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SAME-SEX RELATIONSHIPS IN HISTORY:
INTERNATIONAL PERSPECTIVES SINCE 1789

BY MARK SEYMOUR AND SEAN BRADY

FOREWORD

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Years ago, I served the cause of human rights in Cambodia.¹ The country was devastated by a genocide perpetrated by the Khmer Rouge. Whenever, in Australia, North America and Europe, I would talk about my work and findings I would be confronted with a well-meaning question. Was I not trying to impose western values on the Khmer people? Was the United Nations not pursuing the hopeless dream of the universality of human rights?

The same questions have recurred more recently following further work for the United Nations on human rights in the Democratic People's Republic of Korea (North Korea).² In lecture halls and in private conversation, questioners would tax me with the same doubts. Why not

*. Was something supposed to go here?

¹ As Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia (1993-6).

² As chair of the United Nations Human Rights Council's Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (A/HRC/25/CRP.1) (7 February 2014).

leave people from completely different historical and cultural traditions alone? If their traditions were autocratic, patriarchal and oppressive to European ideas of justice and freedom, what was so wrong with the North Korean UN Ambassador's demand before the Human Rights Council: that the UN should 'mind its own business'.

When talking with people about the cruelties of Cambodia and North Korea, I would sometimes present the same questions to the victims. They would look at me in astonishment. They would demand exactly the same human rights as were expected in my own country. They would state that they never had any doubt that what had happened to them was fundamentally wrong. They just did not have the power to do anything about it. But they could dream of a time, yet to come when their fundamental human rights would be respected and upheld. Arguments based on cultural relativism do not tend to go down well with the victims of injustice and oppression.

So it is with the SOGIE minorities in our world.³ There is no land on Earth where LGBTIQ⁴ minorities enjoy the exact same rights and freedoms, in law and social attitudes, as their heterosexual brothers and sisters. If they are not downtrodden by criminal laws, civil discrimination,

³ SOGIE is Sexual Orientation and Gender Identity and Expression.

⁴ LGBTIQ is Lesbian, Gay, Bisexual, Transgender, Intersex and Queer.

religious hostility and antagonistic schooling, the general attitudes in society are unfriendly. This is the burden that almost every minority has to face, simply because to the majority, they are the 'other'. They don't quite fit. At infants' schools, often with their parents and sometimes by religions people, they are taught this minority should be disdained and isolated.

Because social and cultural attitudes pre-exist, explain and reinforce legal and religious prescriptions, many of the chapters in books on LGBTIQ equality are written by and for theologians and lawyers. In recent years there has been a steady rise in the number of such works. Now, there is a virtual tidal wave of writing on the topic, especially by lawyers. I am familiar with such texts. I have contributed to more than a few of them.

However, this book is different. Although there may be a lawyer or two amongst the contributors, basically they are historians. Whilst they derive their conclusions, findings, lessons and prescriptions from their studies, their object is basically to record and interpret what has happened in human history so far as the SOGIE minority have been concerned. History is important in the case of this minority. Only by knowing and understanding history's developments can we perceive the

commonalities and differences in the global treatment of sexual minorities. Only then can we understand the very large (but not unique) role that religion and the law have played, over the centuries, in oppressing this portion of humanity.

The wide-ranging character of this book can be seen in the introductory chapter written by the editors, Sean Brady and Mark Seymour. In effect, by their survey of the individual contributions they demonstrate the particular features of SOGIE injustice and oppression in many different countries. Reading that introduction, one can begin to understand the forces, deeper than sexuality, that have resulted in a kind of global uprising against oppression and inequality that has so marked the past 50 years.

Contemplating the collection of chapters in this book as a unity, one can perceive the interconnections with other global movements that have marked the past century of human history. The movement against patriarchy and for the equality of women. The movement against racism and colonialism. The movement to recognise and respect the outcast indigenous peoples on every continent. The movement for equality in the treatment of religious minorities and also unbelievers. The demand for

equality and justice for the SOGIE minorities can only be fully understood in this broader historical setting.

Several chapters explain how, following France in 1791, a number of European states (and their colonies) threw off the criminal laws that targeted sexual minorities. Those laws originated in religious texts. They were enforced and supported by theological scholars. The special cruelty meted out to gay men under the laws of England mattered more because those laws were exported to the four corners of the Earth and every land where the Union Jack had ever flown. A number of chapters describe this particular oppression. It is continuing to the present time. In the Commonwealth of Nations, which is successor to the British Empire, 38 of the 54 member states still criminalise same-sex sexual activity today. Whilst such criminal laws exist, the notion of marriage and relationship recognition is fanciful. The criminal law reinforces prejudice. It is an obstacle difficult to remove, especially because of its religious supporters. Where God has spoken, man's duty is simply to obey.

Several chapters review developments in the law and social attitudes in continental European countries. Most of them followed the French repeal of criminal prohibitions. But that did not stop social and cultural

hostility emerging later, as the chapters on Germany, Spain, Italy and elsewhere demonstrate.

When the book turns to the reforms in England, North America and Australasia, history reveals the slow and often reluctant changes in the law, commonly lagging decades behind changes in social attitudes. A study of the history recounted in these chapters does not, however, fully explain why so many countries moved ahead with repeal of criminal statutes and the enactment of same-sex marriage whilst other jurisdictions (like Ireland, parts of the United States and continental Australia) dawdled behind, limping.

Yet by the end of the book we can surely perceive the remarkable revolution in attitudes, judicial decisions and parliamentary enactments that have come upon this field of human activity in Europe and in the countries of 'white' settlement in what is little more than half a century. Truly, as the editors state in chapter 1, the changes constitute 'one of the most remarkable transformations of official attitudes in modern history'. And not only in 'official attitudes'. Reliable opinion polls show strong and consistent changes and improvements in majority popular attitudes. Especially amongst educated people who are informed on the discoveries of science and the realities of our world.

At the end of their survey of the contents of this book, the editors offer a sobering conclusion. They state that there is 'little sign that social or cultural acceptance, let alone positive legal change, are emerging in areas that are home to vast proportions of the global population, stretching from Africa up to Russia and across all of Asia'. They ask a haunting question, not dissimilar to the one posed to me concerning my work on human rights in Cambodia and North Korea. Will the changes witnessed in Europe and its 'white' colonies ever spread to the rest of the world? Or will those changes 'yet turn out to be merely a high water mark of post-war liberal-democratic values'?

Some historical attitudes would certainly give a measure of support to this hesitancy to declare that the SOGIE revolution is over and that the angels have won.

The very reluctance of such a hard core of members of the Commonwealth of Nations to repeal and replace the hostile legal impediments shows how difficult it has been in many lands to gather legislative support to repeal the criminal oppression of LGBTIQ people, let alone to provide for marriage and other relationship recognition and broader equal rights. Enactment by the Russian Federation, followed by

many of its old Soviet neighbours, of laws purportedly to defend 'traditional values' and to silence their critics, demonstrates the still existing widespread hostility. That hostility is not only visible in Russia and the Arab and Islamic countries. It is actually on the increase as reports of violence from Bangladesh to Iran and from Afghanistan to Egypt clearly show. Even Indonesia, a country traditionally tolerant of the SOGIE minorities, has lately witnessed unprecedented violence. This is although the Netherlands left them without criminal provisions with which to oppress the minority.

When the UN Human Rights Council created a mandate of the independent expert on SOGIE violence and discrimination, the rage and opposition in the Council and later in the General Assembly of the United Nations almost killed the mandate at birth.⁵ By a whisker, it survived. But the hostility of so many countries was a shock to those who felt the battle was almost over.

Yet, just when these developments give rise to the pessimism and foreboding about the future hinted at by the editors in Chapter 1, wonderful developments occur and are celebrated. In increasing number, courts in many lands are standing up for the equal rights of

⁵ M.D. Kirby, "A Close and Curious Vote Upholds the new UN Mandate on Sexual Orientation and Gender Identity" [2017] EHRLR 37.

LGBTIQ citizens under their national constitutional provisions. This has happened in Fiji, Belize, the Philippines, Hong Kong and elsewhere. In the face of populist legislation, courts are upholding and insisting on marriage equality, as in Bermuda. In India, the Supreme Court has taken a second look at the colonial law that penalises sexual minorities.⁶ It has expressed itself critically about the reasoning of an earlier case⁷ that had overturned a decision that had struck down that law.⁸ It has insisted that the earlier judicial statements, hostile to gays, should be reconsidered by the Supreme Court. So indeed, it now has been.⁹

In argument in the follow-up to the earlier Indian decision, it was pointed out that the Irish Prime Minister, who is openly gay, was 'partly Indian'. When one of the judges acknowledged this fact stating that the Irish leader was a 'Maharashtrian', the courtroom reportedly erupted in laughter. When people laugh at a foolish law, its future begins to look doubtful. And the Government of India itself disclaimed support for the colonial criminal law. It left the survival of s377 IPC 'to the wisdom of this honourable court'¹⁰ and in September 2018, the Supreme Court of

⁶ The *Indian Penal Code* 1860, s377.

⁷ *Naz Foundation v Government of NCT of Delhi* [2009] 4LRC 828 (2009) DLT 277. Overruled by *Koushal v Naz Foundation*, (2014) 1SCC 1; [2014] 2LRC 555.

⁸ *Puttaswamy v Union of India*, WP(C)494/2002.

⁹ Section 377 case, <http://www.livelaw.in/section-377-day-1-session-2-right-to-choose-a-partner> (July 10, 2018).

¹⁰ *Johar and Ors v Union of India*, WP(CRL) 76/2016; *Keshav Suri v Union of India*, WP (CRL) 88/2018 4.

India administered the constitutional quietus to the application of s 377 IPC to the private, consensual, sexual acts of persons of the same sex.

It is true that much remains to be done to rid the world of the punitive criminal laws. And to let the sunshine in with full relationship recognition. However, there is nothing so powerful as an idea whose time has come. This book is a chronicle of one such idea that is now upon us.

When *Weibo* reverses its ban on gay websites; when Pope Francis asks 'Who am I to judge?' the sexual orientation of gay believers; and when brave Russians at the Winter Olympics and World Cup stand up for equality, the long-term future looks promising. Science supports an end to hostility and injustice. Rationality supports change. Familiarity with members of the minority supports change. Celebrities come out everywhere and support change. The internet is full of it. The writing is on the wall.

A reflection on the histories recounted in this book, and on the histories of other continents and regions yet to be told, shows that the times are changing. Past history is turning into contemporaneous actuality. The prospects are promising. Everywhere.

Sydney

Michael Kirby

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