely enforcing the private moral opinions and preferences of a section of the community, was far outweighed by the harmful and prejudicial impact that the law had on gay men. Moreover, “depriving such persons of the right to choose for themselves how to conduct their intimate relationships poses a greater threat to the

[72] *Banana, ibid,* at 672

[73] *Banana, ibid,* at 673.

[74] *Banana, ibid,* at 671.

[75] *Banana, ibid,* at 671.

fabric of society as a whole than tolerance and understanding of non-conformity could ever do".[76]

The Zimbabwean decision in *Banana* was later relied on by the Botswana Court of Appeal in *Kanane v State* (2003). The Botswana court likewise upheld the constitutional validity of the local sodomy provisions. It did so largely on the basis of deference to imputed public opinion:

> [W]hile courts can perhaps not be dictated to by public opinion, the courts would be loath to fly in the face of public opinion, especially if expressed through legislation passed by those elected by the public to represent them in the legislature … The public interest must therefore always be a factor in the court's consideration of legislation particularly where such legislation reflects public concern.[77]

In light of this factor, the Botswana Court went on:

> "[T]he time has not yet arrived to decriminalise homosexual practices even between consenting adult males in private. Gay men and women do not represent a group or class which at this stage has been shown to require protection under the Constitution".[78]

In 2013, judgment was delivered by a single judge of the High Court of Singapore in *Lim Meng Suang v Attorney-General.* The case concerned the "gross indecency" provision appearing in s 377A of the *Singapore Penal Code.* That provision was copied in colonial times from the *Indian Penal Code*. The plaintiffs argued that s 377A violated Article 12 of the Singapore Constitution. That provision was also substantially derived from its Indian counterpart. It guarantees equality before the law and equal protection of the law.

---

[76] *Banana, ibid,* at 648.

[77] *Kanane v The State*, 2003 (2) BLR 67 (CA).

[78] *Kanane v The State*, 2003 (2) BLR 67 (CA).

This is not the occasion to dwell at length on the case. An appeal is pending before the Singapore Court of Appeal. However, the loss by the plaintiffs at first instance reinforces some of the themes covered in this lecture.

In *Lim Meng Suang*, the High Court of Singapore applied the "rational relation" test for the validity of the local law. This required a two-step process of reasoning in assessing the constitutionality of laws measured against the equality provision in Article 12. That approach would be familiar to Indian and United States constitutional jurists. It requires a consideration of:

(a) whether the classification prescribed by s377A was founded on intelligible *differentia*; and
(b) whether those *differentia* bore a rational relation to the object sought to be achieved by s377A.

By way of legislative history, s377A was first introduced in Singapore in 1938. In 2007, the Singapore Parliament reconsidered the provision. At that time it repealed the gender neutral provision in s377A, in so far as it applied to heterosexuals. However, it decided to retain s377A as it applied to males only. Curiously, in ascertaining the object of the s377A, Justice Quentin Loh in the Singapore High Court considered that only the original object of the section, as it stood in 1938, was relevant. He dismissed any necessity to examine the 2007 parliamentary debates or actions. The original object, as considered by Justice Loh following a review of the 1938 Legislative Council speeches, was as follows:

> The act of males engaging in grossly indecent acts with other males was to be criminalised. The prevalence of such acts was a regrettable state of affairs and not desirable.[79]

[79] *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [67].

Confined to the original 1938 purpose, Justice Loh dismissed submissions by counsel for the State and the plaintiffs who both argued that the Court should examine any updated purpose described by the legislative in 2007. On this basis, arguments about HIV prevention relevant to modern day Singapore, which had proved important to the Delhi High Court in the *Naz Foundation* Case, were ignored. By comparison, in *Naz Foundation*, the Delhi High Court did not examine the original purpose of the colonial lawmakers when the IPC was first enacted in India in 1860. Rather, the Delhi High Court examined any purported justifications relevant to the modern day.

The proportionality exercise, raised earlier, is relevant to the second limb of the rational relation test. In the Singapore Court Justice Loh properly recognised: "The concept of reasonableness is … central to the inquiry into whether the 'rational relation' test is satisfied".[80] "The *differentia* underlying the classification prescribed by the law must be broadly proportionate to the purpose of that law".[81] Aside from HIV/AIDS, confining the purpose of s377A to 1938 expositions enabled the Singapore Court to avoid confronting other obvious objections to the proportionality of the law including why, if the object was to display moral opprobrium against homosexuality, the legislature failed to criminalise sexual relations between homosexual women. Strikingly, despite the close relationship between the *Indian Penal Code* and constitutional equality provision, not a single reference was made in the Singapore court to the Delhi High Court's reasoning in *Naz Foundation*.

Finally, the Singapore Court held, in the alternative, that the purpose of the law was legitimate because "some portions of Singapore society today still hold certain deep seated feelings with regard to procreation and family lineage".[82] Justice Loh credits the social mores and norms of the "Chinese portion of Singapore society" for these deep seated values. In doing this, he appears to ignore, or minimise, the multiracial character of Singaporean society that is an element in its economic success. Taken to its logical

[80] *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118, at [93].

[81] *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118, at [94].

[82] *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118, at [127].

conclusion, the reasoning of Justice Loh would seem to make it permissible to imprison heterosexual fertile married couples who chose not to conceive. Certainly, they are not conforming to the suggested importance of "procreation and family lineage", attributed above to Singapore's Chinese citizens.

It remains to be seen whether the Singapore Court of Appeal will endorse the reasoning at first instance or place the development of constitutional law in Singapore in the mainstream of contemporary constitutional analysis. And whether it will find the reasoning of the Delhi High Court or the Supreme Court of India influential to its reasoning, having access to both decisions and being bound by neither. Obviously, the respect ordinarily paid to the Supreme Court of India – especially in a decision concerning the IPC – will represent a new challenge for the cause of reform in Singapore.

Beyond the Horizon?

Despite the early trend towards decriminalisation of same sex offences in several legislatures and a number of successes in the courts, the removal of stigmatising criminal laws remains a high priority. This is why I have described them as standing at "the Gateway". On one view, the process of legislative reform in Commonwealth countries has struck a logjam. In certain parts of Africa, new efforts to increase the penalisation of sexual minorities have arisen. In Uganda, an *Anti-Homosexuality Bill* has been approved by the legislature, and consented to by the President, containing increased penalties of life imprisonment for homosexuality and the death penalty for "aggravated homosexuality", defined to include repeat offenders. Persons who fail to report a homosexual offender would be liable, under this Bill if it became law, to a fine or imprisonment of up to three years. The President of Uganda originally stated that he would withhold his assent to the Bill and propose alternative legislation in keeping with Ugandan values. However, in February 2014, after hearing some dubious evidence, he proceeded to approve the legislation. He declared that, with so many beautiful women in Uganda, he could not understand how some men would prefer men.

Meanwhile, in Nigeria, the *Same Gender Marriage (Prohibition) Bill 2011* was passed by both Houses of Parliament and was assented to by the President of Nigeria. Some of its more draconian provisions include a prohibition on registering gay clubs, societies and organisations and the criminalisation of any public displays of same-sex amorous feelings. Other countries such as Cameroon, neighbour to Nigeria, are vigorously enforcing and prosecuting gays and lesbians under their sodomy laws. Proposals made unanimously in 2011 by the Eminent Persons Group on the future of the Commonwealth of Nations, that sodomy laws in Commonwealth countries should be repealed, have so far fallen on deaf ears.[83] So has a like recommendation by the Secretary-General of the United Nations and the unanimous recommendation in 2012 of the United Nations Development Programme Global Commission on HIV and the Law.[84] Not a single Commonwealth country has followed these recommendations with repeal of its sodomy laws, relic of colonial times. The President of Malawi, Joyce Banda, has proposed legislative reform to a reluctant legislature, in the context of a very serious HIV/AIDS epidemic in Malawi. In the Russian Federation new laws have been made prohibiting advocacy of "non-traditional sexual relationships, particularly for under aged persons. Reform comes dropping slow.

The effort to secure reform in alternative ways continues. The decision of the Belize Supreme Court is awaited following the argument of a challenge before that Court in 2013. The appeal hearing of the *Lim Meng Suang,* before the Singapore Court of Appeal, should take place early in 2014. A case was taken to the European Court of Human Rights against the Turkish Republic of Northern Cyprus ("TRNC"), the last jurisdiction in Europe still to criminalise same-sex acts. That litigation prompted the TRNC legislature to approve a Bill to repeal the offending provision. In consequence, the court challenge may not reach the stage of a published decision. Finally, the Malawian High Court faces a hearing in 2014 on the constitutionality of its sodomy

[83] Commonwealth of Nations, Eminent Persons Group, *A Commonwealth of the People: Time for Urgent Reform*. ComSec, London, 2011 (Perth CHOGM 2011), 168 [R61].
[84] United Nations, UNDP, Global Commission on HIV and the Law, *Risks Rights and Health* (Report 2012) New York, 50 [R 3.3.1]; 54 [R3.4] See below, Lecture VI.

provision. Inevitably, the recent decision of the Supreme Court of India is likely to loom large in courts before whom that decision will certainly be read.

Despite set-backs and hostility I am optimistic that rationality will eventually triumph over restrictive criminal laws, with their disproportionate provisions and oppressive operation. The global struggle against HIV demands this course. So does the application of principle and proportionality concerning the proper ambit of the criminal law. So does the overall trend in global constitutionalism and universal human rights. So does the knowledge, now available from science, about the characteristics of minority sexualities. So does the power of love and kindness to one another that underpins the effort to build a better world on the foundations of the United Nations *Charter* and the *Universal Declaration of Human Rights.* Time will tell. And time will sometimes need a helping hand. Change in the criminal laws targeting LGBT accused is the gateway through which any wider measures to afford relief against inequality, discrimination and injustice must pass before equality for the LGBT minority can be achieved. To afford a glimpse of the future, I now turn to changes that have followed in jurisdictions that have repealed the criminal obstacles to reform.