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ASIA & OCEANIA LGBT LAW REFORM: BREAKING THE LOG-  
JAM

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The Hon. Michael Kirby AC CMG\*\*

*A PROMISING ENVIRONMENT*

A meeting on LGBTI law reform,<sup>1</sup> occurring in a glittering metropolis like Singapore or Hong Kong, is bound to stimulate an attitude of optimism. Especially in the context of widely publicised recent developments affecting LGBTI rights in other countries,<sup>2</sup> one could be forgiven for the notion that the laws that previously oppressed sexual minorities were now well on the way to extinction. At least in these places, the unscientific prejudices and superstitions of the past, are surely now going to change, and quickly.

Yet, after thousands of years of prejudice (and many centuries of prejudiced laws), targeted at LGBTI people, why should their situation

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\* This article is based on an address to the conference on the Life and Future of British Colonial Sexual Regulation in Asia, held at the Faculty of Law, National University of Singapore, 8-9 October 2015. The conference was hosted by the National University of Singapore, Center for Asian Legal Studies and the *Hong Kong Law Journal*.

\*\* Justice of the High Court of Australia (1996-2009); President of the International Commission of Jurists (1995-8); Australian Human Rights Medal, 1991; Laurette, UNESCO Prize for Human Rights Education, 1998; Gruber Justice Prize, 2010; the author acknowledges the use he has made of research undertaken by Professor Paula Gerber and Mr Raymond Roca, of the Kaleidoscope Human Rights Foundation (Monash University, Melbourne) on the legal provisions applying to LGBTI persons in Asia and Oceania.

<sup>1</sup> That is law reform concerning Lesbian, Gay, Bisexual, Transgender and Intersex persons and issues.

<sup>2</sup> Such as the rapid increase of availability of 'marriage' to same-sex couples, including the adoption of legislation in New Zealand amending the *Marriage Act 1955* (NZ) on 17 August 2013; the strong affirmative outcome of the Irish referendum on same-sex marriage on 22 May 2015; and the 5-4 decision of the United States Supreme Court in *Obergefell v. Hodges*, 576 U.S.(this page is not yet assigned) 26 June 2015; 135 SCT 2584.

suddenly begin to improve in the current age? This is a puzzle. Many suggestions have been advanced, ranging from the growth of secularism in society to the expansion of general education and the growth of the modern technology of communications and information. Today, information and opinions about LGBTI topics are suddenly everywhere.

Some contemporary writers have dug more deeply to identify an explanation for the improvement of the situation of homosexuals in the world. For example, Steven Pinker in *The Better Angels of Our Nature*,<sup>3</sup> has suggested that what has occurred to improve the lot of LGBTI people is just one instance of a wider movement that is at work in the world. Building on statistical analysis of large amounts of data, Pinker argues there has been a significant decline, over the millennia, in violence generally. This, he suggests, is evident in the reduction in military conflict, the overall drop in homicide, genocide and torture; and the improvement in the treatment of women, children, homosexuals, racial and ethnic minorities and animals.

Pinker acknowledges that “the decline... has not been smooth; it has not brought violence down to zero; and it is not guaranteed to continue”.<sup>4</sup> However, he suggests that the motive forces that have favoured “multiple declines in violence” are the international rise of the nation state with its legal institutions and general predictability of conduct and the great expansion of commerce that gives many a stake in the survival of others. The softening of the patriarchal organisation of society and the growing respect for kinder, what he calls “feminine interests and values”; and the growth of cosmopolitanism that stimulates sympathy

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<sup>3</sup> Viking Books, New York, 2011 (“*Better Angels*”).

<sup>4</sup> Ibid, 8.

and empathy for others are, for Pinker, causative factors. However, he declares that the ultimate cause is human intelligence and the propensity for rational ethical reasoning. He describes this as “the escalator of reason”: i.e. the “intensifying application of knowledge and rationality to human affairs”. I have myself suggested that a genetic propensity to search for rational solutions to issues and problems (to prevail over brute power, force and violence) affords a reason for confidence in the ongoing gradual evolution of universal human rights.<sup>5</sup>

For Pinker, a Canadian born cognitive scientist not a lawyer, the spread of the rule of law and the discipline “the rights’ revolutions”, including in respect of LGBTI people, constitute evidence of a “growing revolution” in human conduct, particularly in the years since 1945. There is a trend, he concludes, “against aggression on smaller scales, including violence against homosexuals”. He identifies psychological elements that propel human beings in the direction of “an inner drive toward aggression”. But he suggests that four forces can orient humans away from violence and towards cooperation and altruism. These are empathy; self-control; the moral sense and reason.

In an extended section of his book, Pinker puzzles over the evolutionary causes of homophobia and of homosexuality itself. He acknowledges that, scientifically, homosexuality “is more concordant in identical than in fraternal twins”, suggesting that their shared genes play a role in causation.<sup>6</sup> He concedes that a widespread hostility towards homosexuality continues “among traditional societies”, where “more than

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<sup>5</sup> M.D. Kirby, *Sexual Orientation and Gender Identity – a New Province of Law for India* (Tagore Law Lectures 2013), Universal, New Delhi, 2015 (“Tagore Lectures”), 265.

<sup>6</sup> *Better Angels*, 448.

twice as many disapprove of it as tolerate it”.<sup>7</sup> Yet he demonstrates a rapid recent change in attitudes, evidenced in the growing decriminalisation of homosexuality worldwide.<sup>8</sup> The increase in the abolition of criminal sanctions coincides with the aftermath of the scientific investigation by Alfred Kinsey and his colleagues in the United States, into the incidence, widespread appearance and stable survival of minority sexual orientation. He notes some interesting features:<sup>9</sup>

“[In the United States] between the first burst of legalization in the 1970s and the collapse of the remaining laws a decade and a half later, Americans’ attitudes towards homosexuality underwent a seachange. The rise of AIDS in the 1980s mobilized gay activist groups and led many celebrities to come out of the closet... [A]n acceptance of homosexuality among heterosexuals was increasingly depicted as the norm... Americans increasingly felt that gay people were part of their real and virtual communities, and that made it harder to keep them outside their circle of sympathy. The changes can be seen in the attitudes they reveal to pollsters. ... Liberals are more accepting of homosexuality than conservatives, whites more accepting than blacks, and the secular more tolerant than the religious. But in every sector the trend over time is towards tolerance. Personal familiarity matters.”

Criticisms of Pinker’s analysis, and diagnosis of the world’s global trends, have suggested that he underestimates the violence of modern states; the ongoing consequences of colonialism for violence to many people; a failure to allow for different cultures beyond Western Europe and North America; and the conservative slant towards the optimism

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<sup>7</sup> Ibid, 449.

<sup>8</sup> See figure 7-23 in *Better Angels*, 450.

<sup>9</sup> Ibid, 451-2.

about progress and the enlightenment, unsullied by sufficient realism.<sup>10</sup> Some of the vitriol directed at Pinker appears to be a response to his religious agnosticism and humanism. However, this article affords an opportunity to consider whether the long-term trends that Pinker ascribes to deep running forces in the world, specifically in the human species, are accurate; whether they are instances of a broader global force held together by genetic or societal reasons; or whether they represent wishful thinking as a result of “the ecstatic innocence of a faith unsullied by prudent doubt... derived from a “heroic capacity to believe a beautiful falsehood, not only in excess of the facts, but in resolute defiance of them”.<sup>11</sup>

When attention is diverted from the antiseptic halls of the United Nations in New York and Geneva and from the courts and institutions of Western Europe, North America and Australasia to the back streets of Asia, Africa, the Caribbean and Oceania, is Pinker’s analysis right or wrong? At least, is it premature and over confident? If it is, what is the correct analysis? And should we humans do anything to advance progress to a new “enlightenment” of universal human rights? Specifically, can we do so in the context of LGBTI rights and specifically towards the reduction of violence against LGBTI people worldwide? Including the violence of criminal laws expressly targeted at them?

### *ASIA AND OCEANIA: THE GOOD NEWS*

Most of Pinker’s analysis, and virtually all of the examples in his discussion of changes in LGBTI rights, concern Western Europe and

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<sup>10</sup> D.B. Hart, “The Precious Steven Pinker” in *First Things (Journal of Religion and Public Life)* January 2012.

<sup>11</sup> Hart, *ibid.*

North America, particularly the United States of America where he is now a professor at Harvard University.

It is well known that the incorporation of a special hostility towards LGBTI people (or at least towards the acts of homosexual men) was a peculiar feature of British colonialism. This is reflected in the title of the conference for which this article was prepared.<sup>12</sup>

In a sense, the title for the conference was unfair. Most of the countries that were formerly part of the British Empire in Asia (and elsewhere) have long since won complete political and legal independence from the United Kingdom. To that extent, they enjoy, and have long exercised, complete freedom to alter their criminal and other laws and to substitute new laws of their own. Indeed, both in academic writing,<sup>13</sup> in the Commonwealth<sup>14</sup> and in the United Nations,<sup>15</sup> I have endeavoured to persuade them to do this. However, so far, they have overwhelmingly declined or refused to act.<sup>16</sup>

At this stage, fifty years after independence, it is therefore unreasonable, to blame the United Kingdom Government. In fact, the United Kingdom was one of the first jurisdictions of former British dominion to reform, and

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<sup>12</sup> “The Life and Future of British Colonial Sexual Regulation in Asia”. D. Sanders, “Section 377 – and the Unnatural Afterlife of British Colonialism” (2009) 4 *Asia Journal of Comparative Law*. See also Human Rights Watch, *This Alien Legacy: the Origins of ‘Sodomy’ Laws in British Colonialism*, New York, December 2008. See also *Tagore Lectures*, 77-81.

<sup>13</sup> M.D. Kirby, “Discrimination on the Ground of Sexual Orientation: A New Initiative for the Commonwealth of Nations” (2007) 16 *The Commonwealth Lawyer*, 36.

<sup>14</sup> Commonwealth of Nations, Eminent Persons Group, *A Commonwealth of the People – Time for Urgent Reform*, 2011, 98-100 (rec 60) 800 (“EPG Report”).

<sup>15</sup> United Nations Development Programme, Report of the Global Commission on HIV and the Law, *Risks, Rights & Health* (UNDP, New York, 2012), 44 [3.3].

<sup>16</sup> At the Commonwealth Heads of Government Meeting (CHOGM) in Malta in November 2015, no progress was reported on the recommendation for reform on criminalisation of LGBTI people contained in the EPG Report.

then repeal, the laws criminalising gay men.<sup>17</sup> This followed parliamentary consideration of a substantial report that urged that course.<sup>18</sup>

As the 20<sup>th</sup> Century moved on, and the United Kingdom became subject to the disciplines of the *European Convention on Human Rights*, it gradually took steps to repeal or modify criminal laws against gays, within its jurisdiction.<sup>19</sup> Two other European countries, that had formerly been part of the British Empire, undertook similar steps after adverse decisions of the European Court of Human Rights.<sup>20</sup> Likewise, before the return of Hong Kong to China in 1997, the United Kingdom ensured that steps were taken to incorporate human rights provisions in the Hong Kong Basic Law, and specifically to reform the criminal laws affecting gay men.<sup>21</sup> In the rest of Asia, where the criminal laws derived from British colonial times remain in place, the responsibility lies with the governments and legislatures of those jurisdictions. These include (as will be seen) Singapore.<sup>22</sup>

Because France abolished the sodomy offence in 1793, colonial legal systems that ultimately derived their criminal laws from the *French Penal Code*, did not generally incorporate the anti gay criminal offence. Thus,

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<sup>17</sup> The process began with the *Sexual Offences Act 1967* (GB).

<sup>18</sup> United Kingdom, *Homosexual Offences and Prostitution*, Command Paper 247, HMSO 1957 (“Wolfenden Report”).

<sup>19</sup> In Northern Ireland following *Dudgeon v United Kingdom* (1981) 4 EHRR, 149.

<sup>20</sup> In the Republic of Ireland following *Norris v Republic of Ireland* (1988) 13 EHRR 186. In Cyprus following *Modinos v Cyprus* (1993) 16 EHRR 485; see also the United Kingdom in *Lustig-Prean v United Kingdom* (1999) ECHR 71 (military).

<sup>21</sup> The Legislative Council of Hong Kong abolished the criminal laws against adult, private, consensual and non-commercial homosexual acts. See *Crimes (Amendment) Ordinance (Ord 90 of 1991)* (Hong Kong) (Cap 383). At first, (as in the United Kingdom) there was an unequal age of consent. However, this was invalidated in a law suit affirmed by the Hong Kong Court of Final Appeal. *Leung TC William Roy v. Secretary for Justice* [2005] HKCFI 713; [2005] 3 HKLRD 657; [2005] 3 HKC 77; HCAL 160/2004 (24 August 2005) *Leung T C William Roy v. Secretary for Justice* [2006] HKCA 360; [2006] 4 HKLRD 211; CACV 317/2005 (20 September 2006).

<sup>22</sup> *Penal Code* (Singapore) s377A (“Outrages on decency”).



it was not part of the law derived from the Netherlands in what is now Indonesia; nor in French colonies in Indochina (Vietnam, Cambodia); nor in Portuguese colonies such as Goa and Macao. That did not mean that social and cultural inhibitions were absent, for example in Indonesia.<sup>23</sup> But Asian countries which, in modern times, copied French-derived laws, had no specific criminal provision, including modern China, Japan and Korea (ROK and DPRK).<sup>24</sup>

The chief sources of legal problems for the LGBTI minority in Asia and Oceania arose in countries that derived their criminal statutes from Britain. The greatest progress made in recent years in Asia has generally been in countries where English criminal law never, as such, applied:

- \* *Nepal*: In 2007, the criminal laws against homosexual persons were abolished, following a decision of the *Supreme Court in Sunil Pant v Nepal*.<sup>25</sup> In 2013, Nepal also introduced a third (transgender) option in its national census return and on its citizenship identity cards. In September 2015, Nepal became the first country in Asia to include affirmative protections for LGBTI people in its national constitution. Discrimination on the grounds of “sexual orientation” and “gender” was prohibited. The decision in *Sunil Pant* also recognised the right of all Nepalese citizens to have “marital relations”. Pursuant to this move, relationship

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<sup>23</sup> S.G. Davies, “Surveilling Sexuality in Indonesia” in L.R. Bennett and S.G. Davies (eds), *Sex and Sexualities in Contemporary Indonesia* (Routledge, Oxford, 2015) 29 at 41.

<sup>24</sup> Although sexual intercourse between men was criminalised in China during the Ming Dynasty, the prohibitions were abolished by the Republic of China in 1912. The Peoples Republic of China added offences such as ‘hooliganism’. It was used to prosecute LGBTI people. This law was abolished by the PRC in 1997. The Chinese Society of Psychiatry removed ‘homosexuality’ from the list of mental disorders in 2001.

<sup>25</sup> R. Roca, “Nepal: South Asia’s LGBTI Human Rights Pioneer”, *Star Observer*, Sydney, December 2015.

recognition is presently under consideration by a committee of the Nepalese legislature.

- \* *Thailand*: In 2015, the legislature of Thailand enacted the *Gender Equality Act*. This included provisions prohibiting and sanctioning discrimination on the grounds of sexual orientation or gender identity.
  
- \* *Cambodia*: The late King of Cambodia, Norodom Sihanouk, often spoke in favour of LGBTI people, claiming that “God loves variety”. The long-term Prime Minister, Hun Sen, acknowledged in 2007 an adopted daughter who had taken a wife. He expressed “disappointment” in her move. A survey of public opinion showed that 63% of Khmer would be ashamed of having an LGBTI relative. Nevertheless, 65% agreed that there should be a law against discrimination on that ground.
  
- \* *Japan*: Whilst having no criminal sanctions, against LGBTI people or conduct, evidence of distaste in Japan towards LGBTI people and issues exists. Thus, the present Abe Government is opposed to marriage law reform. Mr Abe has reiterated his belief that the constitutional definition of ‘marriage’ excludes same-sex couples, being based, in his opinion, on “only the mutual consent of both sexes”.<sup>26</sup> However, formal recognition of same-sex unions has begun to appear in sub-national levels in Japan. In March 2015, Tokyo’s Shibuya Ward Municipal Office became the first in Japan to officially recognise same-sex unions. It adopted an Ordinance

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<sup>26</sup> Quoted in *Asian Review*: “Sex and Gender” *East Asia Forum Quarterly*, October-December 2015, 1.

to allow the office to issue 'partnership' certificates to LGBTI couples. Increased corporate activity on LGBTI issues has also become visible in Japan, including employee training on diversity and gender sensitivity, as well as sponsorship of participation of employees in events such as the Tokyo gay pride parade. At the same time, the new Japanese Minister for Education announced his support for teaching about LGBTI issues in elementary and junior education.<sup>27</sup> He said that the 2020 Tokyo Olympics would be utilised to help change the attitudes of the International Olympic Committee towards the sexual orientation.<sup>28</sup>

- \* *Mongolia*: In 2015 Mongolia announced that it was including sexuality education in its school curriculum.
- \* *Vietnam*: In 2014 Vietnam gave approval for its first gay pride parade. In the same year it witnessed its first legislative debate on the recognition of same-sex relationships.
- \* *Taiwan (China)*: Has enacted an antidiscrimination employment law (2002) forbidding discrimination against gay and lesbian employees. The city of Kaohsiung and the city of Taipei have each adopted Ordinances to permit same-sex couples to register their relationships, although marriage as such is not yet available. The newly elected president and government in Taiwan have expressed support for the rights of sexual minorities.
- \* *Hong Kong (China)*: An important decision of the Court of Final Appeal in Hong Kong concerned the rights of transgender people

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<sup>27</sup> Reported statement by Minister Hirosh Hase, Tokyo, 1 December 2015.

<sup>28</sup> Ibid, loc. cit.

to change their identity papers so as to reflect their gender identity as they experienced it.<sup>29</sup> This, in turn, led to a draft Bill, placed before the Legislative Council of Hong Kong, to permit alteration of one's gender identity, but on the precondition of undergoing radical reassignment surgery. This measure was defeated in the Council as a result of civil society objections, coinciding with a United Nations Development Program (UNDP) conference in Hong Kong which opposed the precondition.<sup>30</sup>

- \* *China (PRC)*: In 2014, China adopted a law prohibiting conversion therapy 'aimed at 'curing' LGBTI people.
- \* *Republic of Korea*: South Korea, like North Korea, has no penal code provision dealing with adult consensual sexual conduct. Recognition of transgender change is permitted in ROK; but only after reassignment surgery. Same-sex relations are only criminalised within the military. An openly homosexual student leader was recently elected student president of a major university.
- \* *Micronesia*: Although many Pacific islands that derive their criminal laws from United Kingdom, or the United States, have retained criminal prohibitions on same-sex activity, a number have recently begun the process of reform. In August 2015, the legislature in the United States territory of Guam enacted a law that recognised marriage equality and protected LGBTI people against employment discrimination on the basis on sexual

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<sup>29</sup> *W v. The Registrar Of Marriages* [2013] HKCFA 39; [2013] 3 HKLRD 90; (2013) 16 HKCFAR 112; [2013] 3 HKC 375; FACV 4/2012 (13 May 2013)

*W v. Registrar Of Marriages* [2011] HKCA 442; [2012] 1 HKC 88; CACV 266/2010 (25 November 2011)

<sup>30</sup> The conference on the rights of transgender persons was held in Hong Kong in October 2014, organised by UNDP resulted in a resolution calling for an end to the precondition of gender reassignment surgery as disproportionate to amendment of identity records and papers.

orientation, gender identity and gender expression. After June 2015 the North Mariana Islands, applied the decision of the United States Supreme Court on marriage equality. The first same-sex marriage was performed in the capital, Saipan, on 22 July 2015. The Marshall Islands and Palau (the latter formerly a German then Japanese colony and later a United States trusteeship territory under the UN) in June 2011 signed a joint statement committing to the reform of anti LGBTI laws inherited from the United States.<sup>31</sup> This led, in July 2014, to the repeal of the relevant Palau criminal laws, although other discriminatory laws remain.<sup>32</sup>

- \* *Nauru*: Also since 2015, the Australian Government has been assisting Nauru to produce a modernised *Criminal Code* that would remove penal sanctions on same-sex activity. Before independence in 1968, Nauru was a mandated territory under the League of Nations and later a UN trusteeship, administered by Australia. Immediately on taking over administration of the island from Germany in 1921, the Australian authorities introduced the anti-LGBTI laws.<sup>33</sup>
  
- \* *Fiji*: In 2005, the High Court of Fiji applied a human rights provision in the Fiji Constitution protecting privacy to invalidate the imported British criminal law targeted at LGBTI people. The court concluded that the law was incompatible with respect for individual privacy.<sup>34</sup> The Fiji High Court also held that the law disrespected individual diversity and the dignity of private consensual intimate

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<sup>31</sup> Joint Statement by the Federated States of Micronesia on ending acts of violence and related human rights violations based on sexual orientation and gender identity (Marshall Islands and Palau), March 2011.

<sup>32</sup> R. Roca, "Micronesia: a Diverse Region with Diverse Laws", *Star Observer*, Sydney, October 2015, 46.

<sup>33</sup> *Criminal Code of Queensland*, ss 209, 209, 211 ("Unnatural offences") applied to Nauru by ordinance dated 1 July 1921.

<sup>34</sup> *Naidan and McCoskar v State* [2005] FJHC500. See Tagore Lectures n.5, 109-110, 116, 121.

conduct that was protected by the then constitution. It declared that the proper function of the criminal law was limited to protecting “the vulnerable and penalising the predator”.<sup>35</sup> In 2012, following this decision, the legislature enacted an anti-discrimination law. Leading members of the Fiji Government have been active and forthright in conferences on HIV/AIDS in promoting legislative reform on LGBTI and other issues as a means of facilitating education of vulnerable populations to the risks of HIV infection. Nevertheless, in more recent times, the President of Fiji has been reported as expressing hostility to the idea of same-sex marriage.

## *ASIA AND OCEANIA: THE BAD NEWS*

Despite these often hopeful developments in Asia and Oceania, other jurisdictions in the region have maintained colonial criminal sanctions against LGBTI people. They have rejected or ignored calls for reform. Some in recent years have even taken backward steps, by endorsing, reintroducing or increasing criminal punishments:

- \* *Mainland: Criminal Law:* A majority of countries in the Asian region still retain pre-independence criminal laws against same-sex activities. Most of these were countries formerly governed by Britain and are now members of the Commonwealth of Nations. They include Bangladesh,<sup>36</sup> Brunei,<sup>37</sup> India,<sup>38</sup> Malaysia,<sup>39</sup>

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<sup>35</sup> *Nadan* cited in Tagore Lectures, *ibid*, 121.

<sup>36</sup> *Penal Code* 1860 (Act XLV of 1860) s377 applied in Bangladesh (“Unnatural Offences”).

<sup>37</sup> *Penal Code*, s377 (“Unnatural Offences”), applied in Brunei.

<sup>38</sup> *Indian Penal Code* 1860, s377 (“Unnatural Offences”).

<sup>39</sup> *Penal Code* (Malaysia – consolidated 1998) s377A (Malaysia) (“Carnal Intercourse Against the Order of Nature”).

Maldives;<sup>40</sup> Myanmar/Burma;<sup>41</sup> Pakistan;<sup>42</sup> Singapore;<sup>43</sup> and Sri Lanka.<sup>44</sup>

- \* *Oceania: Criminal Law:* In Oceania, all of the former British colonies or Australian or United States territorial islands inherited the criminal provision addressed to LGBT people generally or, more usually, gay men in particular. Leaving aside jurisdictions where there has been some improvement, the criminal laws in the following countries remain resolutely unreformed: Kiribati;<sup>45</sup> Papua New Guinea;<sup>46</sup> Samoa;<sup>47</sup> Solomon Islands;<sup>48</sup> Tonga;<sup>49</sup> and Tuvalu.<sup>50</sup> There were three basis models available to British colonial administrators for expressing the criminal law. Each of them had a provision against “unnatural offences”. Each was deployed in the Asia/Oceania region.<sup>51</sup>

Whatever the reason for neglecting reform in jurisdictions that had no pre-colonial laws of a similar kind, in some of the countries on the South Asian region, things have actually become worse in recent times for the LGBTI minority:

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<sup>40</sup> *The Penal Code of Maldiv Islands* does not apply, from 19 September 2006 to sexual offences. The law applied is the uncodified Sharia Law, including punishments of imprisonment and whipping.

<sup>41</sup> Burma also inherited the *Indian Penal Code* s377. It is not a member of the Commonwealth of Nations.

<sup>42</sup> *Penal Code* (law XLV of 1860) s377 (“Unnatural Offences”).

<sup>43</sup> *Penal Code* (Singapore) (Chapter 224), s377A.

<sup>44</sup> *Penal Code* (as amended by *Penal Code (Amendment) Act* no. 22 of 1995, article 365 (“Unnatural Offences”).

<sup>45</sup> *Penal Code* (CAP 67-1977), s153 (“Unnatural Offences”).

<sup>46</sup> *Criminal Code* 1974 (PNG) (copied from *Queensland Criminal Code*) (“Unnatural Offences”) s212 (“indecent practices between male persons”).

<sup>47</sup> *Crimes Act* 1913, s67 (“Sodomy”).

<sup>48</sup> *Penal Code* (Revised 1996), s160 (“Unnatural Offences”), s161 (attempts), s162 (“Indecent Practices Between Persons of the Same Sex”).

<sup>49</sup> *Criminal Offences Act* 1988 (Tonga), s136 (“Sodomy and Bestiality”) s139 (attempts), s142 (whipping).

<sup>50</sup> *Penal Code* (Revised 2000) s153 (“Unnatural Offences”); 154 (attempts); 155 (“Indecent Practices”).

<sup>51</sup> These were the Macaulay, Stephen and Wright or Griffith codes. In Oceania and Nigeria the Griffith (Queensland) code was influential. See Tagore Lectures, above n.5, 91-92.

- \* *India*: In 2009, the Delhi High Court in *Naz Foundation v Delhi*<sup>52</sup> declared that s377 of the *Indian Penal Code*,<sup>53</sup> which criminalised and punished penetrative same-sex acts, violated the constitutional rights LGBTI people in India. Accordingly, it held that the section had to be ‘read down’ so as to apply only to same-sex activity involving under-aged or non-consensual acts.<sup>54</sup> The decision was widely welcomed.

The United Nations Secretary-General, Ban Ki-moon, repeatedly spoke out on the subject and on the application of universal human rights. He also declared the unacceptability of exceptionalism for homosexuality. He advocated an end to homophobia as a ‘matter of personal security, dignity and even survival for countless individuals’.<sup>55</sup> Speaking directly to LGBTI people he said:

- \* “Any attack on you is an attack on the universal values that the United Nations and I have sworn to defend and uphold. Today I stand with you... and I call on all countries and people to stand with you too.”<sup>56</sup>

The Secretary-General insisted that ‘no religion, culture or tradition can ever justify the denial of the basic rights that are contained in the [UDHR] and [UN] treaty law. The heads of other UN agencies spoke repeatedly to similar effect. For the first time in 2011, the UN Human Rights Council adopted an historic resolution against discrimination or violence targeted at homosexual people. The

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<sup>52</sup> (2009) DLT 279 (DELHC); [2009] 4 LRC 838.

<sup>53</sup> The text of s377 IPC is set out in [2009] 4 LRC 838 at 847 [3].

<sup>54</sup> See *Naz Foundation* [2009] 4 LRC 838 at 893 [127] ff.

<sup>55</sup> UN Secretary-General, video message to the Human Rights Council Meeting, 7 March 2012 available at:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11917&LangID=E>.

<sup>56</sup> Quoted Tagore Lectures, 104-130.



Naz Foundation decision in India, shortly before that resolution, was praised as bringing Indian law into line with many expressions of the universal law of human rights.<sup>57</sup>

However, in 2013, in *Koushal v Naz Foundation*,<sup>58</sup> a two member bench of the Supreme Court of India reversed the *Naz* decision. It thereby effectively restored the binding force in India of s377 IPC. An immediate application to the Supreme Court of India for review of the *Koushal* ruling failed. A curative petition was then filed. In 2016, that petition was referred to a five judge constitutional bench of the court; but it has not yet been finally decided.

Meanwhile, a decision of a differently constituted bench of the Supreme Court of India, in April 2014,<sup>59</sup> reached a conclusion in relation to the rights of transgender persons in India, that is difficult to reconcile with the criminal sanctions addressed in s377 IPC and upheld in *Koushal*. Ominously, following the change of the national Government in India in 2015, several leaders of the Bharatiya Janata Party, now in government, supported the Supreme Court ruling in *Koushal*. They expressed homophobic views. Given this political hostility, protection from the courts on constitutional grounds, as in *Naz*, appears to be the most hopeful route for LGBTI reform in India in the immediate future.

- \* *Brunei*: In May 2014, the first phase of the Syariah Penal Code Order commenced operation. This law provides for an increase in the punishment of same-sex activity in Brunei so as to include the

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<sup>57</sup> Ibid, 245-264; T. Khaitan, “Reading Art. 15: “A New Deal of Minorities” (2009) 3 *NUJS Law Rev* 419 at 422.

<sup>58</sup> (2014) 1 SCC 1.

<sup>59</sup> *NALSA v Union of India* (2014) SCC.

death penalty. The Order also criminalises cross dressing, a change liable to be used to target transgender and gender diverse people in Brunei. The availability of the death penalty was delayed to a date to be fixed, expected to be in 2016. In England, and in most of its colonial laws, the death penalty was originally prescribed for convictions for the offence of buggery. However, this was later substituted by life imprisonment or imprisonment for a term of years. The reintroduction of the death penalty for the offence in Brunei has also been foreshadowed in recent moves in a number of African States. It also applies in a number of Islamic countries, that follow the Biblical prescription in the Book of *Leviticus*.

- \* *Australia*: Although criminalisation of adult, consensual, private same-sex activity was finally ended in Australia in 1997, with the repeal of the last remaining provision in the State of Tasmania, and a decision of the High Court of Australia in 2013,<sup>60</sup> the hopes of many LGBTI Australians were dashed by a constitutional decision in December 2013 striking down the validity of a law of the Australian Capital Territory providing, for the first time, for same-sex marriage.<sup>61</sup> In terms, the decision was not concerned with the merits of the measure. It was concerned only with the validity of a law of the Capital Territory to so provide, given what was held to be the “comprehensive and exhaustive statement”<sup>62</sup> of the law of Australia on that subject in the federal *Marriage Act* 1961. Because of political differences that exist in the governing Coalition parties in Australia, the holding by the High Court, that

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<sup>60</sup> *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

<sup>61</sup> *Marriage Equality (Same-Sex) Act* 2013 (ACT).

<sup>62</sup> (2013) 250 CLR 441 at 467 [56].

the Federal Parliament had full power to enact marriage for LGBTI people if it so decided, has not so far been taken up. Instead, the government undertook, exceptionally, to conduct a plebiscite of electors to determine whether a majority of Australian citizens approved, or disapproved, a law providing for same-sex marriage. Australian LGBTI citizens have questioned the entitlement, even of a majority, to decide their basic civil and human rights. They ask why they should be singled out for such an exceptional law-making procedure. Especially so when the nation's highest court had affirmed that the applicable constitutional power to make the law is vested in the Federal Parliament and the established constitutional system is one of a representative democracy. The explanation for the exceptional procedure could only be continuing hostility towards the LGBT population in relevant quarters. This is especially so given that legislative or judicial determinations in favour of same-sex marriage have already been adopted in more than 20 countries that share many legal and social norms with Australia.<sup>63</sup>

- \* *Korea:* As stated, in the Republic of Korea (ROK) same-sex activity continues to be criminalised but only within the military. Reassignment surgery is required for a change of identity papers by transgender citizens. Surprisingly, in 2015, in what is often considered the smart phone centre of the world, the Government of ROK announced that it would no longer be possible for users to access gay networking apps. *Samsung* and *GooglePlay* bowed to

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<sup>63</sup> In 2015 a referendum was carried in the Republic of Ireland. However, a referendum was defeated in Slovenia.

pressure. They removed these services from their products, explaining that this was done because of “local moral values”. *Apple* gave no indication whether they planned to follow suit. Introduction of new laws to protect LGBTI people against discrimination in ROK has effectively been postponed until after general elections later in 2016.

- \* *Singapore*: For some years, attempts had been made in Singapore to challenge s377A of the *Singapore Penal Code* as violating Article 12 of the *Singapore Constitution*. In 2013, a single judge of the High Court of Singapore rejected the arguments for LGBTI equality and invalidation of these penal provisions.<sup>64</sup> Eventually, a substantive appeal was heard by the Court of Appeal of Singapore, now the highest court in the State. That court rejected the constitutional challenge. It held that relief to the appellant would be available, “if at all”, only by legislation enacted by the Singapore Parliament.<sup>65</sup> In so reasoning, the Court of Appeal reflected the reasons expressed earlier the Supreme Court of India in *Koushal*. Change, it was held, was the responsibility of the legislature.

This reasoning amounts to a departure from the normally distinctive functions of a legislature and of a constitutional court reviewing legislation for constitutional error or infirmity. The legislature and the courts must then play their separate respective roles. Legislatures can, of course, often repair constitutional complaints. They can change impugned legislation. However, where they fail to do so, over a very long time, this does not

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<sup>64</sup> *Lim Meng Suang v Attorney General*[2013] 3 SLR 118.

<sup>65</sup> *Lim Meng Suang v Attorney General*, Court of Appeal of Singapore, October 2014.

ordinarily relieve a constitutional court of its own separate responsibility to decide asserted questions of constitutional validity.

Excuses were provided that Singaporean authorities do not ordinarily enforce s377A, except in cases involving underaged and non-consensual persons. The Prime Minister of Singapore himself has recently stated “homosexuals are... our kith and kin”. The Pink Dot organisation has been authorised to organise public meetings to argue in favour of LGBTI rights. However, the reform of s 377A has not been enacted. The stigma of living “outside the law” remains in place for the LGBTI minority in Singapore. The problem of creating a space between the *letter* of the law and its currently benign *enforcement* is that it affords room for the corruption of police and other public officials. That this is countenanced is itself surprising, given Singapore’s justifiable pride in its anti-corruption strategies. A State with strong legal institutions should provide a better example to its neighbours.

- \* *Malaysia*: Malaysia also adheres to the operation of s377A of its *Penal Code*, also derived originally from the IPC. However, as in several Asian societies, Malaysian courts have recognised transgendered persons. In November 2014, in *Khamis v State Government of Negeri Sembilan*,<sup>66</sup> the Court of Appeal of Malaysia struck down the State Sharia Law criminalising persons who “pose” as women or who wear women’s attire in public. The Court of Appeal held that the law was unconstitutional. In that respect, it followed generally an approach taken earlier by the Supreme

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<sup>66</sup> *Government of Negeri Sembilan v Khamis*, unreported, Court of Appeal (Mal), October 2015.

Court of Pakistan.<sup>67</sup> However, on 9 October 2015, whilst the conference at which this article was read was proceeding in Singapore, the Federal Court of Malaysia reversed the judgment of the Court of Appeal. It upheld the validity of the Sharia law prohibition against transsexual conduct in Malaysia. Another disappointing Asian court decision was delivered.

The economic advances of Asian countries in recent years have been extraordinary. To some extent, these changes have proved beneficial to improvements in human rights, including LGBTI rights. Without access to food, shelter, employment, healthcare and other such rights, life is often a misery. To this extent, the environment for human rights has improved in most countries of Asia over the past 50 years. The same is true in Australasia and in much of Oceania.

Nevertheless, in respect of LGBTI rights, freedoms and identity, Asia must be classified, with Africa and the Caribbean, as the region of the world where legal protection of LGBTI persons is least developed. Despite some changes, in most of the jurisdictions of Asia a log-jam against law reform has arisen. So long as the criminal law penalises same-sex activity, a blight is placed on LGBTI persons. In the age of HIV/AIDS and other communicable sexual diseases, it is a dangerous blight. Fear of openness, including in seeking medical advice and treatment, can be life threatening. It does not only amount to a denial of the most basic and intimate of human rights of those concerned. It is also a threat to the human rights of the sexual partners and families of those persons. Given currently available treatment for diseases that,

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<sup>67</sup> Ban Ki-moon quoted in Tagore Lectures, 192-194.

promptly administered, can help to reduce the spread of HIV, the consequences of the present laws are harmful to the societies and individuals concerned.<sup>68</sup>

The log-jam accumulates because of the failure of the legislatures in most of the countries in the Asia-Pacific region, to repeal the offending criminal laws. This failure appears to be endemic, despite numerous well-reasoned international reports and the advocacy of respected leaders of the United Nations and its agencies including Secretary-General (Ban Ki-moon).<sup>69</sup>

### *AN ASIAN OR PACIFIC EXCEPTIONALISM?*

The question presented by a reflection on the foregoing and the writings of Steven Pinker, referred to at the outset of this article,<sup>70</sup> is whether the differentiation in progress outlined in this paper suggests a cultural, ethical and legal exceptionalism, relevantly on the part of the nations and courts of Asia and Oceania? Are the resisting jurisdictions evidence of what they sometimes state is resistance to the ‘Western’ attempt, to force their notions of human rights in an imperialist manner on other countries? Do the differing customs, religions, histories and popular opinions of the regions justify the log-jam? Is there anything that can or should be done to clear it?

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<sup>68</sup> UNDP, Global Commission on HIV and the Law, *Risks, Rights & Health*, 2012.

<sup>69</sup> UN Secretary-General, “Message to UN Forum on International Day Against Homophobia and Transphobia”, 16 May 2013, available: <http://www.un.org/sgstatement/?md=6822>. Also see *UN Secretary-General to Human Rights Council*, 7 March 2012 available at:

<http://www.ohchr.org/EN/issues/discrimination/Pages/LGBTspeechesandstatement.aspx>

<sup>70</sup> See *Better Angels*, above n.3.

From the start, those who drafted the international instruments of human rights of the United Nations asserted that they were searching for truly universal values that inhered in all people, worldwide, simply because of their humanity. One of the reasons for the delay in completing the *Universal Declaration of Human Rights* of 1948 (UDHR) (so that a bill of rights could not be incorporated in the *Charter* of the United Nations of 1945, as at first contemplated) was the emergence of differing attitudes on the part of Western and ‘socialist’ countries over the inclusion and status of economic, social and cultural rights. Another was the suggestion by the Chinese delegation to the United Nations (then the Republic of China) that ‘Confucian values’ in China could require modification of some of the more individualistic values cherished in Western societies.

In later Singaporean excuses for its failure to achieve reform of s377A of the Penal Code either by legislature or judicial action, reference has been made to the suggested “conservative social values” of the Chinese community in Singapore. The same “conservative values” have been nominated in many of the States of Oceania, missioned by colonial Christian missionaries in the 19<sup>th</sup> century. Islamic States are also affected by loyalty to a literal understanding of religious prescripts beginning with the Biblical book *Leviticus*.<sup>71</sup>

The UDHR, in Article 1, asserted its principles in unqualified, universal terms.

“All human beings born free and equal in dignity and rights”

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<sup>71</sup> *Leviticus*, Ch 20, v 13.



This is why it is called a “Universal Declaration”. It is why its provisions are uniformly expressed in terms of “everyone”, “no-one” and “all”. Only Article 16 of the UDHR, dealing with ‘marriage’, is differently expressed (“men and women of full age”). It is because of these provisions, as matter of law, that the United Nations and its agencies have insisted on the universal reach of global human rights law; on its indivisibility; and on its lack of regional, religious or cultural exceptions. So called Asian exceptionalism has not been endorsed in the United Nations, although Singapore advocated for something like it at the World Conference on Human Rights of 1993, that gave rise to the creation of the office of the High Commissioner for Human Rights.

Exceptions and derogations for entire populations or countries must be seen as legal heresy. Rear guard actions to defend exceptionalism can be attempted. However, they have no support in the text of the *Charter* of the United Nations or the UDHR or the succeeding treaties. Nor do they find support in decisions of the courts, tribunals, committees and mandate holders of the United Nations. When I served for Secretary-General Boutros Boutros-Ghali in Cambodia, as his Special Representative for Human Rights, I repeatedly asked the victims of human rights abuses there whether they believed at the time or later that ‘things were different in Asia, so far as human rights were concerned’. Although ready to concede that those with power, or those who were recalcitrant, would often assert differences and enforce them, the victims of abuse were as forthright as the scholars. They urged that they did not enjoy lesser rights by reason of their geography, culture, history, race or other immaterial reasons. They were correct.

## EXPEDITING PROGRESS IN ASIA AND OCEANIA

So what can now be done to expedite the trend of history so that has emerged in the last forty years it expand the protection of LGBTI people and their families and partners in Asia and Oceania? What can be done to guard this part of humanity from violence, discrimination, criminalisation and abuse? What can be done specifically to expedite the availability of universal human rights for LGBTI people in Asia and Oceania?

- \* *UN Leadership:* The United Nations, with its commitment to universal human rights, has been an increasingly influential force in pushing forward an end to criminalisation of, and discrimination against, LGBT people everywhere. Starting with the first High Commissioner for Human Rights, the former Irish President Mary Robinson, successive UN High Commissioners have helped to position LGBTI rights at the centre of the present international dialogue on human rights. There has been resistance. However, calls for the eradication of criminal laws against LGBTI people have been adopted by votes of the General Assembly of the United Nations;<sup>72</sup> and of the Human Rights Council.<sup>73</sup> A further more recent resolution of the Human Rights Council was approved after a sometimes bitter debate.<sup>74</sup> In March 2012, a strong statement was made to the Human Rights Council by the then High Commissioner for Human Rights, Navi Pillay:

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<sup>72</sup> UN General Assembly, *Declaration on Human Rights, Sexual Orientation and Gender Identity*, 18 December 2008. See Tagore Lectures, 253-255. The draft Declaration was contested by a rival declaration initiated by Syria.

<sup>73</sup> United Nations, Human Rights Council, vote on 17 June 2011 available at: <http://www.abc.net.au/news/stories/2011/06/17/3247209.htm?site=news>.

<sup>74</sup> The statement, “Ending violence based on sexual orientation and gender identity” was proposed by Columbia. It was adopted with the support of 85 States.

“People are entitled to their opinion... They have an absolute right to believe – and to follow in their own lives – whatever religious teachings they choose. But that is as far as it goes. The balance between tradition and culture, on the one hand, and universal human rights on the other, must be struck in favour of rights.”<sup>75</sup>

Not only have millions of people come to know these statements. Governments everywhere are aware of the accumulating developments protective of the rights of LGBTI people. The UN and regional standards are bound to influence over time the laws and conduct of member states of the United Nations. Time and international institutions are on the side of change.

- \* *Civil Society Leadership*: In addition to governmental action, global civil society has moved steadily in the direction of upholding the human rights of LGBTI people. Amnesty International, International Service for Human Rights and the International Commission of Jurists (ICJ) and Human Rights Watch (HRW) have all taken an early lead to advance this development. Thus, the ICJ organised the meeting in Indonesia in 2006 that propounded the *Jogjakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity*.<sup>76</sup> These principles have proved influential particularly within the

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<sup>75</sup> UN Human Rights Council, adopted 14 July 2011 (23:19:3). See A/hrc/Res/17/19.

<sup>76</sup> UN High Commissioner for Human Rights, Human Rights Council, 7 March 2012. See <http://www.ohchr.org/EN/newevents/pages/displaynews.aspx?newsID=11917andlangid=E>. See Tagore Lectures, 260-1.

judiciary.<sup>77</sup> They have stimulated reconsideration of past laws and attitudes towards LGBTI people and towards their legal rights in many countries. They have encouraged the establishment of organisations dedicated to initiating legal proceedings to challenge anti-LGBTI laws on constitutional grounds, where such grounds are available. The Human Dignity Trust, based in London, provides skilled legal advice in many countries to support the contest to such laws.<sup>78</sup> After much divided discussion, the Commonwealth Lawyers' Association issued a statement committing itself and constituent Bar associations to the repeal of anti-LGBTI criminal laws.<sup>79</sup> In May 2014, the Council of the International Bar Association eventually likewise called for the repeal of criminal laws against LGBTI people.<sup>80</sup> Lawyers play an important role in implementing, defending, advising on and reforming unjust laws. Inescapably, they have a special responsibility to give leadership, nationally and internationally, to the law reform process.

- \* *Scientific progress*: The growing body of scientific research into the causes, universality and insusceptibility to “treatment” of sexual orientation and gender identity has had a large impact on the ensuing global debates. Once it became generally known that sexual orientation and gender identity were not deliberately chosen ‘lifestyles’ but naturally appearing phenomena in the human (and

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<sup>77</sup> March 2007, Yogyakarta, Indonesia. See Tagore Lectures, 248-9.

<sup>78</sup> See e.g. *Naz Foundation v Delhi* [2009], 4LRC 838 at 861 [43]-[46].

<sup>79</sup> CLA statement, 8 April 2009. See *Naz Foundation v Delhi* [2009] 4 LRC 838 at 879. Other examples in Belize, Singapore and Uganda.

<sup>80</sup> Commonwealth Lawyers' Association, Resolution on Decriminalisation of Sexual Orientation, 16<sup>th</sup> CLA Conference Hong Kong, 5-9 April 2009. See Tagore Lectures, 255-6.

other animal) species,<sup>81</sup> criminalising these characteristics, and the consensual private adult conduct to which they give rise, became increasingly seen as both irrational and unjust. The same had occurred earlier in respect of the legally supported hostility to, and discrimination against, people on the grounds of race, skin colour, gender and disability. The ironic fact that legal and other causes of discrimination against LGBTI people exist today mostly in African, Caribbean and Asian countries that formerly suffered from racial and colonial discrimination, is not lost on an ever increasing cohort of humanity. Most scientific research concludes that variations in sexuality have foundations in genetic, as well as (in some cases) environmental and other causes.<sup>82</sup> This helps to explain why the *Diagnostic and Statistical Manual* of mental diseases, issued by the World Health Organisation, deleted 'homosexuality' as a mental disorder in 1987. This is not just an eccentric view of activist Western psychiatry. It is the generally held opinion of the professional discipline of psychology worldwide. In the face of this alteration in knowledge and beliefs, the maintenance of criminal and other laws against LGBTI citizens is not only irrational. It is seriously unjust and morally untenable. Political and other leadership is needed to remove this affront to civic equality. Just as earlier leadership was afforded to removing unjust treatment of indigenous peoples; of women; and of people of different race, skin colour and appearance.

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<sup>81</sup> International Bar Association, Council resolution on criminal laws, 2015.

<sup>82</sup> JM Bailey and RC Pillard, "A Genetic Study of Male Sexual Orientation" (1991) archives of *General Psychiatry* 1089-1097. See Tagore Lectures, 67; RC Friedman and JI Downey, *Sexual Orientation and Psychoanalysis*, Columbia Uni Press, New York, 83

\* *Media and celebrities:* The advent of global media has also meant that huge numbers of people worldwide cannot now claim ignorance of the advances in human knowledge and understanding just mentioned. Increasing numbers of sports stars, popular entertainers, scholars and even judges and politicians have become open about their sexuality. Leading religious figures (such as South African Bishop Tutu) have spoken out against homophobia. Pope Francis, in an interview soon after his election as Pope, said on 28 July 2013: “If someone is gay and is searching for the Lord and has good will, then who am I to judge him? The catechism of the Catholic Church... says: “no one should marginalise these people for this. They must be integrated into society”.<sup>83</sup> For this and other open mindedness about LGBTI issues (he was the first Pope to use the word “gay”), the United States LGBTI *Advocate Magazine* named Pope Francis as its “Person of the year 2013”.<sup>84</sup> In a number of other Christian denominations, including Anglicanism, theological scholars have begun to question the assumed Biblical interpretations that described LGBTI people as an “abomination”, deserving of death.<sup>85</sup> Whilst it is true that progress is slower in some Islamic and Christian countries,<sup>86</sup> attempts to convert Indonesia to an Islamic state and to introduce *Syariah* law against sexual minorities outside the province of Aceh, have not succeeded.

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<sup>83</sup> Press Conference of Pope Francis during the return flight [to Rome], the Holy See, 28 July 2013, retrieved 3 June 2015.

<sup>84</sup> IL Grindley, “The Advocate’s Person of the Year 2013”, *The Advocate*, 16 December 2013.

<sup>85</sup> See e.g. J. Spong, *Living in Sin? A Bishop Rethinks Human Sexuality*, Harper Colins, New York, 1988, 71; N.Wright (ed) *Five Uneasy Pieces – Essays on Scripture and Sexuality*, ATF Press, Adeliade, 2011; K. Mascord, .

<sup>86</sup> Even in relatively tolerant Indonesia. See K. Robinson, “Masculinity, Sexuality and Islam – The Gender Politics of Regime Change in Indonesia” in L.R. Burnett and S.G. Davies, *Sex and Sexualities in Contemporary Indonesia*, Routledge, Oxford 2015, 51.

In the United States, after the Supreme Court's same-sex marriage decision, many civil society advocates have picked up on the remarks of Chief Justice John Roberts concerning the coming conflict between the human rights of LGBTI people and the religious rights of 'people of Faith'. As a matter of legal analysis, and of practicality, these potentially conflicting assertions of basic human rights need to be reconciled. Harmony can be achieved in most countries according to the postulates of secular governance. To use J.S. Mill's aphorism, 'The right to swing my arm finishes when it comes into contact with your chin'. However, the reconciliation of the competing rights of people of particular religious beliefs cannot oblige LGBTI people to return to denial of their being and pretence that they are actually heterosexual. It cannot justify or revive hatred, hostile laws targeted at them. Nor can the feelings of people 'of Faith' be allowed to restrict the basic human rights of those who are LGBTI. Deep animosity by some to the private, adult, consensual sexual relationships and familial rights of LGBTI people should not be allowed to prevail to the benefit of those who are strangers to the activities and relationships of those persons. This is why the High Commissioner for Human Rights, Navi Pillay, called for mutual forbearance. However, she insisted that, in the end, the rights of LGBTI people had to prevail over the religious beliefs or practices of people who find their very existence and imagined conduct objectionable.

## *PROSPECTS AND PREDICTIONS*

Whilst progress has been made on LGBTI issues elsewhere in the world, in Asia and Oceania the progress is so slow that it appears to challenge the confidence in change predicted by Steven Pinker.<sup>87</sup> Yet cool analysis suggests that the present timewarp in that part of the world amounts approximately to the situation that prevailed in Western Europe, North America and Australasia, 50 years ago. Unenlightened by science, moves for law reform and widespread awareness, many at that time knew that LGBTI people existed. The enlightened felt sorry for their 'sickness'. A few expected that they could 'get over' it, marry and have children just like everyone else. However, in the intervening years, the injustice and oppression involved of this expectation gradually began to sink in. At first, reparative therapy and curative prayer were no longer demanded as a general expectation. Then, they were replaced with a growing acknowledgement of the personal rights to happiness, love, respect and equality of those who had not chosen (and could not change) their sexuality. This is where much of Asia and some parts of Oceania now find themselves. Change is slow. However, change is happening.

The likelihood is that the change will continue. It will probably happen at a faster pace for at least three reasons. The first is the spectacular change that has occurred in Western countries and that is regularly covered in global media. The second is the generational and technological changes that are bringing people everywhere into contact with the realities of minorities evincing their sexual orientation, gender identity and expression. The third is the ongoing pressure from the

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<sup>87</sup> See above part 1 of this article.



United Nations and other institutional forces. And the role that shaming plays in politicising the worst instances of oppression, violence, discrimination, and denial of basic human rights.<sup>88</sup> New international human rights machinery, including the United Nations special procedures, country and thematic special rapporteurs and the creation of commissions of inquiry, together with Universal Periodic Review, tap into this powerful and growing dynamic. Even the most reluctant states can sometimes be pushed in rights respecting directions.<sup>89</sup>

Time alone will determine the accuracy of this diagnosis and of my prediction of an ongoing and growing global movement for LGBTI rights. Given the oppression that has lasted from Biblical times until quite recently, the movement to repeal criminal laws in the majority of the nation states, and the astonishing and rapid arrival of marriage equality and other legal rights in such a short time, make it reasonably safe to predict a continuation of global progress. The issue presents the consequential question as to what will be the next wave of the enlightenment that science and human reason, empathy and knowledge will deliver? If humanity can produce change so radical, unpredicted and so comparatively quickly in the position of LGBTI people, what will be the next instances of the deep changes in the condition of humanity that Steven Pinker has suggested?

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<sup>88</sup> J. Levovic and E. Voeten, “The Politics of Shame: The Condemnation of Country Human Rights Practice in the UNCHR” (2006) 50 *International Studies Quarterly* 861 at 885; T. Risse and S. Rop, “International Human Rights Norms and Domestic Change: Conclusions” in the *Power of Human Rights* (1999), 234, 254.

<sup>89</sup> M.D. Kirby and S. Gopalan, “‘Recalcitrant’ States and International Law: The Role of the UN Commission of Inquiry on Human Rights Violations in the Democratic People’s Republic of Korea” (2015), 37 *Uni of Penn Journal of International Law* 229 at 279-294.