



# This Alien Legacy

The Origins of “Sodomy” Laws in British Colonialism

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## **This Alien Legacy**

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# I. Introduction

## Three Trials

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

Five years earlier in the long-running case, India's Ministry of Home Affairs had submitted an affidavit supporting Section 377. It said: “The law does not run separately from society. It only reflects the perception of the society.... When Section 377 was brought under the statute as an act of criminality, it responded to the values and mores of the time in the Indian society.” The ministry claimed that, by comparison to the United Kingdom and the United States of America, “Objectively speaking, there is no such tolerance to [the] practice of homosexuality/lesbianism in the Indian society.”<sup>2</sup>

This was sheer amnesia. **Section 377**, at its origin, did not respond to Indian society or its “values or mores” at all. British colonial governors imposed it on India undemocratically. It reflected only “the British Judeo-Christian values of the time,” as the petitioners in the case told the court in reply.<sup>3</sup> Indeed, on August 16, 2008—the

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

<sup>2</sup> High Court of Delhi, *Naz Foundation v. Govt. Of N.C.T. of Delhi and Others* (Special Leave Petition No. 7217-7218 of 2005), Counter affidavit on behalf of respondent no. 5, <http://www.lawyerscollective.org/files/Counter%20Affidavit%20%5BGovernment%20of%20India%5D%5B3%5D.pdf> (accessed August 15, 2008).

<sup>3</sup> High Court of Delhi, *Naz Foundation v. Govt. Of N.C.T. of Delhi and Others* (SLP No. 7217-7218 of 2005), Rejoinder to Government of India, [http://www.lawyerscollective.org/files/Rejoinder%20to%20Government%20of%20India\[9\].pdf](http://www.lawyerscollective.org/files/Rejoinder%20to%20Government%20of%20India[9].pdf), (accessed August 15, 2008). See also Sumit Baudh, “Human Rights and the Criminalisation of Consensual Same-Sex Sexual

sixty-first anniversary of India’s freedom—the law’s opponents marched in Mumbai and demanded the UK government “apologise for the immense suffering that has resulted from their imposition of Section 377. **And we call on the Indian government to abandon this abhorrent alien legacy ... that should have left our shores when the British did.**”<sup>4</sup> They chose the day because while “India had got its independence from the British on this date in 1947, queer Indians were still bound by a British Raj law.”<sup>5</sup>

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

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

Yet according to an opinion poll, two-thirds of Malaysians thought politics lurked behind the charges, and only one-third believed the criminal-justice system could handle Anwar’s case fairly.<sup>6</sup> Regardless of how Malaysians felt about homosexual conduct, they did not trust the government to administer the law. The state’s handling of the evidence fed suspicions. Police had sent the man who filed the complaint to a hospital, for anal examinations designed to prove the charges: standard procedure in many countries. Embarrassingly, however, the tests—later leaked on the internet—apparently found no proof. The government vacillated, too, between charging Anwar with consensual and non-consensual “sodomy.” The uncertainty came easy. The law had only relatively recently made a distinction

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Acts in the Commonwealth, South and Southeast Asia,” a working paper of the South and Southeast Asia Resource Center on Sexuality, May 2008.

<sup>4</sup> Jerome Taylor, “Minority Report: Gay Indians Demand a British Apology,” *The Independent* (U.K), August 15, 2008.

<sup>5</sup> “About Queer Azadi,” <http://queerazaadi.wordpress.com/about/> (accessed September 10, 2008).

<sup>6</sup> Human Rights Watch, “Malaysia: Drop Political Charges against Opposition Leader,” August 7, 2008.

between the two—and it still provided virtually identical punishments, regardless of consent.

A third case came in *Uganda*, where three members of an organization defending lesbian, gay, bisexual, and transgender (LGBT) people’s rights faced trial. They had staged a peaceful protest at an AIDS conference in Kampala, drawing attention to the government’s refusal to respond to the pandemic among the country’s lesbian, gay, bisexual, and transgender (LGBT) communities. Police promptly arrested them and charged them with criminal trespass.

Seemingly the case had nothing to do with “sodomy” or sex, but over it hung the shadow of Uganda’s law punishing “carnal knowledge against the order of nature.” That law, Section 140 of the criminal code, was also a British colonial inheritance, though in 1990 legislators had strengthened it, raising the highest penalty to life imprisonment. The government used the revised law to harass both individuals and activists who were lesbian or gay, censoring their speech, threatening them with prison, raiding their homes. Officials also relied on the law to explain, or excuse, their failure to support HIV/AIDS prevention efforts among LGBT people—the inaction that sparked the protest. Four years earlier, the Minister of Information had demanded that both the United Nations and national AIDS authorities shut out all LGBT people from HIV/AIDS programs and planning. He cited the law against homosexual conduct.<sup>7</sup> A spokesman for the Uganda AIDS Commission, the central national clearinghouse for prevention and treatment, conceded in 2006: “There’s no mention of gays and lesbians in the national strategic framework, because the practice of homosexuality is illegal.”<sup>8</sup>

There was no doubt, then, that the “trespass” charges against the protesters aimed not just to suppress dissent, but to send a message that some people—“sodomites,” violators of the “carnal knowledge” law—should not be seen or heard in public at all. President Yoweri Museveni, who had campaigned against LGBT people’s rights for a decade, reinforced that message at every opportunity. He called homosexuality “a

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<sup>7</sup> “Government warns UNAIDS over gays,” *The Daily Monitor* (Uganda), November 29, 2004.

<sup>8</sup> “Uganda: Stuck in the Closet: Gays Left out of HIV/AIDS Strategy,” *Plus News*, March 17, 2006, <http://www.plusnews.org/report.aspx?reportid=39429> (accessed September 13, 2007).



decadent culture ... being passed by Western nations,” warning: “It is a danger not only to the [Christian] believers but to the whole of Africa.”<sup>9</sup> He praised Ugandans for “rejecting” it, and claimed that “having spinsters and bachelors was quite alien to Ugandan traditions.”<sup>10</sup>

The law primed the whole populace to help extirpate the “danger.” For instance, one influential pastor—famous for his campaigns against condom use—urged that “Homosexuals should absolutely not be included in Uganda’s HIV/AIDS framework. It is a crime, and when you are trying to stamp out a crime you don’t include it in your programmes.”<sup>11</sup> The same minister listed Ugandan LGBT rights activists by name on a website, posting pictures and addresses of the “homosexual promoters”—making them bullseyes for brute vengeance. The atmosphere crackled with explosive menace. Hundreds marched in 2007 to threaten punishment for LGBT people, calling them “criminal” and “against the laws of nature.”<sup>12</sup> Yet government ministers still warned that tougher anti-gay measures were needed. “Satan,” one said, “is having an upper hand in our country.”<sup>13</sup>

## Colonial Laws and Contemporary Defenders

More than 80 countries around the world still criminalize consensual homosexual conduct between adult men, and often between adult women.<sup>14</sup>

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<sup>9</sup> “Museveni Backs Church Against Gays,” *New Vision* (Uganda), August 17, 2008.

<sup>10</sup> “Museveni Lauds Citizens on Anti-Gay Stand,” *New Vision*, July 14, 2008.

<sup>11</sup> Pastor Martin Ssempe, quoted in “Uganda: State Homophobia Putting Gays at HIV Risk—Activists,” *Plus News*, August 24, 2007, <http://www.plusnews.org/report.aspx?ReportID=73931> (accessed September 12, 2007).

<sup>12</sup> Human Rights Watch, “Uganda: Rising Homophobia Threatens HIV Prevention: US Should Halt Role in Funding Prejudice and Fear,” October 11, 2007.

<sup>13</sup> James Nsaba Butoro, ethics and integrity minister in the Museveni government, quoted in “Join Politics, Butoro Tells Balokole,” *New Vision* (Uganda), December 18, 2007.

<sup>14</sup> An exact number is hard to calculate. Almost none of these laws mention “homosexuality” (a term only coined in 1869) or homosexual acts; the terminology differs between legal systems and (as the discussion of the original meanings of “sodomy” in Chapter II below shows) is sometimes difficult to interpret. For instance, Egypt is often excused from lists because its law punishes the “habitual practice of debauchery [*fujju*],” even though domestic jurisprudence since the 1970s has established that this term refers to consensual sex between men. The best reference work on the subject is Daniel Ottosson, *State-Sponsored Homophobia: A World Survey of Laws Prohibiting Same-Sex Activity Between Consenting Adults*, an International Gay and Lesbian Association (ILGA) report, [http://www.ilga.org/statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2008.pdf](http://www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2008.pdf) (accessed August 1, 2008).

These laws invade privacy and create inequality. They relegate people to inferior status because of how they look or who they love. They degrade people’s dignity by declaring their most intimate feelings “unnatural” or illegal. They can be used to discredit enemies and destroy careers and lives. They promote violence and give it impunity. They hand police and others the power to arrest, blackmail, and abuse. They drive people underground to live in invisibility and fear.<sup>15</sup>

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

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

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

Section 377 was, and is, a model law in more ways than one. It was a colonial attempt to set standards of behavior, both to reform the colonized and to protect the colonizers against moral lapses. It was also the first colonial “sodomy law” integrated into a penal code—and it became a model anti-sodomy law for countries far beyond India, Malaysia, and Uganda. Its influence stretched across Asia, the Pacific islands, and Africa, almost everywhere the British imperial flag flew.

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<sup>15</sup> The principle that criminalizing consensual same-sex sexual conduct violates basic human rights was laid down by the UN Human Rights Committee—which interprets and monitors compliance with the International Covenant on Civil and Political Rights (ICCPR)—in the 1994 case of *Toonen v. Australia*. The Committee found that sexual orientation is a status protected against discrimination under articles 2 and 26 of the ICCPR.

In *Asia and the Pacific*, colonies and countries that inherited versions of that British law were: Australia, Bangladesh, Bhutan, Brunei, Fiji, Hong Kong, India, Kiribati, Malaysia, Maldives, Marshall Islands, Myanmar (Burma), Nauru, New Zealand, Pakistan, Papua New Guinea, Singapore, Solomon Islands, Sri Lanka, Tonga, Tuvalu, and Western Samoa.

In *Africa*, countries that inherited versions were: Botswana, Gambia, Ghana<sup>16</sup>, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Seychelles, Sierra Leone, Somalia, Swaziland, Sudan, Tanzania, Uganda, Zambia, and Zimbabwe.<sup>17</sup>

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

Other colonial powers had far less impact in spreading so-called sodomy laws. France decriminalized consensual homosexual conduct in 1791.<sup>18</sup> (It did, however,

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<sup>16</sup> The Ghanaian code differs from other British-derived Penal Codes in Africa in that consensual “buggery,” while a crime, is defined only as a misdemeanor. Ghanaian law does not derive directly from the Indian Penal Code (or the Queensland Penal Code)—as do most other British-African codes, as explained below. Its ancestor was a draft prepared for Jamaica by the liberal British jurist R.S. Wright, who was heavily influenced by the libertarian ideals of the philosopher John Stuart Mill. (Mill famously wrote that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others”: Mill, *On Liberty* (Harmondsworth: Penguin, 1974), p. 68). Wright’s draft code was never applied in Jamaica but became the basis for Ghanaian law. See M. L. Friedland, “R. S. Wright’s Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law,” *Oxford Journal of Legal Studies*, Vol. 1, No. 3 (Winter 1981), pp. 307-346.

<sup>17</sup> *South Africa*, although taken over by the British in 1806, retained the Netherlands’ common law, known as “Roman-Dutch”—which also criminalized “sodomy.” This common-law offense was finally struck down by the Constitutional Court of the post-apartheid country in 1998. (The Netherlands itself decriminalized sodomy in 1809, when Napoleon annexed it. In one of the typical paradoxes of colonial law, this was three years too late to affect the Netherlands’ onetime African colony, which kept Roman-Dutch law in its pre-1806 form and hence retained the crime.) Roman-Dutch law came to what is now *Namibia* when, as the territory of South-West Africa, it became a South African mandate in the wake of World War I. It remains Namibia’s common law, and sodomy is still a crime there. The same is true of *Zimbabwe*, which began its colonial existence as a possession of Cecil Rhodes’ Cape Town-based British South Africa Company. However, Roman-Dutch law in colonial Rhodesia as well as modern Zimbabwe has been interpreted by judges trained in British common law, and the understanding of sexual offences there has been heavily affected by the Sec 377 tradition. For a fuller discussion, see Scott Long, “Before the Law: Criminalizing Sexual Conduct in Colonial and Post-Colonial Southern African Societies,” in *More than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa*, a Human Rights Watch/International Gay and Lesbian Human Rights Commission report, 2003, pp. 256-299.

<sup>18</sup> Napoleon’s armies then brought decriminalization to the conquered Netherlands, and thus to most of its colonies.

impose sodomy laws on some French colonies as means of social control, and versions of these survive in countries such as Benin, Cameroon, and Senegal.) Germany's notorious Paragraph 175 punished homosexual acts between men from Bismarck's time till after the Nazi period.<sup>19</sup> German colonies were few, however, and the legal traces of its presence evanescent.<sup>20</sup>

This report does not pretend to be a comprehensive review of "sodomy" and European colonial law. It concentrates on the British experience because of the breadth and endurance of its impact. Nor does this report try to look at the career of "sodomy" and law in all the British colonies. For clarity, it focuses on the descendants of India's Section 377. (Britain's Caribbean possessions received the criminalization of "buggery" in British law, but by a different process relatively unaffected by the Indian example. They are not discussed here.<sup>21</sup>)

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

The law's function is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others ... It is not, in our view, the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behaviour.<sup>22</sup>

England and Wales decriminalized most consensual homosexual conduct in 1967.<sup>23</sup>

That came too late for most of Britain's colonies, though. When they won independence in the 1950s and 1960s, they did so with the sodomy laws still in place.

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<sup>19</sup> East Germany eliminated it in 1957 and West Germany in 1969.

<sup>20</sup> Most of its colonies passed to Britain, France, or Belgium after the First World War.

<sup>21</sup> See *Hated to Death: Homophobia, Violence, and Jamaica's HIV/AIDS Epidemic*, a Human Rights Watch report, 2004.

<sup>22</sup> *The Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution* (New York: Stein and Day, 1963), p. 23.

<sup>23</sup> Scotland followed in 1980, and Northern Ireland in 1982.

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

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

Addressing the sodomy law in 1983, India's Supreme Court proudly declared that "neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking."<sup>24</sup> Courts there have deliberately distanced themselves from conclusions like those of the Wolfenden report, finding—in the ultimate paradox—that England now embodies the sexual decadence against which India must be defended. "Various fundamental differences in both the societies [England and India] must be realised by all concerned, especially in the area of sexual offences," one judge held.<sup>25</sup>

Opponents of change have mounted the same argument elsewhere. While Hong Kong was still a British colony, its authorities fought Wolfenden-like law reforms.<sup>26</sup> Commissions deputed to investigate the issue heard opinions such as "Homosexuality may be very common in Britain, but it is definitely not common in Hong Kong. Even if it is, it is still wrong to legalize activities that are in clear breach of

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<sup>24</sup> *Fazal Rab Choudhary v. State of Bihar*, 1983 All India Report (Supreme Court), p. 323.

<sup>25</sup> *Kailash v. State of Haryana*, 2004 Criminal Law Journal, p. 310 at para 8. In fact, historians contend that in India before British rule, there was no aggressive policing of homosexual conduct. See Saleem Kidwai and Ruth Vanita, eds., *Same-Sex Love in India: Readings from Literature and History* (New York: St. Martin's Press, 2000).

<sup>26</sup> See Carole J. Petersen, "Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong," *Loyola of Los Angeles International and Comparative Law Journal*, Vol. 19 (1997), pp. 337-62.

our morals."<sup>27</sup> Only in 1990, after long advocacy by the LGBT community, did the colony decriminalize consensual homosexual sex.<sup>28</sup>

After fiery debate, Singapore's government refused to rid itself of its colonial law against homosexual conduct in 2007. The supporters of this position cited the "communal cohesiveness" that the British statute supposedly defended.<sup>29</sup> A petition to the prime minister called the law, forced on the colony decades before, "a reflection of the sentiments of the majority of society. ... Repealing [it] is a vehicle to force homosexuality on a conservative population that is not ready for homosexuality."<sup>30</sup> In November 2001, the then prime minister of neighboring Malaysia, who had encouraged Anwar Ibrahim's first "sodomy" trial, blamed homosexuality on the former colonial power: "The British people accept homosexual [government] ministers," he said. "But if they ever come here bringing their boyfriend along, we will throw them out. We will not accept them."<sup>31</sup>

Extreme and extraordinary, however, have been the law's defenses from sub-Saharan Africa. Zimbabwe's Robert Mugabe launched the long ferocity in the early 1990s, vilifying lesbians and gays as "un-African" and "worse than dogs and pigs." "We are against this homosexuality and we as chiefs in Zimbabwe should fight against such Western practices and respect our culture," he berated crowds.<sup>32</sup> President Daniel Arap Moi of Kenya blasted homosexuality as "against African tradition and biblical teachings. We will not shy away from warning Kenyans against the dangers of the scourge."<sup>33</sup> In Zambia, a government spokesman proclaimed in 1998 that it was "un-African and an abomination to society" which would cause moral

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<sup>27</sup> Submission from General Association of Kowloon District Association, quoted in The Law Reform Commission of Hong Kong, *Report, Laws governing homosexual conduct*, June 28, 1982, <http://www.hkreform.gov.hk/en/docs/rhomosexual-e.doc> (accessed August 8, 2008). (The Law Reform Commission, however, supported the Wolfenden principles).

<sup>28</sup> It however retained a discriminatory age of consent—14 for heterosexual sex, 21 for sex between men—and a draconian punishment of imprisonment up to life for gay men who broke it, as against five years for heterosexuals. This was only overturned in court in 2006.

<sup>29</sup> Mohammed Aidil in "Re-Scoping Sec 377A: A Juxtaposition of Views," *Juris Illuminae*, Vol. 3, No. 3 (January 2007), <http://www.singaporelawreview.org/wp-content/uploads/2007/01/jurisjano7.pdf> (accessed August 25, 2008).

<sup>30</sup> "Open Letter to the Prime Minister," *Keep377a.com*, <http://www.keep377a.com/Letters.aspx> (accessed August 25, 2008).

<sup>31</sup> *Human Rights Watch World Report 2002*, "Lesbian, Gay, Bisexual, and Transgender Rights," p. 604.

<sup>32</sup> Quoted in *More than a Name: State-Sponsored Homophobia and Its Consequences in Southern Africa*, p. 23.

<sup>33</sup> Gift Siso Siphos and Barrack Otieno, "United Against Homosexuality," *New African*, December 1999.

decay”; the vice-president warned that “if anybody promotes gay rights after this statement the law will take its course. We need to protect public morality.”<sup>34</sup>

Some reasoned voices spoke up. Nelson Mandela, steering a country proud of its human rights reforms, told a gathering of southern African leaders that homosexuality was not “un-African,” but “just another form of sexuality that has been suppressed for years ... Homosexuality is something we are living with.”<sup>35</sup> Over the years, though, the desperate defense of Western mores in indigenous clothing grew more enraged, and influential. Nigeria’s President Olusegun Obasanjo perorated to African Bishops in 2004 that “homosexual practice” was “clearly un-Biblical, unnatural, and definitely un-African.” A Nigerian columnist echoed him, claiming those who “come in the garb of human rights advocates” are “rationalizing and glamourising sexual perversion, alias homosexuality and lesbianism ... The urgent task now is to put up the barricades against this invading army of cultural and moral renegades before they overwhelm us.”<sup>36</sup>

From Singapore to Nigeria, much of this fierce opposition stemmed from Christian churches—themselves, of course, hardly homegrown in their origins. Archbishop Peter Akinola, head of the Anglican Church of Nigeria, has threatened to split his global denomination over some Western churches’ acceptance of lesbians and gays. He acknowledges that the missionaries who converted much of Africa in colonial days “hardly saw anything valid in our culture, in our way of life.”<sup>37</sup> Yet he also interprets the most stringent moral anathemas of the missionaries’ faith, along with an imported law against homosexuality, as essential bulwarks of true African identity.

But the embrace of an alien legal legacy is founded on falsehood. This report documents how it damages lives and distorts the truth. *Sodomy laws throughout Asia and sub-Saharan Africa have consistently been colonial impositions. No “native” ever participated in their making. Colonizers saw indigenous cultures as sexually corrupt. A bent toward homosexuality supposedly formed part of their*

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<sup>34</sup> Quoted in *More than a Name*, p. 39.

<sup>35</sup> Gift Siso Sipho and Barrack Otieno, “United Against Homosexuality.”

<sup>36</sup> Bisi Olawunmi, “Homosexuality and Its Apostles,” *Vanguard* (Lagos), March 10, 2004.

<sup>37</sup> Quoted in Craig Timberg, “Nigerian Churches Tell West to Practice what It Preached on Gays,” *Washington Post*, October 24, 2005.

corruption. Where precolonial peoples had been permissive, sodomy laws would cure them—and defend their new, white masters against moral contagion.

Chapter II of this report traces the history of Britain’s law on “sodomy,” or “buggery,” from its medieval origins to the nineteenth-century attempt to rationalize the chaos of common law. The draft Indian Penal Code, the first experiment in producing a criminal code anywhere in the Empire, was a test of how systematizing law would work. Colonial officials codified sodomy as a criminal offense—and refined its meaning—in the process of writing comprehensive codes. This began in India, and traveled from Nigeria to the Pacific in the imperial bureaucrat’s baggage.

Chapter III shows how the sodomy provisions connected to other laws and practices that strengthened the colonial state’s authority: laws that marked out whole populations as “criminal,” and medical practices that marked off some bodies as intrinsically, physiologically perverse. Both assumed that laws should not just punish specific sexual acts, but help control certain types of dangerous persons.<sup>38</sup>

Chapter IV traces how courts, under colonialism and in the newly independent states, interpreted the vague language laid down in the colonial codes. Three themes emerge.

- *First*, judges tried to bring an ever wider range of sexual acts within the laws’ punitive reach: descending, while doing it, into almost-comical obsessions with orifice and organ, desire and detail.
- *Second*, the sodomy laws almost universally made no distinction on the basis of consent, or the age of the partners. The horror lawmakers and judges felt for homosexual conduct simply obliterated these issues. The “homosexual” therefore emerged before the law deeply tarnished by the association with pedophilia and rape—as a sexual monster.
- *Finally*, British provisions on “gross indecency” gave police opportunities to arrest people on the basis of suspicion or appearance. And they were an opening for governments looking to criminalize sex between women as well.

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<sup>38</sup> See Leslie J. Moran, “The Homosexualization of English Law,” in Didi Herman and Carl Stychin, eds., *Legal Inversions: Lesbians, Gay Men, and the Politics of Law* (Philadelphia: Temple University, 1995).



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

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

## II. “Sodomy,” Colonialism, and Codification

The laws that the Europeans brought dragged a long prehistory behind them. **The first recorded mentions of “sodomy” in English law date back to two medieval treatises called *Fleta* and *Britton*.** They suggest how strictures on sex were connected to Christian Europe’s other consuming anxieties.<sup>39</sup>

*Fleta* required that “Apostate Christians, sorcerers, and the like should be drawn and burnt. Those who have connections with Jews and Jewesses or are guilty of bestiality or sodomy shall be buried alive in the ground, provided they be taken in the act and convicted by lawful and open testimony.” *Britton*, meanwhile, ordered a sentence of burning upon “sorcerers, sorceresses, renegades, sodomists, and heretics publicly convicted.”<sup>40</sup> Both treatises saw “sodomy” as an offense against God. **They classed it, though, with other offenses against ritual and social purity, involving defilement by Jews or apostates, the racial or religious Other.**

The grab-bag of crimes was telling. It matched medieval law’s treatment of “sodomy” elsewhere in Europe. The offense was not limited to sexual acts between men, **but could include almost any sexual act seen as polluting.** In some places it encompassed intercourse with Turks and “Saracens” as well as Jews.<sup>41</sup>

In part, **this traced to an old strain in Christian theology that held sexual pleasure itself to be contaminating, tolerable only to the degree that it furthered reproduction (specifically, of Christians).**<sup>42</sup> More cogently, though, it reflected increasing fears in

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<sup>39</sup> *Fleta, seu Commentarius Juris Anglicani*, was a Latin survey of English law produced in Edward I’s court in 1290 (allegedly written while the out-of-favor author served time in Fleet prison, accounting for its name): *Fleta*, ed. and trans. H. G. Richardson and G. O. Sayles (London: Quaritch, 1955). *Britton* was composed somewhat later, and in Norman French. See Heinrich Brunner, *The Sources of the Law of England*, trans. William Hastie (Edinburgh: T.T. Clark, 1888), and Hampton L. Carson, “A Plea for the Study of Britton,” *Yale Law Journal*, Vol. 23, No. 8 (1914), pp. 664-671.

<sup>40</sup> *Fleta*, quoted in Leslie Moran, *The Homosexual(ity) of Law* (London: Routledge, 1996), p. 213, n. 2; *Britton*, quoted in Derrick Sherwin Bailey, *Homosexuality and the Western Christian Tradition* (London: Longmans, 1955), p. 86. See also Michael Goodrich, “Sodomy in Medieval Secular Law,” *Journal of Homosexuality*, Vol. 1 (1976), pp. 295-302.

<sup>41</sup> Long 2003, p. 260; see also David F. Greenberg, *The Construction of Homosexuality* (Chicago: University of Chicago, 1988), pp. 274-92.

<sup>42</sup> Christian precepts on sexual practice and sexual imagination were refined in patristic literature between the 1<sup>st</sup> and 8<sup>th</sup> centuries A.D. The emphasis was on minimizing pleasure and maximizing procreative possibility in sexual activity. All acts of

the advancing Middle Ages about pollution and defilement across social boundaries. The historian R.I. Moore finds in the eleventh and twelfth centuries the birth of a “persecuting society” in Europe, targeting various enemies within—Jews, lepers, heretics, witches, prostitutes, and “sodomites”—who threatened purity and carried contamination, and had to be cast out and controlled.<sup>43</sup> Periodic bursts of repression against these and other groups characterized European law for centuries to follow. “Sodomy” was pollution. Punishing it marked out racial and religious identity. The urgency British authorities later showed in transplanting “sodomy” laws into colonial contexts—even before they were fully codified at home—may reflect the legal category’s origins. It was a way of segregating the Christian, European self from alien entities that menaced it with infection.

In England, King Henry VIII’s break with the Catholic Church in the sixteenth century led to revising much of the country’s common law—simply because offenses that had formerly been tried in church courts now had to be heard in secular ones. Many sexual offenses were among them. A 1533 statute, therefore, reiterated the criminalization of “sodomy” as a state rather than Church concern. Under the name of the “detestable and abominable Vice of Buggery committed with mankind or beast,” it was punished by death.<sup>44</sup> In one form or another, this law persisted until 1861. The last known execution for “buggery” in England was in 1836.<sup>45</sup>

The sense of the mysterious, polluting power of “sodomy” or “buggery” complicated the prosaic legal task of coming up with definitions. Precision was dangerous because it flirted with contamination. The jurist Edward Coke, in his seventeenth-century compilation of English law, wrote that “Buggery is a detestable, and

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intercourse, including heterosexual vaginal intercourse outside the “missionary” position, were graded as “unnatural” to the degree that pleasure superseded the purely procreative functions of the sexual act. See James A. Brundage, *Sex, Law and Marriage in the Middle Ages: Collected Studies* (Aldershot: Variorum, 1993).

<sup>43</sup> R. I. Moore, *The Formation of a Persecuting Society* (London: Blackwell, 1987); see also Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (London: Routledge, 2002).

<sup>44</sup> The word “buggery” derived by way of the French “*bougre*” from the medieval Bogomil heresy, which flourished in Bulgaria. Again, sexual and religious (and racial) “deviance” were intimately associated. See Bailey, pp. 147-49, and H. Montgomery Hyde, *The Love That Dared Not Speak Its Name: A Candid History of Homosexuality in Britain* (Boston: Little Brown, 1970). The law was repealed twenty years later with the return of Catholicism under Queen Mary, as sexual offences moved back to the jurisdiction of ecclesiastical courts; it was re-enacted under the Protestant Queen Elizabeth I in 1563. See also Kenneth Borris, *Same-Sex Desire in the English Renaissance: A Sourcebook of Texts, 1470-1650* (London: Routledge, 2004).

<sup>45</sup> Hyde, p. 142.

abominable sin, amongst Christians not to be named.” He stressed the foreign derivation of the term—“an Italian word”—as well as the act itself: “It was complained of in Parliament, that the Lumbards had brought into the realm the shamefull sin of sodomy, that is not to be named.” He nonetheless named it as acts “committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast.”<sup>46</sup> Coke specified that anal sex between two men or a man and a woman, along with bestiality, were comprised by the term.

Describing “sodomy” precisely was risky, to be avoided. In an 1842 British court case that involved a man accused of committing “nasty, wicked, filthy, lewd, beastly, unnatural and sodomitical practices” in the vicinity of Kensington Gardens, the defense objected that the adjectives gave no indication of what the crime actually was.<sup>47</sup> The vagueness became more an issue as, in the nineteenth century, reformers set about codifying and imposing order on the chaos of British common law and statute law. The Offences Against the Person Act in 1861 consolidated the bulk of laws on physical offences and acts of violence into one “modern,” streamlined statute—still the basis for most British law of physical assault. It included the offense of (consensual and nonviolent) “buggery,” dropping the death penalty for a prison term of ten years to life.

Less well known is that codifying sexual offenses began far earlier, in 1825, when the mandate to devise law for the Indian colony was handed to the politician and historian Thomas Babington Macaulay. Macaulay chaired the first Law Commission of India and was the main drafter of the Indian Penal Code—the first comprehensive codified criminal law produced anywhere in the British Empire.<sup>48</sup>

The colonial environment was the perfect field for experiments in rationalizing and systematizing law. The colonies were passive laboratories. A nineteenth-century

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<sup>46</sup> Edward Coke, *The Third Part of the Institutes of the Laws of England*, Cap. X, “Of Buggery, or Sodomy” (Printed for E. and R. Brooke, 1797), p. 58.

<sup>47</sup> The judges agreed that the invective in the indictment was unspecific. They concluded, however, that simply adding the term “buggery” would have the effect of “shewing the intention implied by the epithets.” *R v. Rowed*, cited in Moran 1996, pp. 38 ff.

<sup>48</sup> M. Y. Friedland, “Codification in the Commonwealth: Earlier Efforts,” *Commonwealth Law Bulletin*, Vol. 18 (July 1992), p. 1172.

historian observed that the Indian Penal Code was a success because there, unlike at home, the British government could express “a distinct collective will” and could “carry it out without being hampered by popular discussion.”<sup>49</sup> This autocratic imposition of a unified code took advantage of the “absence of a developed and contentious Indian public opinion around questions of criminal law,” allowing Macaulay a “free field for experimentation.”<sup>50</sup>

Fears of moral infection from the “native” environment made it urgent to insert anti-sodomy provisions in the colonial code. A sub-tradition of British imperialist writing warned of widespread homosexuality in the countries Britain colonized. The explorer Richard Burton, for instance, postulated a “Sotadic Zone” stretching around the planet’s midriff from 43 degrees north of the equator to 30 south, in which “the Vice is popular and endemic .... whilst the races to the North and South of the limits here defined practice it only sporadically amid the opprobrium of their fellows.”<sup>51</sup>

The European codifiers certainly felt the mission of moral reform—to correct and Christianize “native” custom. Yet there was also the need to protect the Christians from corruption. Historians have documented how British officials feared that soldiers and colonial administrators—particularly those without wives at hand—would turn to sodomy in these decadent, hot surroundings. Lord Elgin, viceroy of India, warned that British military camps could become “replicas of Sodom and Gomorrah” as soldiers acquired the “special Oriental vices.”<sup>52</sup>

Macaulay finished a draft Indian Penal Code in 1837, though Indian resistance and English hesitation meant that an approved version did not come into force until 1860. Introducing the text in an 1837 speech, he discussed the clauses in detail—except

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<sup>49</sup> J. F. Stephen, *A History of the Criminal Law of England* (London: Macmillan, 1883), vol. III, p. 304.

<sup>50</sup> Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (London: Oxford University, 1998). See also Elizabeth Kolsky, “Codification and the Rule of Colonial Difference: Criminal Procedure in British India,” *Law and History Review*, Vol. 23, No. 3 (2005), <http://www.historycooperative.org/journals/lhr/23.3/kolsky.html> (accessed August 8, 2008).

<sup>51</sup> Quoted in Robert Aldrich, *Colonialism and Homosexuality* (London: Routledge, 2003), p. 31. Or, as Lord Byron theorized about a similar but heterosexual “vice”: “What men call gallantry, and Gods adultery / Is much more common where the climate’s sultry.” *Don Juan*, Canto I, stanza 63.

<sup>52</sup> Quoted in Ronald Hyam, *Empire and Sexuality: The British Experience* (London: Manchester University, 1990), p. 116; see also Hyam, “Empire and Sexual Opportunity,” *Journal of Imperial and Commonwealth History*, Vol. 14, No. 2 (1986), pp. 34-89.

when, reaching his version of the anti-sodomy provision, he showed a traditional discomfort that drafters had to speak to such distasteful issues:

Clause 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said ... [We] are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision.<sup>53</sup>

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

Cl. 361 Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is *by his own consent* touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment ... for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine.

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

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<sup>53</sup> *Report of the Indian Law Commission on the Penal Code*, October 14, 1837, pp. 3990-91.

The “injunction to silence”<sup>54</sup> that Coke and other jurists had promoted around the vocabulary of “sodomy” continued to be powerful, however. When the final draft of the Indian Penal Code came into force in 1860, the “Unnatural Offences” section was modified. The ultimate, historic text—which, in one form or another, influenced or infested much of the British Empire—read:

Section 377: Unnatural offences – Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment ... for a term which may extend to 10 years, and shall be liable to fine.

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

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

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

Thus the separate Penal Code provision addressing rape (Section 375) remained restricted to a man’s rape of a woman. No distinct criminal offense was entailed in a man’s sexual assault on another man; it was simply lumped with consensual offenses in Section 377. Section 377 also had no separate provision or protection

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<sup>54</sup> Moran 1995, p. 33.

prohibiting an adult male from having sexual relations with a male child. That offense, too, was contained in 377 without distinction.<sup>55</sup>

As a result, India—along with other countries from Zambia to Fiji with legal systems affected by the Indian Penal Code—was left without laws fully covering rape or child protection. To the drafters, the act of “sodomy” itself was so horrible that the harm seemed uniform: regardless of the other party’s age, and regardless of whether he consented or not. Section 377 appeared in a Penal Code section on “Offenses Affecting the Human Body.” The fiction that “carnal knowledge against the order of nature” violated one’s own physical integrity, even if consented to, seems to have been powerful. (As the next chapter notes, it found fodder in medical myths that supposed the “habitual” sodomite prone to literal physical deformation).

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

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

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<sup>55</sup> Meanwhile, a man who had sexual relations with a girl under 10 was guilty of statutory rape; the age was raised to 12 in 1891, 14 in 1925 and 16 in 1940. “Experts for Raising Statutory Rape Age to 16,” *One India*, February 6, 2008, <http://news.oneindia.in/2008/02/06/experts-for-raising-statutory-rape-age-to-16-1202306730.html> (accessed August 8, 2008).



Finally, the “modernization” of British law in the Indian Penal Code was almost immediately exported back to Britain itself. The 1861 Offences against the Person Act dropped the death penalty for the “abominable crime of buggery,” imposing a sentence modeled on that in the IPC.<sup>56</sup>

British law at home underwent a further refinement in 1885, during a revision of laws on the “protection of women, girls [and] the suppression of brothels.” Henry Labouchere, a member of Parliament, introduced an amendment so unrelated to the debate that it was almost ruled out of order. When finally passed, it punished “Any male person who in public or private commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person,” with two years at hard labor. “Gross indecency” was a broad offence designed to include virtually all kinds of non-penetrative sexual acts between two men. Unlike the 1861 “buggery” law, the Labouchere Amendment also explicitly extended to private acts. The press quickly dubbed it the “blackmailer’s charter.” Oscar Wilde was convicted under its terms in 1895.<sup>57</sup>

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

Labouchere’s provision came too late to be introduced in the Indian Penal Code itself. However, subsequent colonial codes incorporated versions of it, including codes that derived from the IPC. It appeared in the Sudanese Penal Code in 1899, and in the influential penal law of Queensland in the same year. Malaysia and Singapore received the gross indecency provision jointly through an amendment in 1938.<sup>58</sup> Moreover, as explained below, subsequent jurisprudence in India (particularly the

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<sup>56</sup> *Offences against the Person Act*, 1861, 24 and 25 Victoriae, C.100, “Unnatural Offences,” Sec 61.

<sup>57</sup> H. Montgomery Hyde, *The Trials of Oscar Wilde* (New York: Dover, 1962), pp. 12-13.

<sup>58</sup> Sec 377A was introduced into the Singapore Penal Code by Sec 7 of the Penal Code (Amendment) Ordinance 1938 (No 12 of 1938). The reason, as stated in the Proceedings of the Legislative Council of the Straits Settlements in 1938 was to “[make] punishable acts of gross indecency between male persons which do not amount to an unnatural offence within the meaning of s 377 of the Code”: p. C81, April 25, 1938. See microfiche no 672, Straits Settlements Legislative Council, Proceedings (SE 102), Vol. 1938 (Central Library Reprographic Dept, National University of Singapore).

*Khanu* judgment) expanded the scope of “unnatural offences” to include what would otherwise have been “gross indecency” under British law. Further, though Labouchere’s innovation only spoke of male-male sex, some governments have made “gross indecency” apply to sex between women—by dropping the “male” before “person” (as detailed below in chapter IV).

The Indian Penal Code became the model for British colonies’ legal systems throughout most of Asia and Africa. Each territory took over the newest version, one legal historian writes, “improving and bringing them up to date, and the resulting product [was] then used as the latest model for an enactment elsewhere.”<sup>59</sup> The Straits Settlement Law of 1871, covering territory that today encompasses Singapore, Malaysia, and Brunei, effectively duplicated the IPC.<sup>60</sup> Between 1897 and 1902 administrators applied the Indian Penal Code in Britain’s African colonies, including Kenya and Uganda.<sup>61</sup> Some British residents complained about the undemocratic character of the codes. British East Africans, for instance, protested a policy of placing “white men under laws intended for a coloured population despotically governed.”<sup>62</sup>

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

S. 318 Whoever has carnal intercourse against the order of nature with any person *without his consent*, shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine; provided that a consent given by a person below the age of sixteen years to such intercourse by his teacher, guardian or any

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<sup>59</sup> H. F. Morris, “A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876-1935,” *Journal of African Law*, Vol. 18, No. 1 (Spring, 1974), pp. 6-23.

<sup>60</sup> Dominic Chan, “Oral Sex — A Case of Criminality or Morality?” *Singapore Law Gazette*, September 2004, <http://www.lawgazette.com.sg/2004-9/> (accessed August 8, 2008).

<sup>61</sup> James S. Read, “Criminal Law in Africa of Today and Tomorrow,” *Journal of African Law*, Vol. 17, No. 1 (Spring 1963), pp. 5-17.

<sup>62</sup> Morris, p. 13.

person entrusted with his care or education shall not be deemed to be a consent within the meaning of this section [emphasis added].<sup>63</sup>

Similarly, while the Sudanese code adopted the “gross indecency” provision, it only punished it when non-consensual.<sup>64</sup> These distinctions were lost after independence, however, when in 1991 Sudan’s government imposed a *shari’a*-inspired penal code.<sup>65</sup>

The Penal Code of the Australian colony of Queensland (QPC) was drafted in 1899 by the colony’s chief justice, Sir Samuel Griffith.<sup>66</sup> It came into force in 1901 and was the second most influential penal code after the IPC, especially in British Africa. The QPC introduced into the IPC’s version of “unnatural offences” the category of the “passive” sexual partner—the one who “permits.” Section 208 read:

Any person who –

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

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<sup>63</sup> Alan Gledhill, *The Penal Codes of Northern Nigeria and the Sudan* (London: Sweet & Maxwell, 1963), p. 443.

<sup>64</sup> *Ibid.*, p.444, Sec 319: “Whoever commits an act of gross indecency upon the person of another without his consent or by the use of force or threats compels a person to join with him in the commission of such act, shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine; provided that a consent given by a person below the age of sixteen years to such an act when done by his teacher, guardian or any person entrusted with his care or education shall not be deemed to be a consent within the meaning of this section.”

<sup>65</sup> The Sudanese Penal Code of 1991, Sec 148, “Sodomy: (1) Any man who inserts his penis or its equivalent into a woman’s or a man’s anus or permitted another man to insert his penis or its equivalent in his anus is said to have committed Sodomy; (2) (a) Whoever commits Sodomy shall be punished with flogging one hundred lashes and he shall also be liable to five years imprisonment; (b) If the offender is convicted for the second time he shall be punished with flogging one hundred lashes and imprisonment for a term which may not exceed five years. (c) If the offender is convicted for the third time he shall be punished with death or life imprisonment.” As chapter V discusses below, in a number of countries—Pakistan and Nigeria among them—the modern resurgence of supposedly *shari’a*-influenced or -derived laws has not so much revived “indigenous” legal values as further entrenched colonial ones. This toxic mix is an important topic in its own right, but beyond the scope of this report.

<sup>66</sup> Friedland, p. 1177. It was based on an earlier proposal from 1878.

This eliminated one of the ambiguities in the IPC, making clear that both partners in the act were criminal. The QPC also widened the ambit beyond “penetration,” by introducing an independent provision for “attempts to commit unnatural offences.”<sup>67</sup> Thus any sexual act or approach not resulting in penetration could be called an “attempt.”

Outside Australia, the QPC first took root in Papua New Guinea. The chief justice of Northern Nigeria, H.C. Gollan, then decided to adopt it as the model for his colony’s penal code, which came into force in 1904. It then became the subject of bureaucratic battles between colonial administrators; officials in Southern Nigeria were divided between proponents of the QPC and supporters of the Indian Penal Code.<sup>68</sup> The former finally won out. In 1916, two years after Nigeria combined into a single colony, a common criminal code based on the QPC was adopted.<sup>69</sup>

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

The whims, preferences, and power struggles of bureaucrats drove it. After the Criminal Code of Nigeria was imposed, colonial officials in East Africa—modern Kenya, Uganda, and Tanzania—moved gradually to imitate it. A legal historian observes that the “personal views and prejudices” of colonial officials, rather than any logic or respect for indigenous customs, led to replacing IPC-based codes with QPC-based codes in much of the continent.<sup>70</sup>

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<sup>67</sup> Unnatural offenses themselves continued to be defined by penetration, as in Sec 6: “Carnal Knowledge: When the term ‘carnal knowledge’ or the term ‘carnal connection’ is used in defining an offence, it is implied that the offence, so far as regards that element of it, is complete upon penetration.” However, Sec 2-9 of the QPC reads that “Any person who attempts to commit any of the crimes defined in the last preceding section is guilty of a crime, and is liable to imprisonment with hard labor for seven years.”

<sup>68</sup> Broader issues than “unnatural offences” divided supporters of the two codes. The QPC was heavily inflected by European civil law, particularly the Italian Penal Code, and omitted the common-law requirement of *mens rea*, or criminal intent.

<sup>69</sup> H. F. Morris, “How Nigeria Got Its Criminal Code,” *Journal of African Law*. Vol. 12, No. 3 (Autumn, 1970), pp. 137-154; see also Omoniyi Adewoye, *The Judicial System in Southern Nigeria, 1854-1954: Law and Justice in a Dependency* (New Jersey: Humanities Press, 1977).

<sup>70</sup> Morris 1974, p. 6.

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

S. 140: Any person who (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or(c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years.

S. 141 Any person who attempts to commit any of the offences specified in the last preceding section is guilty of a felony and is liable to imprisonment for seven years.

S.143 Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.

Nigeria did offer variations from the trend. Its version narrowed “carnal knowledge” to exempt sex between “a husband and wife,” making clearer what it understood by the “order of nature.”<sup>71</sup> The law zeroed in toward its primary focus on sex between men.<sup>72</sup>

Three generalizations arise from the confused history of “carnal knowledge” in colonial penal codes.

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<sup>71</sup> Sec 6: “‘Unlawful carnal knowledge’ means carnal connection which takes place otherwise than between husband and wife.”

<sup>72</sup> Later, in 1960, during the waning days of colonial rule, the territory of Northern Nigeria chose to have a separate Penal Code, independent of the new country’s Federal Criminal Code. It took as a basis the Sudanese Penal Code of 1899, ironically based on the IPC, which Northern Nigeria had earlier rejected (Morris 1970, p. 153). However, the fact that the Sudanese code had decriminalized consensual sodomy did not go unnoticed—or unchanged. The Northern Nigeria Penal Code reverted back to the old consent-neutral definition from the Indian Penal Code. To multiply confusion, though, the drafters neglected to make the same change to the “gross indecency” provision, which remained applicable only to non-consensual activities (Gledhill, p. 444).

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

### III. Colonial Power on the Street and over the Body

Why was criminalizing consensual homosexual conduct important to the colonial, and post-colonial, state?

No single explanation can describe what happened—what is still happening—in places as distant and different as Zambia and Singapore. One hint, though, lies in the other laws and practices colonizers imported along with anti-sodomy provisions. Those provisions were part of a package, one that extended the “civilizing,” reforming mission—and the power and the knowledge—of the still-tenuous colonial apparatus over both broader and more intimate areas of life. The state rigidly policed the public sphere and people’s bodies. Many of its mechanisms are still working.

#### From “Vagrant” to “Eunuch”

Vagrancy laws target people whom officials see as wandering or loitering with no purpose. Beyond that, though, they help to rid the public sphere of people not wanted there: to “alleviate a condition defined by the lawmakers as undesirable,” as one commentator observes.<sup>73</sup> They do not require a “proscribed action or inaction,” another writes, but depend on a “certain personal condition or being a person of a specified character.”<sup>74</sup> They make people criminals for what they *are*, not what they *do*. And not every “wanderer” qualifies as a target. Enforcement usually aims selectively at despised groups such as migrant laborers, the poor, the homeless, beggars, travelers, or street children.<sup>75</sup>

In Europe for centuries, legal and administrative measures controlling “vagrancy” criminalized poverty, to keep it and the effects of economic dislocation out of sight.<sup>76</sup>

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<sup>73</sup> William J. Chambliss, “A Sociological Analysis of the Law of Vagrancy,” in John Galliher, ed., *Deviant Behavior and Human Rights*, (New Jersey: Prentice Hall, 1964), p. 116.

<sup>74</sup> Forrest W. Lacey, “Vagrancy and other Crimes of Personal Condition,” *Harvard Law Review*, Vol. 66, No. 7 (May 1953), p. 1203.

<sup>75</sup> Ibid. See also Arthur H. Sherry, “Vagrants, Rogues and Vagabonds: Old Concepts in Need of Revision,” *California Law Review*, Vol. 48, No. 4 (1960), pp. 557-580.

<sup>76</sup> Robert Jutte, *Poverty and Deviance in Early Modern Europe* (Cambridge: Cambridge University, 1994); Robert Forster and Orest Ranum, eds., *Deviants and the Abandoned in French Society: Selections from the Annales, Economies, Societes, Civilisations, Vol. 4*, trans. Elborg Forster and Patricia M. Ranum (Baltimore: Johns Hopkins, 1978); Thomas McStay Adams, *Bureaucrats and Beggars: French Social Policy in the Age of the Enlightenment* (Oxford: Oxford University, 1990).

Brutal laws in England had been a fixture at least since the Tudor period, when enclosures and privatizing common land had caused vast increases in the numbers of homeless, drifting poor. A 1572 act required “Rogues, Vagabonds, or sturdy Beggars” to “be grievously whipped, and burnt through the gristle of the right Ear with a hot Iron.”<sup>77</sup> The United Kingdom’s 1824 Vagrancy Act systematized both classification and punishment of undesirables for a bourgeois age. Anyone begging or sleeping out, as well as appearing to engage in prostitution or acts associated with a “disreputable mode of life,” could be convicted as “idle and disorderly” and sentenced to two weeks’ hard labor. Multiple convictions, or conspicuous poverty, led one to be classed as a “rogue and vagabond” or, worse, an “incorrigible rogue,” in a descending ladder of permanent legal stigma.<sup>78</sup> This breadth and sweep of preemptive classification remained a feature of vagrancy laws into the twenty-first century. (In California, for instance, a 1950s legal change revised the former common-law definition of a vagrant as “a wanderer from the place where he worked,” to one where any “idle, or lewd or dissolute person” could be classed as vagrant.<sup>79</sup>)

The 1824 law was a model for equally broad criminalization of “vagrancy” throughout British colonies. The Bengal Vagrancy Act and the Bombay Beggary Prevention Act are classic examples. Most such colonial-era laws used the same tripartite distinction between “idle and disorderly persons,” repeat offenders who are “rogues and vagabonds,” and “incorrigible rogues”; many laws heightened punishments over their British forebear. And most of these laws still remain in effect. Zambia’s Penal Code, for example, makes any “idle or disorderly person” (including “every person who, without lawful excuse, publicly does any indecent act”) liable to a month in prison; a repeat conviction can cause one to “be deemed a rogue and vagabond” with a far steeper sentence. These categories give the government wide latitude to control public expression (Section 27 of the 1906 public nuisance law in Singapore includes under “rogues and vagabonds” people who show “any obscene print, picture or other indecent exhibition”) as well as almost any other conduct in

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<sup>77</sup> Angus Fraser, *The Gypsies* (London: Blackwell, 1995), p. 134.

<sup>78</sup> “Vagrancy,” *Encyclopedia Britannica*, Eleventh Edition, 1911; Lionel Rose, *“Rogues and Vagabonds”: The Vagrant Underworld in Britain, 1815-1985* (London: Routledge, 1988).

<sup>79</sup> Karl M Bowman and Berenice Engle, “A Psychiatric Evaluation of Laws of Homosexuality,” *The American Journal of Psychiatry*, Vol. 112 (February, 1956), p. 577-583.



public. (In Zambia, “rogues and vagabonds” include “every person found wandering ... in any public place at such time and under such circumstances as lead to the conclusion that such person is there for an illegal or disorderly purpose.”<sup>80</sup>)

In the colonies, these laws both served the “civilizing mission” and gave police enough power to punish almost any behavior, or people, they wanted. Sexual conduct—or sexualized identities—were among those singled out. The 1899 Sudanese Penal Code is an instructive instance. As noted earlier, this code, unique among British colonial laws, did not punish consensual sodomy. It compensated, however, by creating a new identity within the “habitual vagabond”: the “catamite.” (The Northern Nigeria code also followed this example). The code listed seven types of “vagabonds,” one of them the “catamite,” defined as a “any male person who 1) dresses or is attired in the fashion of a woman in a public place or 2) practises sodomy as a means of livelihood or as a profession.”<sup>81</sup>

A person’s clothing became not only criminal in itself, but potentially the sign of a criminal sexual history. One legal commentator clarified that “catamite” meant a “habitual” practitioner of sodomy, adding that “it is not necessary to prove when and where any individual act of this nature occurred.”<sup>82</sup> Beyond the person’s appearance, no evidence was needed for his (or her) arrest and jailing.

In Europe, vagrancy laws targeted the poor, but rarely had an explicitly racial side.<sup>83</sup> In the colonies, everything was racial. These laws regulated the movements, and controlled the conduct, of the non-white population. In British India, moreover, legislation notoriously marked out whole tribal (and other) groups as intrinsically, unchangeably criminal. The Criminal Tribes Act of 1871 in India, inspired by vagrancy laws, defined certain tribal communities collectively as *dacoits*, thieves, and undesirables. These provisions are a high-water mark in European legal racism. “Nomadic tribes are invariably addicted to crime,” one administrator wrote.<sup>84</sup> To be born in a community that was listed as a criminal tribe put one under permanent

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<sup>80</sup> Long 2003, p. 277.

<sup>81</sup> Sec 448 (2) (e), Sudanese Penal Code.

<sup>82</sup> Gledhill, p. 749.

<sup>83</sup> The signal exception was their use against Roma and Sinti populations, or Gypsies.

<sup>84</sup> S.T. Hollins, *The Criminal Tribes in India* (1914), [JS: what’s “rpt”?] (Delhi: Nidhi Book Centre, 2005), p. 56.

legal disability. All members of criminal tribes had to register individually with the authorities; non-registration could lead to prosecution. Once registered, the tribe member's movements were restricted to authorized areas, and she or he could be arrested if found outside them—or even inside them, if discovered in suspicious circumstances—with a penalty up to three years in prison.<sup>85</sup>

British authorities associated nomadism not only with crime but with sexual immorality. The criminal tribes “implied absolute licentiousness” to the colonizers, one historian notes.<sup>86</sup> A British administrator's 1914 study monotonously repeats its judgments on one ethnic group after another: “The women of the tribe are notoriously immoral”; “Nearly all the girls of the tribe are reserved for prostitution”; “Immorality is very prevalent”; “The women, from their vagrant life, naturally bear an indifferent character. ... Girls have considerable liberty before marriage, and lapses from virtue on their part are not seriously dealt with”; “Their women are all prostitutes.”<sup>87</sup>

Along these moralizing lines, authorities amended the Act in 1897 expressly to include “eunuchs” as a notified group. A eunuch was “deemed to include all members of the male sex who admit themselves, or upon medical inspection clearly appear, to be impotent.” In practice, this meant India's *hijras*, presumed to be sexually immoral and guilty of “sodomy.”<sup>88</sup>

*Hijras*—possibly derived from the Urdu word *ezra* meaning a nomad or wanderer—form a large community of people in India who, born male, live their lives as female or third-gender. In many traditional Indian cultures they had a defined and permitted social niche.<sup>89</sup> Under the statute, though, any “eunuch” who appeared “dressed or

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<sup>85</sup> Arvind Narrain, *Queer: Despised Sexuality, Law, and Social Change* (Bangalore: Books for Change, 2004), pp. 58-59.

<sup>86</sup> Meena Radhakrishna, *Dishonoured by History: “Criminal Tribes” and British Colonial Policy* (New Delhi: Orient Longman, 2001), p. 15.

<sup>87</sup> Hollins, pp. 30, 23, 40, 49, and 64.

<sup>88</sup> Cited in *Human Rights Violations against the Transgender Community: A Study of Kothi and Hijra Sex Workers in Bangalore, India*, a report by People's Union for Civil Liberties, Karnataka (PUCL-K), September 2003, pp. 44-45, and Gayatri Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* (Chicago: University of Chicago, 2005). “Eunuch” in European culture and law meant a castrated male; some though hardly all Indian *hijras* had removed their male genitals in whole or in part. The general category of “impotence” in these laws, however, seemed meant to embrace any biological men who abjured “active” male sexual functioning.

<sup>89</sup> *Human Rights Violations against the Transgender Community*, pp. 44-45.

ornamented like a woman in a public street ... or who dances or plays music or takes part in any public exhibition, in a public street” could be arrested without warrant and imprisoned for up to two years. The law denied eunuchs legal personhood, including the rights to draw up a will or to adopt children. Local authorities had to keep a register of all eunuchs “reasonably suspected” of “committing offences under Section 377 of the Indian Penal Code.”<sup>90</sup>

The British considered *hijra* communities in India a “distasteful nuisance.”<sup>91</sup> Colonial authorities obstructed their traditional rights, including rights to land and money they owned, in villages across India.<sup>92</sup> Anti-begging provisions in vagrancy laws, such as those in the Bombay and Bengal Presidencies, also criminalized the customary social niche of *hijras* as mendicants. The 1897 amendment—subtitled “An Act for the Registration of Criminal Tribes and Eunuchs”—linked “eunuch” identity to Section 377. It showed how the vagrancy and sodomy provisions stemmed from the same motive: to place not just behaviors, but classes of people, under surveillance and control. Colonial vagrancy laws ultimately made the “personal condition” of being a *hijra* a criminal offence. One Indian human rights organization observes that

The sexual non-conformity of the eunuch thus earned severe strictures and penalties from the colonial administration. Being a eunuch was itself a criminal enterprise, with surveillance being the everyday reality.... The role of the police in inflicting violence through and outside the law governed their lives as much as it governed the lives of the former criminal tribes. However ... it is important to note that because of the stigmatized nature of their sexualities, the eunuchs never found a voice in nationalist or subaltern histories.<sup>93</sup>

The categories of the vagrant catamite and criminal eunuch allowed the state to arrest people on the presumption of sodomy, without proof of an actual act. Being,

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<sup>90</sup> Ibid.

<sup>91</sup> Laurence W Preston, “A Right to Exist: Eunuchs and the State in Nineteenth Century India,” *Modern Asian Studies*, Vol. 21, No.2 (1987), pp. 371-87.

<sup>92</sup> Ibid.

<sup>93</sup> *Human Rights Violations Against the Transgender Community*, pp. 45-46.

or looking like, a certain kind of person became the basis for harassment, arrest, detention, and abuse.

## Forensic Mythologies

“**Infundibuliform**” means “**funnel-shaped**.” An unusual word, it has been used to describe two things in particular—the shapes of certain flowers, and the anuses of “habitual sodomites.” Colonial law, predictably, was more interested in the latter.

Its concern can be seen in one of the first reported cases under Section 377 of the Indian Penal Code to be appealed. In *Queen-Empress v. Khairati*<sup>94</sup> in 1884, the sessions judge convicted the anonymous *hijra* defendant (called only *Khairati* or beggar) under 377, on the charge “that he, within four months previously to the 15<sup>th</sup> of June (1883), the exact time it being impossible to state, did in the district of Moradabad abet the offence of sodomy, by allowing some unknown person to commit the offence of sodomy on his person.” *Khairati* was called a “eunuch,” as he “was found singing dressed as a woman among the women of a certain family.”

The trial court stated that “he is shown to have the characteristic mark of a habitual catamite - *the distortion of the orifice of the anus into the shape of a trumpet ... which distinctly points to unnatural intercourse within the last few months.*”<sup>95</sup> Thus *Khairati* was not tried for any particular incident of sodomy: the only clue was clothing—substantiated by later medical examination. The lower court stated that “the three facts proved against the accused—his appearance as a woman, the misshapement [of the anus], the venereal disease—irresistibly lead to the conclusion that he has recently subjected himself to unnatural lust.” The appeals court set aside the conviction because there was no specificity about the act: time, place, and identity of the “accomplice” were unknown. However, the judge called official attempts at “checking these disgusting practices ... laudable.”<sup>96</sup>

In *Khairati*, the first court took the forensic evidence as proof that sodomy definitely had happened at a prior time. Despite the appeals judge’s demand for specificity,

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<sup>94</sup> *Queen-Empress v. Khairati*, 1884 Indian Law Report, Vol. 6, Allahabad High Court 204, p. 602.

<sup>95</sup> *Khairati*, p. 602, emphasis added.

<sup>96</sup> *Ibid.*

the authorities' "laudable" medical endeavors would continue—and would gain general acceptance as evidence.

The full impact of sodomy laws cannot be understood by looking at the legal offence alone. Evidentiary requirements to prove the offence of sodomy have helped to establish the state's authority over the suspect body, as well as to create the criminal identity of the homosexual.

All sexual offences give the state unusual power to undertake interventions directly into people's bodies: to determine the occurrence of the offence, to separate truth from false accusation, and often to establish the exact extent to which sexual interaction took place. Thus, for example, forensic medical experts must examine a rape victim—especially in common-law countries—to search for physical injuries or other signs of assault. Forensic doctors also helped establish regimes for the control of sex workers. The various nineteenth-century Contagious Diseases Acts enacted in Britain and throughout its colonies created the category of the "common" or habitual prostitute. Under those acts, women's bodies were subjected to brutal medical exams. A diagnosis of venereal disease was the equivalent of criminal conviction, and led to jailing.<sup>97</sup>

Forensic medicine in the Victorian era also invented elaborate, imaginary sets of signs to find the "habitual sodomite." As Michel Foucault wrote: "The nineteenth-century homosexual became a personage, a past, a case history, and a childhood ... with an indiscreet anatomy and possibly a mysterious physiology."<sup>98</sup>

The French forensic doctor Auguste Ambroise Tardieu published his hugely influential treatise on identifying the prostitute and the "pederast" in 1857. Six infallible signs, he believed, marked out the latter: "the excessive development of the buttocks; the funnel-shaped deformation of the anus; the relaxation of the sphincter; the effacement of the folds, the crests, and the wattles at the circumference of the anus; the extreme dilation of the anal orifice; and ulcerations,

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<sup>97</sup> See Judith R. Walkowitz, *Prostitution and Victorian Society: Women, Class, and the State* (Cambridge: Cambridge University, 1980).

<sup>98</sup> Michel Foucault, *The History of Sexuality*, Vol. 1 (London: Penguin, 1976), p. 42.

hemorrhoids, fistules.”<sup>99</sup> In Britain, Glaster’s *Medical Jurisprudence and Toxicology* followed Tardieu: in editions stretching into the twentieth century it proclaimed “an infundibuliform shape of the anus” as a confirmed sign of the passive sodomite.<sup>100</sup>

Human Rights Watch has documented examinations to detect such imaginary deformations, in countries from Egypt to Zimbabwe. They invade bodily privacy. Conducted without consent in carceral conditions, they are torture. The theories underlying them are medically worthless. Dr. Lorna Martin, professor of forensic pathology at the University of Cape Town, South Africa, told Human Rights Watch that Tardieu’s theories are “bizarre and antiquated ... rubbish.” She added, “It is impossible to detect chronic anal penetration; the only time the [forensic anal] examination could be of any use is for acute non-consensual anal penetration, when certain injuries may be seen.”<sup>101</sup> Nonetheless, the fact that they still take place suggests they are important not only for the medical mythology behind them, but because their component elements—the subject’s humiliation, and the assertion of the government’s power over his body—support, in a drastic and torturous way, the state’s policing of sexuality.

Various Indian forensic-medical experts followed the writings of Tardieu and Glaster, adding new parameters based on their own understanding of the “difference” in sodomites’s bodies. They claimed the “catamite” or “sodomite” as a scientifically separate manner of person, physically distinct. Ejaz Ahmed, for example, points to the “patulous state of the anus, and the destruction of the folded or puckered state of the skin in this part.”<sup>102</sup> Narayan Reddy takes the notion of dilation further and

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<sup>99</sup> Auguste Ambroise Tardieu, *Etude Medico-Legale sur les Attentats aux Moeurs* (Forensic Study of Assaults against Decency) 3<sup>rd</sup> Edition, (Paris: J. B. Bailliere, 1859), pp. 142-3; translation for Human Rights Watch by Scott Long.

<sup>100</sup> J. Glaster, *Medical Jurisprudence and Toxicology*, Eleventh Edition (Edinburgh: Livingston, 1950) p. 259.

<sup>101</sup> E-mail communication to Scott Long, Human Rights Watch, from Dr. Lorna Martin, July 23, 2003. Dr. Robert Nye, a historian of sexology, told Human Rights Watch that “The famous six ‘signs’ of passive sodomy were questioned and disregarded by the very next generation of forensic doctors and sexologists.” He called Tardieu “utterly discredited,” and the examinations “horrific in the extreme.” E-mail communication to Scott Long, Human Rights Watch, from Professor Robert Nye, Department of History, Oregon State University, July 18, 2003. Both are quoted in *In A Time of Torture: The Assault on Justice in Egypt’s Crackdown on Homosexual Conduct*, a Human Rights Watch report, 2004. For a survey of the medical and legal implications of the exams, see Scott Long, “When Doctors Torture: The Anus and the State in Egypt and Beyond,” *Health and Human Rights: An International Journal*, Vol. 7, No. 2 (2004), pp. 114-40.

<sup>102</sup> Ejaz Ahmed, *Sexual Offences*, second edition (Hyderabad: Ashok Law House, 1980), p. 736. See also *Modi’s Medical Jurisprudence and Toxicology*, 22<sup>nd</sup> edition, ed. B.V. Subramanyam (New Delhi: Butterworths India, 1999), pp. 521-533, and S.N. Gour, *Lyon’s Medical Jurisprudence for India*, 10<sup>th</sup> edition, (Allahabad: Law Publishers India Pvt. Ltd., 1988), pp. 482-488.

provides a rough sphincterometer, requiring as proof an opening of “4 to 5 cm. in diameter through which rectum can be seen.”<sup>103</sup> Another forensic expert moves beyond just the physical signs of penetration to the way the sodomite prepares his appearance. He lists “the shaving of the anal hair but not necessarily the pubic hair” as evidence to impugn a habitual, passive sodomite.<sup>104</sup>

These conjectures by forensic writers are not attempts to document single sexual acts, but to infer life histories and an identity.<sup>105</sup> In the colonial Indian case of *D. P Minwalla v. Emperor* the defendant used the *un*-infundibuliform, *un*marked character of his anus to maintain he had an un-criminal past. Minwalla was caught in the act of anal sex with another man. To exonerate himself, he submitted to a medical examination to convince the court his anal orifice was not shaped like a funnel. The appeals court confirmed Minwalla’s conviction but with a reduced sentence, mindful that the physical examination suggested this had been a momentary lapse rather than a habitual identity.<sup>106</sup>

Much as women’s sexual histories can be manipulated to deny them protection in rape cases, the status of a “habitual sodomite” means, in effect, losing the right to refuse consent.<sup>107</sup> A 1981 case from independent Pakistan is illustrative. Pakistan inherited the Indian Penal Code and retains Section 377; in the 1970s, however, the government’s program of Islamizing national law also introduced the offence of *zina*, which among other things punishes sex between men when coupled with abduction.<sup>108</sup> In *Muhammad Din* two men were charged with *zina* for raping another young man at a railway station in Lahore. The medical examination of the accuser, though, found his anus “moderately funnel shaped and he appeared to be a habitual passive agent.” Based on this, the court threw out the victim’s claim. The view that

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<sup>103</sup> K. S. Narayan Reddy, *Essentials of Forensic Medicine and Toxicology* (Hyderabad: K. Suguna Devi, 2003), p. 212.

<sup>104</sup> R.L. Gupta, *Medico-Legal Aspects of Sexual Offences* (Lucknow: Eastern Book Company, 1991), p. 414.

<sup>105</sup> Moran 1995, p. 34.

<sup>106</sup> *D. P Minwalla v. Emperor*, 1935 All India Report, High Court of Sind, p. 78.

<sup>107</sup> The permanent legal minority that British colonial law imposed on *hijras* or “eunuchs,” denied even the capacity to make a will, is perhaps a parallel.

<sup>108</sup> The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979, Sec 12: “Kidnapping or abducting in order to subject person to unnatural lust: Whoever kidnaps or abducts any person in order that such person may be subjected, or may, be so disposed of as to be put in danger of being subjected, to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with death or rigorous imprisonment for a term which may extend to twenty-five years.”

he willingly participated in sex “received support from the medical evidence that he appeared to be a habitual passive agent.” The court thus refused to believe “that the complainant had been kidnapped or abducted for the purpose of subjecting him to unnatural lust.” It dropped the charge of *zina*.<sup>109</sup>

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<sup>109</sup> *Muhammad Din v. The State*, 1981 All Pakistan Law Decisions, Federal Supreme Court, p. 191. The case was then tried under Pakistan’s version of Sec 377.



## IV. Interpreting Sodomy Laws: The Scope Expands

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

One distinction that never mattered much, in “unnatural offences,” was the axis of consent. Most of the surviving jurisprudence under colonialism and since independence (what reached the law reports were largely cases on appeal, undoubtedly representing only a fraction of convictions) deals with charges of non-consensual sodomy. **Nearly universally—as one Zimbabwean legal expert writes—the fact that “an assault (possibly violent) has taken place is of secondary importance” to the court.<sup>110</sup> The law’s silence on consent translates into judges’ indifference to the victim. It also reaffirms that “the non-existence of a victim,” where there was consent, is no hindrance to prosecution.<sup>111</sup>**

This chapter will show:

- First, investigating the details of sexual acts led to further expanding the scope of acts covered by Section 377. The law came to recognize broader categories of “sexual perversion,” and while that extended into acts committed by heterosexual couples, the “sodomite” or “catamite” or “homosexual” was at the center of its meaning.
- Second, Section 377’s failure to distinguish consensual from non-consensual acts, or to offer separate protection to minors from abuse, led to identifying “homosexuality” with other violent sex crimes—intensifying the legal stigma.

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<sup>110</sup> Oliver Phillips, *Sexual Offences in Zimbabwe: Fetishisms of Procreation, Perversion and Individual Autonomy* (unpublished Ph.D. thesis, University of Cambridge, July 1999), p. 193.

<sup>111</sup> *Ibid.*

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

## Jurisprudence: From “Crimes against Nature” to Communal Values

In 1930s India, police captured a young man called Ratansi while he and another man were trying to have sex. In court, Ratansi did not deny it. The furious judge called him a “despicable specimen of humanity,” addicted to the “vice of a catamite” on his own admission.<sup>112</sup> It was not just the act in isolation that appalled the court: it was the contemptible class of person. Yet the judge could not punish the two accused: they were caught before they could finish the act. A gap yawned between his repulsion at the arrested men, and the evidentiary limits his understanding of the statute demanded. Conviction required penetration, and physical or other proof.

Much of the later jurisprudence around Section 377, in the many places where it was enforced, would try to close that gap: to re-draw the sexual map of “immorality” and cram a sufficiently wide range of acts within the criminal compass, so that no “despicable specimen of humanity” would be acquitted. What counted as “unnatural” and, as one commentator observes, “what counted as penetration continued to be an ongoing, arbitrary, and unsystematic discussion” across courts and countries.<sup>113</sup>

“Carnal intercourse against the order of nature” had never been precisely defined. One of the first Indian cases to reach the law reports on appeal, though, reflected what was probably the usual judicial understanding. The phrase meant anal sex, since “the act must be in that part where sodomy is usually committed.”<sup>114</sup>

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<sup>112</sup> *Noshirwan v. Emperor*, 1934 All India Report, High Court of Sind, p. 206

<sup>113</sup> Suparna Bhaskaran, “The Politics of Penetration: Section 377 of the Indian Penal Code,” in Ruth Vanita, ed., *Queering India: Same-Sex Love and Eroticism in Indian Culture and Society* (London: Routledge, 2002), p. 20.

<sup>114</sup> *Government v. Bapoji Bhatt*, 1884 Mysore Law Report, Vol. 7, p. 280. The appellant was charged under Sec 377 on allegations of oral sex with a minor.

The 1925 Indian case of *Khanu v. Emperor*<sup>115</sup> took the first step toward redrawing the boundaries of Section 377. It became, for a long time, the guiding judgment on interpreting 377 through British colonies in South Asia, East Asia, and East Africa. The case involved forcible oral sex between an adult male and a minor. The non-consensual nature of the act played no role in the appeals decision. The only question that concerned the court was whether oral sex was an unnatural carnal offence under Section 377.

*Khanu* said yes. 377 was not limited to anal sex.<sup>116</sup> It cited two lines of reasoning.

The first defined the order of nature in sex as “the possibility of conception of human beings”: oral sex was legally like anal sex in that it was not reproductive. The colonial court’s complete divorce from the Indian context—its reliance on purely European traditions of sexual propriety, which conflated nature with procreation—could not have been clearer. Nor did the court consider that other forms of penetrative sex (for instance, using birth control) also foreclosed the “possibility of conception.”<sup>117</sup>

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

a temporary visitation to one organism by a member of the other organism, for certain clearly defined and limited objects. The primary object of the visiting organism is to obtain euphoria by means of a *detente* of the nerves consequent on the sexual crisis. But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity.<sup>118</sup>

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<sup>115</sup> *Khanu v. Emperor*, 1925 High Court of Sind, p. 286.

<sup>116</sup> *Ibid.*

<sup>117</sup> At the same time the colonial court in *Khanu* defined “unnatural” sex as non-procreative sex, contraception was legal in Britain. Marie Stopes opened Britain’s first family planning clinic in 1921, four years before *Khanu*. Birth control had never been criminalized in the home country, though distributing information on contraception risked obscenity charges through the 19<sup>th</sup> century: see Kristen Brandser, “Law, Literature, and Libel: Victorian Censorship of ‘Dirty Filthy’ Books on Birth Control,” paper presented at the meeting of the Law and Society Association, Chicago, Illinois, May 27, 2004.

<sup>118</sup> *Khanu*, p. 286.

As long as there is an **orifice** (the mouth) to enclose the “visiting member,” there can be carnal intercourse. When it cannot lead to procreation, there is an “unnatural offence.”<sup>119</sup>

*Khanu* opened the way to bringing other acts under the scope of Section 377. For example, **a 1961 case from East Pakistan (present-day Bangladesh) found that the identical provision in the Pakistan Penal Code criminalized what it called “thigh sex.”**<sup>120</sup> The court followed the penetration-specific definition of *Khanu* and held that “the entry of the male organ of the accused into the artificial cavity between the thighs of [the other partner] would mean penetration and would amount to carnal intercourse.”

The post-independence Indian case of *Lohana Vasantlal* also followed and modified the *Khanu* decision.<sup>121</sup> On the facts, much like *Khanu*, it involved three men who forced an underage boy to have anal and oral sex with them. However, the judgment neglects the injury caused to the boy who was forced to undergo the sexual act: there is no discussion of coercion. Instead the court concentrated on including oral sex under 377. As with other appealed cases involving coerced sex, the court’s reasoning would apply seamlessly to consensual acts.

***Lohana Vasantlal* agreed with *Khanu* in finding oral sex unnatural:** the “orifice of the mouth is not according to nature meant for sexual or carnal intercourse.”<sup>122</sup> The court applied **two tests.** Its main source, tellingly, came from the UK: **the eminent British sexologist Havelock Ellis.** Following him, it argued that oral sex might be permissible **if it was part of foreplay leading to “natural” (vaginal) sex:** “If the stage of the aforesaid act was for stimulating the sex urge, it may be urged that it was only a prelude to carnal intercourse.”<sup>123</sup> **However, again citing Ellis, it found that when forms of sex play cease being “aids to tumescence” and “replace the desire of coitus,”**

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<sup>119</sup> Ibid. The *Khanu* court still found oral sex “less pernicious than the sin of Sodom.” Its peculiar reasons were that “It cannot be practiced on persons who are unwilling. It is not common and can never be so”—and, most notably, “it cannot produce the physical changes which the other vice produces.”

<sup>120</sup> *Muhammad Ali v. The State*, 1961 All Pakistan Law Decisions, High Court of Dacca, p. 447.

<sup>121</sup> *Lohana Vasantlal Devchand v. The State*, 1968 All India Report, High Court of Gujarat, p. 252.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

then “They became deviations ... and thus liable to be termed ‘perversions.’”<sup>124</sup> The *Lohana* court also developed an “imitative test” for sex acts. For example, oral sex imitated anal sex in terms of penetration, orifice, enclosure, and sexual pleasure. Therefore it could also be punished under Section 377.

*K. Govindan*, a 1969 Indian case, used the “imitative test” from *Lohana* to arrive at the same conclusion as the court in former East Pakistan on “thigh sex”: if “the male organ is ‘inserted’ or ‘thrust’ between the thighs, there is ‘penetration’ to constitute unnatural offence.”<sup>125</sup>

The judge in *Khanu* had said, “I doubt if mutual cheirourgia would be” a form of “carnal intercourse”—turning to Greek to dredge up a euphemism for masturbation.<sup>126</sup> However, a court moved mutual masturbation under the ambit of Section 377 in the Indian case of *Brother John Antony v. State*<sup>127</sup> in 1992. In this case, again, allegations of coercion were of no interest to the court. The judgment instead delves into the “sexually perverse,” analyzing and analogizing practices like “tribadism,” “bestiality,” “masochism,” “fetichism,” “exhibitionism,” and “sadism.”<sup>128</sup> Using the imitative test, it concluded that mutual masturbation falls within 377, as “the male organ of the petitioner is said to be held tight by the hands of the victims, creating an orifice-like thing for manipulation and movement of the penis by way of insertion and withdrawal.”<sup>129</sup>

In Singapore, two cases from the 1990’s—*PP v. Tan Kuan Meng*<sup>130</sup> and *PP v. Kwan Kwong Weng*<sup>131</sup>—followed the distinction (between “prelude to” and “substitute for” the act of “natural” sex) that *Lohana* had laid down. Each of these 377 trials involved a woman’s allegation that a man had forced her to have oral sex. The court in *Kwan*

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<sup>124</sup> *Ibid.*

<sup>125</sup> *State of Kerala v. K. Govindan*, *Criminal Law Journal* (1969), 818 p. 20.

<sup>126</sup> *Khanu* at 286. Cheirourgia, in Greek, means “work done by hands.”

<sup>127</sup> *Brother John Antony v. State*, *Criminal Law Journal* (1992), 124 p. 1352. The case involved charges of oral sex and mutual masturbation against a boarding school teacher.

<sup>128</sup> *Ibid.*, p. 1353.

<sup>129</sup> *Ibid.*

<sup>130</sup> *PP v. Tan Kuan Meng*, 1996 Singapore High Court, p. 16.

<sup>131</sup> *PP v. Kwan Kwong Weng*, 1997 Singapore Law Report, Vol. 1, p. 697.

*Kwong Weng* defined the crime as “fellatio between a man and woman, whether the woman consented or not, which was totally irrelevant.”<sup>132</sup>

*Kwan Kwong Weng* weighed current mores among heterosexuals, taking note of “statistical evidence ... of these forms of oral sex being practised in Singapore. We cannot shut our minds to it.”<sup>133</sup> The court granted “it is a fact of life that foreplay occurs before copulation.” And it held that “when couples engaged in consensual sexual intercourse willingly indulge in fellatio and cunnilingus as a stimulant to their respective sexual urges, neither act can be considered to be against the order of nature. In every other instance the act ... will be ... punishable.”<sup>134</sup>

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

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

This opened again the question: how confidently can the law distinguish between “natural” and “unnatural”? The lack of a self-evident standard in the *Kwan Kwong Weng* case ultimately led to a renewed push in Singapore for reforming the colonial-era provision. That push was given force by more prosecutions of heterosexuals for oral sex. In 2004, Singapore courts sentenced a former policeman to two years in prison for having oral sex with a teenage girl.<sup>135</sup> One judge spoke of “certain offences that are so repulsive in Asian culture ... There are countries where you can go and

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<sup>132</sup> *Ibid.* para 12.

<sup>133</sup> *Ibid.* para 30.

<sup>134</sup> *Ibid.* para 28.

<sup>135</sup> First press accounts suggested that she was 16, above the legal age of consent for (vaginal) sex, and had consented. Later reports, however, suggested she was 15. “Singapore Reviews Oral Sex Law,” *BBC News*, January 6, 2004;

suck away for all you are worth. People in high places do it for all they're worth. I'm not an expert, but you read about it in the papers. But this is Asia.”<sup>136</sup>

“Asia” was not as conservative as the judge thought. Criminalizing *homosexual* acts was one thing; criminalizing *heterosexual* acts by now sparked outrage. Press and public opinion rebelled at the presumption that straight “sucking” was alien to Singapore. Under pressure, the government launched a review of the law. Officials said from the beginning it would aim to decriminalize consensual oral sex between men and women, but leave all oral sex between men banned.<sup>137</sup>

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

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

Singapore is basically a conservative society. The family is the basic building block of our society. It has been so and, by policy, we have reinforced this and we want to keep it so. And by “family” in Singapore, we mean one man one woman, marrying, having children and bringing up children within that framework of a stable family unit.<sup>138</sup>

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<sup>136</sup> Quoted in Mark Baker, “No Oral Sex Please, This Is Clean-Living Singapore,” *Sydney Morning Herald* (Australia), February 18, 2004.

<sup>137</sup> Chan, “Oral Sex — A Case of Criminality or Morality?”

<sup>138</sup> “Lee Hsien Loong’s Speech on Section 377A,” [www.yawningbread.org/apdx\\_2007/imp-360.htm](http://www.yawningbread.org/apdx_2007/imp-360.htm) (accessed August 25, 2008).

Despite the reference to procreation, one thing was clear in the debate: the criterion of “nature” had basically been thrown out the window. If heterosexual oral sex could be legally seen as natural in itself—despite its lack of any connection to “having children”—there was no coherent basis for calling oral sex between two men “unnatural.”<sup>139</sup> One commentator wrote,

I am especially suspicious of arguments that resort to “nature”; these have had an appalling history in justifying racism, sexism, xenophobia and homophobia, leading to the murder and torture of millions of people. What is natural? You might say that transplanting A's kidneys into B's body is unnatural. The fact that an act is or isn't natural is not a good reason to make it a criminal offence.<sup>140</sup>

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

If we seek to copy the sexual libertine ethos of the wild wild West, then repealing s377A is progressive. But that is not our final destination. The onus is on those seeking repeal to prove this will not harm society. ... We have no need of foreign or neo-colonial moral imperialism in matters of fundamental morality. Heterosexual sodomy unlike homosexual sodomy does not undermine the understanding of heterosexuality as the preferred social norm.<sup>141</sup>

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<sup>139</sup> Lee Kuan Yew, the powerful former prime minister, made the shift from nature-based to culture-based arguments explicit, telling supporters: “You take this business of homosexuality. It raises tempers all over the world, and even in America. If in fact it is true -- and I have asked doctors this -- that you are genetically born a homosexual because that's the nature of the genetic random transmission of genes, you can't help it. So why should we criminalise it? But,” he went on, “there's such a strong inhibition in all societies ...” *Straits Times*, April 23, 2007, quoted in “The Oracle from St. James,” [www.yawningbread.org/arch\\_2007/yax-734.htm](http://www.yawningbread.org/arch_2007/yax-734.htm) (accessed November 15, 2008).

<sup>140</sup> Paul Tan Beng Hwee, “Oral sex law demeans the individual,” *Straits Times*, November 10, 2003.

<sup>141</sup> “377A serves public morality : NMP Thio Li-Ann,” *The Online Citizen*, October 23, 2007, <http://theonlinecitizen.com/2007/10/377a-serves-public-morality-nmp-thio-li-ann/> (accessed August 15, 2008). She also warned ominously, “To those who say that 377A penalizes only gays not lesbians, note there have been calls to criminalize lesbianism too.”



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

The Singapore story tears off the mask. It shows that Section 377’s central focus, despite the heterosexual acts it had always punished, lay in eliminating homosexual conduct. It also shows, though, how tenuous the case for that purpose had become. “Nature” was no longer a credible justification. The mores of particular societies were all that was left. As a Malaysian court had declared in 1979 (addressing a wife’s claim that her husband had sexual relations with other men): “Such despicable conduct though permitted among some Westerners should not be allowed to corrupt the community’s way of life.”<sup>142</sup>

Of course, the governments of Singapore and Malaysia, both politically repressive states, had only limited interest in listening to that “community,” or actually testing its values.<sup>143</sup> Elsewhere too, though, invoking a vague set of “national” or “cultural” norms became the main defense of the colonial-era sodomy laws. To the colonizers, laws on sex were needed because the “native” was corrupt and an enticement to moral corruption. Now it was the West that threatened to corrupt indigenous standards.

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

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<sup>142</sup> *Lim Hui Lian v. CM Huddleston*, 1979 Malayan Law Journal, Vol. 2, p. 134.

<sup>143</sup> The only statistical study regularly cited in the debate showed a high level of negative feeling among Singaporeans about homosexuality *per se*, but did not ask whether they wanted those opinions translated into criminal penalties: Benjamin H. Detenber, Mark Cenite, Moses K. Y. Ku, Carol P. L. Ong, Hazel Y. Tong, and Magdalene L. H. Yeow, “Singaporeans’ Attitudes toward Lesbians and Gay Men and their Tolerance of Media Portrayals of Homosexuality,” *International Journal of Public Opinion Research*, Vol. 19, No. 3 (July 2007), pp. 367-79. See also Kenneth Chan, “Gay Sexuality in Singaporean Chinese Popular Culture: Where Have All the Boys Gone?” *China Information*, Vol. 22, No. 2 (July 2008), pp. 305-29.

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

Yet the conclusive factor for the judge, as he studied the accusation under a British law brought to Zambian territory by colonial invaders less than a hundred years before, was: "Accused's behavior is alien to the African custom."<sup>144</sup>

### **Ignoring Rape, Intensifying Stigma**

Consent in the British colonial anti-sodomy laws is irrelevant. In a 1982 sodomy case, the court stated it clearly: "This is one of the offences to which a victim cannot consent."<sup>145</sup> Or, as an Indian court explained, "consent of the victim is immaterial" under Section 377, simply because "unnatural carnal intercourse is abhorred by civilized society."<sup>146</sup>

These laws, in their original form, are thus completely silent about male-male rape. One sinister effect has been to place the victims of such rape under the same legal stigma as people who engage in consensual homosexual acts—or as the rapists. Sometimes, people who have suffered sexual abuse have confronted criminal punishment themselves.

In a 1973 Papua New Guinea case, a man filed a complaint against his employer for committing "sodomy" on him. He ended up convicted himself, as an accomplice. The court believed he had "allowed" himself to be sodomized, fearing he would lose his job if he protested.<sup>147</sup>

The court relied on a 1952 British decision that had determined "the offence of buggery whether with man or beast does not depend upon consent; it depends on

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<sup>144</sup> Quoted in *More than a Name: State-Sponsored Homophobia and Its Consequences in Southern Africa*, pp. 91-92.

<sup>145</sup> *State v Bakobaro*, 1982 Nigerian Criminal Report, Vol. 1, p. 110.

<sup>146</sup> *Mihir v State of Orissa*, 1992 Criminal Law Journal, p. 488.

<sup>147</sup> *Regina v. MK*, 1973 Papua New Guinea Law Report, p. 204.

the act and if an act of buggery is committed, the felony is committed.”<sup>148</sup> Justice Prentice, writing a separate concurring judgment, stated that the word “permit” does not necessarily imply consent, but can simply mean “that once a person allowed, suffered or did not prevent ... intercourse, having perceived what was about to take place—the character of the act—he would be committing an offence.”<sup>149</sup> The Justice also made clear that protecting individuals was not the provision’s purpose. “Buggery,” he wrote, “is one of the offences of sexual indecency which modern text writers see as not designed so much for private protection as for the enforcement of officially received opinions on particular aspects of sexual morality.”

In practice, most courts probably do accept lack of consent as a defense. A Ugandan commentary clarifies, “all participants in unnatural offences are perpetrators, *unless any of them is not a consenting party*.”<sup>150</sup> However exceptional, the Papua New Guinea ruling still shows the sheer travesties of justice the law’s muteness around consent can generate.

Courts dealing with cases of non-consensual “sodomy” continue to show little or no interest in the plight of the victim—only the unnaturalness of the act.<sup>151</sup> And this legal lacuna leads to media and popular opinion regularly mixing “sodomy” up with rape. In Zimbabwe—where the law is similar—one activist says “the angle of articles” in the press about consensual sodomy arrests “is always ... as far as possible to suggest that abuse was involved.”<sup>152</sup>

Malaysia, as recounted below, has tried to address these injustices by separating non-consensual “carnal knowledge against nature” from consensual acts in the Penal Code. (The punishment for the two, however, remains effectively the same.) In country after country, however, British-derived laws continue to restrict the definition

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<sup>148</sup> *Sydney Joseph Bourne*, 1952 Criminal Appeals Report, Vol. 36, p. 125 (United Kingdom). The law of Papua New Guinea derived from the Queensland Penal Code, which expressly punished anyone who “permits a male person to have carnal knowledge of him ... against the order of nature.”

<sup>149</sup> *Regina v. MK*, Prentice J.

<sup>150</sup> D. D. N. Nsereko, “Uganda,” *International Encyclopaedia of Laws*, “Criminal Laws,” Vol. 4, Part 1, ch. 7 (“Particular Crimes”), para. 385 (Leyden: Kluwer Law International, 2006), emphasis added.

<sup>151</sup> See, for instance, *Calvin Francis v. State of Orissa*, 1992 Crimes Report, Vol. 2, p. 455 and *State of Gujarat v. Bachmiya Musamiya*, 1998 Gujarat Law Report, Vol. 2, p. 2456.

<sup>152</sup> Keith Goddard, director, Gays and Lesbians of Zimbabwe, quoted in Long 2003, p. 289.

of rape to forcible insertion of a man's penis in a woman's vagina. India's courts (both before and after independence) in *Khanu*, *Lohana*, and *K. Govindan* have widely expanded the scope of "sodomy": but judges have refused to extend the meaning of rape to make it gender-neutral.<sup>153</sup>

In fact, as will be seen below, campaigns in Malaysia, Sri Lanka, and Botswana that meant to create a gender-neutral definition of rape ended with lawmakers re-defining "unnatural offences" to include sex between women. Meanwhile, legislators have repeatedly denied demands by women's rights activists to criminalize marital rape. Once again the heterosexual marital sphere has been placed beyond the law's reach—both for consensual "unnatural" acts and for rape itself.<sup>154</sup>

Equating consensual and coercive acts, and the lack of any separate punishment for same-sex acts with children, together deepen the stigma around homosexuality. The colonial court in *Khanu* had conflated pedophilia with consensual homosexual conduct between adults. It claimed "the danger to young persons, lest they be

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<sup>153</sup> *Sakshi v. Union of India*, 2004 Supreme Court Cases, Vol. 5, p. 518.

<sup>154</sup> The very definition of "consent" is a point of deep political division in India. Secs 375 and 376 of the IPC, which deal with rape, have accumulated jurisprudence around what "consent" means which, even after independence, reflects Victorian presumptions about women's purity. In a famous 1970s case in Maharashtra, two policemen raped a 16-year-old tribal girl in their station. A local court acquitted the policeman, holding that since the girl had already eloped with her boyfriend, she was "habituated" to intercourse, had implicitly consented—and could not be raped. A high court decision overturned this ruling, and tried to elaborate a distinction between consent on the one hand, or passive submission or helpless surrender due to threat on the other. The Supreme Court overruled the high court and set aside the conviction, holding in effect (similarly to the Papua New Guinea ruling, above) that passive submission was the equivalent of consent.

The case triggered a women's rights campaign to reduce the high standard requiring a rape victim to prove "beyond reasonable doubt" that she had not consented. Advocates demanded that a woman's retrospective claim that she had not consented be given evidentiary force. Partial criminal law reforms in 1983 accepted this standard but only for rape in custodial settings such as jails. During the debate in the Lok Sabha (Parliament), MPs revealed some of the society's underlying attitudes about women's sexuality and how to "protect" and control it. At one extreme—suggesting some women merited no protection—one speaker said, "We're not dealing all the time with virtuous women. We may also deal with some women who unfortunately do not conform to normal standards of womanhood." At another extreme—of repression masquerading as protection—another MP suggested classing any sexual relationship between an unmarried woman and a man as rape, which he claimed would be consistent with "our own sexual morality." Quoted in Nivedita Menon, "Embodying the Self: Feminism, Sexual Violence, and the Law," in Partha Chatterjee and Pradeep Jeganathan, eds., *Community, Gender, and Violence: Subaltern Studies XI* (New York: Columbia University, 2000). See also Flavia Agnes, *Journey to Justice* (Bombay: Majlis, 1990).

Women's rights advocates maintain the Indian judiciary is still rife with the belief that some women—"lewd" or of "questionable character"—deserve no protection against sexual violence. See Oishik Sircar, "Women Make Demands, but Only Ladies Get Protection," at [http://infochangeindia.org/index2.php?option=com\\_content&do\\_pdf=1&id=5621](http://infochangeindia.org/index2.php?option=com_content&do_pdf=1&id=5621), (accessed August 21, 2008). The conflicting standards are conspicuous: no man can consent to "sodomy," but some women cannot deny consent to any sexual act.

indoctrinated into sexual matters prematurely,” as an important justification for anti-sodomy laws. The idea lives on. India’s Home Ministry has warned that “Removal of Section 377 will open floodgates of delinquent behaviour.”<sup>155</sup> The Indian petition against 377 asks only that the High Court reinterpret the provision to decriminalize consensual sex between adults—and leave standing the protection of male children against abuse. Nonetheless, a senior Law Ministry official defended the whole law, saying the Section “acts as an effective deterrent against paedophiles and those with sick minds.”<sup>156</sup>

Independent India’s Supreme Court has held that an offence under 377 implies “sexual perversity.”<sup>157</sup> This lends authority to linking homosexuality indiscriminately with almost any kind of “perversion.” As far back as 1958, a judge in colonial Malaysia identified “sodomy” with sadomasochism, stating that “In view of the well-known psychological connection between the giving and the suffering of pain and sexual perversion, a sentence of whipping is not a suitable punishment for such offence.”<sup>158</sup> An Indian court in 2001 alleged the “perversity” that leads to sexual offences may result either in “homosexuality or in the commission of rape.”<sup>159</sup>

## “Gross Indecency” and Criminalizing Lesbians

“Gross indecency” in British-derived penal codes is highly elastic. A Singapore Court has stated its meaning depends “on what would be considered grossly indecent by any right-thinking member of the public.”<sup>160</sup> Just slightly more specifically, a 1998 amendment to the Tanzanian Penal Code clarified that gross indecency included any act that “falls short of actual intercourse and may include masturbation and indecent behaviour without any physical contact.”<sup>161</sup> Thus two men kissing, holding hands,

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<sup>155</sup> Nagendar Sharma, “Gays Have No Legal Rights: Ministry,” *Hindustan Times*, August 28, 2008.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Fazal Rab Choudhary v. State of Bihar*, 1983 All India Report (Supreme Court), p. 323 .

<sup>158</sup> *Ahmad Bin Hassan v Public Prosecutor*, 1958 Malayan Law Journal, Vol. 1, p. 186 (Court of Appeal).

<sup>159</sup> *Pooran Ram v. State of Rajasthan*, 2001 Criminal Law Journal, p. 91 at para. 31.

<sup>160</sup> *NG Huat v. PP*, 1995 Singapore Law Report, Vol. 2, p. 783: an X-ray technician was charged with “gross indecency” for allegedly touching the chest, nipples and buttocks of a patient.

<sup>161</sup> Sec 3 of the Sexual Offences Special Provisions Act (Act no. 4 of 1998), passed by the Parliament of the United Republic of Tanzania, amended several provisions relating to sexual offences of the Tanzanian Penal Code, including the definition of gross indecency.

sleeping together, or conceivably even looking at one another with sexual intent, could break the law.

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

The usefulness of “gross indecency” in convicting men for homosexual conduct comes clear in the 1946 Singapore case of *Captain Marr*.<sup>162</sup> A naval officer faced charges of committing gross indecency with an Indian man. There were no witnesses, but police found the Indian’s shirt in the captain’s room. Such circumstantial evidence persuaded the court to convict.

The authorities are free to infer “gross indecency” from any suspicious activity. The term is insidious, a legal bridge between “unnatural” sexual acts and the associated identity of a certain kind of person: the “homosexual” as a criminal offender. Homosexuality becomes a crime of the “personal condition.” This broader understanding of “unnatural acts” permits state and police harassment on a wider scale. A homosexual need not be caught in the act: presumptions fed by prejudice, or stereotypes of attire, manner, or association, are enough.<sup>163</sup>

“Gross indecency” has been used to extend criminal penalties to sex between women. Lesbian sex had never been expressly punished in English law. The colonial court in *Khanu* excluded it from “carnal knowledge” because a woman lacked a

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<sup>162</sup> *Rex v. Captain Douglas Marr*, 1946 Malayan Law Journal, Vol. 1, p. 77.

<sup>163</sup> A 1957 Ugandan case showed how stereotype and presumption—about relations between the races, as well as sex itself—could also serve as conclusive evidence in cases of “sodomy.” A British officer had given a “native” herdsman one shilling and some sugar as gifts. The unusualness of this “special favor” across the power divide created a presumption of sodomy, leading to the officer’s arrest. *Hoyle v. Regiman*, Criminal Appeal No. 242, 1957 Uganda Law Report, pp. 314-321.

penis. A recent Ugandan commentary explains that “women who perform sexual acts on each other are not caught by the current law because they do not possess a sexual organ with which to penetrate each other.”<sup>164</sup> Non-penetrative sex is not “real” sex.<sup>165</sup>

Between men, however, it was seen as something sex-like enough to be “grossly indecent.” There was no reason the same logic could not extend to women. Some modern governments did want lesbian acts and identities moved under the criminal law. They found their chance through public debate about reforming rape laws. In the late 1980s the Malaysian women’s movement campaigned for a new, gender-neutral definition of rape, as well as for criminalizing marital rape.<sup>166</sup> Partially in response to their lobbying, the legislature in 1989 moved to amend the Penal Code.<sup>167</sup>

In the end, however, legislators ignored the calls to modernize law on rape, and instead turned their scrutiny to Section 377. Their comprehensive re-write divided the Section into five different parts, while broadening its meaning and reach more than ever before. Their excuse? They could make rape effectively gender-neutral by adding a new crime of non-consensual “carnal intercourse against the order of nature.”<sup>168</sup> The new provision also offered limited protection for children against sexual abuse.<sup>169</sup> But the two most significant changes were:

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<sup>164</sup> Lillian Tibatemwa-Ekirikubinza, *Criminal Law in Uganda: Sexual Assaults And Offences Against Morality* (Kampala: Fountain Series in Law and Business Studies, 2005), p. 97.

<sup>165</sup> Sylvia Tamale, “Out of the Closet: Unveiling Sexuality Discourses in Uganda,” *Feminist Africa* (February 2003), [http://www.feministafrica.org/fa%202/02-2003/sp-tamale.html#\\_ftn2](http://www.feministafrica.org/fa%202/02-2003/sp-tamale.html#_ftn2) (accessed September 3, 2006).

<sup>166</sup> The Joint Action Group on Violence against Women (JAG-VAW) led the movement. Their initial proposal called for an additional Sec 375A of the Penal Code, to redefine sexual intercourse as: “a. sexual connection occasioned by the penetration of the vagina of any person or anus of any person by , 1.any part of the body of another person; or 2. an object manipulated by another person except where the penetration is carried out for proper medical purposes; b. sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person; c. cunnilingus.” Beng Hui, “One Step Forward, Two Steps Back? Conundrums of the Rape Legal Reform Campaign in Malaysia,” *Gender, Technology and Development*, Vol. 11, No. 1 (2006).

<sup>167</sup> Criminal Code (Amendment) Act 1989 (Act A727 of 1989).

<sup>168</sup> The punishment—five to 20 years’ imprisonment—remained almost the same as for consensual homosexual acts, but was equivalent to the punishment for a man’s rape of a woman: “377A. Carnal intercourse against the order of nature. Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature. Explanation: Penetration is sufficient to constitute the sexual connection necessary to the offence described in this section. 377B. Punishment for committing carnal intercourse against the order of nature. Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping. 377C. Committing carnal

- For the first time in a British-derived legislative provision, “carnal intercourse” was expressly defined as both anal and oral sex.
- In a vengeful and almost parodic response to the demands of women’s rights activists, the offence of “gross indecency” was made gender-neutral.<sup>170</sup> It could now be applied to heterosexual couples—and also to lesbian and bisexual women.<sup>171</sup>

A similar, regressive rape law change occurred in Sri Lanka. Falling back on religious and communal values, the state rejected women’s rights activists’ demands to legalize abortion, criminalize marital rape, and make the crime of rape gender-neutral. However, it did amend the “gross indecency” provision to make it gender-neutral and apply to sex between women.<sup>172</sup>

Meanwhile, in Botswana, legislators put gender-neutral language in both the “carnal knowledge” and “gross indecency” provisions of the British-derived Penal Code, in a general revision aiming at gender equity in 1998.<sup>173</sup>

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intercourse against the order of nature without consent, etc. Whoever voluntarily commits carnal intercourse against the order of nature on another person without the consent, or against the will, of the other person, or by putting other person in fear of death or hurt to the person or any other person, shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping.”

<sup>169</sup> The provisions on “carnal intercourse” continued to make no distinction between adults and children. The only specific protection for children was in the new 377E, “Inciting a child to an act of gross indecency: Any person who incites a child under the age of fourteen years to any act of gross indecency with him or another person shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to whipping.” However, the punishment for sexual relations with a girl under 16 (under “Rape,” Sec 375) is substantially higher, including imprisonment from five to 20 years. Penetrative rape of male children remained without specific mention in the code.

<sup>170</sup> “Sec 377D: Outrages on decency: Any person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be punished with imprisonment for a term which may extend to two years.”

<sup>171</sup> Courts have been slow to adopt this interpretation, however. As late as 1998 a court still held that the purpose of Sec 377D was to punish “gross indecency” between men alone. *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor*, 1998 Malayan Law Journal, Vol. 4, p. 742. Meanwhile, the introduction of Islamic (Syariah) law in Malaysia has also created new or parallel sexual offences. Some states have passed Syariah Enforcement enactments, punishing not only *Liwat*—sodomy—but also *Musahaqah*, defined as “sexual relations between female persons” and punished with three years’ imprisonment, fines, or whipping: see, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Sec 26.

<sup>172</sup> One activist argues that “the criminalization of lesbianism” in Sri Lanka derives not just from a “lack of clarity” about how to classify sexual behaviour before the law, but also from the stigma created by the “confusion between male homosexuality and pedophilia”: Yasmin Tambiah, “Realising Women’s Sexual Rights: Challenges in South Asia,” *Nordic Journal of International Law*, No. 67 (1998), pp. 97-105.

<sup>173</sup> Long 2003, pp. 272-74.



## V. Conclusion: The Emancipatory Potential of Decriminalization

What are so-called “sodomy” laws for?

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

It is important to start the analysis by asking what is really being punished by the anti-sodomy laws. Is it an act, or is it a person? Outside of regulatory control, conduct that deviates from some publicly established norm is usually only punishable when it is violent, dishonest, treacherous or in some other way disturbing of the public peace or provocative of injury. In the case of male homosexuality however, the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than because of its proven harm. .... Thus, it is not the act of sodomy that is denounced... but the so-called sodomite who performs it; not any proven social damage, but the threat that same-sex passion in itself is seen as representing to heterosexual hegemony.<sup>174</sup>

The legal scholar Dan Kahan writes that “Sodomy laws, even when unenforced, express contempt for certain classes of citizens.”<sup>175</sup> This contempt is not simply symbolic. Ryan Goodman, in exhaustive research based on interviews with lesbian and gay South Africans before the sodomy law was repealed, found the statutes have multiple “micro-level” effects. These impacts are independent of occasions when the law is actually enforced. To the contrary: even without direct enforcement, the laws’ malign presence on the books still announces inequality, increases vulnerability, and reinforces second-class status in all areas of life.

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<sup>174</sup> *National Coalition for Gay and Lesbian Equality v. Minister of Justice and Others*. 1999 (1) South Africa 6 (Constitutional Court), at 108.

<sup>175</sup> Dan M. Kahan, “The Secret Ambition of Deterrence,” *Harvard Law Review*, Vol. 113 (1999), p. 413.

The laws “disempower lesbians and gays in a range of contexts far removed from their sexuality (for example, in disputes with a neighbor or as victims of burglary),” Goodman writes. They influence other areas of knowledge: “the criminalization of homosexual practices interacts with other forms of institutional authority, such as religion and medicine.” The statutes empower social and cultural arbiters to call the homosexual a criminal. Goodman concludes that “The state’s relationship to lesbian and gay individuals under a regime of sodomy laws constructs ... a dispersed structure of observation and surveillance. The public is sensitive to the visibility of lesbians and gays as socially and legally constructed miscreants.”<sup>176</sup>

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

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

### ***India***

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

*They were jailed for 47 days. A Lucknow judge denied them bail, accusing them of “polluting the entire society.” The prosecutor in the case called homosexuality “against Indian culture.” In jail guards threatened and beat them; police told the*

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<sup>176</sup> Ryan Goodman, “Beyond the Enforcement Principle: Sodomy Laws, Social Norms and Social Panoptics,” *California Law Review*, Vol 89, No 3 (May 2001), pp. 643-740.

*prisoners they were "trying to destroy our country by promoting homosexuality" and that "Hindus don't have these practices—these are all perversions of the Muslims."<sup>177</sup>*

*In January 2006, the same police superintendent in Lucknow oversaw the arrest of four more men under Section 377: the police said they were engaged in a "picnic" in a public place, and accused them of belonging to an "international gay club." An attorney in the case told Human Rights Watch that undercover police agents logged into an internet chatroom and pretended to be gay men, entrapping one of the victims into meeting, then arrested him. In custody, he was threatened until he agreed to call several acquaintances and arrange a meeting in person, at which point the police arrested them as well. Press reports suggested that police obtained the mobile telephone numbers or identifying information of 18 to 40 other gay men in Lucknow, and that they were also investigating hundreds of other men in India who had logged onto the website.<sup>178</sup>*

*Section 377 continues to provide a pretext for police harassment, extortion, arrests, unreported and arbitrary detention, and other abuses against LGBT people in India.<sup>179</sup> The law creates legal stigma for lesbians as well. In 2006 in New Delhi the father of a 21-year-old woman told the police that his daughter's lesbian partner had "abducted" her. A magistrate refused to accept the daughter's statement that she had left the parental home of her own free will, saying, "it appears that ...there are hidden allegations of an offence under Section 377 as well."<sup>180</sup>*

*Reports also continue in India of forced detention of lesbians and gays in psychiatric hospitals, and involuntary aversion therapy and other forms of abuse aimed at "converting" people to heterosexuality. In April 2001 the National Human Rights Commission of India declared that it "did not want to take cognizance" of a case*

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<sup>177</sup> "Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India," a Human Rights Watch report, 2002.

<sup>178</sup> Human Rights Watch, "Letter to Indian Prime Minister Singh on the Arrest of Four Men on Charges of Homosexual Conduct in Lucknow," January 10, 2006.

<sup>179</sup> *Human Rights Violations Against Sexuality Minorities in India: A PUCL-K Fact-Finding Report About Bangalore*, a report by Peoples' Union for Civil Liberties-Karnataka (PUCL-K), February 2001, [www.pucl.org/Topics/Gender/2003/sexual-minorities.pdf](http://www.pucl.org/Topics/Gender/2003/sexual-minorities.pdf); and *Human Rights Violations Against the Transgender Community: A Study of Kothi and Hijra Sex Workers in Bangalore, India*, PUCL-K, September 2003.

<sup>180</sup> Recorded in the "Intervention Application" filed by Voices Against 377 (a coalition of civil society groups) in the ongoing challenge against Sec 377's application to consensual homosexual acts, in the Delhi High Court, Civil Writ Petition No. 7455/2001.

*objecting to these medical abuses. The commission stated that "sexual minority rights did not fall under the purview of human rights." <sup>181</sup> Reportedly a member of the Commission told the press, "Homosexuality is an offence under IPC, isn't it? So, do you want us to take cognizance of something that is an offence?"<sup>182</sup>*

### **Pakistan**

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

*The case led to a full-blown public panic, coursing through the media and eventually the courts. Raj had undergone two operations to alter his physical appearance to match the gender he lived in. Headlines nonetheless called them a "she-couple," a "same-sex couple," and two "girls" or "lesbians," and described—and dismissed—their union as the country's first same-sex marriage.<sup>183</sup>*

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

*A court-appointed panel of forensic doctors had, in the end, to try to settle the issue of legal identity. As Human Rights Watch has noted, "It was more important to identify the history behind Shumail Raj's full beard and masculine build than to recognise his right to privacy, his dignity and self-respect."<sup>184</sup>*

*Prosecutors chose ultimately not to try the pair under 377; the uncertainty over Raj's gender joined with the legal ambiguity over whether the law could be used against what officials now saw as a lesbian relationship. Clearly, though, the stigma the provision created helped set off the investigation and sustain hysterical public pressure. On May 28, 2007, a court sentenced the couple to three years'*

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<sup>181</sup> *Human Rights Watch World Report 2002*, "Lesbian, Gay, Bisexual, and Transgender Rights," p. 605.

<sup>182</sup> Cited in Narrain 2004, p. 89.

<sup>183</sup> Jessica Stern, "An Identity Under Scrutiny," *Dawn* (Pakistan), June 21, 2007, <http://hrw.org/english/docs/2007/06/21/pakist16231.htm>.

<sup>184</sup> *Ibid.*

*imprisonment for perjuring themselves — for saying in court that Shumail Raj was a man. The judge called the sentence “lenient.”<sup>185</sup>*

### **Sri Lanka**

*Extending criminal penalties in 1995 to include sexual acts between women led to an increased atmosphere of stigma and menace. The leader of an LGBT support group has reported having to leave the country for a time because of death threats.<sup>186</sup> In 2000, when a lesbian conference was held on the island, a newspaper printed a letter to the editor urging the participants be raped, “so that those wanton and misguided wretches may get a taste of the zest and relish of the real thing.”*

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

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

*The Council instead slapped a fine on the complainant, one of the conference’s organizers.<sup>187</sup>*

### **Singapore**

*Singapore police periodically use its laws on homosexual conduct to raid gay gathering places, including saunas: one raid in 2001 led to four men being charged initially under Section 377A, though the charge was later moved under Section 20 of the Miscellaneous Offences (Public Order and Nuisance) Act. The men received a*

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<sup>185</sup> “Same Sex Couple Jailed for Perjury,” *The News* (Pakistan), May 29, 2007; Monica Izam, “Victims of Inhumane Society,” *Dawn*, June 21, 2007.

<sup>186</sup> Quoted in Chloe Arnold, “Sri Lanka’s Gays Share Their Journey,” *BBC News*, May 20, 2005.

<sup>187</sup> International Gay and Lesbian Human Rights Commission, “National Press Council Calls Lesbianism ‘An Act of Sadism,’” <http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=382> (accessed August 28, 2008).

*substantial fine.<sup>188</sup> Further raids took place in April 2005.<sup>189</sup> There may be no organized official campaign against such establishments. Rather, local activists point to the enticing possibilities of blackmail that the laws offer lower-ranking officers as an incentive to repeated incursions. The provisions implicitly encourage arbitrary behavior.<sup>190</sup>*

*The government—conscious of its international image, and of pressure from international business—has occasionally made gestures toward non-discrimination, but its commitment to Section 377A strips them of meaning. In 2003, the prime minister publicly said that civil service jobs were open to gay people. Christian groups vigorously objected, and launched a protest campaign targeting Parliament and press.<sup>191</sup> Two years later, a researcher interviewed civil servants about whether the promise had any effect, and heard “a uniformly resounding ‘no.’” He concluded the prime minister’s statement was “nothing more than an embellishing discourse designed to make Singapore appear more attractive to potential immigrants.”<sup>192</sup>*

*Police keep tight control on all public or political events in Singapore. In 2004, they banned a theatre group from holding seminars on gay literature.<sup>193</sup> Authorities have also denied permits to gay pride events. Censorship enforces silence about LGBT people’s lives.<sup>194</sup> In 2004, the state film board banned a Taiwanese romantic comedy for its gay themes, saying it “creates an illusion of a homosexual utopia,*

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<sup>188</sup> 600 Singapore dollars, the equivalent of about US\$400 at the time: see “The arrests at One Seven and Section 20,” at [http://www.yawningbread.org/arch\\_2001/yax-248.htm](http://www.yawningbread.org/arch_2001/yax-248.htm).

<sup>189</sup> “Singapore Police Arrest Four in Gay Sauna,” *Utopia-Asia.com*, [http://www.utopia-asia.com/unews/article\\_2005\\_05\\_3\\_114741.htm](http://www.utopia-asia.com/unews/article_2005_05_3_114741.htm) (accessed August 28, 2008), and “Singapore Police Raid Gay Sauna; Arrest Owner,” *Topix.com*, [http://www.utopia-asia.com/unews/article\\_2005\\_05\\_3\\_114741.htm](http://www.utopia-asia.com/unews/article_2005_05_3_114741.htm) (accessed August 28, 2008); e-mail to Human Rights Watch from a Singapore activist, November 20, 2008.

<sup>190</sup> E-mail to Scott Long, Human Rights Watch, from a Singapore activist who asked not to be named, November 20, 2008.

<sup>191</sup> M. Nirmala, “Gay Backlash,” *Straits Times*, July 23, 2003.

<sup>192</sup> Chris K. K. Tan, “Turning the Lion City Pink: Interrogating Singapore’s New Gay Civil Servant Statement,” unpublished paper presented at the Sexualities, Genders, and Rights in Asia conference, Bangkok, July 2005, <http://bangkok2005.anu.edu.au/papers/Tan.pdf> (accessed August 28, 2008).

<sup>193</sup> “Singapore police ban gay literature seminars,” March 11, 2004, *M2 Best Books*, [http://findarticles.com/p/articles/mi\\_moKNB/is\\_2004\\_March\\_11/ai\\_n25084816](http://findarticles.com/p/articles/mi_moKNB/is_2004_March_11/ai_n25084816) (accessed August 28, 2008).

<sup>194</sup> The government’s power to censor is enormous, but scattered among several agencies, meaning that standards are erratic and unpredictable—and leave writers or artists perpetually unsure where the line will be drawn. See Alex Au, “Making Sense of Censorship in Singapore,” *Fridae.com*, January 30, 2007, <http://www.fridae.com/newsfeatures/article.php?articleid=1846&viewarticle=1> (accessed August 28, 2008).

where ... no ills or problems are reflected.<sup>195</sup> In 2008, authorities fined a Singapore television station for a show that depicted a gay couple and their baby, alleging it "promotes a gay lifestyle."<sup>196</sup> They also fined a cable station that aired a commercial with two women kissing, because "TV advertising guidelines ... disallow advertisements that condone homosexuality."<sup>197</sup>

Perhaps the most serious side effect, though, is that the state rejects all attempts by LGBT groups to register their organizations legally. One activist laments, "The laws make for a chicken-and-egg problem. In order to work towards decriminalization, the gay community has to get organized, but organizing to defend a 'criminal act' in turn makes gay people and their supporters cagey."<sup>198</sup> One Singapore gay leader told Human Rights Watch in 2008: "In the absence of legality, we are effectively breaking the law whenever we organize anything."<sup>199</sup>

### **Uganda**

For years, Uganda's government has used the criminalization of homosexual conduct to threaten and harass Ugandans. In 1998, President Yoweri Museveni told a press conference, "When I was in America, some time ago, I saw a rally of 300,000 homosexuals. If you have a rally of 20 homosexuals here, I would disperse it." True to his word, when (inaccurate) press reports the next year recounted a wedding between two men in Uganda, Museveni told a conference on reproductive health, "I have told the CID [Criminal Investigations Department] to look for homosexuals, lock them up, and charge them." Police obediently jailed and tortured several suspected lesbians and gays; most later fled the country.<sup>200</sup>

Similarly, in October 2004, the country's information minister, James Nsaba Buturo, ordered police to investigate and "take appropriate action against" a gay association

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<sup>195</sup> "Socially Conservative Singapore Bans Popular Gay-Oriented Taiwanese Film," *Taipei Times*, July 23, 2004.

<sup>196</sup> "Singapore Censors Fine Local TV Station for Airing Show Featuring Gay Couple," *International Herald Tribune*, April 24, 2008.

<sup>197</sup> Singapore Media Development Authority statement, "Starhub Cable Vision fined for breaching the TV Advertising Code," <http://www.mda.gov.sg/wms.www/thenewsdesk.aspx?sid=861> (accessed August 28, 2008).

<sup>198</sup> Russell Hiang-Kheng Heng, "Tiptoe Out of the Closet: The Before and After of the Increasingly Visible Gay Community in Singapore," in Gerard Sullivan and Peter A. Jackson, eds., *Gay and Lesbian Asia: Culture, Identity, Community*, (Binghamton, NY: Harrington Park Press, 2001), p. 90.

<sup>199</sup> E-mail to Scott Long, Human Rights Watch, from a Singapore activist who asked not to be named, August 5, 2008.

<sup>200</sup> Human Rights Watch, *More than a Name*, pp. 50-51.

*allegedly organized at Uganda's Makerere University. On July 6, 2005, the government-owned New Vision newspaper urged authorities to crack down on homosexuality: "The police should visit the holes mentioned in the press, spy on the perverts, arrest and prosecute them. Relevant government departments must outlaw or restrict websites, magazines, newspapers and television channels promoting immorality – including homosexuality, lesbianism, pornography, etc." That month, local government officers raided the home of Victor Mukasa, an activist for LGBT people's human rights and chairperson of Sexual Minorities Uganda (SMUG). They seized papers and arrested another lesbian activist, holding her overnight.*<sup>201</sup>

*LGBT activists held a press conference in Kampala in August 2007, launching a public campaign they called "Let Us Live in Peace." The next day, Buturo, now ethics and integrity minister, told the BBC that homosexuality was "unnatural." He denied police harassment of LGBT people, but added menacingly, "We know them, we have details of who they are." Four days later, the press announced that the attorney general had ordered lesbians and gays arrested. "I call upon the relevant agencies to take appropriate action because homosexuality is an offense under the laws of Uganda," he reportedly said. "The penal code in no uncertain terms punishes homosexuality and other unnatural offenses."*<sup>202</sup>

*The media intensify the metastasizing fear. In August 2007, the Uganda tabloid paper Red Pepper published a list of first names, workplaces, and other identifying information of 45 alleged gay men. In exposing the victims to firing or the threat of violence, the paper claimed it published the list "to show the nation ... how fast the terrible vice known as sodomy is eating up our society."*<sup>203</sup>

## **Nigeria**

*Arrests under Nigeria's federal sodomy law happen steadily, as local headlines suggest: "Paraded by Police for Homosexuality, Married Man Blames 'Evil Spirit' For*

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<sup>201</sup> Human Rights Watch, "Uganda: Press Homophobia Raises Fears of Crackdown: Government Campaign Against Gay and Lesbian Community Escalates," September 8, 2006.

<sup>202</sup> Human Rights Watch, "Uganda: State Homophobia Threatens Health and Human Rights: Government Persecution Contributing to HIV Pandemic," August 23, 2007.

<sup>203</sup> Human Rights Watch, "Uganda: Press Homophobia Raises Fears of Crackdown."



*His Unholy Act*<sup>204</sup>; or “Caught in the Act: 28-yr-old Homosexual Arrested by OPC While in Action.”<sup>205</sup>

*Most of Nigeria’s Northern provinces now have their own penal codes. These combine principles of Islamic law with elements of the Northern Nigeria Penal Code adopted at the time of independence.*<sup>206</sup>

*The penal codes of Kano and Zamfara states have simply taken over the language of the British colonial provisions on “carnal intercourse against the order of nature,” and put it under the shari’a-esque heading of “sodomy (liwat).” They provide punishments of 100 lashes for unmarried offenders, and death by stoning for married ones. The Zamfara Penal Code also criminalizes “lesbianism (sihaq),” punishing it with up to 50 lashes and six months’ imprisonment:*

*Whoever being a woman engages another woman in carnal intercourse through her sexual organ or by means of stimulation or sexual excitement of one another has committed the offence of Lesbianism. ... The offence is committed by the unnatural fusion of the female sexual organs and or by the use of natural or artificial means to stimulate or attain sexual satisfaction or excitement.*<sup>207</sup>

*Courts in the north have handed down death sentences for homosexual conduct under the combined shari’a-and-colonial codes, though there have been no accounts of executions—yet. The UN special rapporteur on extrajudicial, summary, or arbitrary executions reports that on a 2005 visit to Nigeria, he asked to meet with all death-row inmates in Kano prison:*

*One of them was a 50 year old man awaiting death by stoning after being convicted of sodomy. A neighbour had reported him to the local*

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<sup>204</sup> *The Sun* (Nigeria), June 27, 2003.

<sup>205</sup> *Sunday Punch* (Nigeria), August 10, 2003 (with picture of the man’s face, showing only his eyes blacked out).

<sup>206</sup> The entire concept of codification is alien to the spirit and history of *shari’a* law, which traditionally is embodied in the scattered rulings of jurists in the four Sunni schools. That *shari’a* advocates in northern Nigeria have turned to imposing full-fledged codes further reveals how the colonial legacy persists.

<sup>207</sup> Article 135 of the Zamfara Penal Code, <http://www.zamfaraonline.com/sharia/chaptero8.html> (accessed August 25, 2008). See also *Political Shari’a? Human Rights and Islamic Law in Northern Nigeria*, a Human Rights Watch report, 2004.

*Hisbah Committee [described by the Rapporteur as “groups of mostly young men who patrol neighbourhoods with the aim of preventing crime and arresting individuals suspected of committing crimes against the Shari’a ”] which carried out a citizen arrest and handed him to the police. He claimed to have been comprehensively beaten by both groups. The official court records show that he admitted to the offence, but sought the court’s forgiveness. He had no legal representation and failed to appeal within the time provided. The Special Rapporteur subsequently took steps so that a late appeal could be lodged and the case is now under review.*

*In December 2005 the Katsina Shari’a Court acquitted two other men charged with the capital offence of sodomy, because there were no witnesses. They had nevertheless spent six months in prison on remand which the judge reportedly said should remind them “to be of firm character and desist from any form of immorality.”<sup>208</sup>*

*Although draconian provisions were in place at federal and state levels, Nigeria’s government tried to go further. In January 2006, the president’s office proposed new legislation called the “Same Sex Marriage (Prohibition) Act.” That was a misnomer: the bill’s reach went far beyond marriage. It would punish any “publicity, procession and public show of same sex amorous relationship through the electronic or print media physically, directly, indirectly or otherwise,” and adoption of children by lesbian or gay couples or individuals. It dictated five years’ imprisonment for anyone, including a cleric, who abetted a same-sex couple in marrying—and for any person “involved in the registration of gay clubs, societies and organizations, sustenance, procession or meetings, publicity and public show of same sex amorous relationship directly or indirectly in public and in private.” In addition to condemning to prison human rights defenders who address issues of sexuality, the bill could be used to jail even lesbian or gay couples holding hands.<sup>209</sup>*

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<sup>208</sup> “Extrajudicial, Summary, or Arbitrary Executions, Report of the Special Rapporteur, Mr. Philip Alston, Mission to Nigeria,” January 7, 2006, E/CN.4/2006/53/Add.4, at 21-24.

<sup>209</sup> Human Rights Watch, “Nigeria: Anti-Gay Bill Threatens Democratic Reforms: Homophobic Legislation Restricts Free Speech, Association, Assembly,” February 28, 2007.

*Despite a push to rush the bill through the National Assembly in early 2007, it eventually died without a vote. It could, however, be revived at any time. In international arenas, Nigeria has continued its campaign, openly calling for killing people who engage in homosexual conduct. At the UN Human Rights Council in September 2006, Nigeria ridiculed “the notion that executions for offences such as homosexuality and lesbianism is [sic] excessive.” Its diplomat said: “What may be seen by some as disproportional penalty in such serious offences and odious conduct, may be seen by others as appropriate and just punishment.”<sup>210</sup>*

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

The paradox remains that a democratic government promoted this repressive legislation as part of indigenous values, although it actually extended old, undemocratic colonial statutes. “Basically it is un-African to have a relationship with the same sex,” the Nigerian minister of justice said in 2006. A national newspaper intoned, “This progressive legislation is expected to put a check on homosexuality and lesbianism, a deviant social behaviour fast gaining acceptance in Western countries.”<sup>211</sup>

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

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<sup>210</sup> “Recognizing Human Rights Violations Based on Sexual Orientation and Gender Identity at the Human Rights Council Session 2,” ARC International (2006); also available on Human Rights Council Website, [www.unhchr.ch](http://www.unhchr.ch).

<sup>211</sup> Minister of Justice Bayo Ojo, and the newspaper *Nigeria First*, both quoted in “Nigeria: Government proposes law to ban same-sex marriage,” *IRIN Africa*, January 20, 2006, <http://www.irinnews.org/report.aspx?reportid=57879> (accessed August 26, 2008).

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

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

Removing the sodomy laws would affirm human rights and dignity. It would also repair a historical wrong that demands to be remembered. The legacy of colonialism should no longer be confused with cultural authenticity or national freedom. An activist from Singapore writes: "It's amazing" that millions of people "have so absorbed Victorian prudishness that even now, when their countries are independent— and they are all happy and proud they're free from the yoke of the British—they stoutly defend these laws." He concludes, "The sun may have set on the British Empire, but the Empire lives on."<sup>212</sup> These last holdouts of the Empire have outlived their time.

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<sup>212</sup> "The Map's Tale," [http://www.yawningbread.org/arch\\_2004/yax-350.htm](http://www.yawningbread.org/arch_2004/yax-350.htm) (accessed August 15, 2006).

## Recommendations

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

- Repeal all laws that criminalize consensual sexual activity among adult people of the same sex.
- Ensure that criminal and other legal provisions of general application are not used to punish consensual sexual activity among adults of the same sex.
- Pass laws defining the crime of rape in a gender-neutral way so that the rape of men by men, or of women by women, is included in the definition and subject to equal punishment.
- Pass laws expressly criminalizing the rape or sexual abuse of children.
- Consistent with the principle of non-discrimination, ensure that an equal age of consent applies to both same-sex and different-sex sexual activity.
- Repeal any law that prohibits or criminalizes the expression of gender identity, including through dress, speech or mannerisms, or that denies individuals the opportunity to change their bodies as a means of expressing their gender identity.

To the Commonwealth Secretariat

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

To the United Nations and its human rights mechanisms

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

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# This Alien Legacy

## The Origins of “Sodomy” Laws in British Colonialism

More than 80 countries around the world still make consensual homosexual sex between adults a crime.

More than half have these laws because they used to be British colonies.

This report describes the strange afterlife of a colonial legacy. In 1860, British colonizers introduced a new criminal code to occupied India. Section 377 of the code prohibited “carnal intercourse against the order of nature.”

Versions of this Victorian law spread across the British Empire. They were imposed to control the colonies, put in place because imperial masters believed that “native” morals needed “reform.”

They are still in force from Botswana to Bangladesh, from Nigeria to Papua New Guinea—even though the United Nations and international law condemn them.

These laws invade privacy and create inequality. They condemn people to outlaw status because of how they look or whom they love. They are used to discredit enemies and destroy careers. They can incite violence and excuse murder. They hand police and others the power to arrest, blackmail, and abuse.

Today, as a court case in India tries to eliminate the original Section 377’s repressive force, this report documents their dangerous effects. These holdouts of the British Empire have outlived their time.

*The British Viceroy of India and his wife in the 1930s, in their robes of state, together with Indian attendants. Through law and example, British imperialism strove to impose Western practices on its colonized peoples—including promoting models of Victorian propriety, and criminalizing sexual behaviors that did not conform.*

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