377– and the unnatural afterlife of British colonialism

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Article 377 of the ***Indian Penal Code*** of 1860 made "carnal intercourse against the order of nature" an offence. This provision, or something very close to it, is presently in force in all former British colonies in Asia with the exception of Hong Kong. Even the article number, 377, is repeated in the current laws in force in India, Pakistan, Bangladesh, Myanmar, Singapore, Malaysia and Brunei - as if it were a special brand name, all of its own. Sri Lanka, Seychelles and Papua New Guinea have the key wording from 377, but different article numbers. Parallel wording appears in the criminal laws of many of the former colonies in Africa. Surprisingly, viewing the matter from Asia, the 377 wording has never been a part of the criminal law in Britain.

377 is an amazingly successful law – if we judge it by its geographical spread and its longevity. In just three years it will be 150 years old. How was it formulated? How did it come to Asia? What is its role today?

First, we have to look back to the reign of Henry VIII and the break of the English church from Rome.

I BACK TO BUGGERY

British criminal laws covering homosexual acts began in 1534. Legislation in the reign of Henry VIII, prohibited

> **…the detestable and abominable Vice of Buggery committed with mankind or beast.**

The term buggery traces back to "bougre," or heretic in old French, and to the Latin Bulgarus for Bulgaria (seen as a place with heretics).[1] By the thirteenth century the term had become associated with sodomy.[2] The 1534 statute took over the offence of buggery from ecclesiastical law. The word "abominable" was taken from Leviticus (18:22 and 20:13). Buggery was described as a "vice." The religious character of the provision is unmistakable.

The law has an odd history:

> **It was a first step in justifying the dissolution of the monasteries and the seizure of their endowments. The first act was not intended to be permanent, and it had to be renewed three times in 1536, 1539 and 1540. In 1548, under the reign of Henry's young son, a new version of the Act was passed (2 & 3 Edward VI. C.29). When Henry's daughter Mary succeeded her brother and restored England's papal allegiance, all these Protestant Acts were repealed. But when Henry's daughter Elizabeth became queen, a new version of the Act (5 Elizabeth, c.17) was passed in 1563.[3]**

From 1563 it continued as a non-ecclesiastical criminal law. The penalty was death, a common penalty in the period for most offences. It remained a capital offence until 1861.

The law was originally enacted one year after Parliament ended Papal jurisdiction over the English Church. Catholic courts had been unsympathetic to Henry VIII's divorce case. The buggery law was part of a widening campaign against Catholics, which led to the expropriation of the monasteries, a campaign that began in earnest in 1536.

> **By 1534 the government was embarked upon a more sweeping program of change for the English Church. Henry had himself declared "Supreme Head" of the Church, in effect replacing the Pope at the apex of ecclesiastical authority. Moreover, it is likely that the chief minister Thomas Cromwell was then already eyeing the rich monastic properties in England for expropriation. Though official greed drove the dissolution of the monasteries, Cromwell characteristically sought a pretext for the policy. Thus the supposed sexual immorality of those in religious vocation was trumpeted.**
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> **25 Hen.8, c.6 [the buggery law] gave the common law courts jurisdiction over acts of sodomy, and explicitly denied "benefit of clergy," the immunity ecclesiastics had traditionally enjoyed from punishment by royal officials. Together with a "visitation" campaign in 1535 that trumped up tales of sexual indiscretion in the religious houses, the sodomy law made the tendentious point**

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1 Compact Oxford English Dictionary, 2003.

2 Robert Mills, Male-Male Love and Sex in the Middle Ages, in Matt Cook, et al, A Gay History of Britain, Greenwood, 2007, 1 at 24.

3 Randolph Trumbach, Renaissance Sodomy, in Matt Cook, et al, A Gay History of Britain, Greenwood, 2007, 45 at 50.

> **that the Catholic Church in England had lapsed in its adherence to divine law. Henry stepped in to police religious morals, and righteously smote the monasteries where sins like buggery had been profligate; or so the pretext ran. … The program went on to encompass the execution of diehard English Catholics, most notably Sir Thomas More in 1535. The expropriation of the monasteries began in earnest in 1536, with Cromwell's slanderous groundwork well in place. Accusations of sodomy rang out in the Parliamentary debate over the 1536 bill to suppress the monasteries.** [4]

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

The picking out of 'buggery' is revealing. Adultery, which Leviticus also says should be punished by death, and which seems more disruptive of social life, was not made a crime in Britain or the British derived criminal codes (though often criminalized in the United States).

We see certain patterns of language used over time: - buggery, sodomy, a crime against nature, a crime not to be mentioned, not to be named. Thomas Aquinas defined 'sodomitic vice' as a subspecies of the sin 'against nature', a vice performed with a person of the same sex.[5] In 1644, Sir Edward Coke described the crime as "a detestable and abominable sin, among Christians not to be named…"[6] Sir William Blackstone, in his 1767 Commentaries on the Laws of England, referred to the 1534 law as prohibiting the "infamous crime against nature."[7] In all this we find no exact definition of "buggery" or "sodomy" – instead the active avoidance of definition.

What became of the 1534 buggery law?

Laws against consenting homosexual acts are very difficult to enforce in any systematic way. This reduces the significance of the difference between the British law and continental laws which had no prohibitions of same-sex acts. Most arrests involve some public activity or issues of age or consent, and can be prosecuted under any criminal law system.

Would the police attempt any systematic enforcement of the 1534 British law once the anti-Catholic campaigns of the period were over? Randolph Trumbach says of the law:

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[4] Don Gorton, Timing of Henry VIII's sodomy law matters, The Gay and Lesbian Review, Jan-Feb 2004, 6.

[5] Quoted in Robert Mills, Male-Male Love and Sex in the Middle Ages, in Matt Cook, et al, A Gay History of Britain, Greenwood, 2007, 1 at14. Mills cautions that the elements that constituted 'sodomy' in the medieval period were notoriously vague.

[6] Coke, Institutes, 1644, 58-9.

[7] Blackstone's writings were very influential in United States law. Blackstone had taken the ecclesiastical law formulation of the offence and substituted "crime" for "sin". See Don Gorton, The Origins of Anti-Sodomy Laws, The Harvard Gay and Lesbian Review, Winter, 1998, 10 at 12.

… Most of the few cases brought to court under the Elizabethan statute over the next century and a half seem to have been cases of rape against prepubescent boys. [8]

H.G.Cocks has written that the law

…was hardly enforced at all before the 1720s. It was only after about 1780 that the numbers of men arrested began to rocket. This expansion in criminal justice occurred almost by accident. In general, there was no sustained witch-hunt against identifiable groups of 'sodomites', but instead a series of sporadic efforts at policing cities and individual behaviour. The rising level of arrest was due mostly to changes in the structure of criminal justice which were not necessarily intended to police homosexual behaviour, but instead were directed at more ordinary offences such as theft, violence or political sedition. … In spite of this apparent lack of coordinated policy, it was nevertheless the case that between about 1780 and 1840 laws were adapted so that they could be used against all kinds of homosexual behaviour.[9]

Cocks explains that the law in practice had come to prohibit any homosexual act. Such acts were either buggery or regarded in law as an attempt to commit buggery. In 1870, in a famous case, two men were charged with conspiracy to commit buggery and soliciting others to do so by provocative cross-dressing in streets and theatres.[10] Prosecutions shifted to charges of 'indecent assault' after 1850, apparently finding it easier to prove. Assault did not always mean assault; Cocks cites one case of two men alleged to have sexually assaulted each other.

Men could also be prosecuted for a variety of common law offences – so called because they were established by the courts through the process of precedent rather than enacted by Parliament – which together were grouped under the general rubric of 'unnatural offences.' In legal terms, this category comprised sodomy (which also included bestiality – about a quarter of indictments), indecent assault (any touch or sexual act ostensibly committed without the other's consent), indecent exposure with the intention of committing the crime (exposing one's private parts for this intention), invitations to commit the crime ('inciting and soliciting'), 'suffering and permitting' some else to have sex with you or even 'meeting together' for the purpose of committing a homosexual act. [11]

Between 1806, when reliable figures begin, and 1900, 8,921 men were indicted for sodomy, gross indecency or other 'unnatural misdemeanours' in England and Wales. Ninety men per year were, on average, indicted for homosexual offences

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[8] Don Gorton, Timing of Henry VIII's sodomy law matters, The Gay and Lesbian Review, Jan-Feb 2004, 6.

[9] H.G.Cocks, Secrets, Crimes and Diseases, in Matt Cook, et al, A Gay History of Britain, Greenwood, 2007, 110.

[10] Morris Kaplan, Sodom on the Thames, Cornell, 2005, 1.

[11] H.G.Cocks, 2007, 110-111.

in this period. About a third as many again were arrested and their case considered by magistrates. Most of the men convicted were imprisoned, but between 1806 and 1861, when the death penalty for sodomy was finally abolished, 404 men were sentenced to death. Fifty-six were executed, and the remainder were either imprisoned or transported to Australia for life. Two such men, James Pratt and John Smith, were the last to be executed in Britain for sodomy on 27 November 1835.[12]

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

The persistent use of cruising areas such as St James' Park and Moorfields suggests that there was no concerted crackdown and that periodic arrests and prosecutions did not comprehensively deter men from visiting these places. Some of the Molly Houses certainly seem to have been well known for long periods before they were raided and shut down. Witnesses in the trial of Gabriel Lawrence, who was hanged for his part in the Mother Clap case, testified that 'the house bore the public character of a place of rendezvous for sodomites' and that 'it was notorious for being a Molly House'. Cook, the proprietor of the White Swan on Vere Street, had been in business for twelve years before being raided and was well enough known to attract customers from up to thirty miles away. Policing of the capital was uneven and disorganized during the period…[13]

BUGGERY IN AMERICA

The 1534 buggery law applied in the American colonies either as a matter of common law or by local statute. Twenty prosecutions are known in the colonial period. After independence most states eliminated the death penalty. New language developed, criminalizing "the infamous crime against nature," using words from Sir William Blackstone. From 1610 to 1900 each state enacted a criminal prohibition.[14]

Judges and commentators in the nineteenth century read the sodomy, buggery, carnal knowledge, and crime against nature laws – hereinafter collectively described as "sodomy" laws – to criminalize "unnatural" intercourse between men and women and men and men, but not between women and women. Although there are only a handful of reported cases, sodomy prosecutions occurred episodically throughout the century. In 1880 there were sixty-three

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12 H.G.Cocks, 2007, 109. See also H.G.Cocks, Nameless Offences: Homosexual Desire in the 19th Century, Taurus, 2003, 7-8 and 17.

13 Matt Cook, London and the Culture of Homosexuality, 1885-1914, Cambridge, 2003, 11.

14 William Eskridge, Gaylaw, Harvard, 1999, p. 157 and Appendix A, Early municipal and state regulation, 328.

> **persons imprisoned for the crime, two-thirds of them people of color and foreign immigrants.**[15]

Eskridge notes a redefinition of these laws to include oral sex after 1880, seeing this shift as a parallel reform to the 1885 Labouchere amendment in the United Kingdom.

II CARNAL INTERCOURSE AGAINST THE ORDER OF NATURE

Section 377 of the ***Indian Penal Code*** of 1860 deals with "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 ten years, and shall be liable to fine.**
>
> **Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.**

Section 377 had wording unlike any enactment in the United Kingdom. Was it a codification of British practice, though not following existing statutory language? Was it seen as an innovation by the drafters? Why was Britain criminalizing 'unnatural' acts when the continental legal systems ignored them, in line with the 1810 Napoleonic penal code?

The last half of the 19th century was a period of immense social change. It was the era of Darwin, Marx and Freud.[16] It was a period of economic globalization comparable to the present day, with dramatic new levels in the movement of people, commodities and capital.[17] The period saw the last great surge of formal colonial expansion. The West took control of major parts of Africa, Asia and Oceania. Russia took control in the Caucuses and Central Asia. The independent states of Japan and Siam westernized their legal systems and built European-style palaces to justify continuing autonomy. The Eiffel Tower and colonial railways displayed new Western engineering skills. Anthropology developed in the service of empire.

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15 Eskridge, 158.

16 Charles Darwin lived from 1809 to 1882 and published The Origin of Species in 1859. Karl Marx lived from 1818 to 1893 and published volume one of Capital in 1867. Sigmund Freud lived from 1856 to 1939 and published The Interpretation of Dreams in 1900. From 1856 to 1882 all three were alive. Freud, in his Introductory lectures on Psychoanalysis, suggested that there had been three major intellectual challenges to the human view of its own uniqueness in creation: Copernicus (the earth is not the centre of the universe), Darwin (humans had evolved) and Freud (humans had unconscious drives). See Cornelia Dean, Science and the soul: Descartes loses force, International Herald Tribune, June 28, 2007, 9.

17 Naill Ferguson, Sinking Globalization, Foreign Affairs, March/April, 2005, 64.

For whatever reasons, homophobia assumed a particular normalcy in Western thinking in the late 19th century, buttressed by the new sexological studies of the period. The focus was medical or psychological, not religious. Emerging in a period of Western imperial expansion, the new ideas spread beyond the West, though their impact abroad was not the same as at home.[18]

377 spread, but not on its own. It was only one article in a comprehensive 'code' designed to state in an orderly, rational way, the complete body of criminal law.

Continental European law is characterized by codes, while judge-made British 'common law' is found in innumerable court rulings, supplemented by specific statutes. A move to codes would have been a major change in Britain.

Criminal law reform and the drafting of criminal codes took place for Britain and for India in the same period. This was a parallel process (though the results were different). The ***Indian Penal Code*** was not a British code exported to India. But it was British law exported to India.

BRITAIN

The 19th century was a period of major criminal law reform in the United Kingdom. British criminal law was a mess, in need of major reform and rationalization. Jeremy Bentham, John Stuart Mill and the Utilitarians had strong ideas on law reform and codification:

> **Bentham and Mill envisioned a series of codes on every area of the law; so instead of relying on caselaw and independent digests, the entire corpus of legal knowledge would be written down in one source, in a concise, easy to read form. Moreover, codification would end the corruptive monopoly enjoyed by the legal profession. The common man would no longer have to depend on profit-hungry lawyers and magistrates to protect his rights. This cure-all approach [was] typical of the Utilitarians…**[19]

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

[19] David Skuy, Macaulay and the Indian Penal Code of 1862, (1998) 32 Modern Asian Studies, 513 at 523.

Macaulay favoured many Benthamite principles of procedure as well: oral pleadings, jurisdiction of courts based on issue not pecuniary amounts, appeals on questions of law only, and no new evidence admissible on appeal.[20]

These reforms may sound obvious. But in terms of 19th century British law, they were revolutionary.

Jeremy Bentham launched the 19th century codification movement in the English speaking world.[21] The codes followed Bentham's ideas on form and procedure.

Bentham would have been no supporter of Article 337 or its kin. In 1785 Bentham wrote an essay titled Offences Against One's Self in which he argued that there was no justification for the criminalization of same sex acts. He was unwilling to make public his opinions on the matter and the essay remained unpublished for almost 200 years, emerging finally in 1978.[22] It stands as one of the earliest written defenses of homosexuality in English. Only recently has an earlier defense been located, Thomas Cannon's text of 1749.[23]

How did criminal law reform proceed in Britain and India? As the 19th century progressed, at least five draft criminal codes were completed. Why so many? We see the dynamic impact of Bentham and the Utilitarians on 19th century legal thinking.

What reform is needed? We need a code!

How to make your mark? Draft a code!

Bentham, himself, wrote to governments in the United States and Europe seeking commissions to draft codes. He was spurned. Others were honored.

Two royal commissions were established to propose criminal law reform in Britain.

The first Royal Commission sat from 1832 to 1845, and published eight reports. The second Royal Commission was convened in 1845 and during its five-year

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20 Skuy, footnote 39.

21 See Sanford Kadish, Codifiers of the Criminal Law: Wechsler's Predecessors, (1978) 78 Columbia Law Review, 1098-1144; Martin Friedland, Codification in the Commonwealth: Earlier Efforts, (1990) 2 Criminal Law Forum, 145-159.

22 See http:// skeptically.org / utilitarianismtheethnicaltheoryforalltimes/ id22.html; (1978) Journal of Homosexuality, 389. John Stuart Mill, in On Liberty, stated that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."

23 Early gay-rights writings found, Wocker International News # 680, May 7, 2007. An indictment of the book by Thomas Cannon, entitled Ancient and Modern Pederasty Investigated and Exemplify'd, was found in a box of unclassified legal documents from 1750. The book itself has not survived, but the indictment reproduces many of its passages.

tenure published five reports. Both Commissions completed a criminal code, in 1843 and 1848, respectively.[24]

Parliament approved the ***Indian Penal Code*** in 1860, drafted by Thomas Babington Macauley and the Indian Law Commisssion. When it came into force in 1862 it was the first criminal code in force in the British Empire.

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

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

In 1887, William Gladstone, the greatest statesman of 19th century Britain, wrote that one of the leading achievements of previous decades had been the fact that "the disgusting criminal code" had been cast aside.[25] Of course, it had not been a code. And it was not replaced by a code (that is a systematic statute). Reform took place piecemeal, by a number of statutes. To this day British criminal law is uncodified.

INDIA

…India was the 'brightest jewel in the imperial crown' and the core of British global strategic thinking precisely because of her very real importance to the British economy. This was never greater than at this time [1875-1914], when anything up to 60 per cent of British cotton exports went to Indian and the Far East, to which India was the key – 40-45 per cent went to India alone – and when the international balance of payments of Britain hinged on the payments surplus which India provided.[26]

While the East India Company had been active in India for many years, formal governmental power dates to 1764 when the Company gained rights of governance over Bengal, Bihar and Orissa. In 1803 the Mughul emperor accepted British "protection." British India had gradually come into being, along with suzerain rights over the many Princely States that retained some autonomy.

Britain was now in the position to undertake law reform for India. Following the pattern newly established for domestic law reform at home, Parliament established an Indian Law Commission in 1833. Thomas Babington Macaulay was appointed to chair the Commission.

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24 Skuy, at 518.

25 Paul Kennedy, The Parliament of Man, 283.

26 Eric Hobsbawn, The Age of Empire, Pantheon, 1987, 69.

Macaulay was the son of Zachary Macauley, a British Colonial governor and abolitionist. He was educated at Trinity College, Cambridge. He became a Member of Parliament in 1830. He traveled to India in 1834. Due to the illness of other commissioners, the draft ***Indian Penal Code*** of 1837 was largely his work.

Macaulay's draft was not immediately accepted. Twenty-three years passed, during which his work was reviewed and assessed by the Commission and the Supreme Court judges in Bombay, Calcutta, and Madras.

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

In 1860 the ***Indian Penal Code*** was enacted, coming into force in 1862. But, in spite of coming after the Indian Mutiny, it was not a document that reflected Indian laws and customs. It had many of the features of the 1843 British Royal Commission's draft code.

> **Without a doubt, the structures and organization of the Indian and English codes was virtually identical. Criminal offences are divided into chapters according to classes, such as offences against the state, offences against public justice, and offences against the public tranquility. Each offence, along with related lesser offences, was defined, followed by the appropriate punishments and exceptions. … In fact, the Indian and English codes differed in structure and organization in only one significant way; the English codes did not include Illustrations. Illustrations were hypothetical fact situations that showed how a particular section operated. The Royal Commission attached notes to their draft codes, and hypotheticals were naturally used in the notes to clarify certain points, but the Royal Commission never seriously contemplated including Illustrations in the actual code. … Illustrations in a criminal code made sense only for India, at that time. India did not have a formal body of caselaw, so hypothetical factual situations served the same function as English common law.**[27]

Macaulay said that the substance of his code was wholly original.

> **Despite Macaulay's professions to the contrary, his contemporaries did not consider his Code a revolutionary departure from English law. Macaulay's code was submitted to Supreme court judges in Bombay, Calcutta and Madras. Their comments were forwarded to Charles Hay Cameron and Daniel Elliot, Indian Law Commissioners, who issued two exhaustive reports in 1847 and 1848. In the**

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[27] Skuy, page 539-540.

1848 report, the two Commissioners compared the 1837 Indian Code to the Royal Commission's 1843 Code, with the intention of amending the former whenever it differed from the latter; however, no unacceptable differences were found and the 1837 Indian Code's implementation was recommended with relatively few amendments. Reacting to Macaulay's claim that his Code was not based on any existing legal system Hay and Cameron reported that with certain tolerable exceptions, the Indian Code departed very little from substantial principles of English law. Macaulay's claims of originality were rejected out of hand: "The novelty … is more imaginary than real, and is to be found more in form than in substance."[28]

Within two decades most of India's law was codified, both criminal and civil. In contrast Britain enacted a series of criminal reform statutes, but no criminal code.

The appeal of statutory codes for India was very strong. Areas of law were systematically set out in one document. A new local elite of Anglicized lawyers and civil servants would be able to use the codes – "a class of persons, Indian in blood and colour, but English in taste, in opinions, in morals and in intellect." These would be "Macaulay's Children", the product of Macaulay's educational policies in India.[29]

Macaulay's code came to be seen as a great achievement, bringing an orderly and systematic criminal law to vast India. Its success was confirmed by its adoption in the other British colonies in Asia.

Malaysia inherited the identical s. 377 from the Indian Penal Code. However, in 1938 s. 377A was introduced as the gross indecency provision. In 1989 the Malaysian authorities amended s. 377 and subdivided it into bestiality, consensual and non-consensual sodomy and gross indecency. This amendment defined carnal intercourse as anal or oral sex, and made gross indecency gender neutral – thereby also making it applicable to lesbian women.[30]

Criminal law is federal in Malaysia, but Shariah law at the provincial level can also apply penalties. Occasional news reports tell of raids on beauty pageants, with only Muslims being charged for cross-dressing.

Both Japan and Thailand westernized their legal systems towards the end of the 19th century, part of larger strategies to remain independent. Anal intercourse was made a criminal offence in the Meiji legal code in 1873 (though hardly ever punished, and dropped from the law in 1881).[31] In the first decade of the 20th century Thailand barred

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28 Skuy, page 542-543.

29 Thomas Babington Macaulay, Wikipedia, accessed May, 2007; Niall Ferguson, Empire, 2002, Basic Books, 189, 210.

30 Alok Gupta, page 56. A 1995 amendment in Sri Lanka also extended its criminal prohibition to cover lesbian acts.

31 Mark Mclelland, Male Homosexuality in Modern Japan, Curzon, 2000, 24-26l, citing Makoto Furukawa, The Changing Nature of Sexuality: The Three Codes Framing Homosexuality in Modern Japan, U.S.-Japan Women's Journal English Supplement, no.7, 98-126.

acts "against human nature," adopting wording from the ***Indian Penal Code***. The section was dropped in 1956 when a reform eliminated sections with no history of enforcement.[32]

AUSTRALASIA, CANADA, AFRICA

Stephen's code was the basis for the Canadian ***Criminal Code*** of 1892, the New Zealand ***Crimes Act*** of 1893 and the ***Queensland Penal Code*** of 1899. The Queensland code, as drafted by the Chief Justice of Queensland, Sir Samuel Griffith, provided in Section 208:

> **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.**

The Queensland code was adopted in Northern Nigeria in the nineteenth century, later becoming the basis for a uniform federal code in Nigeria in 1916.[33]

The ***Indian Penal Code*** had been used in Kenya, Uganda and Tanzania, but those laws were later replaced by drafts based on the Nigerian criminal code. Sudan used the ***Indian Penal Code***. In 1960 Northern Nigeria enacted a separate criminal code, based on the Sudan code.

One source suggests why the ***Indian Penal Code*** was seen as the better model for Sudan:

> **In preparing that code Thomas Babington (later Lord) Macaulay, right at the outset sought, rather than imposing English law, to give due consideration to India's civilization and moral values. He was by the same token particularly concerned with accommodating the Islamic principles of criminality and criminal responsibility, since the only regular courts had been those established by the Mogul Empire in the parts of India under its control. Consulting several penal systems, including the Code of Louisiana and couching his draft in simple lucid language, he produced a code that was described by Sir James Fitzjames Stephen as an excellent piece of legislation.[34]**

Macaulay was only in India for three years and spoke none of the local languages. David Skuy emphasizes the faithfulness of Macaulay's draft to substantive British law. Kalil's suggestion that the Macaulay code was sensitive to Islamic traditions is puzzling.

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[32] Personal communication, Professor Peter Jackson, December, 2002.

[33] Alok Gupta, The Presumption of Sodomy, draft dated April 10, 2007, page 20.

[34] Mohamed Ibrahim Khalil, Sudan Legal System and Problems of Law Reform, http:// mik-law.org/sudanlegalsystemandreform.html.

The Queensland Code was also widely adopted outside the African portions of the Commonwealth. Cyprus adopted it in 1928 and Palestine in 1936. Indeed, this code forms the basis of the present Israeli Criminal Code.[35]

South Africa continued pre-Napoleonic Dutch law, which prohibited homosexual acts. The law was invalidated by the Constitutional Court, enforcing the post-apartheid constitution which specifically bans discrimination on the basis of sexual orientation.[36]

Wright's code, drafted for Jamaica, only criminalized non-consensual buggery. The code was never applied to Jamaica, but enacted for British Honduras (Belize), Tobago, St. Lucia and the Gold Coast (Ghana).[37]

THE MIDDLE EAST, NORTH AFRICA, CENTRAL ASIA

Recently an Arab-American wrote:

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

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

What passes in present-day Saudi Arabia, for example, as sexual conservatism is due more to Victorian Puritanism than to Islamic Mores… Originally, Islam did not have the same harsh Biblical judgement about homosexuality as Christianity.[39]

A study, State Homophobia, available on the website of the International Lesbian and Gay Association, lists penal provisions in various countries.[40] It indicates that Syria punishes "unnatural sexual intercourse" with three years imprisonment. Lebanon prohibits "all sexual relations that are unnatural." Morocco and Mauritania also prohibit unnatural sexual acts. Bahrain uses the earlier English term "buggery" in its prohibition.

The laws vary in other parts of the Middle East, North Africa and Central Asia, but do not use the idea of 'unnatural' acts.

Not all jurisdictions prohibit homosexual acts. They are not prohibited Iraq, Israel, Jordan, Kyrgyzstan, Tajikistan or Egypt (though individuals there have been charged with 'debauchery').

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35 Friendland, page 157.

36 ***National Coalition v Minister of Justice***, 1999, 1 S.A. 6 (Constitutional Court).

37 Alok Gupta, page 54; Friedland, page 156.

38 David Hall, Gay, Arab, American, The Advocate, June 19, 2007, 32.

39 As'ad AkuKhalil, a Lebanese-American scholar, writing in 1993 in the Arab Studies Journal, as quoted by Bill Strubbe, Cruising the Casbah, Out Magazine, September 2002, 115 at 116.

40 State Homophobia, April, 2007, accessed at. www. ilga.com.

III GROSS INDECENCY

The radical Liberal party MP Henry Labouchere, editor of a muck-raking newspaper called Truth, introduced an amendment in the British Parliament in 1885 that made acts of 'gross indecency' between males an offence. Existing law, he said, was not adequate.

Cocks' study of prosecutions, however, shows that the law, in practice, was quite adequate to charge and convict individuals. The new law was unnecessary and was not a government proposal. It did not represent a significant change in public attitudes, or a new anti-homosexual campaign.

> **Whilst the importance of the legislation of 1885 and 1898 and the circumstances in which it was passed should not be underestimated, the specific provision against homosexual activity contained in the Criminal Law Amendment Act and the Vagrancy Law Amendment Act were secondary to their central focus on under-age sex and prostitution. Newspaper reports on the passage of the Acts included barely any reference to the clauses relating to homosexual activity.**[41]

The new wording was simple and broad. There would be no need to allege that the accused was conspiring, soliciting, inciting or attempting. The focus on the end goal of anal penetration was gone. This new formulation was used against Oscar Wilde a decade later, in the most sensational homosexual trial in Western history.

The 'gross indecency' law spread through the influence of Stephen's code and the Queensland penal code. It appeared in Malaysia and Singapore by amendment in 1938. It was the key provision in Canada, but never introduced in India.[42]

IV 1534, 1860, 1885

Cocks' analysis leads to a view that section 377 of the ***Indian Penal Code*** would have been seen in the late 19th century as a statement of the existing British law against buggery, and a conservative statement at that. The reference to 'penetration' in the Explanation could be interpreted as requiring evidence that in British practice was not necessary.[43]

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41 Matt Cook, London and the Culture of Homosexuality, 1885-1914, Cambridge, 2003, 48-9.

42 Alok Gupta, The Presumption of Sodomy, draft dated April 10, 2007, page 40.

43 Any attempt to draw conclusions on whether the drafters thought they were altering the existing British law would require an analysis of the reports of the criminal law reform commissions that functioned in the United Kingdom in the 1890s, a study not undertaken by the author. The author is not aware whether the draft codes produced in that process contained equivalent language to article 377. As we will see, the ***Indian Penal Code*** closely follows the codes the British commissions produced for domestic reform.

377 secularized the older offence of buggery. The key religious terms "abominable" and "vice" are gone (along with the term "buggery," itself, which had religious origins). The offence was cast in a modern, secular manner as "against the order of nature." In this it was congruent with the writings of influential sexologists in the late 19th century.

To simplify, there were two kinds of provisions.

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

Secondly there was an offence focused on indecency, able to catch various forms of same-sex activity, but limited to acts between men in its original 1885 formulation.

Many jurisdictions had both provisions. Both provisions apply in Malaysia and Singapore, following a reform in 1938 introducing what is now 377A in Singapore and 377D in Malaysia. The Tasmanian law challenged in ***Toonen v Australia*** had both "unnatural sexual intercourse" (section 122) and "indecent practice between male persons" (section 123).[44]

V ENFORCEMENT ?

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

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

Patterns of police non-enforcement are described, somewhat paradoxically, in major court cases. In the ***Dudgeon, Norris*** and ***Modinos*** cases before the European

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[44] ***Toonen v Australia***, UN Human Rights Committee, March 31, 1994, CCPR/C/50/488/1992.

Court of Human Rights, involving Northern Ireland, Ireland and Cyprus, the individuals bringing the cases had not been charged with any offence. In each case police were not routinely enforcing the law. In the ***Toonen*** case, under the ***International Covenant on Civil and Political Rights***, police in Tasmania had not charged anyone under the particular sections "for several years." These were cases brought by gay rights activists who publicly campaigned against the laws. They were allowed to pursue their cases though it was apparent they faced no possibility of arrest.

The United States has much stricter rules on 'standing' and the two leading cases, ***Bowers v Hardwick*** and ***Lawrence v Texas*** both involved police searches looking for something quite different than what they found. Instead of drugs or an armed intruder they found sexual activity and laid charges. So even in those cases, the charges did not result from routine enforcement of anti-homosexual criminal laws.

In many jurisdictions there are or were patterns of criminal prohibition, social disapproval and little actual police enforcement of the law. In such situations, bars and saunas are tolerated, but somewhat insecure. Individuals know that charges are possible. The existence of the law keeps a lid on things.

In most situations, these patterns seem quite stable. Perhaps they seem stable today in the Indian subcontinent and in Malaysia and Singapore.

Such stable patterns could be broken by gay men flaunting their presence. The history in Britain shows periods of flagrant public cross-dressing that challenged society and, perhaps, forced a police reaction.

Stable patterns could also be broken by increased repression. The years after World War II saw increased actions by police in Western countries.

> **Purges of homosexuals from state bureaucracies, crackdowns on gay meeting places, and depictions of the homosexual threat posed to the nation's security and children developed at the same time in many European countries [as well as in the United States], whether ruled by left-wing Social Democratic regimes or by right-wing Christian Democratic regimes, as well as in Australia and New Zealand and elsewhere.[45]**

We will look at patterns in Britain, for we now have quite detailed studies of patterns of policing and prosecutions there.

UNITED KINGDOM

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

There were well known gay pubs in London in the first half of the twentieth century and some flamboyant clientele.

> **The police raided pubs and made arrests throughout the period, though they were pretty unsystematic and unpredictable; queens and homosexuals never knew quite when the police would act. The Running Horse had a reputation for years before it was placed under surveillance, for example.[46]**

Twenty-seven men were prosecuted for a drag party in 1933, with sentences of up to twenty months. Arrests went up after the second World War though there was no "coordinated witch hunt" and known gay bars and saunas operated. [47]

It was working class men who were more likely to be arrested. There was relatively open and fashionable homosexuality at Oxford and Cambridge and gay circles among the wealthy and in artistic circles. But such openness was unimaginable for the middle and upper-middle classes:

> **Lawyers, accountants, doctors and teachers had to go to elaborate lengths to cover their queer tracks in the workplace and with their families – including of course the so-called marriages of convenience. This left many men especially vulnerable to blackmail, a trade which thrived throughout the period.[48]**

An astonishing thing happened in the 1950s. Some police forces began to take the criminal law seriously and attempt systematic enforcement. It was only some police who did this and even those police may not have acted consistently over time.[49] The results were dramatic trials of groups of men.

Police seized dairies and address books, and compelled individuals to name their homosexual friends and contacts. In this way arrests of individuals for some public offence led to the prosecution of scores of others for private activities.

> **A 'vicious clique' of twenty-eight tracked by police through a single address book appeared before a judge in Birmingham in August 1954. What a judge described as a 'festering sore in the county of Surrey' – fifteen men in Dorking – was exposed after a policeman followed up names and numbers left 'on a wall in a public place'. At Chippenham in Wiltshire in 1956, 'a web of vice' involving nineteen men who had sometimes 'dressed as women' and 'indulged flagrantly in certain practices' at parties were brought to justice. A judge told eleven men from Evesham that they had 'brought dishonour on the neighborhood'.[50]**

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46 Matt Cook, Queer Conflicts; Love, Sex and War, in Matt Cook, et al, A Gay History of Britain, Greenwood, 2007, 145 at 152.

47 Cook, 152-3.

48 Cook, 159.

49 Cook, 170.

50 Cook, 168.

In a sensational high-profile case in 1954 the aristocrat Edward Douglas Scot Montagu, his cousin Michael Pitt Rivers and the journalist Peter Wildeblood were convicted and imprisoned for acts involving two boy scouts and two Royal Air Force men.[51]

> **Court cases involving sodomy, gross indecency and indecent assault had risen – from 719 in 1938 in England and Wales to 2,504 in 1955. This figure for one year compares with the total of 8,921 cases for the whole of the nineteenth century.**[52]

> **…the level of prosecutions and the articles about 'evil men' and 'sex perverts' made the first half of the 1950s a period of real anxiety for many men. Cases like that of Wildeblood are mentioned almost universally by men interviewed about the 1950s and as a sensational reminder of the risks they were taking and the caution they needed to exercise. ….John Alcock remembers being 'very frightened'. … 'We thought we were all going to be arrested and there was going to be a big swoop. The newspapers were full of it. I got so frightened that I burnt all my love letters from Hughie'. …'I never kept the names and addresses of my Brighton friends written down', Dennis observed, 'it was in my head but I never wrote it down on anything and I would certainly never dream of keeping a diary…'**[53]

One individual told his story:

> **I lived in the West country in a very conservative seaside town. …and one particular member of our gay community was caught cottaging by the police [cruising a public toilet]. They threatened him with ten years in prison if he didn't tell them the names of all the gay men who lived in the area. So he went round in a police car to everywhere we worked or lived and a dozen of us ended up at the quarter sessions of the Exeter Assizes. … When it came to sentencing it was rather frightening for myself and another young chap. They were sending people down – to prison – for four to six years. We were just shaking in our shoes wondering what was going to happen. Fortunately we were put on probation.**[54]

What was the result of this rather horrifying surge in police activity? In spite of the patterns of condemnation that had been a staple in the popular press, opinion shifted in reaction to events.

1. In 1954 the Church of England published a report on the 'problem of homosexuality,' focused on the misery and anxiety being inflicted. The report advocated the legalization of sex between consenting men and an equal age of consent. It condemned the existing law for leading to blackmail and suicide.

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51 Cook, 168-9.
52 Cook, 169.
53 Cook, 170.
54 Interview by Hugh David quoted in Cook, 171.

2. The Hampstead and Highgate Express refused to cover cases of homosexual sex in the 1950s 'because of the misery that was caused.'
3. The Sunday Times in 1954 called for an enquiry, saying the law was not in accord with a large mass of public opinion.
4. In 1954 the government set up the Wolfenden Committee to examine the laws on homosexuality and prostitution. It reported in 1957 recommending decriminalization.
5. Peter Wildeblood published Against the Law and A Verdict on You All, both in 1955, which gave a vivid account of his treatment.
6. In 1958 the elite Homosexual Law Reform Society was established to lobby for reform.
7. Two films on Oscar Wilde appeared in 1960, and in 1961 Dirk Bogarte starred in the film Victim, a tale of blackmail and suicide. Sympathetic novels were published. TV documentaries were broadcast in 1965 and 1967.
8. The North-West Homosexual Reform Committee was founded in 1964 which became the Committee for Homosexual Equality in 1969 and the Campaign for Homosexual Equality in 1971. CHE became the first major national organization of homosexuals.
9. The ***Sexual Offences Act*** of 27 July 1967 decriminalized homosexual acts in private when the individuals were over 21. The Act did not apply to Scotland, Northern Ireland, the Channel Islands or the merchant navy or the armed forces.

The previous half century had seen the expansion of a visible queer scene, and then, postwar, its partial recession. The 'homosexual problem' had become a key area of discussion in the 1950s, and many queers felt more embattled and fearful than before, especially after experiencing the liberalism of the war years. Campaigns for law reform took a conservative route in their lobbying and campaigning work and touted an image of the homosexual which revolved around middle-class respectability, discretion and conformity.[55]

The strategy worked. But, now, 30 years later, we see how incomplete the changes in the law and in public attitudes were.

INDIA

The available material on India is quite different. While in general it confirms a pattern of limited enforcement, there is a stress on how 377 supports and confirms patterns of discrimination and marginalization in Indian society, well beyond the legal provision itself.

A look at the history of the use of Section 377 reveals that it has hardly been used to prosecute cases of consensual adult male sexual relationships. Mostly, it is used in cases of child sexual abuse. Two important caveats must be made here: the study cites only decisions that cite Section 377 in the higher courts; it does not

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[55] Cook, 177.

account for lower and trial court decisions where the law may have been used. More importantly, we must realise that the true impact of Section 377 on queer lives is felt outside the courtroom and must not be measured in terms of legal cases. Numerous studies, including both documented and anecdotal evidence, tell us that Section 377 is the basis for routine and continuous violence against sexual minorities by the police, the medical establishment, and the state. There are innumerable stories that can be cited – from the everyday violence faced by hijras [a distinct transgender category] and kothis [effeminate males] on the streets of Indian cities to the refusal of the National Human Rights Commission to hear the case of a young man who had been given electro-shock therapy for nearly two years. A recent report by the People's Union for Civil Liberties (Karnataka), showed that Section 377 was used by the police to justify practices such as illegal detention, sexual abuse and harassment, extortion and outing of queer people to their families…[56]

Clearly gay issues had become national issues in the United Kingdom in the 1950s. In India there have been a series of events raising such issues, but not to the extent that national level politicians have felt any apparent need to address them. India is a very plural society, with many issues of religion, caste, class, tribal status, region and sex in active discussion. Sexual orientation issues may now have a foothold in national debates on social and political issues, but precariously. The integration of Hijra issues within a LGBT or queer political framework may be asserted by activist leaders, but Hijra have very low standing in Indian society.

The major recent events seem to be:

1. A legal challenge to Article 377 that has been in the courts since 2002. The government of India filed a statement that the law reflected Indian social attitudes, and was not out of line with the laws in over 80 other countries. The National Aids Control Organization filed a statement supporting the challenge by saying that Article 377 made its work more difficult. The head of NACO has stated that the section should be repealed. At one point the court case was rejected on the basis that the plaintiffs lacked proper standing. That rejection was reversed by the Supreme Court, and the matter sent back for trial. A trial has yet to be held.
2. In 2007, a number of celebrities signed a letter supporting the challenge to Article 377. Vikram Seth, a famous author, was the lead signatory and spoke publicly as a gay man about his objections to the law.
3. A number of individual health workers doing HIV/AIDS education and prevent work for Nas Foundation in Luckow, the capital of the state of Uttar Pradesh were arrested. Police argued that their AIDS work promoted homosexuality, in contravention of the law. The health workers were detained in jail for a number of weeks, before being released and charges dropped. There was extensive national publicity.
4. Violent right-wing Hindu protests occurred against the film Fire, made in India by an overseas Indian director, and featuring a lesbian relationship. Theatres were

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[56] Arvind Narrain, Gautam Bhan, Because I Have a Voice, Yoda Press, New Delhi, 2005, 7-8.

attacked and posters defaced in many parts of India. This was a national agitation. It was followed a couple of years later by protests about a second film, The Girlfriend, which depicted a lesbian as a manic killer.

5. A killing of an upper-middle class gay man at his parents home in a posh suburb of New Delhi. Media gave extensive coverage to the story of gay life in a privileged upper class milieu.

In complex, fractious India, these events do not seem to have been enough to put law reform on a national reform agenda.

NORTH AMERICA

The Stonewall Riots of June, 1969, in New York City, were prompted by a fairly routine police harassment of a gay bar. Patrons fought back, and the event became a symbol of a new resistance to oppression. Police activity had provoked a reaction.

Decriminalization had occurred in Canada in 1969 as an elite reform, not as a reaction to increased police repression or in response to LGBT activism. With criminal law reform in place, the public legal issue became the inclusion of "sexual orientation" in provincial anti-discrimination laws dealing with employment and public services.

Two key events in Canada were the raid on the Truxx bar in Montreal in 1977 and on gay saunas in Toronto in 1978 and 1979. These and other arrests in the period seemed serious breaches of a stable situation of police tolerance of gay bars and saunas, so long as they remained relatively marginalized.

> **From 1975 to 1984, a series of police raids and other actions by the state to repress same-sex sexuality convinced activists that a campaign was underway to recriminalize and demonize gays, and turn public opinion against legislating equality within human rights laws. The police campaign began in March 1975 with the arrests of the clients of the Unique Modelling Agency in Ottawa, and intensified in August 1975 with a raid on Sauna Aquarius, a Montreal gay bathhouse, that resulted in a number of men being charged with bawdy house offences. The raid took place during a period of increased police presence at gay and lesbian bars, and greater entrapment of men in washrooms. These actions were part of a clean-up of Montreal in preparation for the 1976 Olympic games.**[57]

In October, 1977, fifty Montreal police, heavily armed, raided Truxx bar . 146 men were charged as 'found ins' and the owner was charged with keeping a 'common bawdy house,' or brothel. In 1978 Toronto police raided the Barracks, a gay sauna and Hot Tubs Club in 1979. Each of these events provoked extensive counter demonstrations. [58]

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[57] Tom Warner, No Going Back, Toronto, 2002. 107. Decriminalization had occurred in 1969, and the main public legal issue had become the inclusion of 'sexual orientation' in provincial anti-discrimination or 'human rights' laws.

[58] Warner, 108-118.

When the bawdy house law was used for the first time against a gay bar in the 1977 Truxx raid, the massive demonstration in response was enough to convince the new Parti Quebecois government to amend the Human Rights Charter. Quebec thus became the first major jurisdiction in North America to protect its citizens against discrimination on the basis of sexual orientation.[59]

VI MOMENTUM FOR CHANGE ?

There are three jurisdictions in Asia where LGBT issues have become public issues, and where there has been some extent of legal change. They are Hong Kong, Taiwan and South Korea. Of the three, only Hong Kong inherited colonial-era anti-homosexual criminal laws. We will look at developments in Hong Kong and Singapore.

In the West legal and social change developed slowly in the years after World War II. None of the modern LGBT NGOs has a history that goes back earlier. While there were some calls for law reform in the early years of the twentieth century, modern law reform movements start from scratch in the post-war period. Law reform begins with Illinois in 1961, the UK in 1967, Canada in 1969.

The visibility of gays and lesbians also begins in the West in the 1960s. Now there are openly gay elected members of legislatures in most western countries.

Amnesty International first took up gay and lesbian cases, in a limited way, in 1961. Now both AI and Human Rights Watch and other international human rights NGOs regularly address a range of LGBT issues.

HONG KONG

A Law Reform Commission proposal in Hong Kong in 1983 called for the decriminalization of homosexual acts, in line with the British reforms. But reform was put off.

The United Kingdom signed the ***International Covenant on Civil and Political Rights*** and, in this way, it came to apply in Hong Kong. Human rights was a major issue in discussions leading up to the reversion of the colony to China in 1997. Hong Kong enacted a ***Bill of Rights*** based on the ***International Covenant***. This was followed in 1991 by the decriminalization of consensual homosexual acts, though the reform, as in Britain, established an unequal age of consent. As in post-1969 Canada, the public issue moved from criminal law reform to prohibiting discrimination, though some criminal law issues remained.

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[59] Displayed text, part of The History of Gay Montreal, an exhibit held at the time of the Out Games, Montreal, August, 2006.

In 1995-6 the Hong Kong Government issued a consultation paper on a general non-discrimination law. Anna Wu, a member of the Legislative Council, proposed an ***Equal Opportunities Bill*** that would outlaw discrimination on a number of grounds, including sexual orientation. The Hong Kong government responded with two bills dealing with gender and disability. They were enacted. An Equal Opportunities Commission enforces those laws.

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

The ***Basic Law***, the new post-reversion constitution for Hong Kong enacted by the National Peoples Congress, confirmed that the ***International Covenant on Civil and Political Rights*** continued to apply in Hong Kong, though it had not, at that time, been signed by China itself. Matters of human rights were to be within the jurisdiction of the Hong Kong Special Administrative Region. Any law implementing the ***International Covenant*** would have priority over other enactments.

When the Hong Kong High Court ruled in 2005 that the ***Bill of Rights*** was a law implementing the ***International Covenant***, this gave the ***Bill of Rights*** constitutional status, superior in force to other Hong Kong laws. Of course there would have been ways to avoid this conclusion in the particular case, most obviously by holding that the ***Basic Law*** did not have retrospective effect.

The 2005 case was a challenge by William Leung to the unequal age of consent for sexual activity. The High Court ruled that the general equality provision in the ***Bill of Rights*** invalidated the discrimination. This conclusion was in line with the UN Human Rights Committee decision in ***Toonen v Australia***, which found a Tasmanian criminal law in violation of the provisions of the ***International Covenant***. The High Court decision was upheld by the Court of Appeal in 2006. A more recent decision in July, 2007, by the Court of Final Appeal has invalidated another unequal provision, which had different rules on "public" space for homosexual and heterosexual activity.[60]

The issue of banning discrimination on the basis of sexual orientation continues to be considered. Two UN treaty bodies, dealing with the two major international human rights covenants, have urged Hong Kong to prohibit discrimination. A non-binding code of conduct was issued by the Home Affairs Bureau in 1996.

In 2004 the new Deputy Secretary for Home Affairs, Stephen Fisher, met with LGBT representatives and set up a Gender Identity and Sexual Orientation Unit to handle discrimination complaints, though it has no adjudicative powers. Fisher also set up a Sexual Minorities Forum with members from LGBT organizations. The forum has discussed a number of issues, including immigration issues for same-sex couples, sex

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[60] ***Secretary of Justice v Yau Yuk Lung Zigo, Lee Kam Chuen***, Hong Kong Court of Final Appeal, 17 July 2007.

reassignment surgery, social services, sex education and human rights education. Fisher also initiated a survey on public attitudes towards homosexuality.

> **The report indicated that the public was ambiguous on whether homosexuals are psychologically abnormal (41.9%), whether homosexuality contradicted family values (49.1%) or morals of the community (38.9%). Most respondents stated that they accepted their gay friends, co-workers, work supervisors and neighbors (76.1%, 79.9%, 77.5% and 78.0% respectively) while gays being teachers (60.2%) and family members (40.0% were less acceptable. While close to a third (29.7%) of the respondents considered discrimination based on sexual orientation as serious or very serious, 41% considered it of average concern and 41.6% considered that merely educational effort to eliminate discrimination was insufficient, the report concluded that legislation should not be introduced at that time. However, the report found solid support for legislation against discrimination in employment (41.6%), education (37.3%) and provision of services, facilities and goods (37.2%). In brief, the survey found that mere education is insufficient and that legislation should be enacted, just not at the moment.[61]**

Three quarters of the respondents said they had never had direct contact with a gay or lesbian person.

After the 2005 decision in the ***Leung*** case, Donald Tsang, the Chief Executive of the Hong Kong SAR, warned that the "privatization of morals" was a danger to society. He is known to be a devout Roman Catholic. But in March, 2007, he took a different position in a televised debate between himself and the second candidate for the position of Chief Executive.

> **With respect to the question of sexual [orientation] discrimination, we have international human rights conventions and the Basic Law. We are within the purview of such legal framework. Discrimination is wrong. Despite my religious persuasion or anybody else's, we must face the reality of our society, listen to the diverse views of the community and legislate under the legal framework. This is the most appropriate way of handling it.[62]**

This seemed to say that he would not oppose an anti-discrimination law, given that it would be in line with the human rights framework in place in Hong Kong.

There have been LGBT NGOs in Hong Kong since 1986, when a medical doctor founded the Ten Percent Club. After decriminalization in 1991, the number of organizations multiplied. In Asia only the Philippines and India are similar in having a significant number of NGOs, often with alliances to women's organizations and

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[61] Roddy Shaw, Lesbian, Gay, Bisexual and Transgender rights working in Hong Kong, June, 2007, copy in possession of the author.

[62] Quoted in Shaw, 2007.

progressive social issues. Activists have become visible in Hong Kong. Small annual pride parades, on the International Day Against Homophobia, began in 2005.

Gay saunas have existed in Hong Kong for many years, though such places typically have little public visibility. Gay bars, much more open places, have existed for perhaps fifteen years.

There are no openly LGBT elected officials. The government's Sexual Minorities Forum is unique in Asia in hosting a public dialogue between activists and government officials.

Hong Kong, like Taiwan, South Korea and Singapore, has active conservative Christian organizations that oppose reform. This gives political debates something of an American flavor. Reform is actively contested and religious and family arguments are strongly put forward. But some reform has happened and public debate occurs. In contrast there is little or no public debate in places like Malaysia or Singapore.

SINGAPORE

Singapore is a jurisdiction for which we have some information on enforcement. Mohan Gopalan has compiled a list of section 377A cases (the gross indecency provision), expanding an earlier list prepared by Lynette Chua.[63] Much of the information comes from news reports in the Straits Times. This overcomes one of the problems of the study of cases in India which did not include trial level decisions, which routinely are not found in the law reports.

Government figures gave the number of prosecutions for the years 2002 to 2006 as 25, 11, 13, 4 and 7. Almost all of the cases can be described as involving one or more of the standard concerns – public activity, underage partner or lack of consent. Out of 64 cases described by Gopalan, 6 were cases of police entrapment. Alex Au, commenting on the list, notes that there are no entrapment cases after 1994 and that cases after 2001 only involve minors or extortion.

Gopalan's list seems to omit a number of cases, probably guilty pleas that got no media attention. But both his list and the government's figures indicate a decline in prosecutions over the last number of years.[64]

Gay bars have been operating openly in Singapore for perhaps a decade. Gay saunas have been operating since about 2001. This takes pressure off 'public' places, like toilets, parks and swimming pools, which feature in the descriptions of many of the cases.

Local activist/entrepreneurs began a Singapore 'circuit party' coinciding with the national holiday. It was held at Sentosa park, a venue open for use by various groups.

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[63] See Mohan Gospalan, A heftier list of s.377! cases, Yawning Bread, May, 2007, accessed in July, 2007 at www. yawningbread. Org.

[64] See Why Section 377A is redundant, at the Yawningbread website.

Wrapped in the Singapore flag, the Nation parties became bigger and bigger every year, drawing hot young guys from the region. Nation 04 in 2004 was, however, far too successful for the Singapore government. It was publicized in the South China Morning Post, the Asian Wall Street Journal, the Far Eastern Economic Review, Time magazine and numerous newspapers – but not a word in the strictly controlled local Singapore papers.

The event had become too big, too public. Singapore denied licenses for future Nation parties, and the spin off Snowball, and even for the gay Christian duo Jason and DiMarco. The lid was back on the pot. The Nation party moved to Phuket in Thailand for the next couple of years, openly welcomed by the governor of that very tourist-oriented province.

Singapore, then, is an example of a jurisdiction that retains a criminal law prohibition, but where general police non-enforcement is the norm. Singapore also prohibits the legal recognition of LGBT NGOs. Controls on the media limit LGBT news, though the Straits Times has reported on prosecutions. Prime Minister Goh ended the official ban on government hiring of gays and lesbians, giving a good secular medical explanation for homosexuality. Some of us are born this way, he said. And some of us are born that way. Current Prime Minister Lee described the present pattern as 'drawing a line,' balancing toleration and control.

WHY RETAIN LAWS THAT ARE BASICALLY NOT ENFORCED ?

Veteran Singapore gay activist Alex Au laments:

The Singapore debate about gay people in our midst … is virtually non-existent.

He tells an amusing story of seeming to be unable to engage prosperous, well-educated Singaporeans in any kind of public policy debate on gay rights:

…she quickly assured me that she had lots of gay friends, in fact, she said, she suspected her boss at work was (hushed tones) a lesbian. … "But it makes no difference to me," she made it a point to add. She herself strongly felt that sexuality was one's "private decision" and that "discrimination in any form is wrong."

"Indeed," I replied, "except that in Singapore it's more than just social discrimination. The state creates and sustains that discrimination through its laws."

"I know about that," she said, which only made me wonder if she had known about that.

At that point, I felt I had to cut to the chase. "Let me ask you then, do you think such laws should be repealed? Would you openly support repeal?"

"Well," she hesitated, "em… ah… maybe there are reasons for that." [65]

And, yes, indeed, there are reasons to maintain these particular unenforced criminal laws.

As we have seen, actual systematic attempts to enforce anti-homosexual criminal laws are rare. And when police activism has occurred in a serious way in the post-war period (as in Britain in the 1950s and Canada in the 1970s), it tended to destabilize the situation by provoking an activist reaction and perhaps a new public sympathy or support for gays and lesbians.

What then is the reason or the purpose for retaining such criminal laws and not enforcing them?

Perhaps there is a very simple explanation. Politicians want to avoid doing or saying anything about homosexuality. If the subject is seen as 'controversial,' no matter what the foibles of the law are, politicians can be happy with a situation in which homosexual issues are not talked about.

But more seems to be involved in the dual strategy of having a criminal law and not attempting to enforce it. Not only does this strategy avoid discussion of the merits of the criminal law, it can successfully block discussion of other issues.

There are a series of issues involving gays and lesbians that only starts with issues of criminal law. The issues, in sequence, are (1) being charged with a crime for having sex, (2) getting fired from your job, (3) being denied benefits available to heterosexual couples (pensions, health insurance, rent-controlled apartments), (4) equal rights in relation to children (custody, access, adoption, fertility treatment), (5) equal rights in immigration law to sponsor a partner, (6) social recognition and support (registered partnerships or marriage), (7) open inclusion in public institutions (teachers, professors, the judiciary, the cabinet, human rights commissions).

The issue that will come up most clearly after criminal law reform is employment. Why should a person be fired from his or her job simply on the basis of sexual orientation? This becomes a compelling argument, with individuals and politicians willing to say that they oppose discrimination (which is easier to say than that homosexuals deserve equality). After decriminalization, discrimination becomes the major public issue, as we saw in the cases of Hong Kong and Canada.

But if the legal system brands homosexuals as criminals, then how can we say that it should bar discrimination in employment? And even more obvious - if homosexual acts are criminal, it makes no sense to recognize same-sex relationships, even if it is for the specific purpose of pension rights or health insurance or successor rights to housing. And immigration rights! Why let more criminals in the country.

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[65] Alex Au, We're all for freedom and non-discrimination, aren't we?, Fridae online magazine, June 12, 2006.

In other words, retaining, but not enforcing a criminal law, can block having to deal with any of these subsequent issues. It is clear in the United States that the decision in ***Bowers v Harwick***, upholding a state level criminal law, was used in many judicial decisions to block various civil claims – relating to employment, spousal rights and parental rights.

In ***Lawrence v Texas***, 2003, the successful constitutional challenge to US sodomy laws, the American Center for Law and Justice (linked to the evangelist Pat Robertson) said that it had decided to enter the case after concluding that acceptance of the gay rights arguments by the court might provide a constitutional foundation for same sex marriage. Focus on the Family and the Family Research Council argued in a joint brief in the case that the Texas criminal law was a reasonable means of promoting and protecting heterosexual marriage. Mr. Justice Scalia, in his dissent, said the decision placed heterosexual only marriage laws in question.

They weren't supporting the criminal law; they were opposing same-sex marriage. The same is true in Singapore. In 1993 the government of Singapore stated at the UN World Conference on Human Rights in Vienna that human rights were still essentially contested notions:

> **Singaporeans, and people in many other parts of the world do not agree, for instance, that pornography is an acceptable manifestation of free expression or that homosexual relationships is just a matter of lifestyle choice. Most of us will also maintain that the right to marry is confined to those of the opposite sex.[66]**

Back in 1993, the Singapore government, virtually alone in the world, saw the right to marry on the horizon. Well, it certainly isn't on the horizon in Lion City, and 377 keeps it that way.

VII OVERVIEW

1. The 1534 British buggery law was taken over from ecclesiastical law. The wording confirms its religious character.

2. It was enacted in the context of the break of the English Church from papal authority, and was designed to justify the seizure of the monasteries and the confiscation of their properties. Without this anti-Catholic agenda, it seems unlikely that it would have been enacted.

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[66] Copy in possession of author. Some of this language was repeated by Singapore's Deputy Prime Minister S. Jayakumar in September, 2005, at the UN Summit. He repeated that most human rights were still essentially contested concepts. "But the penchant of some states to present their views as universal norms inevitably provokes resistance, unnecessarily politicizes the process and is ultimately unhelpful to the cause of human rights. Unless this deeper issue is squarely addressed, any changes will only be superficial." Quoted in UFP, U.N. assembly pressured over new human rights council, Japan Times, September 18, 2005, 5.

> **…the 1534 sodomy law advanced a moralistic pretext for the ensuring plunder of the monasteries, carried out by Thomas Cromwell's ministry in 1536 with the smaller houses and in 1539 with the rest.**[67]

3. The 1534 law continued in force in Britain, though continental legal systems came to follow the Napoleonic criminal code of 1810 which had no special prohibitions on same-sex activities.

4. Prosecutions under the 1534 law focused on public activity, or issues of age or consent. Over time it became possible to charge individuals with a wide range of activities (attempts, soliciting, conspiring, meeting together) as well as separate judge-made 'unnatural offences'.

5. Codification of law, particularly criminal law, became a major reform project in Britain in the 19th century, pushed by Bentham and the utilitarians.

6. Codes were well-suited to colonialism, providing a single, orderly written version of areas of law, easy to enact for a colony. The individual states in the United States developed their own criminal codes. As well, Siam and Japan, modernizing and westernizing in the face of colonial threats, chose to adopt European codes. British judge-made common law, while difficult to transport, proved resilient to codification attempts at home.

7. The ***Indian Penal Code*** of 1860 was a codification of existing British criminal law. It was a reform in terms of logical exposition of the law and consistency, particularly in sentencing. It did not reflect Indian or Islamic approaches. Article 377 of the ***Indian Penal Code*** varied from existing British criminal law only in secularizing the offence. It did this by eliminating the words "abominable", "vice" and "buggery." Other codifications of British criminal law developed, which we can consider simply variants of the pattern of the ***Indian Penal Code***.

8. In the last years of the 19th century a new body of expert medical literature emerged, examining sexual diversity. The most important single text was Krafft-Ebing's Psychopathia Sexualis. In general terms, this literature saw sexual variation as problematic or pathological, perhaps indicative of some degeneracy. The primary justification for anti-homosexual views had become medical, rather than religious. A counter discourse also emerged in the period, particularly with the study Sexual Inversion by Havelock Ellis and writings by others, including Edward Carpenter and John Addington Symonds.

9. The rationale for the buggery law and for Article 377 was not, apparently, debated or reconsidered in the codification process that began in the 19th century, whose major goals were order, consistency and accessibility. The one public policy analysis, by

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[67] Don Gorton, The Origins of Anti-Sodomy Laws, Harvard Gay and Lesbian Review, Winter, 1998, 10 at 11.

Bentham on utilitarian grounds, was not published in the period. Two judges remarked on the lack of any substantive critique of the provisions:

> **One magistrate who was against the death penalty for sodomy wrote in 1835 that the capital nature of the crime was only sustained by the 'difficulty of finding any one hardy enough to undertake, what might be represented as, the defence of such a crime'. Similarly, another judge lamented the fact that the punishments for homosexual acts were archaic and disproportionate to the offence but complained that the main problem was that 'there is no one to take the matter up'.[68]**

10. The 1860 ***Indian Penal Code*** was the first codification of criminal law in Britain and the Empire. It was repeatedly praised and copied for many other colonies.

11. The 1885 'gross indecency' amendment in Britain was a result of a back-bench amendment by a maverick member of parliament. It was not a government initiative, and gained little attention at the time of enactment. It was adopted in Stephen's draft criminal code, and as a result it spread through parts of the common law world. Some former colonies have both the 1860 and the 1885 provisions.

12. Colonial patterns meant that criminal prohibitions existed in former British Colonies, and not in other jurisdictions. Prohibitions existed in India, Malaysia and Hong Kong – but not in China, Indonesia or Vietnam. In spite of the colonial origins of the laws, some figures have defended them on the basis that they reflect local cultures and traditions.

13. In general, where we have information, we see that these laws are enforced in cases involving public activity, or featuring issues of age, consent or extortion. This means that, with rare exceptions, the laws are not enforced against private activity between consenting adults. The general lack of enforcement has been noted and discussed in many of the judicial and quasi-judicial cases where the laws have been challenged.

14. A discourse on human rights emerged after World War II. Human rights features in the ***United Nations Charter***. The only real international consensus condemned racism, reflecting desegregation in the United States, opposition to the racist regimes in Rhodesia (now Zimbabwe) and South Africa, and decolonization. It was not initially apparent whether this new discourse would take issues of sex/gender discrimination seriously or extend to issues of sexual orientation and gender identity.

15. A human rights or public policy analysis of anti-homosexual criminal laws, along the lines of Bentham's earlier critique, developed in the post-World War II era, with the work of the American Law Institute, the Wolfenden Committee and the Hart-Devlin debate. The themes were privacy and a distinction between morality (as individual and private) and criminal law (as public and secular).

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[68] H.G.Cocks, 2007, 114.

16. The most striking set of judicial or quasi-judicial decisions in modern international human rights law applies principles of privacy and equality to rule against anti-homosexual criminal laws. These cases began in the European human rights system with decisions in ***Dudgeon v United Kingdom***, 1981, ECHR; ***Norris v Ireland***, 1988, ECHR; ***Modinos v Cyprus***, 1993, ECHR, ***Sutherland v United Kingdom***, 1997, European Commission on Human Rights. The same outcome has occurred in ***Toonen v Australia***, 1994, UN Human Rights Committee. Legislative decriminalization began in the West in 1961, and by the early 21st century, such laws were gone in North America, Europe and Australasia, as well as most jurisdictions in Latin America. In the Asia-Pacific region such laws have been ruled against in Hong Kong and Fiji. The strong role of judicial decisions reflects the caution legislative bodies have shown in reform.

17. The research of Dr. Evelyn Hooker in the United States in the 1950s showed that gay men had no more psychological problems than others, dealing a blow to the medical arguments.[69] Her work led to the declassification of homosexuality as a mental illness in both the US and the UK in 1973, and by the World Health Organization in 1983.

18. The principles established in the criminal law cases have been expanded to deal with issues of discrimination in employment (***Lustig Prean v UK***), spousal benefits (***Karner v Austria, Young v Australia***) and custody and access to children. In this way they have led to arguments for equal access to marriage.

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[69] Evelyn Hooker, The Adjustment of the Male Overt Homosexual, (1957) 21 Journal of Projective Techniques, 18; Evelyn Hooker, Male Homosexuality in the Rorschach, (1958) 22 Journal of Projective Techniques, 33. Dr. Clarence.A.Tripp, a psychologist, trained by Kinsey, published The Homosexual Matrix in 1975 (McGraw-Hill). On Tripp's death in 2003, the book was remembered as something of a breakthrough. Author and AIDS activist Larry Kramer commented that the book was the first from a reputable source that dared to openly speak of homosexuality as a healthy occurrence. Historian Jonathan Ned Katz added that before the book "you could count on one hand the books on the subject that had any intellectual substance." See Douglas Martin, C.A.Tripp, Author of Works on Homosexuality, dies at 83, New York Times, May 22, 2003, A29.