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OUR LEGACY OF CRIMINAL LAW: ADVANCING LIBERTY IN THE FACE OF INTRASIGENCE?

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THE ENGLISH LAWS ON SODOMY

There is a particularly unlovely legacy of the criminal law of England, namely the sodomy offence. I have dealt with it in several earlier papers, one of them on the religious influences that originally gave rise to the law[1], and others on the dead end that we appear to have arrived at in securing repeal and reform of this law in the newer countries of the Commonwealth of Nations[2].

I choose this topic for this celebratory collection, not to put a dampner on the work of the CLA but because the subject presents a mixture of quaint legal history, oppressive current operation of the criminal law, high matters of public policy, international engagement of the English heritage in criminal law and issues of cruelty and injustice perpetrated in

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* Justice of the High Court of Australia (1996-2009); Member of the Eminent Persons Group on the future of the Commonwealth of Nations (2010-11); Commissioner of the UNDP Global Commission on HIV and the Law (201-12). Parts of this text are derived by the author's Paul Byrne Memorial Lecture, delivered at the Sydney University Law School on 28 November 2011.

1 M.D. Kirby, "The Sodomy Offence: England's Least Lovely Criminal Law Export?" (2011) *Journal of Commonwealth Criminal Law* 23.

2 M.D. Kirby, "Lessons from the Wolfenden Report" (2008) 34 *Commonwealth Law Bulletin* 551; M.D. Kirby, "Homosexuality – A Commonwealth Blind Spot on Human Rights" (2007) *CHRI News* Vol.14(4) 6; M.D. Kirby, "Discrimination on the Ground of Sexual Orientation – A New Initiative for the Commonwealth of Nations" (2007) *Commonwealth Lawyer* 36.

the guise of law that should be of interest to all people concerned about civil liberties.

The ultimate origin of the sodomy offence in the English criminal law was a series of provisions in the Old and New Testaments of the *Bible.* There were interpreted as forbidding, under pain of death, sexual penetration by one male of another male. The principal and earliest sources of this instruction are to be found in passages in the first book of the Old Testament, *Genesis,* wherein an account is given of the way the men of Sodom, in ancient Israel, surrounded the home of Lot, who was there sheltering two mysterious visitors to the city (thought possibly to be angels). The dwellers of Sodom demanded that Lot should bring out his guests in order that they might "know" them[3]. The Hebrew verb 'to know' is '*yd*'. It possesses a number of meanings, just as it does in English. Sometimes these meanings have a sexual connotation. This is how the scriptural passage in question has long been interpreted.

The *Book of Leviticus* contains an extensive 'Holiness Code'. It was designed to control all manner of activities of the people in ancient Israel. Amongst these, a specific passage appears which is generally taken as a clear indication of divine disapproval of what we now describe as male 'homosexual' activity[4]:

> "If a man ... lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon you."

[3] *Genesis* 19:5.

[4] *Leviticus* 20:13.

To these passages in the *Old Testament*, can also be added a number in the *New Testament* which are said to re-affirm the divine prohibition on same-sex activity[5].

As chance would have it, I recently launched, at St. Paul's Anglican Cathedral Chapter House in Melbourne, a new work written by five experienced Anglican theologians, examining the foregoing passages of scripture[6]. Later in the same week, by another coincidence, the national conference of the Australian Labor Party debated a motion designed to amend the *Platform* of the Party, so as to commit it to amendment of the *Marriage Act* 1961 (Cth) to "open up" marriage in Australia to make it available, as in Canada and other countries, to all persons, irrespective of their sex or sexual orientation, who are committed to that form of relationship[7].

The proposition advanced by the theologians is (to oversimplify things) that the interpretation of the scriptures, adopted in the past by the Abrahamic religions, to support the sodomy offence, and to criminalise male homosexual conduct, has been (or at least may have been) a serious theological mistake. That the passages, properly analysed, do not support the prohibition and divine disapproval. That the interpretation has been a needless infliction upon the small minority of people in every society who are same-sex attracted. And that other and better interpretations are available which should be preferred.

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[5] See e.g. *Romans* 1:26-27; 1 *Corinthians* 6:9-10; and 1 *Timothy* 1:8-11.

[6] *Five Uneasy Pieces: Essays in Scripture and Sexuality*, (TF Ltd, Adelaide SA, 2011) (essays by Megan Warner; Richard Treloar; Peta Sherlock; Alan Cadwallader and Gregory C. Jenks).

[7] Subsequently, on 3 December 2011, the National Conference of the ALP voted to amend the *Platform* of the Party; but to preserve the right of Members of the Australian Federal Parliament to vote according to conscience against any such measure. Because the Federal Opposition is opposed to a conscience or free vote, this outcome guarantees defeat of any immediate attempt to amend the *Marriage Act* 1961 (Cth).

Lawyers, who grow up in the world of interpretation of written texts, many of them old and some of them even ancient, are familiar with debates of this kind. In a sense, the arts of theology appear to be quite similar to those of constitutional interpretation. The texts are typically brief, vague, sometimes poetic and often ambiguous. In hermeneutics[8], it is sobering to read the theological analyses and conclusions and to keep in mind that, upon the basis of the unravelling of the biblical texts, many human beings over the centuries have been put to death and even more have been oppressed, shamed and punished by the criminal law inspired by these texts and shunned by society. Some today still are.

The early English law committed the punishment of sodomy to the ecclesiastical courts, conducted by the clergy, representing the universal Christian church. A strict separation between Church and State had not developed in medieval times. The Church took upon itself the punishment of those who committed ecclesiastical offences and thereby endangered social peace and defiled the kingdom. A survey of the English laws, published in Latin in 1290, during the reign of Edward I, specifically mentions sodomy[9]. Another description of English criminal laws, written shortly afterwards in Norman French, describes the punishment for the offence as burning alive. Being an offence seen as being against God's will and a supposed source of social defilement, it attracted condign punishments[10].

[8] Hermeneutics is the art or science of interpretation, especially of Scripture.

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

[10] The offence is contained in a work by Britton which is described in H. Brunner, *The Sources of the Law of England* (Trans. Williams Hastie, Edinburgh, T.T. Clark 1888). See also H.L. Carson, "A Plea for the Study of Britton" 23 *Yale Law Journal* 664 (1914).

The foregoing arrangements were partly altered by Henry VIII's break with the Church of Rome. The trial of ecclesiastical offences had then to be transferred to the Royal Courts in England for secular disposition. Accordingly, in 1533, a statute was enacted by the English Parliament providing for the crime of sodomy under the description of "the detestable and abominable Vice of Buggery committed with mankind or beast". Death was the punishment proscribed for the offence.

When Henry VIII died and was eventually succeeded by his older daughter, Mary I, his statute was repealed. The crime of sodomy reverted to the Ecclesiastical courts. However, with the accession of Elizabeth I, the Ecclesiastical courts were again abolished and in 1563 the secular offence was re-enacted.[11].

Once the law attained this tortuous lineage, was described and lauded by the taxonomists of English law, Edward Coke[12] and William Blackstone[13]. It was through Blackstone's analytical *Commentaries on the Laws of England* that much of the jurisprudence on the sodomy offence passed into the United States of America, including after the independence of that country following the revolution of 1776. Several of the foundation American colonies already had enactments of their own, substantially repeating the language of the offence of Henry VIII.

It was in this way that the sodomy offence found itself as a key provision both of English and colonial law. It spread to the vast empire of Britain that expanded in the seventeenth to twentieth centuries was assured.

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

[12] E. Coke, *The Institutes of the Laws of England* (3rd part), cap. X *Of Buggery, or Sodomy*, 1797, 58.

[13] W. Prest, *Blackstone and His Commentaries: Biography, Law, History*, Hart, Oxford, 2009, 3.

Yet nothing made assurance more certain than the mode by which the British colonialists and administrators secured the export of their criminal laws to the countries brought under allegiance to the British Crown.

The end of the eighteenth century had witnessed a move in France to reconsider all of the Royal laws of that country and to codify the French common law, so as to make them more accessible, and suitable for, to the people. As part of this process, the sodomy offence in France was abolished by the revolutionary legislature in 1791. This abolition was preserved and extended by the Napoleonic codifiers who drafted the French *Penal Code* of 1810. In consequence of these amendments, most of the newly emerging nation states of the Continent followed the French *Penal Code*. In the result, neither they, nor their overseas empires, inherited the sodomy offence. Criminalisation of sodomy was not a feature of the French Empire, nor of the German, nor the Spanish or Portuguese, nor the Netherlands, Belgium, Scandinavian or Russian Empires. Thus, the Netherlands penal code in what is now Indonesia never contained such an offence. It still does not. The sodomy offence was, however, most certainly a feature of the British Empire which had not enjoyed the benefit of the revolutionary repeal in France and throughout Europe.

On the contrary, the self-same process which had led to the codification of French law in the early years of the nineteenth century produced an equivalent movement in England, seeking to codify the English common law, including the common law of crime. Supporters of this codification movement included notable legal philosophers and reformers such as

Jeremy Bentham, John Austin and J.S. Mill[14]. The moves to obtain the codification of the English criminal law in England eventually failed (although reforms were achieved concerning the law of criminal evidence). However, the attempt to express that law in the form of criminal codes was to prove greatly influential.

A clear requirement of any colonial power, in exerting its rule in a colony or settlement beyond the seas, was to provide a functioning system of criminal law. This the British did by implementing one of four major criminal codes in all of their overseas colonies. These codes were:

- The Indian Penal Code of 1860, drafted by Thomas Babington Macaulay[15];
- The Stephen Penal Code, based on the draft of Sir James Fitzjames Stephen[16];
- The Griffith Criminal Code, named after Sir Samuel Griffith, first Chief Justice of the High Court of Australia who, as Chief Justice of Queensland, had drafted his own criminal code drawing on earlier British attempts and on the criminal laws adopted at that time in Italy and New York[17]; and
- The Wright Penal Code, based on the work of R.S. Wright, intended for the colony of Jamaica. This Code was not eventually implemented in Jamaica but, in the peculiar ways of the British Empire at that time, it was implemented on the other side of the Atlantic Ocean in the Gold Coast (now Ghana)[18].

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[14] H.L.A. Hart, *Jeremy Bentham* in A.W.B. Simpson (Ed), *Biographical Dictionary of the Common Law* (Butterworths, London, 1984) 44. *Ibid*, 45. See also J. Anderson, "*J.S. Mill*" in AWB Simpson, *ibid*, 364-5.

[15] M.B. Hooker, "*Macaulay*" in A.W.B. Simpson, *ibid*, 330.

[16] S. Uglo, "*Stephen*" in A.W.B. Simpson, *ibid*, 486.

[17] A.C. Castles, "*Griffith*" in A.W.B. Simpson, *ibid*, 216 at 217.

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

There were many variations and differences in the implementation of the foregoing codes in the many colonies and dominions of the British Crown. However, a common feature of them all was the inclusion of an offence of sodomy. So it was that this offence became a universal feature of all jurisdictions of the British Empire, including Canada and Australia. It was law in force by statute in New South Wales, for example, at the time that Mr Vernon Treatt QC taught Murray Gleeson and me criminal law at the University of Sydney law School in 1958.

LEGISLATIVE REFORM PETERS OUT

With varying degrees of directness, Jeremy Bentham and J.S. Mill had, cast doubt on the appropriateness and utility of preserving the sodomy offence. They did so by reference to their concepts about the proper limitations of the criminal law in a civilized society. Still, it required the writings of early leaders in the discipline of psychology, and research of important scientists such as Alfred Kinsey, to place the acceptability of the sodomy offence on the active agenda of law reformers.

Kinsey's influential reports on human sexuality were published in 1948 and 1953[19]. They occasioned a great deal of public and media discussion about the sodomy offence, with the growing recognition of the apparent fact that significant numbers of otherwise lawful citizens were being exposed to prosecution for committing the offence. This was not a tiny fraction of evil-doers. Eventually, a Royal Commission of Enquiry was established in the United Kingdom, chaired by Sir John Wolfenden, a university vice chancellor. The report of this Commission (the

[19] A. Kinsey et al, *Sexual Behaviour in the Human Male*, (1948); Kinsey et al, *Sexual Behaviour in the Human Female*, (1953).

Wolfenden Report) proposed repeal of the sodomy offence, so far as it concerned adults, acting by consent and in private. In language which reflected the earlier approaches of Bentham and Mill, the Wolfenden Committee concluded[20]:

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

Legislation to give effect to this conclusion was first enacted in England in 1967[21]. Reform followed in Canada (1969)[22], Australia (1974-97), New Zealand (1986), Hong Kong (1990) and the Fiji Islands (2005). It was achieved by a decision of the Constitutional Court, in South Africa in 1988[23]. Later, in a constitutional decision, the United States Supreme Court, following an earlier false start in *Bowers v Hardwick*[24], struck down the sodomy offence in *Lawrence v Texas*[25] in 2003.

In the course of the struggle to conclude the repeal of the sodomy offence in Australia, a communication was taken to the Human Rights Committee established under the First Optional Protocol of the *International Covenant on Civil and Political Rights*. This is a treaty and protocol to which Australia is a party. In resolving that communication, the Human Rights Committee found that, by maintaining the sodomy offence in the State of Tasmania, Australia was in breach of its

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[20] Report of the Committee on Homosexual Offences and Prostitution (Wolfenden Report), CMND247, HMSO, 1957. See also M.D. Kirby, "Lessons From the Wolfenden Report" (2008) 34 *Commonwealth Law Bulletin* 551.

[21] *Sexual Offences Act* 1967 (UK).

[22] *Criminal Law Amendment Act* 1968-69, s7.

[23] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] 3 LRC 648; 1999(1) SA 6 (SACC)

[24] 478 US 186 (1986).

[25] 539 US 558 (2003).

obligations under the treaty[26]. Armed with the precedent of repeal in the country from which the law had initially come; the absence of such a law in most countries of the world; the arguments of philosophers; the reports of the Royal Commissioner; the common non-prosecution of the offence; and the agitation of informed public opinion, it might have been expected that the sodomy offences would quietly, and relatively quickly, have slipped out of the penal laws of the countries of the Commonwealth of Nations. Not so.

RESISTANCE TO REPEAL AND RESPONSE

In 2006, in Singapore, the Law Society of that city state delivered a report proposing repeal of s377A of the *Singapore Penal Code*. Repeal seemed assured because the "Minister Mentor" and foundation Prime Minister of Singapore (Lee Kuan Yew) indicated his personal support for reform. Nevertheless, the Bill to implement the Law Society's recommendations failed in the Singapore Parliament. It was said by opponents that it would undermine "social cohesiveness" and "force, homosexuality on a conservative population that is not ready for homosexuality"[27].

Reform was achieved in one or two jurisdictions of the Commonwealth of Nations (such as The Bahamas). Pressure to introduce the sodomy law was resisted by the newest member of the Commonwealth that had a French penal code background (Rwanda). Nevertheless, the process of reform basically ground to a halt. African leaders in Zimbabwe, Kenya, Uganda and Nigeria competed with one another for the vehemence of their condemnations of Western attempts to persuade

[26] *Toonen v Australia* (1994) 1 *International Human Rights Reports* 97 (No.3).

[27] M. Aidil, "Re-Scoping Sec.377A: A Juxtaposition of Views", *Juris Illuminae*, Vol.3, No.3, (January 2007) (Singapore).

them to get rid of the law. This is the situation in which the Commonwealth of Nations now finds itself. Forty-one of the 54 countries of the Commonwealth still criminalise sodomy. A number of these countries (e.g. Sri Lanka and Singapore) have actually extended the offence to apply to women or to remove the application of the offence in the case of heterosexual married couples. Far from being repealed, the crimes have been expanded. The reform movement seems to have faded and collapsed.

It is in this context that some new developments have taken place that need to be noted by those interested in this unhappy relic of English criminal law. One of them is an important decision of the Delhi High Court in India in *Naz Foundation v Delhi & Ors*[28]. That decision upheld a challenge to the constitutional validity of s377 of the *Indian Penal Code* dealing with the offence of sodomy. The judges of the Delhi High Court (A.P. Shah CJ and Muralidur J) concluded that the provisions of s377 were contrary to the guarantees of human rights in the Indian Constitution, specifically guarantees of privacy, and equality of status of all citizens.

The decision in *Naz i*s presently subject to an appeal to the Supreme Court of India which awaits hearing and determination. However, the Government of India did not lodge an appeal against the decision of the Delhi High Court and it is being brought by religious bodies. The outcome of the Indian litigation will be of potential importance for many countries of the Commonwealth of Nations, given that virtually all of them, in the new Commonwealth, have a provision similar to s377 of the *Indian Penal Code*. Most of them have constitutional provisions on the

[28] [2009] 4 LRC 835 (Delhi High Court).

basic civil rights of individuals, similar to those invoked successfully in the Indian Court.

Meantime, three further developments have occurred, that place the spotlight on the still operating sodomy offences in the majority of Commonwealth countries:

* *The Commonwealth EPG report*: The first is the publication of a report of the Eminent Persons Group (EPG) on the future of the Commonwealth[29]. I served as a member of the EPG, as did Senator Hugh Segal of Canada. It decided to tackle the issue of the remaining sodomy offences, but in the context of another special Commonwealth problem involving the HIV/AIDS epidemic. Statistical evidence provided to the EPG by the United Nations Development Programme (UNDP) indicated that the levels of HIV in Commonwealth countries are at least twice as high as those in non-Commonwealth countries, including in Africa. A contributing factor to this worrying statistic was considered to be the state of the law in Commonwealth countries dealing with sex, specifically homosexual conduct and the criminalisation of prostitution (sex workers). The problems of the continuing global financial crisis; the declining funds available for the provision of anti-retroviral drugs; and the ongoing rates of infection in developing countries make it urgent that these Commonwealth countries should address their special problem. Unfortunately, at the Commonwealth Heads of Government Meeting (CHOGM) in Perth in October 2011, there was no sense of urgency on the part of Commonwealth leaders. The central recommendations of the EPG on responses to the

[29] Commonwealth, Eminent Persons Group, *A Commonwealth of the People: Time for Urgent Reform* (Commonwealth Secretariat, London, 2011). See p98-102.

AIDS epidemic were postponed to be considered by officials and to be reviewed by the Foreign Ministers of the Commonwealth in September 2012. It might be hoped that realism and an appreciation of the dangers of HIV for millions of citizens of Commonwealth countries will encourage a sense of urgency. But this is by no means assured;

* *The UNDP Global Commission on Law*: Another body on which I serve, the Global Commission on HIV and the Law is preparing a report on the legal impediments to successful strategies necessary to combat the continuing spread of HIV. This report will be addressed to the entire world and not simply to Commonwealth countries. The final meeting of the Global Commission took place in Geneva in December 2011. A report can be expected mid 2012. It may be anticipated that this report too will address specifically the legal impediments that include the laws on homosexuals and sex workers; but also on other vulnerable groups, including women's legal disempowerment, the laws on injecting drug users and the laws of intellectual property that increase the costs of essential treatments. The follow-up to this report in Commonwealth countries will draw attention to the continuing existence and stigmatising effect of the sodomy offences surviving there; and
* *UN and other leaders*: In addition to these initiatives, the leaders of the United Nations, from the Secretary-General (Ban Ki-moon) down have been speaking with one voice of the imperative need to repeal the laws that interfere with successful strategies against HIV/AIDS, notably the laws on homosexuals providing for the

sodomy offence. In an address to the Human Rights Council of the United Nations in January 2011, the Secretary-General said[30]:

> "I understand that sexual orientation and gender identity raise sensitive cultural issues. But cultural practice cannot justify any violation of human rights. ... When our fellow human beings are persecuted because of their sexual orientation or gender identity, we must speak out. That is what I am doing here. That is my constant position. Human rights are human rights everywhere, for everyone".

With a growing unanimity and strength, leaders of the United Nations and of individual countries are thus speaking out. They are calling for the sodomy offence to be repealed and for an end to the stigma and the oppression of the homosexual minority that is a direct result of the survival of this unlovely feature of inherited colonial criminal laws. So why is nothing happening? How can law reform proposals be translated into action so as to promote civil liberation on this subject world-wide?

CONCLUSION: A PUZZLE AND DILEMMA

We need to break the impasse that has arisen that impedes the reform process that began with Jeremy Bentham and gathered momentum with the Wolfenden Report, the statutory reforms in the United Kingdom and the later reforms in the old Dominions of the British Empire, including Canada and Australia.

The adoption of those reforms in the newer countries of the Commonwealth has reached a complete blockage. Leaders of those countries resist reform. They denounce it as a new kind of Western imperialism, seeking to reassert the influence that 'white' people held

[30] Ban Ki-moon, Secretary General of the United Nations, Remarks to the Human Rights Council, Geneva, 25 January 2011, TSPT.

over their countries in the time of Empire. This is their perception of the issue.

On the other hand, observers in the developed countries see the urgency of the AIDS epidemic and the futility of responding to the epidemic by criminalising, shaming and stigmatising a minority because of their sexual orientation, which they did not choose and cannot change. The persistence with the sodomy offence appears to these observers to be similar to the former persistence of the apartheid regime in South Africa, with the racial laws that existed in that country before the election of the Mandela Government. These laws were often justified by reference to supposed scriptural texts. The sodomy offence is a kind of apartheid law, directed not at race or skin colour, but to another indelible feature of human nature, namely sexual orientation. Sadly, the very same nations that denounced and fought against racial apartheid are now often leaders in resisting the calls for the reform of the laws that enforce sexual apartheid. In 41 of the 54 Commonwealth countries, sexual apartheid survives. So what can be done to move the logjam?

At the present juncture, the way ahead is by no means clear. Resistance to affirmative action is very strong. Effective means of persuading those who resist are difficult to find. Particularly so because of the pressure of religious voices that often reinforce political causes for inaction and resistance.

The sodomy offence is a British imperial export to countries still found in every part of the world that is proving very difficult to erase. The full story of this unlovely export is yet to be finally written. Before the last full stop is inscribed on the page, many victims of this law will die, including

many infected with HIV/AIDS who are driven by shame and fear away from protective knowledge and treatment. Much violence, hatred and discrimination will take its toll before these laws are all repealed. The puzzle and challenge of unheeded calls for law reform are given a special urgency because of their relevance to successful strategies to address the new peril of HIV. Ironically, the dangers of HIV are specially present in the very countries that most vehemently resist the calls for law reform.

The challenge of converting law reform proposals into action is one that I have faced over nearly 40 years of public life, starting with my years in the Australian Law Reform Commission in 1975. On an international level, the difficulties are magnified. The forces of resistance and inactivity are increased. We cannot force reform. But we must redouble our efforts of persuasion. Because the present law is a vehicle of human oppression and repression, it falls to judges and lawyers throughout the Commonwealth to give the lead and to raise their voices in favour of reform. As earlier they did against racial discrimination.

Canada and Australia must be leaders in the calls for reform – not only for the pragmatic reasons of disease control. But also because of the need to secure equal dignity and civil liberties for people everywhere who are oppressed because of their sexual orientation. Civil Liberties today are no longer solely the concern of a State or Province. Or even of a Nation. Civil Liberties today occasion a global movement for justice and equalities for human beings everywhere.

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