

# SAME-SEX LOVE AND INDIAN PENAL CODE § 377: AN IMPORTANT HUMAN RIGHTS ISSUE FOR INDIA

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*The paper discusses the relatively new phenomena of “sexual orientation” and “gender identity”, the reasons why criminalisation of same-sex sexual activity by IPC §377 is an important human rights issue for India, the roots of §377 in Christian religious law, and the repeal of its equivalent in English criminal law. It then examines the trends in international and comparative human rights law that would support a decision by the Supreme Court of India to affirm the Delhi High Court’s “reading down” of §377 as not applying to private, consensual, adult sexual activity.*

## I. INTRODUCTION

In India, as in every country in the world, there exists a small minority of men who fall in love with other men, and women who fall in love with other women. These “same-sex-loving” men and women face widespread legal and social discrimination. As a result of films like “Fire” (1996), “Dostana” (2008) and “Dunno Y” (2010), and other discussions in the media, Indian society can no longer deny their existence.<sup>1</sup> In *Naz Foundation v. Government of NCT of Delhi and Others*,<sup>2</sup> the Delhi High Court (consisting of

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<sup>1</sup> See also *BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA* (Arvind Narrain & Gautam Bhan eds., 2005); *Rights for All: Ending Discrimination Against Queer Desire Under Section 377* in *VOICES AGAINST 377* (2005); PARMESH SHAHANI, *GAY BOMBAY: GLOBALIZATION, LOVE AND (BE)LONGING IN CONTEMPORARY INDIA* (2008); *THE RIGHT THAT DARES TO SPEAK ITS NAME: NAZ FOUNDATION V. UNION OF INDIA AND OTHERS: DECRIMINALISING SEXUAL ORIENTATION AND GENDER IDENTITY IN INDIA* (Arvind Narrain & Marcus Eldridge eds., 2009).

<sup>2</sup> *Naz Foundation v. Government of NCT of Delhi & Ors.*, 2009 (160) DLT 277.

Chief Justice Ajit Prakash Shah and Dr. Justice S. Muralidhar) took the first step towards dismantling the legal discrimination they face, by interpreting the Constitution of India as requiring a “reading down” of the offence of “carnal intercourse against the order of nature” in §377 of the Indian Penal Code. The Delhi High Court’s judgment has been appealed to the Supreme Court of India.<sup>3</sup> I will argue in this article that *Naz Foundation* raises important human rights issues, and that persuasive authorities from international and comparative human rights law provide solid support for a judgment of the Supreme Court affirming the “reading down”, and clearly extending it from the State of Delhi to the whole of India.

I will begin by explaining what I mean by “same-sex love”, “sexual orientation”, and “gender identity”, why *Naz Foundation* is an important case, and how §377 began in Christian religious law and reached India via English criminal law, before describing trends in international and comparative human rights law related to discrimination based on sexual orientation. There are two major trends: a growing judicial treatment of “sexual orientation” as a “suspect ground” of discrimination (i.e. raising a strong presumption, under international human rights treaties and national constitutions, against discrimination based on sexual orientation); and a gradual elimination of legal and social discrimination based on sexual orientation (as a result of the application of this presumption by courts and legislatures). I will then turn to a specific aspect of these two trends: the decriminalisation of same-sex sexual activity in at least 58% of the 192 member states of the United Nations, and the decisions of international human rights tribunals and national appellate courts that have required decriminalisation in some of these states.

## II. PHENOMENA AND TERMINOLOGY: SEXUAL ORIENTATION AND GENDER IDENTITY

Since at least 1980, international human rights tribunals and national constitutional courts around the world have been asked to consider issues of discrimination related to two new phenomena: “sexual orientation” and “gender identity”. These phenomena have presented a challenge to societies and legal systems, because they represent two previously hidden aspects of human diversity. They are characteristics that are possessed by every human being, but manifest themselves in different ways, each one defining a majority and a minority, or a more powerful group and a less powerful group. Societies have always known that every person has a biological sex (generally male or female), an age (calculated from their date of birth), and a set of ancestors (who determine the person’s racial, national or ethnic origins). Societies have also known

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<sup>3</sup> Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors., SLP(C) No. 15436 of 2009.

that most people have a religion, and that some people have physical disabilities (often causing obvious impairments). The concepts of sexual orientation and gender identity, however, did not exist for centuries, because every individual was presumed to be heterosexual (to be attracted emotionally and physically only to persons of the opposite sex), and to be non-transgender (to have a psychological sex that matched their physical sex).

As more and more persons of minority sexual orientation or gender identity have stated publicly that they are different, it has become necessary to develop terminology to describe these characteristics, and the majority and minority groups defined by them. An individual's "sexual orientation" has come to mean their orientation with regard to "choice of sex of partner" for sexual activity and long-term emotional-sexual couple relationships, ie, "sexual orientation" means "sex-of-partner orientation". Possible sexual orientations include "heterosexual" (women who are attracted to men, and men who are attracted to women), "bisexual" (women who are attracted to both sexes, men who are attracted to both sexes), "lesbian" (women who are attracted to women), and "gay" (men who are attracted to men). Because sexual orientation is essentially about combinations of sexes, a specific sexual act, or a specific long-term emotional-sexual couple relationship involving two persons, can itself have a sexual orientation. These acts and relationships can be "different-sex" (if they are male-female) or "same-sex" (if they are male-male or female-female).

All the evidence suggests that, in every society, the vast majority of people are heterosexual, and the vast majority of sexual acts and couple relationships are different-sex. The percentage of the population strongly preferring same-sex sexual acts and couple relationships, and thus in many cases identifying as lesbian, gay or bisexual, is thought to be somewhere between 1% (a figure generally considered too low) and 10% (a figure generally considered too high). It is hard to know how many people, in India or any other country, would identify as lesbian, gay or bisexual, in the absence of any legal or social discrimination against them. One very rough indication comes from the Netherlands where, in 2009, 97.8% of registered relationships (marriages and registered partnerships) involved different-sex couples, and 2.2% involved same-sex couples.<sup>4</sup>

"Gender identity" is a phenomenon that is completely distinct from "sexual orientation". Every individual has both a sexual orientation and a gender identity. To make the concept useful, an individual's gender identity

<sup>4</sup> Centraal Bureau voor die Statistiek, *Marriage and Partnership registration: Key Figures*, available at [http://statline.cbs.nl/StatWeb/publication/?DM=SLEN&PA=37772eng&D1=047&D2=0,10,20,30,4,50,\(1-1\)-I&LA=EN&VW=T](http://statline.cbs.nl/StatWeb/publication/?DM=SLEN&PA=37772eng&D1=047&D2=0,10,20,30,4,50,(1-1)-I&LA=EN&VW=T) (Last visited on February 14, 2011). Of course, even in the Netherlands, some lesbian and gay persons may enter different-sex marriages because of social or family pressure. And the 2.2% figure could be an underestimate, if lesbian and gay persons are less likely than heterosexual persons to form couple relationships, or if same-sex couples are less likely than different-sex couples to register their relationships.

must refer, not merely to whether they identify as male or female, but to whether there is “conformity or non-conformity” between, on the one hand, their physical or biological or birth sex, and on the other hand, their psychological sex and the way they express it through physical characteristics (including changes to their body through hormones and surgery), hairstyle, dress, makeup, voice and mannerisms. The vast majority of individuals (probably at least 999 out of 1000) find themselves in a position of conformity, because they were born into a physical sex that matches their psychological sex. No standard terms even exist to describe the majority, apart from “non-transgender”, “non-transsexual”, or “non-intersex”. Persons who are born into a physical sex, but come to realise that it does not match their psychological sex, often identify as “transgender” or “transsexual”. Persons who are born with a chromosomal pattern, or physical characteristics, that do not clearly fall on one side or the other of the “male-female line”, are known as “intersex”. It is important to note that the vast majority of lesbian, gay and bisexual persons are not transgender, transsexual or intersex, and that many transgender, transsexual or intersex persons are heterosexual. The expression “LGBT persons” refers to the combination of minorities defined by sexual orientation, and minorities defined by gender identity. They might support each other in political campaigns or litigation, but their lives and concerns are often very different.<sup>5</sup>

It is important to note how “sexual orientation” and “gender identity” are linked, through the concept of “legal sex”. In the case of a transgender, transsexual or intersex person, their sexual orientation cannot be determined, for legal purposes, until they have been assigned a legal sex. A change to their legal sex, to bring it into conformity with their psychological sex (whether or not changes to their physical sex are desired or financially feasible), will generally change their sexual orientation as well. For example, a person born male who is attracted to women might decide that her gender identity is female, but remain attracted to women after transitioning from male to female (legally and socially, with or without physical changes). If so, she will go from having been seen by society as a heterosexual (and non-transsexual) man to identifying publicly as a transsexual lesbian woman. Because of this linkage, §377 is an issue for transgender, transsexual and intersex persons in India (whether they identify as hijra or kothi or by another name). If they are

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<sup>5</sup> LGBT persons could also be described as “sex discrimination minorities”, in that they experience forms of discrimination based on sex that the majority (including the majority of judges) are not willing to recognise. It can be argued that all forms of discrimination against LGBT persons can be characterised as discrimination based on sex. See R. Wintemute, *Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes*, (1997) 60 MODERN LAW REVIEW 334; R. Wintemute, *Sex Discrimination in MacDonald and Pearce: Why the Law Lords Chose the Wrong Comparators*, (2003) 14 KING’S COLLEGE LAW JOURNAL 267. This argument is analytically sound, but is only necessary in the context of a constitutional or statutory prohibition of discrimination that has an apparently closed list of grounds, including “sex” but not including “sexual orientation” and “gender identity”. See, e.g., Constitution of India, Article 15.

legally male, their sexual activity with another man will probably be caught by §377, even though (according to their gender identity), they might consider themselves as engaging in legal female-male sexual activity.

The terms “sexual orientation” and “gender identity” are now commonly used in international and comparative human rights law. Use of the term “heterosexual” (with “hetero” meaning “other” or “different”), or its equivalent in another language, is not really controversial, except that the vast majority of heterosexual persons would rarely find it necessary to describe their sexual orientation. If pressed, most would say “normal”. The term “bisexual” (with “bi” meaning “two”), or its equivalent in another language, can probably also be used in every country. But the terms “lesbian” and “gay” are problematic. Their etymological origins (a Greek island, in the case of “lesbian”, and slang usage of an English word meaning “happy” to connote sexual immorality, in the case of “gay”), and their associations with political identities, richer countries, and particular “lifestyles”, arguably make them unsuitable in India and other countries in the Global South.<sup>6</sup>

It is, however, difficult to propose alternatives that are culturally-neutral, respectful, and accurate, yet not linguistically awkward. The term “queer” means “strange” or “odd”, and is used as an insult in many English-speaking countries. The Delhi High Court used it in the following phrase: “[w]hen everything associated with homosexuality is treated as bent, queer, repugnant ...”.<sup>7</sup> “MSM” (“men who have sex with men”) is useful in the field of education to prevent HIV transmission. But it ignores the reason why the man has chosen a sexual act with another man, which will often be the difficulty of obtaining sexual activity with any woman who is not his wife, rather than a strong emotional and physical attraction to men. A better term for men who feel a strong attraction to, and fall in love with, other men might be “MLM” (“men who love men”). Combining MLM with the corresponding term “WLW” (“women who love women”), lesbian and gay persons could instead be described (as in the Introduction) as “same-sex-loving persons”. This would avoid the associations of the term “homosexual” (even though “homo” only means “same”) with a diagnosis of mental disorder,<sup>8</sup> and with the insult “homo”, which is common in some English-speaking countries.

Having mentioned the difficulty of finding neutral terminology, I will postpone an experiment with “MLM”, “WLW” and “same-sex-loving

<sup>6</sup> See Sonia Katyal, *Exporting Identity*, 14 YALE JOURNAL OF LAW AND FEMINISM 97 (2002).

<sup>7</sup> *Supra* note 2, ¶94. See also [2009] 4 Law Reports of the Commonwealth 838 at 883.

<sup>8</sup> It is important to stress that the inaccuracy of this historical association was recognised by the World Health Organization on May 17, 1990, when it removed “homosexuality” from its list of mental illnesses. The anniversary of this decision has become the annual “International Day Against Homophobia”. See IDAHO, *The Global Portal for Information and Action on the International Day Against Homophobia and Transphobia*, available at <http://www.dayagainsthomophobia.org/-IDAHO-english,41-> (Last visited on February 14, 2011).

persons”, and instead use “lesbian” and “gay”, as the Delhi High Court did throughout its judgment. The world’s largest association of non-governmental organisations (NGOs) working for lesbian and gay human rights, ILGA, began as the International Gay Association, but is now known as the International Lesbian, Gay, Bisexual, Trans and Intersex Association.<sup>9</sup> For the sake of brevity, I will not use “bisexual”, “transgender”, “transsexual” and “intersex”, but my arguments apply to every person who adopts one of these identities and is affected by §377.

### III. WHY ALL FORMS OF DISCRIMINATION SHOULD BE A PRIORITY FOR INDIA COURTS

In the 2009 Special Issue of this law review on “Sexual Orientation and the Law”, Vice-Chancellor and Professor Mahendra P. Singh expressed his doubt that the legal issue in *Naz Foundation* (whether or not the Constitution of India permits criminalisation of consensual sexual acts between adults in private) “deserves so much prominence in the present stage of our society as it has received”.<sup>10</sup> Rather,

“homosexuality could very well have a low priority, especially [because] ... hardly anybody is prosecuted ... Even if the criminalizing provision of our law has a chilling effect on homosexuality ... it is doubtful if in our present day society these activities need to be made so sacrosanct as, for example, freedom of speech...”<sup>11</sup>

He suggests that the West

“followed a logical sequence ... [F]reedom from unlawful arrest and detention, [freedom] of ... expression, assembly and association came first[,] and then the freedom from want such as hunger, disease, illiteracy, homelessness, etc. followed [b]y the ... early twentieth century ... [S]ince the middle of the twentieth century they have been attending to other restraints on freedom

<sup>9</sup> See <http://www.ilga.org>.

<sup>10</sup> Mahendra P. Singh, *Decriminalisation of Homosexuality and the Constitution*, 2 NUJS L. REV. 361 (2009).

<sup>11</sup> *Id.*, 361-62.

including the ones on sexuality, child bearing, etc.”<sup>12</sup>

With great respect, I cannot accept Prof. Singh’s assessment of the order in which human rights claims should be addressed. Prof. Singh’s order appears to be: (1) civil and political rights essential for a democracy; (2) economic and social rights essential to ensure a decent standard of living for all; (3) other (more exotic?) freedoms related to sexuality and child bearing. What Prof. Singh has not taken into account is that *Naz Foundation* is mainly about *discrimination* (direct or indirect) against gay men and lesbian women, and that freedom from discrimination is a civil and political right, essential for a democracy in which there is equality of opportunity for all, without regard to sex, race, caste, religion, etc. Although it is true that the “right to privacy” (including the right to use contraception, to have an abortion, or to engage in same-sex sexual activity) has only been upheld by the U.S. Supreme Court since 1965,<sup>13</sup> this is not because this right has a lower priority than the civil and political rights established in the late 1700s and the 1800s. It is simply because this right was of less concern to the white, Christian, heterosexual men who dominated legislatures, courts and the legal profession in the United States in the 1700s and 1800s.<sup>14</sup>

The social movements for equal opportunities in education and employment for African-Americans and women only gained strength in the 1950s and 1960s,<sup>15</sup> and were joined in the 1970s by a social movement for equal opportunities for lesbian and gay persons. These social movements were or are demanding civil and political rights that should have been recognised at stage (1), not stage (3), and without which their members cannot be fully equal citizens. It is easy for many heterosexual, dominant-caste, Hindu men in India to say that discrimination against women, Dalits, Muslims, Sikhs, or lesbian and gay persons is not a priority, because these forms of discrimination do not affect them personally. But a human rights lawyer must always strive to display empathy, and to put herself or himself in the shoes of the minority or the disfavoured group.

Prof. Singh does not seem to appreciate that the absence of police raids into bedrooms is a minimal form of respect, and that §377 has a serious, stigmatising and chilling effect on India’s lesbian and gay minority. Ideally, they would like to be able to live their lives in the same way as heterosexual persons, ie, to be open about their sexual orientations, and to enjoy

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<sup>12</sup> *Id.*

<sup>13</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>14</sup> See *Bradwell v. Illinois*, 83 U.S. 130 (1873) (women could be denied the right to practise law).

<sup>15</sup> See *Brown v. Board of Education*, 347 U.S. 483 (1954); Civil Rights Act of 1964, Public Law 88–352 (Federal).

legal protection against any discrimination their openness may trigger on the part of employers, landlords, service providers, etc. Yet as long as §377 exists, the public debate about legal protection cannot even begin: why should the law prohibit discrimination against people who are classified as “criminals”, like thieves and murderers?<sup>16</sup>

In addition to §377’s symbolic condemnation of a minority, criminalisation causes practical problems. Despite the benefits of the internet and its virtual social spaces, it is difficult for any group to meet and organise effectively, or make its presence known to society, if it does not have its own physical social spaces. Part of the chilling effect of §377 has been to deter (for fear of legally-authorized police harassment) the establishment of bars, clubs and cafés where lesbian and gay persons can meet. For example, to my knowledge, the four huge cities of Chennai, Delhi, Kolkata and Mumbai do not have a single 7-night-per-week commercial social venue catering to the lesbian and gay minority. Several such venues can be found in every major city of Japan, China and South-East Asia, as well as South Africa, Europe, the Americas and Australasia. The stigmatising and chilling effect of §377 makes it much harder for India’s lesbian and gay minority to become visible, and to challenge legal and social discrimination. The criminal law therefore helps to perpetuate their inferior position in society.

If we accept that freedom from any form of discrimination (including discrimination based on sexual orientation) is a first-priority civil and political right, which deserves to be remedied by India’s courts immediately (rather than progressively, as in the case of an economic or social right, realisation of which will depend on the availability of resources),<sup>17</sup> it is not a question of having to choose “freedom over bread”.<sup>18</sup> Struggles for civil and political rights, and economic and social rights, can proceed simultaneously in different forums: ministries, legislatures, courts, media and university debates, NGO activities, etc. Some struggles will take longer than others. It is sad, but true, that it will take many years of economic growth and improvement of social security systems before everyone in India enjoys access to adequate healthcare, housing and education. But that is not a reason to say that legal equality for lesbian and gay persons in India must be “put on hold” until those goals are achieved, any more than legal equality for women, Dalits, Muslims or Sikhs should be put on hold. The judicial resources required to “read down” §377 are very small. Yet ending discrimination against minorities substantially

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<sup>16</sup> See, e.g., *Padula v. Webster*, 822 F.2d 97 at 103 (U.S. Court of Appeals for the District of Columbia Circuit, 1987): “It would be quite anomalous ... to declare status defined by conduct that states may constitutionally criminalise as deserving of strict scrutiny under the equal protection clause ... [T]here can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.”

<sup>17</sup> International Covenant on Economic, Social and Cultural Rights, Article 2(1).

<sup>18</sup> Singh, *supra* note 10, 362.

improves their lives, frees them from having to fight discrimination, and gives them more time to focus on the long-term battle to improve the economic and social welfare of their neighbours.

Far from being a low-priority issue, *Naz Foundation* is a test case (one of many) for human rights in the new India that has resulted from India's economic globalisation, since the collapse of the Soviet Union in 1991. It is another test of the ability of the Constitution of India to respond to new social situations, to protect new minorities that were not contemplated when the Constitution was drafted, and to take into account strong trends in international and comparative human rights law. Most importantly, it is another test of India's ability to lead on a human rights issue. India is the most populous country in the world with a law criminalising some or all forms of private, consensual, adult, same-sex sexual activity. No such law exists in China, the United States, Indonesia,<sup>19</sup> or Brazil, the other four most populous countries. If the Supreme Court of India were to affirm the Delhi High Court's decision, it could have a highly persuasive influence on 42 other Commonwealth countries with similar laws, including Pakistan, Bangladesh, Sri Lanka, the Maldives, Malaysia, Brunei and Singapore.<sup>20</sup> Indeed, it would be a watershed judgment for the world, because it would immediately and definitively reduce, by nearly 50%, the number of lesbian and gay persons living in countries with criminal laws.

As for India's 21st-century rivalry with China (in which the entire democratic world is rooting for India), a favourable final decision in *Naz Foundation* would serve as an excellent example of where India stands. It would demonstrate, once again, that India is a democracy in which NGOs, representing a minority, can go to court to challenge a law with a discriminatory impact, and have the law "read down" to make it consistent with India's constitutional values.

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<sup>19</sup> In 2009, the Governor of the province of Aceh (island of Sumatra) refused to sign a bill that would create a Muslim Criminal Code, including a prohibition of same-sex sexual activity. Even if the bill became law, this prohibition would not be necessarily permitted by Indonesia's Constitution. See ZIBA MIR-HOSSEINI & VANJA HAMZIC, CONTROL AND SEXUALITY: THE REVIVAL OF ZINA LAWS IN MUSLIM CONTEXTS 67 (2010).

<sup>20</sup> See Michael Kirby, *Legal Discrimination Against Homosexuals: A Blind Spot of the Commonwealth of Nations?*, EUROPEAN HUMAN RIGHTS LAW REVIEW 21 (2009); Sumit Baudh, *Human Rights and the Criminalisation of Consensual Same-Sex Sexual Acts in the Commonwealth, South and Southeast Asia* (South and Southeast Asia Resource Centre on Sexuality, Working Paper, May 2008).

#### IV. THE ROOTS OF §377: CHRISTIAN RELIGIOUS LAW, CONVERTED TO ENGLISH CRIMINAL LAW, AND EXPORTED TO INDIA

§377 began in the Book of Leviticus, which forms part of the Jewish Torah and the Christian Bible's Old Testament. Chapter 20, Verse 13, provides as follows:

“If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death ...”<sup>21</sup>

Reflecting the human rights standards and scientific knowledge of the time when it was written, Leviticus also prescribes the death penalty for cursing one's parents, committing adultery, engaging in sexual activity with an animal, or being a wizard, as well as for blasphemy:<sup>22</sup>

“He that blasphemeth the name of the Lord, he shall surely be put to death, and all the congregation shall certainly stone him.”<sup>23</sup>

There is a striking resemblance between these rules of Jewish-Christian religious law, and parts of Islamic religious law (shari'a law) that are condemned by human rights lawyers today, ie, the death penalty for adultery, blasphemy or male-male sexual activity. The particular prohibition of “a man ... [lying] with mankind” is so tainted by its origins in Jewish-Christian religious law that, absent any showing of harm to Indian society caused by this behaviour, I would argue that it has no place in the criminal law of India's “Secular Democratic Republic”.<sup>24</sup> It reflects the hostile reaction of an ancient Middle Eastern society to a perceived violation of a strict gender hierarchy (the man penetrated by the other was “acting like a woman”), and to a perceived threat to the expansion of the society's population (the two men were “wasting their sperm” by engaging in sexual activity with no procreative potential).

<sup>21</sup> Leviticus, *Chapter 20: Verse 13*, available at <http://etext.virginia.edu/toc/modeng/public/KjvLevi.html> (Last visited on February 15, 2011).

<sup>22</sup> *Id.*, Chapter 20: Verses 9, 10, 15, 16, 27.

<sup>23</sup> *Id.*, Chapter 24: Verse 16.

<sup>24</sup> Constitution of India, 1950, Preamble. France's decriminalisation of “sodomy” in 1791 was part of a general repeal of criminal offences derived from Christian religious law. The penalty for “sodomy” was “to sentence... both the active one and the passive one, to be burned alive”. See *Homosexuality in Early Modern France 19–25, 77–79* (J. Merrick & B. Ragan, eds., 2001).

How did the rule of Leviticus 20:13 make its way into the Indian Penal Code?<sup>25</sup> The rule was part of Christian religious law (canon law), administered by the Roman Catholic Church in Western Europe, until King Henry VIII rejected the authority of the Pope and established the Church of England. Part of this conflict amongst Christians was the decision of the Parliament of England, in 1533, to pass an Act entitled “The Punishment of the Vice of Buggery”:<sup>26</sup>

“Forasmuch as there is not yet sufficient ... Punishment appointed ... by the due Course of the Laws of this Realm, for the detestable and abominable Vice of Buggery committed with Mankind or Beast ... it may be enacted ... That the same Offence be from henceforth adjudged Felony ... and that the Offenders being hereof convict ... shall suffer such Pains of Death ... as Felons be accustomed to do ...”

“Buggery” refers to penile-anal intercourse (male-male or male-female), or penile-animal intercourse, as opposed to penile-vaginal intercourse, the “natural” form, because it might have procreative potential if contraception is not used. The fact that the English word “buggery” is derived (through French) from the word “Bulgarian” is consistent with denying that anal intercourse is a common sexual practice in every country, and with attributing the practice to heretical foreigners (Eastern Europeans in the case of France and England; “the West” in the case of India and other countries in the Global South).

As part of Queen Mary I’s restoration of Roman Catholicism in 1553, the Parliament of England repealed the offence of “buggery”,<sup>27</sup> and returned it to the realm of Christian religious law. Mary was, however, succeeded in 1558 by her Protestant half-sister Queen Elizabeth I. In 1562, Parliament revived the felony of “buggery” in English criminal law (emphasis added):

“Sithence which Repeal so had and made [in 1553], divers evil-disposed Persons have been the more bold to commit the said most horrible and detestable Vice

<sup>25</sup> Douglas Sanders, *377 and the Unnatural Afterlife of British Colonialism in Asia*, 4 *ASIAN JOURNAL OF COMPARATIVE LAW* 1-8 (2009).

<sup>26</sup> 25 Henry VIII c. 6 (1533); made permanent by 32 Henry VIII c. 3 (1540).

<sup>27</sup> 1 Mary session 1, c. 1, §5: “all Offences made Felony ... by any Act ... of Parliament ... made sithence the first Day of the first Year of the Reign of the late ... King Henry the Eighth, not being Felony before, ... and all Pains and Forfeitures concerning the same, ... shall from henceforth be repealed, and utterly void and of none Effect.”

of Buggery ... *to the high Displeasure of Almighty God* ... Be it enacted ... That the said Statute [of 1533] ... shall ... be revived, and from thenceforth shall stand, remain and be in full Force, Strength and Effect for ever, ... as the same Statute was at the Day of the Death of the said late King Henry the Eighth ...”<sup>28</sup>

It was this Act of 1562, making “buggery” a criminal offence punishable by death, that was exported, directly or indirectly, to as many parts of the British Empire as possible.<sup>29</sup> In 1828, the 1562 offence was replaced, for England<sup>30</sup> and for all parts of India in which British criminal courts had jurisdiction,<sup>31</sup> by a new version, with identical wording and an identical death penalty for England and India:

“every Person convicted of the abominable Crime of Buggery, committed either with Mankind or with any Animal, shall suffer Death as a Felon”.

Whether or not any man in India was actually convicted of “buggery” and sentenced to death, between 1828 and the entry into force of the Indian Penal Code on January 1, 1862, this criminal offence applied, at least in theory, to:

“all Persons and all Places ... over whom or which the Criminal Jurisdiction of any of His Majesty’s Courts of Justice erected or to be erected within the British Territories under the Government of the United Company of Merchants of England trading to the East Indies does or shall hereafter extend”.<sup>32</sup>

<sup>28</sup> 5 Elizabeth I c. 17 (1562).

<sup>29</sup> See Alok Gupta, *This Alien Legacy: The Origins of ‘Sodomy’ Laws in British Colonialism*, HUMAN RIGHTS WATCH, New York (2008); Sanders, *supra* note 25.

<sup>30</sup> “An Act for consolidating and amending the Statutes in England relative to Offences against the Person”, 9 George IV c. 31 (1828), §1 (repeal), §15 (new offence).

<sup>31</sup> “An Act for improving the Administration of Criminal Justice in the East Indies”, 9 George IV c. 74 (1828), §63 (new offence), §125 (repeal).

<sup>32</sup> *Id.*, §1. Aditya Bondyopadhyay has suggested (via e-mail on 14 Jan. 2011) that, in 1828, the jurisdiction of British criminal courts probably did not extend much beyond the Presidency towns of Bombay, Calcutta and Madras.

On October 14, 1837, the all-British “Indian Law Commission” (consisting of Macaulay, Macleod, Anderson and Millett) submitted its draft Penal Code to Lord Auckland, the British Governor-General of India. In this draft, “buggery” had been replaced by two crimes under the heading “Of Unnatural Offences”:

“§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 of either description for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine.

§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 of either description for a term which may extend to life and must not be less than seven years, and shall also be liable to fine.”<sup>33</sup>

This first draft of what became §377 was both worse and better than the 1828 offence of “buggery”. It was worse because it criminalised, not just penile-anal intercourse, but all touching of one person by another “for the purpose of gratifying unnatural lust”. It was better because it removed the death penalty, and substituted two different terms of imprisonment (two to fourteen years, or seven years to life), depending on whether or not the “touched person” had consented.<sup>34</sup>

The Indian Penal Code became an Act of the (British) Governor-General in (his all-British Legislative) Council on October 6, 1860.<sup>35</sup> The final version of §377 retained the caption “Unnatural offences”, but merged the two broad offences in the 1837 draft (presumably because consent was later deemed irrelevant) into one narrower offence of “carnal intercourse against the order of nature”. This offence was narrower than the 1837 draft, because it required some form of penetration, as opposed to mere “touching”. Compared with the 1828 offence of “buggery”, §377 was potentially broader,

<sup>33</sup> A Penal Code prepared by the Indian Law Commissioners and published by command of the Governor General of India in Council 47 (1838, reprinted in 2002).

<sup>34</sup> See also Gupta, *supra* note 29, 16-20.

<sup>35</sup> Act No. 45 of 1860 (of the Legislative Council for India, not the UK Parliament).

depending on what interpretation the courts would give to “carnal intercourse against the order of nature”. §377, however, effected at least one improvement, even though it probably inspired no celebrations at the time. From at least January 1, 1862, it repealed (at least impliedly) the death penalty for “buggery” that existed in some parts of India, and substituted a maximum penalty of “transportation for life” to the Andaman Islands,<sup>36</sup> which was replaced by “imprisonment for life” in 1955.

Having been modified in Indian criminal law, what became of the offence of “buggery” in English criminal law? The 1828 version was repealed, along with the death penalty (from November 1, 1861),<sup>37</sup> and replaced by the Offences against the Person Act, 1861<sup>38</sup> §61:

“Whosoever shall be convicted of the abominable Crime of Buggery, committed either with Mankind or with any Animal, shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life, or for any Term not less than Ten Years.”

In 1885, “buggery” was supplemented by a new offence of “gross indecency” between male persons,<sup>39</sup> which probably gave the English offences the same scope as the 1837 draft for India (in the case of male-male sexual activity), by encompassing any touching for the purpose of “indecency”. In 1895, the writer Oscar Wilde was convicted of “gross indecency” and given the maximum sentence: two years in prison with hard labour.

“Buggery” and “gross indecency” were later united, under the heading “Unnatural Offences”, as §12 and §13 of the Sexual Offences Act, 1956.<sup>40</sup> The Wolfenden Committee’s Report of 1957 led to the Sexual Offences Act, 1967,<sup>41</sup> which decriminalised sexual activity between consenting men aged 21 or more in private. That age (the age of majority in 1967) was reduced to 18 in 1994,<sup>42</sup> and then to 16 (the same age as for male-female and female-female sexual activity) in 2000.<sup>43</sup> Finally, the Sexual Offences Act, 2003,<sup>44</sup> a

<sup>36</sup> Law Commission of India, 39th Report (July 1968), 4, 9, available at <http://lawcommissionofindia.nic.in/1-50/Report39.pdf> (Last visited on 15 Feb. 2011).

<sup>37</sup> 24-25 Victoria c. 95, §1 and The Schedule (9 George IV c. 31).

<sup>38</sup> 24-25 Victoria c. 100.

<sup>39</sup> Criminal Law Amendment Act, 1885 (An Act to make further provision for the Protection of Women and Girls, the suppression of brothels, and other purposes), 48-49 Victoria c. 69, §11.

<sup>40</sup> 1956 c. 69.

<sup>41</sup> 1967 c. 60.

<sup>42</sup> Criminal Justice and Public Order Act, 1994, c. 33, § 143, 145.

<sup>43</sup> Sexual Offences (Amendment) Act, 2000, c. 44 (the equal age is 17 in Northern Ireland).

<sup>44</sup> 2003 c. 42.

comprehensive reform of this area of English criminal law, abolished the “unnatural offences” of “buggery” and “gross indecency”. In short, after appearing in criminal statutes for most of the 470-year period from 1533 to 2003, England’s equivalent of §377 no longer exists,<sup>45</sup> and all offences that discriminate directly or indirectly on the basis of sexual orientation have been eliminated from English criminal law.<sup>46</sup>

## V. TRENDS IN INTERNATIONAL AND COMPARATIVE HUMAN RIGHTS LAW

Given that §377 is discredited by its roots in Christian religious law, and has been disavowed by its “creator” (England), one would hope that a brief bill and a short debate in the Union of India’s Parliament would be sufficient to ensure its amendment or repeal.<sup>47</sup> Unfortunately, legislators in most countries are reluctant to discuss sexual activity. Indeed, the first decriminalisation by an independent part of the former British Empire, in the U.S. state of Illinois in 1961, took the form of enactment of a new Criminal Code, influenced by the American Law Institute’s Model Penal Code, which did not criminalise private, consensual, adult sexual activity.<sup>48</sup> There was therefore no need to focus on the specific sexual acts that were being decriminalised. Fortunately, in India and other democratic countries that take legal protection of human rights seriously, minorities affected by discriminatory laws have a second option. They may go to a national court, and ask it to apply national constitutional law, in the light of trends in international and comparative human rights law.

### A. TREATING SEXUAL ORIENTATION AS A “SUSPECT GROUND” OF DISCRIMINATION

The first trend of which the Supreme Court of India should be aware is towards judicial treatment of “sexual orientation” as a “suspect ground” of discrimination (ie, raising a strong presumption, under international human rights treaties and national constitutions, against discrimination based

<sup>45</sup> §69 of the 2003 Act creates a new offence of “intercourse with an animal”. The offences of rape (§1), sexual assault (§3), and sexual activity with a child (§9) apply both to different-sex and same-sex sexual activity.

<sup>46</sup> See generally R. Wintemute, *Sexual Orientation Discrimination* in *INDIVIDUAL RIGHTS AND THE LAW IN BRITAIN* 491-533 (C. McCrudden & G. Chambers eds., 1994); R. Wintemute, *Sexual Orientation and Gender Identity* in *Human Rights in the Community* 175-199 (C. Harvey ed., 2005).

<sup>47</sup> Law Commission of India, 172<sup>nd</sup> Report (Review of Rape Laws) (March 25, 2000), 3.6, available at <http://lawcommissionofindia.nic.in/rapelaws.htm> (Last visited on February 15, 2011). “We are of the opinion that §377 deserves to be deleted. After the changes effected by us in the preceding provisions (§375 to §376E), the only content left in §377 is having voluntary carnal intercourse with any animal. We may leave such persons to their just deserts.”

<sup>48</sup> See WILLIAM N. ESKIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA* 118-127 (2008).

on sexual orientation, as in the case of discrimination based on race, religion or sex). When courts adopt this presumption, they are recognising the analogy between the history of discrimination suffered by gay men and lesbian women, and the history of discrimination suffered by women and racial or religious minorities. They might explain this presumption by viewing sexual orientation as an “immutable status” (ie, gay men and lesbian women are “born this way” and cannot be expected to change), or as a “fundamental choice” (ie, an individual’s decision about which sexual orientation is right for them is, like their decision about whether or not to practise the religion of their family or a new religion or no religion, a deeply personal, private or intimate decision, which the majority must accept and respect, even if they find it difficult to understand).<sup>49</sup> In deciding whether or not sexual orientation is a choice, and whether or not it matters, heterosexual men and women should ask themselves whether they ever consciously chose to be attracted to women or men. Similarly, they should note that many gay men and lesbian women might find the sexual orientation of heterosexual persons just as hard to understand.

The trend towards judicial treatment of sexual orientation as a “suspect ground” of discrimination has influenced, and been influenced by, the texts of national constitutions. Since 1989, it has become more common, when a national constitution is drafted for the first time or amended, to include “sexual orientation” or a similar ground in the provision on “equality before the law”, “equal protection of the laws” or “non-discrimination”. The first national constitutions in the world to do so were South Africa’s 1993 transitional Constitution,<sup>50</sup> and 1996 final Constitution<sup>51</sup>:

“The state may not unfairly discriminate  
... against anyone on one or more grounds,  
including race, sex, ..., sexual orientation,  
... religion....”

South Africa is a country in which the black African majority has a long and bitter experience of racial discrimination. Those who adopted the transitional and final Constitutions recognised the similarity between discrimination based on race and discrimination based on sexual orientation.<sup>52</sup> In *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (1998), the Constitutional Court of South Africa noted the importance of constitutional rights for lesbian and gay persons:

<sup>49</sup> R. WINTEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, AND THE CANADIAN CHARTER* (1997).

<sup>50</sup> Constitution of the Republic of South Africa Act (No. 200 of 1993), §8(2).

<sup>51</sup> Constitution of the Republic of South Africa (No. 108 of 1996), §9(3).

<sup>52</sup> See Edwin Cameron, *Sexual Orientation and the Constitution*, 110 *SOUTH AFRICAN LAW JOURNAL* 450, 468-69 (1993) (the draft Bills of Rights of the two main black-majority political parties, the African National Congress led by Nelson Mandela and the Inkatha Freedom Party, both expressly prohibited discrimination based on sexual orientation).

“The impact of discrimination on gays and lesbians is rendered more serious ... by the fact that they are a political minority not able on their own to use political power to secure favourable legislation .... They are ... almost exclusively reliant on the Bill of Rights for their protection. ... [They] are a permanent minority in society and have suffered in the past from patterns of disadvantage.”<sup>53</sup>

South Africa was followed by the Fiji Islands in 1997,<sup>54</sup> Ecuador in 1998,<sup>55</sup> Portugal in 2004,<sup>56</sup> and Bolivia in 2009.<sup>57</sup> And at least 12 states or territories in countries with federal systems have added sexual orientation or a similar ground (“sexual identity”) to the non-discrimination articles of their constitutions: six in Brazil,<sup>58</sup> five in Germany,<sup>59</sup> and one in Argentina.<sup>60</sup>

At the international level, Article 21(1) of the Charter of Fundamental Rights of the European Union (December 7, 2000), which was intended to supplement the European Convention on Human Rights (November 4, 1950) in situations governed by EU law, provides:<sup>61</sup>

“Any discrimination based on any ground such as sex, race, ... religion ... or sexual orientation shall be prohibited.”

On December 1, 2009, the Charter became legally binding and enforceable by the EU’s highest court (the Court of Justice of the European Union, based in Luxembourg), under the new Art. 6(1) of the EU Treaty.

Because many national constitutions and international human rights treaties were drafted long before the first challenges to discrimination

<sup>53</sup> Case CCT 11/98, available at <http://www.constitutionalcourt.org.za>, ¶¶25-26, 28 (Last visited on February 15, 2011).

<sup>54</sup> Constitution Amendment Act 1997, § 38(2)(a).

<sup>55</sup> Constitution, 1998, Article 23(3), replaced by Constitution, 2008, Articles 11(2), 66(9), 83(14).

<sup>56</sup> Constitution, 2004 (amendment), Article 13(2).

<sup>57</sup> Constitution (approved by referendum on 25 Jan. 2009), Article 14. II.

<sup>58</sup> Mato Grosso, Constitution, 1989, Art. 10. III; Sergipe, Constitution, 1989, Art. 3.II; Federal District, Organic Law, 1993, Article 2; Alagoas, Constitution, 2001 (amendment), Art. 2-I; Santa Catarina, Constitution, 2002 (amendment), Art. 4-IV; Pará, Constitution, 2007 (amendment), Art. 3-IV.

<sup>59</sup> Berlin, Constitution, 1995, Article 10(2); Brandenburg, Constitution, 1992, Article 12(2); Bremen, Constitution, 1947 (as amended on 4 Sept. 2001), Article 2; Saarland, Constitution, 1947 (as amended in Feb. 2011), Article 12; Thuringia, Constitution, 1993, Article 2(3).

<sup>60</sup> Autonomous City of Buenos Aires, Constitution, 1 October 1996, Article 11.

<sup>61</sup> See [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

based on sexual orientation, and are difficult to amend, lawyers must often argue that the open-ended list of prohibited grounds of discriminations in a constitution or treaty should be interpreted as implicitly including sexual orientation, because of its similarity to the enumerated grounds. The European Court of Human Rights in Strasbourg (France),<sup>62</sup> which issues binding interpretations of the European Convention on Human Rights, affecting the 800,000,000 people living in the 47 member states of the Council of Europe,<sup>63</sup> has developed a substantial body of case-law establishing a strict justification test for cases involving discrimination based on sexual orientation. In particular, the Court has drawn analogies between sexual orientation and race, religion and sex.

In *Smith & Grady v. United Kingdom* (September 27, 1999), the Court held that the dismissal of all lesbian and gay members of the armed forces could not be justified by the hostility of their heterosexual colleagues towards them:

“97. ... To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot ... amount to sufficient justification for the interferences with the applicants’ rights ..., any more than similar negative attitudes towards those of a different race, origin or colour.”

In *Mouta v. Portugal* (December 21, 1999), the Court concluded that the sexual orientation of a gay father could not be treated as a negative factor in deciding whether or not to award him custody of his daughter from a prior marriage to a heterosexual woman:

“36. ... a distinction based on ... the applicant’s sexual orientation ... is not acceptable under the Convention (see, *mutatis mutandis*, the *Hoffmann* judgment ... [para.] 36 [in which a Jehovah’s Witness mother had been denied custody of her children because of her religion]).”

Finally, in *S.L. v. Austria* (January 9, 2003), the Court stressed that:

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<sup>62</sup> All cited judgments of the Court are available at <http://www.echr.coe.int>.

<sup>63</sup> See <http://www.coe.int>. (Last visited on February 15, 2011). The European Union (<http://europa.eu>) has 27 member states.

“37. ... sexual orientation is a concept [implicitly] covered by Art. 14 [the non-discrimination provision of the Convention] ... Just like differences [in treatment] based on sex, ... differences [in treatment] based on sexual orientation require particularly serious reasons by way of justification ...”

At the national level, the Supreme Court of Canada held unanimously (9-0), in *Egan v. Canada* (1995), that sexual orientation is an “analogous ground” under §15(1) of the Canadian Charter of Rights and Freedoms (part of the Constitution of Canada), meaning that it is analogous to race, religion and sex, and that discrimination based on sexual orientation is implicitly prohibited by §15(1). The majority observed that:

“[t]he historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse ... is not uncommon. [They] have been the victims of crimes of violence ... [and] discriminated against ... in ... employment and ... access to services. ... [S]tigmatization ... and ... hatred ... ha[ve] forced many homosexuals to conceal their orientation. This imposes its own associated costs in the work place, the community and in private life... [H]omosexuals, whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage.”<sup>64</sup>

The minority agreed on this point, but preferred an “immutable status” analysis:

“whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls

<sup>64</sup> [1995] 2 S.C.R. 513 at 600-02, available at <http://scc.lexum.umontreal.ca/en/1995/1995rcs2/513/1995rcs2-513.html> (Last visited on February 15, 2011).

within the ambit of §15 protection as being analogous to the enumerated grounds.”<sup>65</sup>

Similarly, the Supreme Court of California (USA) determined in *In re: Marriage Cases* (May 15, 2008) that sexual orientation is a “suspect classification” warranting “strict scrutiny” under the California Constitution. The Court cited with approval judicial statements that “[l]esbians and gay men . . . share a history of persecution comparable to that of Blacks and women”, and that “[o]utside of racial and religious minorities, we can think of no group which has suffered such ‘pernicious and sustained hostility’ ... as homosexuals”. Consequently, the government “bears a heavy burden of justification”: classifications based on sexual orientation must be “necessary” to further a “constitutionally compelling” government interest.<sup>66</sup>

## B. GRADUAL ELIMINATION OF DISCRIMINATION BASED ON SEXUAL ORIENTATION

The second trend that can be seen in international and comparative human rights law is the gradual elimination of legal and social discrimination based on sexual orientation, as a result of the application of the “suspect ground” presumption by courts and legislatures. This process of law reform involves a number of steps, which tend to be taken in roughly the same order, but may be stretched over a period of more than 200 years. The process requires a society to evolve slowly from a position of rejecting and persecuting its lesbian and gay minority, to one of accepting and respecting them as fellow human beings and citizens, by granting them equal access to every opportunity the society offers.

The first step is the one taken by the Legislative Council when the Indian Penal Code came into force on 1 January 1862: repeal of the Leviticus-inspired death penalty for same-sex sexual activity. The second step is the one taken by the Delhi High Court in *Naz Foundation*, and currently under review by the Supreme Court: decriminalisation of private, consensual, adult, same-sex sexual activity. The third step is the removal of any remaining discrimination from the criminal law, especially with regard to the age of consent to sexual activity. The fourth step is the enactment of legislation prohibiting discrimination based on sexual orientation (and in some countries, gender identity) in employment, education, housing, and access to services, both in the public and private sectors. The fifth and final step (which may be divided into multiple smaller steps) is the reform of family law relating to marriage,

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<sup>65</sup> *Id.*, 528.

<sup>66</sup> See <http://www.courtinfo.ca.gov/opinions/archive/S147999.PDF> (106) (4-3) (Last visited on 15 Feb. 2011).

adoption of children, and medically assisted procreation. To summarise, the five steps are:

- (1) repeal of the death penalty for same-sex sexual activity;
- (2) decriminalisation of such activity (no fines or imprisonment);
- (3) removal of all discrimination against such activity from the criminal law;
- (4) legislation prohibiting discrimination based on sexual orientation;
- (5) reform of family law.

Would taking the second step (decriminalisation) mean that India must quickly take the third, fourth and fifth steps? Not at all. Subject to any decisions of international human rights tribunals or national courts with which it must comply, each national government may take these steps at its own pace. Although France took steps one and two in 1791, it is still a long way from completing the fifth step in 2011, 220 years after decriminalisation. Similarly, England and Wales decriminalised through the Sexual Offences Act, 1967, but then took 36 years to complete the third step, through the Sexual Offences (Amendment) Act, 2000 and the Sexual Offences Act, 2003. The fourth step took the form of the Employment Equality (Sexual Orientation) Regulations, 2003 (implementing the European Union's Directive 2000/78/EC) and the Equality Act (Sexual Orientation) Regulations, 2007, dealing with education, housing and access to services, both now replaced by the Equality Act, 2010. The fifth step began with the Adoption and Children Act, 2002 (in force on December 30, 2005)<sup>67</sup> and the Civil Partnership Act, 2004 (in force on December 5, 2005), and continued with the Human Fertilisation and Embryology Act, 2008 (relevant sections in force by April 6, 2010).<sup>68</sup> Same-sex couples in England and Wales, however, are still not able to marry.<sup>69</sup>

### C. DECRIMINALISATION OF SAME-SEX SEXUAL ACTIVITY

As recently as 1960, sexual activity between men was a criminal offence in almost every part of the former British Empire,<sup>70</sup> including all

<sup>67</sup> §§49-51 and §144(4).

<sup>68</sup> §§42-47 and §53-54.

<sup>69</sup> See *Ferguson & Others v. United Kingdom*, Application No. 8254/11 (European Court of Human Rights) (challenging the exclusion of same-sex couples from marriage and different-sex couples from civil partnership).

<sup>70</sup> Alok Gupta has pointed out an exception in Sudan. See Gupta, *supra* note 29, 21-22. § 293 of the Sudan Penal Code, 1899, punished "carnal intercourse against the order of nature" with any man or woman, but only if the act was committed "without his or her consent". Sudan Penal

50 states of the USA. The first decriminalisations were the result of legislation in Illinois in 1961,<sup>71</sup> England and Wales in 1967,<sup>72</sup> and Canada in 1969.<sup>73</sup> These reforms implemented the American Law Institute's Model Penal Code (1955 draft),<sup>74</sup> or the Wolfenden Committee's Report (1957),<sup>75</sup> and were influenced by the research of Dr. Alfred Kinsey,<sup>76</sup> which had demonstrated that sexual activity between men was much more common than had been believed. In 2011 (the 50<sup>th</sup> anniversary of the repeal in Illinois, and the 200<sup>th</sup> anniversary of the French-inspired repeal in the Netherlands), a clear majority of the member states of the United Nations (112 out of 192 states or 58.3%) no longer criminalise.<sup>77</sup> Laws criminalising same-sex sexual activity are now found mainly in three categories of countries in Asia, Africa and the English-speaking Caribbean: (a) countries occupied by the UK during the former British Empire (England spread around the world its pre-1967 failure to separate Christian religious law from secular criminal law); (b) countries with Muslim majorities that fail to separate Islamic religious law from secular criminal law (the most populous exceptions to this pattern are Indonesia and Turkey); and (c) low-income and middle-income countries.<sup>78</sup>

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Code, 1899 available at <http://www.archive.org/stream/sudanpenalcode00sudaiala#page/n99/mode/2up> (Last visited on 28 Feb. 2011); Alan Gledhill, *The Penal Codes of Northern Nigeria and the Sudan*, 433 (1963) (Gledhill cites the amended, 1925 version of the Sudan Penal Code, in which §293 became §318, and §319 added a similar prohibition of non-consensual "gross indecency"). This anomalous failure to criminalise, when the new British rulers first had the opportunity to do so in 1899, is difficult to explain. Had the British drafters found male-male sexual activity so common in Sudan, that they considered it necessary to adapt §377 of the Indian Penal Code to suit local conditions? In any case, I would not describe this failure to criminalise as the first decriminalisation in the former British Empire, because "decriminalisation" implies deliberate repeal of existing criminal sanctions by the legislature or courts of an independent country (or a state or province of such a country). The temporary "non-criminalisation" that took place in Sudan in 1899 would appear to have been a decision of the British colonial rulers which, sadly, did not last after independence. Gupta cites, *supra* note 29, 22, Sudan's "sodomy" law of 1991, which permits a death sentence after a third conviction. Illinois, Criminal Code of 1961, Laws 1961, 1983 (in force on 1 Jan. 1962).

<sup>71</sup> Sexual Offences Act 1967.

<sup>72</sup> Criminal Law Amendment Act, 1968-69, Statutes of Canada 1968-69, c. 38, § 7.

<sup>73</sup> Proposed Model Penal Code: Tentative Draft No. 4 (including "Sexual Offenses"), §207.5 (May 1955). See Eskridge, *supra* note 48.

<sup>74</sup> *Report of the Committee on Homosexual Offences and Prostitution*, Cmnd. 247 (Sept. 1957).

<sup>75</sup> *Sexual Behavior in the Human Male* (1948).

<sup>76</sup> See ILGA, *State-sponsored Homophobia: A world survey of laws prohibiting same-sex activity between consenting adults*, available at [http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2010.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2010.pdf). (The 2010 report lists 76 UN member states with criminal laws, and 3 UN member states where the law is unclear, to which I would add India). (Last visited on February 28, 2011).

<sup>77</sup> See, e.g., The World Bank, *World Development Indicators 2006*, available at <http://devdata.worldbank.org/wdi2006/contents/income.htm>, p. 2, listing 54 "high income" countries, of which only seven criminalise. Of these seven, six have Muslim majorities: Bahrain, Brunei, Kuwait, Qatar, Saudi Arabia, and the United Arab Emirates. The exception is Singapore, a former British colony with its own version of the Indian Penal Code (Last visited on February 28, 2011).

Although decriminalisation has often been the result of action by the legislature (as in Illinois, England and Wales, and Canada), as early as 1974, the Supreme Judicial Court of Massachusetts (USA) saw the potential inconsistency between constitutional rights and criminal laws prohibiting private, consensual, adult sexual activity. In *Commonwealth v. Balthazar*,<sup>79</sup> the Court did exactly what the Delhi High Court did in *Naz Foundation*, by “reading down” a Massachusetts criminal statute (§35) that prohibited “commit[ting] any unnatural and lascivious act with another person”. The Court said: “we conclude that [this provision] must be construed to be inapplicable to private, consensual conduct of adults”.<sup>80</sup> In 2002, the Court clarified its judgment, declaring that its “holding[] in the Balthazar ... case[] concerning acts conducted in private between consenting adults extend[s] to §34, as well”.<sup>81</sup> §34 prohibits “commit[ting] the abominable and detestable crime against nature, with mankind or with a beast”, and provides for imprisonment of up to 20 years.

The first decision of an international human rights tribunal requiring decriminalisation was delivered 30 years ago. In *Dudgeon v. United Kingdom* (October 22, 1981),<sup>82</sup> the European Court of Human Rights ruled that the unamended offences of “buggery” and “gross indecency”, found in §61 of the Offences against the Person Act, 1861 and §11 of the Criminal Law Amendment Act 1885 (both Acts still applied in Northern Ireland), violated the right to respect for private life in Art. 8 of the European Convention on Human Rights. The Court made it clear that no criminal prosecution or conviction was necessary to give Jeffrey Dudgeon standing to challenge these criminal offences:

“the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant’s right to respect for his private life (which includes his sexual life) within the meaning of Art. 8(1) ... the very existence of this legislation continuously and directly affects his private life ... : either he respects the law and refrains from engaging – even in private with consenting male partners - in prohibited sexual

<sup>79</sup> 318 N.E.2d 478 (Mass. 1974).

<sup>80</sup> *Id.*, 481.

<sup>81</sup> *Gay & Lesbian Advocates & Defenders v. Attorney General*, 763 N.E.2d 38, 40 (Mass. 2002). Similar decisions by the highest courts of U.S. states include *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976); *State v. Saunders*, 381 A.2d 333 (New Jersey 1977); *People v. Onofre*, 415 N.E.2d 936 (New York 1980); *Commonwealth v. Bonadio*, 415 A.2d 47 (Pennsylvania 1980); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Kentucky 1992); *Gryczan v. State*, 942 P.2d 112 (Montana 1997); *Powell v. State*, 510 S.E.2d 18 (Georgia 1998); *Jegley v. Picado*, 80 S.W.3d 332 (Arkansas 2002).

<sup>82</sup> See <http://www.echr.coe.int> (Last visited on 15 Feb. 2011).

acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.”<sup>83</sup>

The Court then considered whether or not these criminal offences could be justified by the UK Government, under Art. 8(2), as “necessary in a democratic society” for the protection of “morals” or “the rights and freedoms of others”. The Court set the UK Government a high standard, noting that “necessary” does not mean “‘useful’, ‘reasonable’, or ‘desirable’, but implies the existence of a ‘pressing social need’ for the interference”, and that “a restriction on a Convention right cannot be regarded as ‘necessary in a democratic society’ - two hallmarks of which are tolerance and broadmindedness - unless ... it is proportionate to the legitimate aim pursued”. As for the particular legal issue in *Dudgeon*, the Court said (emphasis added):

“The present case concerns a most intimate aspect of private life [sexual life]. Accordingly, *there must exist particularly serious reasons* before interferences on the part of the public authorities can be legitimate ...”<sup>84</sup>

The Court rejected the UK Government’s arguments that the criminal offences could be justified, for two main reasons. The first was “Western European consensus” against these offences, which was similar (albeit stronger) than the current “United Nations consensus” against them:

“in the great majority of the member States of the Council of Europe [17 of 20 at the time] it is no longer considered to be necessary or appropriate to treat homosexual practices ... as in themselves a matter to which the sanctions of the criminal law should be applied ...”

The second reason was the virtual absence of prosecutions in Northern Ireland:

“the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over ... 21 ... No evidence has

<sup>83</sup> ¶41.

<sup>84</sup> *Id.*, 51-53.

been adduced to show that this has been injurious to moral standards ... It cannot be maintained ... that there is a ‘pressing social need’ to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public.”

As for the “proportionality” of the interference, which involved balancing the harm to gay men (and, by ricochet, lesbian women), caused by the existence of the criminal offences, against any benefits the offences provided to society, the Court concluded:

“such justifications ... for retaining the law ... are outweighed by the detrimental effects which [its] very existence ... can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.”<sup>85</sup>

Thus, the criminal offences were not “necessary” to protect “the rights and freedoms of others”, given that only consenting adults and private acts were involved, or a justifiable means of expressing the “moral attitudes” of the heterosexual majority:

“Decriminalisation does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features.”<sup>86</sup>

The Court reaffirmed its reasoning in subsequent cases from the Republic of Ireland and Cyprus (the two other Council of Europe member states with similar laws in 1981): *Norris v. Ireland* (October 26, 1988) and

<sup>85</sup> *Id.*, 60.

<sup>86</sup> *Id.* 61.

*Modinos v. Cyprus* (April 22, 1993). After the fall of the Berlin Wall and the Iron Curtain in 1989-91, the political institutions of the Council of Europe (the Committee of Ministers and the Parliamentary Assembly) insisted that all the formerly Communist countries of Eastern Europe applying to join the Council of Europe (the “club” of democratic, human-rights-respecting, European countries) had to ensure that their criminal law complied with *Dudgeon*. As a result, laws like §377 have now been eliminated from all 48 European countries (the 47 Council of Europe member states and the not-yet-democratic country of Belarus), except for part of Cyprus.<sup>87</sup>

The three judgments of the European Court of Human Rights (*Dudgeon*, *Norris* and *Modinos*) were cited to the United Nations Human Rights Committee in *Toonen v. Australia* (1994).<sup>88</sup> Adopting reasoning similar to that of the European Court in *Dudgeon*, the Committee concluded that the state of Tasmania’s criminal offences of “unnatural sexual intercourse” (similar to §377) and “indecent practice between male persons” (“gross indecency”),<sup>89</sup> which no longer existed in Australia’s seven other states and territories, violated Article 17 (“No one shall be subjected to arbitrary or unlawful interference with his privacy ...”) of the International Covenant on Civil and Political Rights (to which India acceded on April 10, 1979). The distinctive feature of the Committee’s reasoning is that a “public health argument” was made by Tasmania, because HIV and its role in causing the AIDS epidemic had been identified by scientists after the *Dudgeon* judgment in 1981. Even though it is true that anal intercourse without a condom carries a risk of transmitting HIV, the Committee unequivocally rejected this argument:

“the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV. The Government of Australia [which disagreed with Tasmania] observes that statutes criminalizing homosexual activity tend to impede public health programmes ‘by driving underground many of the people at the risk of infection’. Criminalization of homosexual activity thus would appear to run counter to the implementation of

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<sup>87</sup> The criminal law of Turkish-occupied Northern Cyprus (where the reform adopted in Southern Cyprus does not, in practice, apply) is expected to be amended in 2011.

<sup>88</sup> Communication No. 488/1992, *Views of the Committee*, adopted on March 31, 1994, document dated April 4, 1994, available at <http://www1.umn.edu/humanrts/undocs/html/vws488.htm> (see *Views*, footnote 1).

<sup>89</sup> Tasmania, Criminal Code Act 1924, §§ 122-123.

effective education programmes in respect of the HIV/AIDS prevention.”<sup>90</sup>

The Government of Australia complied very quickly with *Toonen*, by introducing legislation in the federal Parliament that made the Tasmanian laws unenforceable.<sup>91</sup> Tasmania formally repealed them in 1997.<sup>92</sup>

The “public health argument” was also considered in Canada by the Ontario and Québec Courts of Appeal, in challenges to the higher age of consent to anal intercourse (18 v. 14 for vaginal intercourse at the time) in §159 of Canada’s Federal Criminal Code. On its face, §159 is neutral as among sexual orientations, by applying both to male-female and male-male anal intercourse. In practice, however, anal intercourse is much more important in male-male sexual activity than in male-female sexual activity, in which the generally preferred alternative is vaginal intercourse. Thus, §159 was struck down by the Québec Court of Appeal in *R. v. Roy*,<sup>93</sup> and by the Ontario Court of Appeal in *R. v. M.(C.)*.<sup>94</sup> Under §15(1) (equality and non-discrimination) of the Canadian Charter, all three judges in *Roy* found indirect discrimination based on sexual orientation, because of the disproportionate impact on gay men, as did Abella J.A. (now Justice Abella of the Supreme Court of Canada) in *M.(C.)*.<sup>95</sup> Under §1 (justification) of the Charter, all six judges held that “prevention of HIV transmission” is not a proportionate justification for criminalisation of private, consensual sexual activity above an age when it would otherwise be legal.<sup>96</sup>

Decriminalisation (repeal of a blanket ban on all private, adult, consensual male-male sexual activity, even if the age of consent is not equal) was achieved in Canada in 1969,<sup>97</sup> New Zealand in 1986,<sup>98</sup> and the whole of Australia in 1994.<sup>99</sup> The United States followed in 2003 when, in *Lawrence & Garner v. Texas*,<sup>100</sup> the Supreme Court struck down a Texas law banning “deviate sexual intercourse” between persons of the same sex (and similar laws in 12 or 13 other US states and Puerto Rico). Police entered a private apartment

<sup>90</sup> *Toonen*, 8.5. See also International HIV/AIDS Alliance, “Enabling legal environments for effective HIV responses: A leadership challenge for the Commonwealth” (2010), available at <http://www.aidsalliance.org/includes/Publication/Enabling-legal-environments-for-effective-HIV-responses.pdf>. (Last visited on February 28, 2011).

<sup>91</sup> Human Rights (Sexual Conduct) Act 1994 (No. 179 of 1994).

<sup>92</sup> Criminal Code Amendment Act 1997 (No. 12 of 1997).

<sup>93</sup> (1998), 125 Canadian Criminal Cases (3d) 442.

<sup>94</sup> (1995), 98 C.C.C. (3d) 481.

<sup>95</sup> The other two judges found direct discrimination based on age.

<sup>96</sup> The age of consent was raised from 14 to 16 in 2008, but the age of 18 for anal intercourse has not been lowered. It is arguably still in force outside of Ontario and Québec.

<sup>97</sup> *Supra* note 73.

<sup>98</sup> Homosexual Law Reform Act, 1986.

<sup>99</sup> *Supra* notes 91-92.

<sup>100</sup> 539 U.S. 558 (26 June 2003), available at <http://www.law.cornell.edu/supct/html/02-102.ZO.html>. (Last visited on February 15, 2011).

and found two men, John Lawrence and Tyron Garner (the petitioners before the US Supreme Court), engaging in anal intercourse. They were arrested, held in custody overnight, charged, convicted, and fined US\$200 each.

Citing *Dudgeon*,<sup>101</sup> the US Supreme Court found an unjustifiable interference of the right to “liberty” in the due process clause of the Fourteenth Amendment to the U.S. Constitution. Justice Kennedy, writing for the majority, clearly identified the harm caused by the remaining criminal laws:

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

He also carefully defined the legal issue before the Court:

“The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter [eg, a right to marry or to register a ‘civil union’]. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. ... The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual....”<sup>103</sup>

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<sup>101</sup> *Id.*, 573, 576.

<sup>102</sup> *Id.*, 575.

<sup>103</sup> *Id.*, 578.

In reaching this conclusion, the majority was greatly assisted by comparative law:

“The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.”<sup>104</sup>

Can *Balthazar*, *Dudgeon*, *Roy*, *M.(C.)*, and *Lawrence* be dismissed as decisions from courts in the Global North? Can *Toonen* be dismissed, even though it is the decision of an international human rights tribunal with jurisdiction over both the Global South and the Global North, because the case concerned Australia (a geographically southern but “economically northern” member of the Global North)? First, there is no doubt that *Toonen* applies to India, and that the UN Human Rights Committee would say so if an individual case were brought to it from India (ie, if, hypothetically, India were to accede to the Optional Protocol to the ICCPR). The Committee made it clear in 2007, in *X v. Colombia*,<sup>105</sup> that there is no “Global South exception” to *Toonen*. The Egyptian and Tunisian members of the Committee, who dissented from the majority’s decision requiring equal treatment of unmarried same-sex and different-sex couples, made it clear that they agreed with the principle of *Toonen*:

“[T]here is no doubt that [A]rticle 17 ... is violated by discrimination on grounds of sexual orientation. The Committee ... has rightly and repeatedly found that protection against arbitrary or unlawful interference with privacy precludes prosecution and punishment for homosexual relations between consenting adults.”

Second, national courts in Latin America, Africa, the Pacific Islands, and Asia have reached the same conclusions as the UN Human Rights Committee, the European Court of Human Rights, the U.S. Supreme Court, and the highest courts of 9 U.S. states and two Canadian provinces. Possibly the first national court in the Global South to do so was the Constitutional Court of Ecuador in 1997.<sup>106</sup> The Court declared unconstitutional Art. 516 of the Penal

<sup>104</sup> *Id.*, 577.

<sup>105</sup> Communication No. 1361/2005, May 14, 2007 (equal treatment of unmarried different-sex and same-sex couples).

<sup>106</sup> Tribunal Constitucional, Case No. 111-97-TC (25 Nov. 1997), published in *Registro Oficial*, Supplement, No. 203 (27 Nov. 1997).

Code, which provided: “In cases of homosexuality, that do not constitute rape, the two participants shall be punished with imprisonment for 4 to 8 years.”<sup>107</sup> Most gay men and lesbian women would find the Court’s reasoning insulting:

“in the area of science, it has not been determined whether homosexual behaviour is a deviant behaviour or is produced by the action of the genes of the individual, rather medical theory tends to find, that the behaviour is a dysfunction or hyperfunction of the endocrine system, which means that this abnormal behaviour should be the object of medical treatment ... imprisonment in jails, creates a suitable environment for the development of this dysfunction. Nevertheless, it is clear that even though this behaviour must not be legally punishable, protection of the family and of minors, requires that it must not be a socially exaltable behaviour ...”

The Court, however, reached a respectful conclusion:

“homosexuals are above all holders of all the rights of the human person and therefore, have the right to exercise them in conditions of full equality ... that is to say that their rights enjoy legal protection, as long as in the exteriorisation of their behaviour they do not harm the rights of others, as is the case with all other persons ...”<sup>108</sup>

In 1998, a new court of the Global South reached the same conclusion as the Constitutional Court of Ecuador, but did so using much more detailed and respectful reasoning. In *National Coalition for Gay and Lesbian Equality v. Minister of Justice*,<sup>109</sup> the Constitutional Court of South Africa held that the common-law crime of “sodomy” (anal intercourse) violated §9 (right to be free from unfair discrimination), §10 (right to have human dignity respected) and §14 (right to privacy). With regard to discrimination, the Court reasoned as follows:

<sup>107</sup> Author’s unofficial translation from the original Spanish version.

<sup>108</sup> *Id.*

<sup>109</sup> (9 Oct. 1998), available at <http://www.constitutionalcourt.org.za>, Case CCT 11/98 (Last visited on February 15, 2011).

“23. The discriminatory prohibitions on sex between men reinforce already existing societal prejudices and severely increase the negative effects of such prejudices on their lives. ‘Even when these provisions are not enforced, they reduce gay men ... to ... ‘unapprehended felons’, thus entrenching stigma and encouraging discrimination in employment and insurance and in judicial decisions about [child] custody ...”

24. ... [S]uch provisions also ... ‘legitimate or encourage blackmail, police entrapment, [and] violence ...’

26. ... (a) ... Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. ...

(b) The ... purpose [of the prohibitions] is to criminalise private conduct of consenting adults which causes no harm to anyone else [because it] fails to conform with the moral or religious views of a section of society. ...”

As for dignity and privacy, the Court found separate, independent violations of constitutional rights (emphasis added):

“28. ... [T]he right to dignity ... requires us to acknowledge the value and worth of all individuals as members of our society. ... [The crime of “sodomy”] punishes a form of sexual conduct which is identified by our broader society with homosexuals. *Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals.* The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. ... [G]ay men are at risk of arrest, prosecution and conviction ... simply because they seek to engage in sexual conduct which is part of their experience of being human. ... [T]he sodomy

*offence builds insecurity and vulnerability into the daily lives of gay men.* There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men *degrades and devalues gay men in our broader society...*

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

Unlike the Delhi High Court, the South African Court decided to invalidate the entire offence of “sodomy” for future cases (arising after October 9, 1998), probably because other provisions of South African criminal law were available to cover non-consensual or public behaviour. For past cases, however, that arose after the transitional, post-apartheid Constitution came into force (April 27, 1994), the Court “read down” the “sodomy” offence in the same way as the Delhi High Court:

“106. ... 1.2 ... [T]he [Court’s] order ... shall not invalidate any conviction for the offence of sodomy unless that conviction relates to conduct constituting consensual sexual conduct between adult males in private committed after April 27, 1994 ...”

Since 2005, in addition to the Delhi High Court, four courts in Asia and the Pacific Islands have issued judgments similar to (or even broader than) that of the South African Court in *National Coalition*. In *Nadan & McCoskar v. State*,<sup>110</sup> Dhirendra Nadan (a Fijian man apparently of Indian ancestry) and Thomas McCoskar (an Australian tourist) were sentenced to two years in prison for private, consensual “carnal knowledge against the order of nature” and “gross indecency”, both prohibited by the Fijian Penal Code. On appeal to the High Court of Fiji, Judge Gerald Winter cited *Dudgeon, Toonen*,

<sup>110</sup> [2005] FJHC 500 available at <http://www.paclii.org/fj/cases/FJHC/2005/500.html>. (Last visited on February 15, 2011).

*National Coalition and Lawrence*, before concluding that the convictions were unconstitutional. He “read down” the Fijian version of §377 as:

“inconsistent with the Constitution and invalid to the extent that this law criminalizes acts constituting the private consensual sexual conduct against the course of nature between adults”.

In Hong Kong (a Special Administrative Region of the People’s Republic of China), sexual activity between men was decriminalised by the Crimes (Amendment) Ordinance in 1991. Two courts, have, however examined other discrimination against such activity in Hong Kong criminal law, in relation to the age of consent and “non-private” sexual activity. In *Leung v. Secretary for Justice* (2006),<sup>111</sup> the Court of Appeal held that the discriminatory age of consent of 21 for male-male “buggery” (v. 16 for male-female vaginal intercourse) was contrary to the Hong Kong Bill of Rights and unconstitutional. The Court rejected the argument that the offence was neutral among sexual orientations:

“[F]or gay couples the only form of sexual intercourse available to them is anal intercourse.’ For heterosexuals, the common form of sexual intercourse open to them is vaginal intercourse. This is obviously unavailable as between men. It is clear then that §118C of the Crimes Ordinance significantly affects homosexual men in an adverse way compared with heterosexuals. The impact on the former group is significantly greater than on the latter. I agree with the following passage from the judgment below : ‘Denying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way natural to them. ... It is disguised discrimination founded on a single base: sexual orientation.’”

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<sup>111</sup> (September 20, 2006), available at <http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp> (Quick Search, CACV 317/2005) (Last visited on February 15, 2011).

Similarly, in *Secretary for Justice v. Yau Yuk Lung Zigo* (2007),<sup>112</sup> the Court of Final Appeal found that criminalisation of male-male anal intercourse “otherwise than in private” was discriminatory and unconstitutional. Male-female vaginal intercourse in similar circumstances was only subject to the neutral offence of “outraging public decency”, which would require proof that a third party might have seen the act and been offended. The sexual act in question had been committed “in a car parked in a dark and isolated spot at night”.<sup>113</sup> Chief Justice Li said: “Homosexuals constitute a minority in the community. The provision has the effect of targeting them and is constitutionally invalid.”<sup>114</sup>

Finally, and closest to India, on December 21, 2007, the Supreme Court of Nepal issued a broad judgment (much broader than that of the Delhi High Court) interpreting the Interim Constitution of Nepal as generally prohibiting discrimination based on sexual orientation or gender identity.<sup>115</sup> Although the Court noted that “there is no any comprehensive law [in Nepal] declaring the relation between homosexuals as crime”,<sup>116</sup> the Court’s reasoning would certainly apply to any form of discrimination in the criminal law:

“No one shall have the right to question that how do two adults perform the sexual intercourse and whether this intercourse is natural or unnatural. If the right of privacy is ensured to the sexual intercourse between two heterosexual individuals, such right should equally be ensured to the people ... having different gender identity and sexual orientation as well.”<sup>117</sup>

## VI. CONCLUSION

It should now be clear that the reasoning of the Delhi High Court in *Naz Foundation* is supported by a large body of persuasive authorities from around the world: from the UN Human Rights Committee, from courts in Asia, and from courts in Africa, Europe, North America, South America and the Pacific Islands. Of course, these authorities are not enough on their

<sup>112</sup> (July 17, 2007), available at <http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp> (Quick Search, FACC 12/2006) (Last visited on February 15, 2011).

<sup>113</sup> *Id.*, 43.

<sup>114</sup> *Id.*, 29.

<sup>115</sup> *Sunil Babu Pant & Others v. Nepal Government*, Writ No. 917 of 2007 A.D., available at [http://www.bds.org.np/publications/pdf\\_supreme\\_eng.pdf](http://www.bds.org.np/publications/pdf_supreme_eng.pdf) (English); <http://www.bds.org.np/publications/Supremecourt.pdf> (Nepali) (Last visited on February 15, 2011).

<sup>116</sup> *Id.* 41.

<sup>117</sup> *Id.*, 40-41.

own. But the Delhi High Court has backed up its conclusion with convincing arguments, based on the text and spirit of the Indian Constitution, and the case law of the Supreme Court of India, as several authors demonstrated in the 2009 Special Issue of this law review.<sup>118</sup> The Supreme Court should therefore affirm the High Court's "reading down" of §377, and extend it from the State of Delhi to the whole of India. In doing so, the Supreme Court would bring the Indian Penal Code into conformity with both the Indian Constitution and the International Covenant on Civil and Political Rights, and make a very important contribution towards improving respect for the human rights of lesbian and gay persons, in India and many other countries in the Global South.

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<sup>118</sup> See, e.g., Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for All Minorities*, 2 NUJS L. REV. 419 (2009); Pritam Baruah, *Logic and Coherence in Naz Foundation: The Arguments of Non-Discrimination, Privacy, and Dignity*, 2 NUJS L. REV. 505 (2009).

