

Will Sexual Minorities Ever Be Equal? The Repercussions of British Colonial “Sodomy” Laws

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This paper discusses the development of equal rights for sexual minorities by examining homosexuality and the law. By looking in depth at the origins of “sodomy” laws we can understand the way in which discrimination against, and persecution of homosexuals has been justified, and why many countries – in recent years – have, and have not, repealed such laws and promoted equal rights for lesbians, gays and bisexuals (LGB).

International Standards

A human’s sexuality is an integral part of who they are, and their sexual orientation makes up a large part of this. It is today widely appreciated that different individuals have different sexualities, which the law should recognise and not criminalise. However, before 1994², international law did not expressly protect any sexual minority. The norm was heterosexuality, i.e. a man and a woman who, in most circumstances, had to be married before their sexual activity was sanctioned by the law. Some have declared that “love is a human right”³: Amnesty International, for example, argues that when countries criminalise homosexuality, this deprives individuals of their right to love one another, and so breaches the principle of equality.

Article 1 of the Universal Declaration on Human Rights (UDHR) states that: “All human

beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”. This article is the fundamental basis of human rights law. Prosecuting homosexuality is a clear violation of this article. In 2008, Article 1 of UDHR was reaffirmed to include sexual orientation by many members of the United Nations.⁴ But it is not only this article which outlaws the outlawing of homosexuality. Article 2 of the UDHR⁵ and certain articles of international covenants and of the European Convention on Human Rights (ECHR) also make the prosecution of homosexuality a violation of human rights, through interpreting protection from discrimination on the basis of “other status” to include sexual orientation.

Decriminalising homosexuality can be tackled from two different perspectives: the right to equality and non-discrimination, and the right to privacy. While most arguments discussed below rely on both of these human rights, this article looks at how the fundamental right to equality can be used to progress the LGB movement.

In the 1960s, the United Nations drew up two major covenants which have mechanisms of enforcement internationally. The most relevant covenant for sexual orientation is the International Covenant on Civil and Political

cal Rights (ICCPR), which came into force in 1976 and is enforced by the Human Rights Committee (HRC). The HRC's main role is to monitor human rights around the world, and to make sure that the rights enshrined in the covenant are respected, protected and fulfilled by the state parties. In 1994, ICCPR was held by HRC to encompass sexuality.⁶ The other major covenant, the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁷, also does not explicitly mention sexual orientation but has been interpreted to cover it as a prohibited ground for discrimination.

In 2006 a team of experts gathered together in Yogyakarta to discuss recent violations of individuals' human rights because of their sexuality. In an attempt to fill a gap in international human rights law consisting in the fact that there was no major international document or agreement relating directly to the legal status of sexuality, to which countries could look for guidance, the experts developed and adopted the Yogyakarta Principles on the application of international human rights law in respect to persons of different sexual orientation or gender identity⁸.

In 2011, the United Nations Human Rights Council for the first time officially addressed the issue of homosexuality and asked the UN Human Rights Commissioner to prepare a report on human rights violations suffered by persons of different sexual orientation or gender identity. The report, published in November 2011, stated that homosexual conduct should be decriminalised in every country, and called on all states to promote equality and work to eradicate homophobia⁹. It is too early to be able to see the full effects of this report, but it is definitely a step forward.

A number of recent reports by human rights organisations, including Amnesty Interna-

tional, have revealed some of the methods that different countries have been using to identify and persecute gay men.¹⁰ These mainly revolve around physical appearance and dress, and are of a nature to instil fear into homosexuals who live in countries where they can be prosecuted for their sexuality. The criminalisation of homosexuality also perpetuates violence and gives society an excuse to abuse individuals who are lesbians, gays, bisexual, trans or intersex (LGBTI) persons. Some countries which have legislation against homosexuals, such as Singapore, have tried to defend it by saying that the law is very rarely enforced and that homosexuals will not be persecuted. But in fact having these laws on the statute books stigmatises sexual minorities as criminals.

Criminalisation of homosexual conduct has a hugely detrimental effect on homosexuals not just within the legal sphere but also socially: because the state has identified this group of individuals as criminals, it creates state-sponsored homophobia that is quickly passed down to members of society who feel that, in certain situations, this gives them the right to discriminate, and quite often bully and harass homosexuals. Criminalisation makes homosexuals feel isolated and deviant in the face of the law. They are not able to be themselves without fear of being arrested by the authorities purely because of their sexuality, or harassed by their peers.

Criminalising homosexuality also has an adverse effect on the treatment of HIV and AIDS, as hospitals and medical professionals may be less likely to treat homosexuals who have HIV/AIDS compared to their heterosexual counterparts. Gay men and other members of sexual minorities are frequently denied essential lifesaving treatment that they are entitled to, on an equal basis with others.

Therefore it is essential that laws that criminalise homosexuality are repealed, not just so that members of sexual minorities are not punished by the state for their sexuality, but further, so that they can live an equal life to their peers who do not identify as LGB.

The Scale of the Problem

There are around 80 countries worldwide, including a number that belong to the Commonwealth, where homosexuality remains illegal to date, although exact numbers differ from source to source, depending on how certain legislation in some countries is interpreted.¹¹ Out of these, according to Amnesty International, there are seven countries that still retain the death penalty for “sodomy”. These laws deprive sexual minorities of basic human rights and promote inequalities in those countries. If laws are in place against sexual minorities, this discriminates against this small group in society and makes them unequal to their peers who identify as heterosexual. This has led to increasing international and domestic pressure to repeal such discriminatory laws, with partial success but also setbacks.

It is difficult to ascertain what percentage of the population may be homosexual. The Kinsey report in 1948 stated that ten percent of the American population were gay,¹² though modern studies suggest that this figure is actually much lower.¹³ In the United Kingdom a recent estimate concluded that about six percent of the population are lesbian, gay or bisexual.¹⁴ The failure of governments to monitor and identify these groups is itself an indication of the lack of official concern. However, it must be stressed that concern with the equal rights of sexual minorities must not depend on the numbers. Regardless of the proportion of LGB persons in the general population, each person with a dif-

ferent sexual orientation still needs equality before the law, and should be treated equally. Still, when one considers the high number of countries that prosecute homosexuality, the scope of the problem is all the more worrying, and it is critical that the campaign for equality and decriminalising homosexuality continues internationally.

It should be noted that there is a difference between those countries which prosecute only gay men and countries which prosecute both gay men and lesbians. This is partly due to the basic definition of “sodomy”.¹⁵ Amnesty International points out that the limitation of the criminalisation of same sex conduct to men has the perverse effect of perpetuating the view that women are not sexual beings under the law. It is said that the British Queen Victoria refused to sign the Bill outlawing homosexuality against women as well as men because she did not believe that lesbianism existed! Treating women as objects and not subjects of the law can legitimise gender inequality and perpetuate gender violence.

Origins of Criminalisation: British Colonialism and “Sodomy” Laws

To fully comprehend the reasons for which so many countries still criminalise homosexuality, it is relevant to examine the origins of such laws. Currently 42 countries, that is over half of the countries which maintain criminal sanctions against homosexuals, are former British colonies. In the colonial period, very strict anti-“sodomy” laws were imposed on all the colonies of which Britain took control. Before the effects of colonialism can be discussed, it is important to look at why Britain had originally decided to introduce such strict laws. This article does not aim to give a full account of the history of “sodomy” laws, but only highlights a few points that are deemed relevant to the cam-

paign for equality between sexual minorities and sexual majorities.

The Bible may be the starting place for looking at the origins of homophobic laws, because it served as the basis of medieval law-making on the subject. In Britain of the thirteenth and fourteenth centuries, the Bible was taken as authoritative guidance for setting the law of the land. The most explicit Biblical mention of same-sex intercourse was in Leviticus 18:22 (“Do not have sexual relations with a man as one does with a woman; that is detestable.”) and 20:13 (“If a man has sexual relations with a man as one does with a woman, both of them have done what is detestable. They are to be put to death; their blood will be on their own heads.”).¹⁶ There is also a mention of unnatural acts in Romans 1:26-28 urging that men and women should only sleep with each other and never give in to unnatural lusts to have intercourse with one another. The word “sodomy” comes from the tale of Sodom and Gomorrah, in Genesis 19, where God sent angels to the city of Sodom to see if it was as detestable as Gomorrah. The story of Sodom has been interpreted in a way making same-sex intercourse at least part of the reason for the destruction of the city to punish its citizens for their sins.

There are as many interpretations of the Scriptures as there are readers, but most interpreters have read the passages referred to above as implying negative views of “sodomy”. The Christian rulers put these interpretations into Canonical and common law, developing the doctrine over centuries. While the Christians were codifying these laws, “sodomy” was never deemed to be something that one could consent to, and therefore “sodomy” laws did not take consent into account when delivering sentence: all “sodomy” was regarded as rape. Age did not play a part in this either, and anti-“sodomy” laws

were often coupled with crimes of bestiality and incest.

The first legal appearance of criminalisation was in a treaty called Fleta written in 1280 that stated:

“Apostate Christians, sorcerers, and the like should be drawn and burnt. Those who have connections with Jews and Jewesses or are guilty of bestiality or “sodomy” shall be buried alive in the ground, provided they be taken in the act and convicted by lawful and open testimony.”¹⁷

This provision was reiterated in the 14th Century by a treaty called Britton, which also stated that sodomites among other people should be publicly convicted.¹⁸

However, it was not until the reign of Henry VIII (1509-47) that common and Canonical laws against “sodomy” were codified.¹⁹ When Henry decided to break away from the Catholic Church, much of the country’s common law needed to be changed, having been founded in Catholic law and implemented by Catholic courts. The original Acte for the punysshement of the vice of Buggerie which Henry passed was repealed by Mary I as she felt that “sodomy” should lie still within the jurisdiction of the church. However, Elizabeth I re-enacted this law in the Buggery Act 1563. There were many writers opining upon “sodomy”²⁰ at that time, with one of the strongest commentaries coming from Edward Coke who stated:

“Buggery is a detestable, and abominable sin, amongst Christians not to be named. ... [It is] committed by carnal knowledge against the ordinance of the Creator and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast”.²¹

It was not until the 19th Century that section 61 of the Offences Against the Person Act 1861 replaced the death penalty for buggery with ten years' imprisonment.²² The gay population, using the utilitarian ideas of the philosopher Jeremy Bentham, pressed for this reform. Bentham had argued that homosexuality does not weaken men, society or the marriage of women.²³

This liberalisation of views did not, however, extend to the colonies. Throughout the 19th Century, those who administered the British Empire felt that there was a need to correct and Christianise the "native" customs of the colonies under their control.²⁴ One aspect of this process was the codification of colonial laws, to reflect the decisions of their colonial masters. India was the first country to have a codified criminal law imposed on it by the British. Indian codified laws were first published in 1860.²⁵ Section 377 of the Indian Criminal Code provided that sodomites would be punished by sentences of up to life imprisonment. The Indian Criminal Code included explanatory notes to clarify that penetration was needed in order to characterise an act as "sodomy", and that it was irrelevant whether or not semen was ejaculated. It should be noted that in the initial drafting of this section, there was a differentiation between acts committed with or without consent, but this was changed before the final version was agreed. Section 377 provided:

"Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine."

"Explanation: Penetration is sufficient to constitute the carnal intercourse

necessary to the offense described in this section."

Although slightly different codifications were produced in various colonies, every one of them introduced a clause against "sodomy", which was seen as a "uniform feature of British imperial rule".²⁶ Section 28 of the Queensland penal code (also referred to as the Griffith Penal code of Queensland) included a subsection providing that anyone who allowed another person to have sexual relations with someone else of the same sex would also be prosecuted.²⁷ There were similar provisions in other Australian states, as well as in Papua New Guinea and in the African colonies of Kenya, Nigeria, Tanzania and Uganda. These provisions are still in force in all of these countries today, apart from Australia.

Other colonial empires around the world did not implement "sodomy" laws during colonisation. At roughly the same time, the French Empire was also growing. But interestingly, none of the French colonies introduced anti-"sodomy" laws. In fact, Napoleon ensured that any existing "sodomy" laws were repealed during colonisation. "Sodomy" was abolished as a crime in France when a new penal code came into force in 1810. This code did not have a clause on "sodomy". The Netherlands, another colonial power, had repealed their "sodomy" laws already at the end of the 18th Century.

The former British colonies generally kept the prohibition of "sodomy" after decolonisation in the 1950s and 1960s. Ironically, this happened at the same time as Britain started a major move towards equality for sexual minorities. Governments of former colonies said they would not contemplate following Britain's footsteps and repeal criminalising laws, on grounds such as "The population is

not ready” and “Reform on this subject is not a priority”.

The 1950s saw the first improvement to sexual minority rights in the UK that had a positive effect worldwide. The Wolfenden Report published on 4 September 1957 looked into homosexual offences and discussed whether or not these provisions should still be enforced. This was the first step forward since the repeal of the death penalty for “sodomy”. The report concluded that homosexual acts should no longer be a criminal offence and stated that this matter belonged in “[the] realm of private morality and immorality which is, in brief and crude terms, not the law’s business”.²⁸ At the time, there was significant social pressure to retain the criminal prohibition of homosexual acts. It was only after ten years of heated debate and many amendments that in 1967 homosexual acts were legalised in England and Wales.²⁹ However, there was still a discriminatory age of consent for same sex relationships that was not equalised with that of heterosexual relationships until 2001.³⁰ Scotland took 13 years to follow England and Wales and did not change her anti-gay laws until 1980, when the Criminal Justice (Scotland) Act 1980 was passed. Homosexuality was now decriminalised throughout Great Britain. This was a major step forward for equal rights, though not by any means the end of the battle. When a country legalises homosexuality, there may still be a strong legacy of homophobia entrenched in the community, and thus, there is a need for another difficult campaign.

The 1980s saw the introduction, by a Conservative government, of Section 28 of the Local Government Act 1988 which stated:

“(1) A local authority shall not—
(a) Intentionally promote homosexuality or

publish material with the intention of promoting homosexuality.”

Allegedly this section was brought in because the Conservative government felt that the standard nuclear family unit was the best type of family for the economy. Although equality in the classroom with respect to sexual minorities is outside the scope of this article, it is evidently the case that this clause had major repercussions on equality for young people who identified as homosexual. In England, this section was not repealed until 2003.³¹

The Role of International Jurisprudence in Pressing for Decriminalisation

It was only through pressure from the courts that the law for one part of the United Kingdom, Northern Ireland, was changed. The case of *Dudgeon v the United Kingdom*³² was one of four cases decided within a 30-year time frame in international jurisdictions that had significant influence on the repeal of homophobic legislation. It is interesting to examine the reasons why each of these cases was decided in a positive light towards homosexuality. These cases can be compared with more recent cases that failed to advance the gay rights movement.

The European Court of Human Rights decided the case of *Dudgeon* in 1981, at a time when Northern Ireland still had “sodomy” laws that had not been altered since the 19th Century; nor had Northern Ireland legislated to accept the recommendations from the Wolfenden Report, possibly due to the greater influence of the Catholic and Protestant churches in that country compared to the rest of the UK. *Dudgeon* argued that Article 8 of the ECHR, which protects the right to a private and family life, and Article 14, which prohibits status discrimination, should apply

to same sex conduct. The Court held in favour of Dudgeon and stated that there had been a breach of his rights under Article 8. The right to a private family life included private sexual relations and therefore not extending this right to homosexuals resulted in a breach of this article. As this was definitive, the Court saw no purpose in examining Article 14. It can therefore be said that Article 8 was interpreted to imply full equality in terms of sexual orientation. This case represented a leap forward for the gay rights movement across Europe, since the ruling applied to all countries that had ratified the ECHR.

The next case that could be argued to have had an even wider impact is *Toonen v Australia*.³³ This case was heard by the United Nations Human Rights Committee, as there had allegedly been certain breaches of articles of the ICCPR. The complainant communicated to the Committee that sections 122(a) and (c) and 123 of the Tasmanian Criminal Code did not comply with articles 2(1) and 26 of the ICCPR which deal with discrimination and article 17 which deals with the right to privacy. The Tasmanian Criminal Code outlawed various forms of sexual contact between men, including between consenting males. The complainant therefore argued that certain sections breached his right to privacy as well as being discriminatory. The Committee noted that apart from Tasmania, every other state in Australia had already repealed laws concerning "sodomy". The Committee decided the case solely on the basis of the right to privacy and, like the European Court of Human Rights, did not feel the need to decide the case on grounds of an infringement of the right to equality. Article 17 of the ICCPR was now affirmed to extend to sexuality as an aspect of private life. Recently, the United Nations High Commissioner for Human Rights, Navi Pillay, stated that this case was ground-breaking and it has prompted

30 different countries to start to change their laws in regards to homosexual acts.³⁴

Chronologically, the next case that had a strong impact on the repeal of "sodomy" laws around the world was *Lawrence v Texas*, decided by the United States Supreme Court in 2003.³⁵ At the time of this judgment, there were still thirteen states in the U.S which enforced "sodomy" laws. In the case of *Lawrence*, two men had been found in an apartment bedroom together by police and were charged with committing illegal homosexual acts. Although this was only a misdemeanour (a minor criminal offence), it would still have resulted in a criminal record as a sex offender. Interestingly, Mr Lawrence initially contacted lawyers because of the way he had been treated: he had been arrested, even though the maximum penalty for "sodomy" was a fine of \$500. He pleaded guilty but at the same time challenged the validity of "sodomy" laws as being contrary to the Equal Protection Clause in the U.S. Constitution. The Supreme Court began by examining the case of *Bowers v Hardwick*³⁶ decided in 1987 that had similar facts to those of *Lawrence*. *Bowers* did not change "sodomy" laws, and in that case it was held that "sodomy" laws had been a large part of American history and did not violate any part of the Constitution. The approach taken in *Lawrence* was different from that of *Bowers* and put forward personal liberty as the decisive consideration. The Court noted that originally "sodomy" laws had been used to prosecute rapists and any act where there was a lack of consent because of a particular reason such as age. In the present case, there had been no issue of consent as both participants of the act had freely consented and were past any age where maturity would have needed to be considered. This case took into consideration *Dudgeon* and also made reference to the Wolfenden report. By a vote of 6-3 the Su-

preme Court decided in favour of Lawrence, and consequently struck down the Texas law prohibiting homosexual conduct. This case affirmed that it was unconstitutional to discriminate against homosexuals anywhere in the United States.

The most recent landmark case with a potentially huge impact on decriminalisation is that of *Naz Foundation*, which has overruled “sodomy” laws in India.³⁷ In 2005, a group called Voices against Section 377 published a report setting out the many flaws of this notorious clause from the Indian Criminal Code. First of all, the report stated that a human’s sexuality is an integral part of who they are and not something that can be consciously changed. Voices against Section 377 also argued that Section 377 of India’s Criminal Code did not identify sexualities but only the sexual act, thus dehumanising many individuals.³⁸ It was only a few years later that the validity of Section 377 was challenged in the Indian Courts. It was brought to court by the Naz Foundation, an organisation that helps support people with HIV/AIDS. Section 377 prevented the state from taking effective action against the HIV/AIDS epidemic in respect of gay men. The Ministry of Health and Family concurred with the arguments of the Naz Foundation. The Ministry of Home Affairs, opposing the Naz Foundation position, put forth many concerns about repealing this section, including the fear that homosexual rape would thereby not be a crime, nor would any actions surrounding sexual activities with children. In its landmark decision, the High Court of Delhi declared that section 377 of the Criminal Code did not extend to prohibiting consensual same sex conduct among adults.³⁹ In this judgment, the Court was concerned not only with the right to a private family life, but – remarkably – also with the right to equality. The Court held that applying section 377 to consenting homo-

sexuals was in breach of Article 14 (equality before the law) and Article 15 (prohibition of discrimination) of the Constitution of India. The court made reference to the Equal Rights Trust’s Declaration of Principles on Equality.⁴⁰ This was deemed to be “the current international understanding of Principles of Equality”. This case was an important victory for gay activists and sexual minorities.

In response to the *Naz* judgment, Amnesty International commented:

“The decision is a significant step toward ensuring that people in India can express their sexual orientation and gender identity without fear or discrimination. This British colonial legacy has done untold harm to generations of individuals in India and across the Commonwealth.”⁴¹

The “sodomy” laws that *Naz* repealed were direct remnants from British colonialism. Hopefully, many other countries which still have these “sodomy” laws in place will be able to look at the reasoning in *Naz* and apply it to their statute books.

At the time of writing, the *Naz* case is being tried at the Indian Supreme Court. During the hearings, the Ministry of Home Affairs referred to homosexuality as unnatural and immoral.⁴² The decision that will come out of the Supreme Court will have a major impact not only on the validity of section 377, but on “sodomy” laws worldwide.

In terms of repealing anti-homosexual legislation, South Africa is a very special case, as the laws concerning homosexuality were affected by the country’s first democratic constitutional Bill of Rights, which explicitly included a clause banning discrimination on the grounds of status including sexual orientation.⁴³ Many countries look at this con-

stitution in awe.⁴⁴ South Africa later became the first country in Africa and only the fifth in the world to allow same sex marriage.⁴⁵ In 2007, Desmond Tutu, the Archbishop of Cape Town, gave a very powerful interview to BBC Radio 4 where he stated: "If God, as they say, is homophobic, I wouldn't worship that God."⁴⁶ A different view has been taken by influential clergy in other African countries, supported by evangelical American Christian groups.

From the cases noted above, it is evident that there has been much progress in the movement for equality of sexual minorities. Hopefully these cases will set precedent for other countries. The case of *Toonen* has global jurisdiction, so should be followed by all the countries which have ratified the ICCPR. Unfortunately there are still many countries, predominantly in Africa and Asia, which have not made any progress toward equality for sexual minorities.

Africa and Asia

The majority of countries in Africa and Asia still have legislation in place prohibiting homosexuality. The report stated that in Africa this status quo was partly due to the culture introduced by Europe during colonialism, and that before the colonial era, African cultures were characterised by a very high tolerance towards homosexuality. On the other hand, many parts of Asia as well as most of the Middle East are under the influence of Islam. Islamic Sharia Law, based on the Qur'an which also tells the story of Sodom and Gomorrah, is harsher on certain grounds such as private family relationships, as compared to Christian Law. For instance, women who are raped must provide four male witnesses – otherwise the Sharia courts may deem the act to be adultery, resulting in the woman being punished, in-

cluding in some cases by stoning to death. However, it must be emphasised that the majority of countries which criminalise homosexuality today are Christian countries.

In Africa, there are strong evangelical Christian movements, supported by American fundamentalist Christian groups, which campaign vigorously against homosexuality. Robert Mugabe, the President of Zimbabwe, is one of the best known figures at the front of the homophobic movement. Recently, Mugabe criticised David Cameron for supporting gay rights and referred to him as "satanic".⁴⁷ Mugabe also made this speech in 1997 at Zimbabwe's annual independence celebrations stating, when referring to "sodomy", that:

"If dogs and pigs do not do it [homosexual acts], why must human beings? We have our own culture, and we must re-dedicate ourselves to our traditional values that make us human beings."

Later, Mugabe apologised to dogs and pigs for comparing them to homosexuals! In 2006, laws were passed in Zimbabwe providing that any actions such as holding hands or kissing someone of the same sex were a criminal offence. Canaan Banana, former President of Zimbabwe, was convicted of homosexual assault and sentenced to ten years' (nine suspended) imprisonment. Banana argued that "sodomy" laws were contrary to constitutional principles, and that no individual should be criminalised because of their sexual orientation. When highly regarded political figures are sentenced on the basis of "sodomy", it brings such laws into the public sphere and initiates much controversial debate around the subject. This can be seen in the recent prosecution of Anwar Ibrahim, leader of the opposition in Malaysia, on the charge

of “sodomy”. Recently, Anwar was acquitted of such allegations. This has led to Malaysia contemplating the repeal of the “sodomy” section of the Criminal Code which Anwar had been accused of breaching.⁴⁸

In Uganda, there have been major setbacks for sexual orientation equality. On 26 January 2011 David Kato, who was described as “the most outspoken gay rights advocate in Uganda”,⁴⁹ was brutally murdered. This is a result of the aggravated homophobic culture which had been brought over by America’s extremist Christian right wing religious groups. The media have also played a large role in encouraging homophobia throughout Uganda. One paper published an article that named many gay rights activists, including David Kato, calling for all of them to be hanged.⁵⁰ A bill proposed in the Ugandan Parliament aims to punish aggravated homosexuality, which includes either repeated offences or the act of engaging in homosexual intercourse when one party has AIDS.⁵¹ This bill was “shelved” in May 2011 by the parliament after strong pressures from around the world but was brought back for debate at parliament in October of the same year. It would also result in imprisonment for any “promotion of homosexuality” and any failure to notify the authorities of any homosexual acts that someone may know about.

There have been many international pressures trying to stop this bill, including from non-governmental organisations. For example, The Equal Rights Trust (ERT) wrote to the President of Uganda, calling for this bill to be rejected in its entirety, as well as to review current section 146 of the Ugandan Penal Code that criminalises homosexuality.⁵² ERT firstly noted that this bill is contrary to the Ugandan constitution, especially Article 21 that relates to equality and non-discrimination. ERT went on to analyse the

obligations of Uganda under important international treaties including the ICCPR and the ICESCR which cover sexual orientation as a protected status. However, at the end of 2011 the Ugandan President, Yoweri Museveni, controversially stated that he cares much more about improving the railways of Uganda than improving equality for different sexual orientations.⁵³

Evidently there is a vast difference in where some of these countries stand on LGB equality. Overall there has been progress, but countries such as Uganda demonstrate that there is still much advocacy and campaigning to be done to create the pre-conditions for equality.

The Present-Day Dynamics

The United States Government would probably hope to see itself as the pioneer for gay rights around the world. President Obama issued a statement of condolences soon after David Kato’s brutal death, saying that the United States highly regarded his work in championing gay rights. Soon afterwards, he repealed the infamous “Don’t Ask, Don’t Tell” policy that had been applied in the military for many years. Gay people in the armed forces now have the right to be open about their sexuality without facing any negative consequences. The state of New York introduced same-sex marriages in 2011. Finally, President Obama declared that the U.S. may withhold aid from countries that persecute homosexuals, and he hoped that this would influence countries to change their laws. A similar statement as also been made by the UK Prime Minister David Cameron.⁵⁴

In response to this threat, Malawi has stated that it would review the “sodomy” clauses within its Penal Code. However, other countries including Ghana, Uganda and Zimbabwe

have expressed strong reluctance to repeal any “sodomy” laws and have condemned western conditionality “bullying”. John Nagenda, advisor to the Ugandan President, summarising the Ugandan government reaction to these threats, stated that tactics used by the United Kingdom were reminiscent of colonialism and reminded the United Kingdom that Uganda was now a sovereign state and will not have bigger nations dictate policy.⁵⁵ Ghana has followed closely with Uganda and also referred to the threats as bullying. A government spokesperson stated that Ghana would not compromise morals for money.⁵⁶ Importantly, local LGB activists and organisations have expressed their frustration with western tactics of gay rights conditionality. Many of them have recently argued that trade sanctions with the purpose of promoting gay rights will only segregate sexual minorities even more, and that if the aid cuts do go ahead this would affect the most vulnerable, many of whom may be homosexual.⁵⁷

Soon after the statement by President Obama, on 6 December 2011, U.S. Foreign Secretary Hillary Clinton made a speech in Geneva to diplomats from around the world. She stated that although gay people may commit crimes, it should never be a crime to be gay. She went on to insist that gay rights are human rights, and that every country should take active steps to repeal any legislation in place which is discriminatory to people of different sexual orientations.⁵⁸

Elections in Jamaica also brought gay rights into the headlines. The Jamaican Labour Party had been accused of homophobia that included “misogynistic and violent rhetoric”,⁵⁹ while the party that won the election, the People’s National Party, was explicitly in favour of repealing discrimination laws. Portia Simpson-Miller, the Prime Minister-designate, stated: “No one should

be discriminated against because of their sexual orientation”.

On 9 January 2012, the Pope gave a speech to the diplomatic corps at the Vatican in which he spoke strongly in favour of traditional family units being the best environment to bring up children.⁶⁰ This has been interpreted in two different ways. For example, *Pink News* has reported that the Pope stated that gay marriage is a threat to the future of humanity⁶¹, whereas a blog in the *Guardian* noted that the only relevant statement he made was that “policies which undermine the family threaten human dignity and the future of humanity itself” and that there was no explicit reference to gay marriage.⁶² The Pope might not be in favour of gay marriage itself, but could this be a step forward that the Pope may be making in terms of gay rights by not explicitly criticising homosexuality?

2011 also marked steps toward sexual orientation equality by the United Nations. In June of that year, the UN General Assembly adopted a resolution which expressed grave concerns over the violence and discrimination against persons due to their sexual orientation or gender identity.⁶³ It called for all of these abuses to be documented. In December 2011, the United Nations published its first ever report specifically on sexual orientation. The report concluded that “Governments and intergovernmental bodies have often overlooked violence and discrimination based on sexual orientation and gender identity”.⁶⁴ This document reiterates that gay people should not face any form of criminal sanctions, and encourages all states to make sure that equality for sexual minorities is included in the political agenda.

It should be noted that recent developments in the United Nations have been influenced by the Yogyakarta Principles⁶⁵. Although this

document has not been in the press often since it was launched in 2007, it has had and continues to have a substantial impact on the gradual acceptance of the issue at UN institutions, and indirectly – on the life of sexual minorities. These principles do however focus on more than just decriminalisation, and summarise many fundamental human rights, explicitly applying them to sexual minorities. One of the important references to these principles has been in the *Naz* case judgment, where Principle Two stating that no country should criminalise homosexuality was relied upon.

In addition to the Yogyakarta Principles, the Declaration of Principles on Equality adopted on the initiative of The Equal Rights Trust in 2008⁶⁶ adds substantial weight in to the legal basis for calling for all countries to decriminalise homosexuality. This document is relevant to sexual minorities' equality through providing general legal principles on equality from a unified human rights perspective, covering all protected ground of discrimination. Both documents should be made use of in campaigning for decriminalisation.

Of course, the battle does not stop once a country has decriminalised homosexuality.

Although this is the most important and urgent fight, even after it has been won, it will not result in equality for sexual minorities. Whilst it is outside the boundaries of this article, there are many campaigns for equality for sexual minorities carried out globally at present, including for equal marriage, family rights such as adoption, and equal rights in terms of the age of consent, which in many countries is different between heterosexual and homosexual relationships.

In conclusion, it is evident that there is much variation in countries around the world in respect to their stance on criminal sanctions for people who have different sexual orientation from the “norm”. This raises old but important questions of sovereignty, in the context of human rights and humanitarian conditionality, as well as questions as to how much influence the various international documents actually can have on states that criminalise homosexuality. The backlash from some African countries has shown that there is still strong resistance. But the growing international movement developing in the spirit of the Yogyakarta Principles and the Declaration of Principles on Equality, both of which draw on the international bill of human rights, is now unstoppable.

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2 The International Covenant on Civil and Political Rights was affirmed to include sexual orientation as a characteristic protected from discrimination in the case of *Toonen v Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994).

3 See article by the Director of Amnesty International UK, Allen, K., “Love Is A Human Right”, *The Guardian*, 17 May 2008.

4 See UN General Assembly, Letter Dated 18 December 2008 from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations, UN Doc. A/63/635, 22 December 2008.

5 Article 2 of the UDHR states “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty” (Universal Declaration of Human Rights, G.A. Res. 217A (III) (1948)).

6 *Toonen v Australia*, above note 2.

7 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) (1966), as interpreted, for example, by the Committee on Economic, Social and Cultural Rights: see Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 27.

8 Yogyakarta Principles – Principles on the application of international human rights law in relation to sexual orientation and gender identity, published by the International Commission of Jurists, March 2007.

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