

Presentation at Blue Diamond forum on “Nepal’s new constitution and the fundamental rights of minorities (based on sexual orientation and gender identity)”

January 8-9, Kathmandu, Nepal

The human rights claim for constitutional or legislative protections against discrimination based on sexual orientation and gender identity.

1. In this presentation, the ICJ will clarify the basis for protection against discrimination based on “sexual orientation” and gender identity” in international human rights law and endorse efforts to ensure that these protections are included in constitutional reform processes. It is acknowledged that the “right to privacy” has been mainly responsible for the most celebrated successes in relation to sexual orientation and gender identity in human rights law. It is worth noting however, that in a single human rights violation, several rights may be engaged. Indeed, violations of the right to privacy are often an indicator of discrimination based on sexual orientation and gender identity. The focus on “discrimination” in this presentation should therefore not suggest a lack of importance of the “right to privacy” or any other rights, but instead, give prominence to this aspect of the human rights claim in relation to sexual orientation and gender identity, for this particular forum.

The basis for “sexual orientation” as a prohibited category of discrimination in international law

2. The principle of non-discrimination is a cornerstone of international human rights law and it is embodied in the Charter of the United Nations¹ the Universal Declaration of Human Rights², the International Covenant on Civil and Political Rights³ and the

¹ Articles 1 (3) and 55 of the United Nations Charter.

“dedicated since 1952 to the primacy, coherence and implementation of international law and principles that advance human rights”

² Articles 2, 7 and 10 of the Universal Declaration of Human Rights

³ Articles 2, 3, 14, 25 and 26 of the International Covenant on Civil and Political Rights

International Covenant on Economic Social and Cultural Rights⁴. Article 2 (1) of the International Covenant of Civil and Political Rights (ICCPR) states that: “*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*”

3. This principle is directly linked with the rights to equality before the law, protection against discrimination and equal protection of the law that are to be found in article 26 of the ICCPR⁵. The UN Human Rights Committee (HRC) – the expert body that oversees the implementation of the ICCPR - affirmed that the reference to “equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status in Article 26 of the International Covenant on Civil and Political Rights *includes discrimination on grounds of sexual orientation*”⁶ (emphasis added).

4. The UN Committee on Economic, Social and Cultural Rights, the UN Committee on the Rights of the Child and the UN Working Group on arbitrary detention have all affirmed the right to protection from discrimination based on sexual orientation⁷. In addition, the UN Human Rights Committee (UN HRC) has called on States not only to repeal laws criminalizing homosexuality but also include the prohibition of discrimination based on

⁴ Article 2 of the International Covenant on Economic Social and Cultural Rights

⁵ *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*

⁶ Human Rights Committee, Communications: Australia, CCPR/C/50/D/488/1992, April 4, 1994, paras. 8.2-8.7. See also Human Rights Committee, Communications: Australia, CCPR/C/78/D/941/2000, September 18, 2003, para. 10.4.

⁷ See Committee on Economic, Social and Cultural Rights, General Comment No 15, E/C.12/2002/11, January 20, 2002, para. 13; General Comment No 14, E/C.12/2000/4, August 11, 2000, para. 18. Committee on the Rights of the Child, General Comment No 4, CRC/GC/2003/4, July 1, 2003, para. 6; General Comment No 3, CRC/GC/2003/3, March 17, 2003, para. 8. Reports of the Working Group on arbitrary detention E/CN.4/2004/3, December 15, 2003, para. 73; E/CN.4/2003/8, December 16, 2002, paras. 68-69 and 76. Opinions adopted by the Working Group on arbitrary detention No 7/2002, Egypt, E/CN.4/2003/8/Add.1, and January 24, 2003. See also Study on non-discrimination as enshrined in article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights, Working paper prepared by Emmanuel Decaux, E/CN.4/Sub.2/2004/24, June 18, 2004, para. 22

sexual orientation in their constitutions⁸. The UN HRC, in the individual petition of *Young v Australia* stated that “article 26 comprises (also) discrimination based on sexual orientation.”⁹

5. The “*Guidelines on International Protection: gender-related persecution within the context of article 1 A (2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees*” (2002),¹⁰ produced by the Office of the United Nations High Commissioner for Refugees (UNHCR) includes proscriptions of discrimination based on sexual orientation. Under the heading “Persecution on account of one’s sexual orientation,” it states that:

“Where homosexuality is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct could amount to persecution, just as it would for refusing to wear the veil by women in some societies. Even where homosexual practices are not criminalized, a claimant could still establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect effectively the claimant against such harm.”

This Guideline clearly lays down a strong statement of principle against discrimination based on sexual orientation and illustrates that the vindication of this principle is not to be affected by particular national considerations.

⁸ Concluding Observation: Namibia, CCPR/CO/81/NAM, July 30, 2004

22. *The Committee notes the absence of anti-discrimination measures for sexual minorities, such as homosexuals (arts. 17 and 26). The State party should consider, while enacting anti-discrimination legislation, introducing the prohibition of discrimination on grounds of sexual orientation.*

Concluding Observations: Egypt, CCPR/CO/76/EGY, November 28, 2002

19. *The Committee notes the criminalization of some behaviours such as those characterized as "debauchery" (articles 17 and 26 of the Covenant).*

The State party should ensure that articles 17 and 26 of the Covenant are strictly upheld, and should refrain from penalizing private sexual relations between consenting adults

⁹ Communication No. 941/2000: Australia, CCPR/C/78/D/941/2000, *Mr. Edward Young v Australia*, September 18, 2003

¹⁰ HCR/GIP/02/01

6. In the case of *Re GJ*¹¹, the Refugee Status Appeals Authority in New Zealand found in favor of an Iranian man who argued that he had a well-founded fear of persecution based, among other grounds, on his homosexuality. In construing that homosexuals formed “a particular social group”, the court stated that sexual orientation is either an innate or unchangeable characteristic or a characteristic so fundamental to identity or human dignity that it ought not to change. The Tribunal used case law from different jurisdictions¹² that supported the assertion that homosexuals constituted a “particular social group” that is worthy of protection. National constitutional law courts have increasingly accepted the notion that unjustifiable differential treatment and exclusion based on sexual orientation, violates the right to equality before the law and the protection against discrimination¹³.

7. Many States have taken action through both their constitution and legislation to prohibit discrimination based on sexual orientation.¹⁴ This list of countries spans every continent of the world. At the regional level, member states of the European Union signed the Treaty of Amsterdam that inserted a new article 13 which authorized the Council of the European

¹¹ <http://www.refugee.org.nz/rsaa/text/docs/1312-93.htm>

¹² See for eg, *Sanchez-Trujillo v Immigration and Naturalization Service*, 801 F. 2d 1571 (9th Cir 1986), *Canada (Attorney General) v Ward* (1993) 2 SCR 689

¹³ Ecuador: The Constitutional Court of Ecuador, Sentencia No 111-97-TC, *Registro Oficial (Official Registry)*, *Supp, No*

203, Nov. 27, 1997, at 67, in *invalidating a sodomy law as a violation of equality*:

“Homosexuals are, above all, bearers of all the rights of the human person and thus have the right to exercise them in

conditions of full equality, which does not imply the absolute identity but rather a proportional equivalence between two or

more beings, that is, their rights to enjoy legal protection, whenever in the manifestation of their conduct they do not

infringe the rights of others just as is the case with all other persons”.

Danilowitz, 48(5) P.D. 749 ¶ 17 (1994), the Israeli Court held that the state airline’s policy of extending certain employee

benefits to different-sex but not same-sex couples violated the constitutional guarantee of equality: “This discrimination—against homosexuals and lesbians—is improper. It is contrary to equality.”

Vriend v Alberta [1998] 1 S.C.R. 493, available at 1998

S.C.R. LEXIS 7 6 . Section 15(1) of Canadian Charter of Rights and Freedoms,

www.efc.ca/pages/laws/charter/charter.head.html, provides:

“[e] very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law

without discrimination.. based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Court said that Section 15 requires that sexual orientation be “read into” a province’s

general anti-discrimination

law).”

¹⁴ See International Lesbian and Gay Association (ILGA) *World Legal Survey on Anti Discrimination Law (Sexual*

Orientation); “*European Treaties and Legislation and National Constitutions and Legislation Expressly Prohibiting*

Discrimination based on Sexual Orientation ” by Dr. Robert Wintemute (last updated September 20, 2002) at:

http://www.ilga.info/Information/Legal_survey/list_of_international_treaties.htm

Union to “take appropriate action to combat discrimination based on ...sexual orientation.”¹⁵ Member states of the European Union have also authorized the solemn proclamation of the Charter of Fundamental Rights of the European Union, which in Article 21(1) provides that discrimination shall be prohibited on grounds “such as . . . sexual orientation . . .”¹⁶

Protection against discrimination based on sexual orientation extends to access to military service

8. On the particular issue of prohibiting discriminatory practices that deny access to public services, including military service, the European Court of Human Rights (ECHR) in the case of *Lustig Prean v UK*,¹⁷ found a violation of the right to respect for private and family life, in favor of applicants of the United Kingdom armed services who were subjected to police investigations concerning their homosexuality, and who were administratively discharged after admitting homosexual orientation. Their dismissal was solely attributable to their admission of homosexual orientation and was pursuant to a Ministry of Defense policy that excluded homosexuals from the UK armed Forces.

9. The Court considered that the investigations conducted into the applicants’ sexual orientation together with the applicants’ discharge from the armed forces constituted especially grave interferences with their private lives. The Court found that the Government had not demonstrated “particularly convincing and weighty reasons” to justify those interferences, and noted that the Government’s core argument was that the presence of homosexuals in the armed forces would have a substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces. The Government relied, in this respect, on the Report of the Homosexual Policy Assessment Team (HPAT) published in February 1996. The Court found that, insofar as the views of armed forces’ personnel outlined in the HPAT Report could be considered representative, those views were founded solely upon the negative attitudes of heterosexual personnel

¹⁵ <http://europa.eu.int/eur-lex/en/treaties/index.html>

¹⁶ http://www.europarl.eu.int/charter/pdf/text_en.pdf

¹⁷ 1999 ECHR 71

towards those of homosexual orientation. It was noted that the Ministry of Defense policy was not based on a particular moral standpoint and the physical capability, courage, dependability and skills of homosexual personnel were not in question. Insofar as those negative views represented a predisposed bias on the part of heterosexuals, the Court considered that those negative attitudes could not, of themselves, justify the interferences in question any more than similar negative attitudes towards those of a different race, origin or color.

10. Finally, the ECHR in *Lustig Prean* considered that it could not ignore widespread and consistently developing views or the legal changes in the domestic laws of Contracting States in favor of the admission of homosexuals into the armed forces of those States. Accordingly, the ECHR found that convincing and weighty reasons had not been offered by the Government to justify the discharge of the applicants.

11. Though the case of *Lustig Pean* was decided on the basis of a violation of the right to privacy, the reasoning of the ECHR can easily found the arguments for a violation of the right to non-discrimination in similar circumstances. The Court offered powerful reasoning against practices that preclude entry into the armed forces on the basis of sexual orientation.

The basis for “gender identity” as a prohibited category of discrimination in international law

12. The International Commission of Jurists endorses the protections offered to “gender identity” in legislation and constitutions. We note that widely held beliefs of what properly constitutes *male* or *female* conventions have been used as an instrument of oppression against individuals who do not fit or conform to the stereotypical or binary models of masculine or feminine. Personal deportment, mode of dress, economic independence in women and the absence of an opposite sex partner, are all features that may subvert gender expectations and attract discriminatory responses based on gender. Lesbians, gay men, transgender persons, travestites and intersex individuals are often seen as flouting rules concerning gender roles. By acknowledging “gender identity” as a prohibited category of discrimination, law addresses how the departure from binary models of genders can be a source of discrimination and human rights abuse.

13. Violence against transgender persons is a worldwide phenomenon.¹⁸ It affects groups that are often marginalized in terms of economic, social and political status and who are vulnerable, due to gender and sexual non-conformity. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has highlighted in various reports, several cases of killings of travestite and transgender persons.¹⁹ Similarly, the Special Rapporteur on Torture has reported serious abuses against transgender and travestite individuals in various country reports²⁰. The UN Committee against Torture in 2002 specifically addressed the issue of abuses against transgender activists in its Concluding observation in Venezuela²¹.

14. The need to address the recognition of a fundamental right to gender identity as a way of fully acknowledging the dignity of *all* persons, has been considered by the European system for the protection of human rights. Although the 1950 text of the European Convention on Human Rights does not explicitly mention gender identity and sexual orientation among the grounds provided by the principle of non discrimination of article 14, the inclusion of both sexual orientation and gender identity within the scope of the Convention itself has been acknowledged in the past decade by the case law of the European Court of Human Rights.²²

15. In the case *Goodwin v. United Kingdom*²³, the justices of the European Court of Human Rights recognized the rights of “*individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost*”, by arguing that “[i]n the twenty

¹⁸ Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, E/CN.4/2004/56/Add.1, March 23, 2004

¹⁹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2003/3, January 13, 2003, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to Honduras, E/CN.4/2003/3/Add.2, June 14, 2002;

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2001/9/Add.1, January 17, 2001; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2001/9, January 11, 2001; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2000/3, January 25, 2000

²⁰ Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, E/CN.4/2002/76, December 27, 2001;

Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, interim report, A/56/156, July 3, 2001

²¹ E/CN.4/2002/76/Add.1, March 14, 2002

²² In the December 21, 1999 judgment in the case of *Salguierdo da Silva Mouta v Portugal*, in which the European Court of Human Rights found a violation of article 8 in conjunction with article 14, on the basis of the applicant’s sexual orientation.

See 1996 ECHR 176

²³ Appl. no. 28957/95 (16 January 2002).

*first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved”. More recently, in Van Kück v. Germany²⁴, the justices have recognized the “right to gender identity and personal development” as a “fundamental aspect of [the person’s] right to respect for private life” protected by article 8 of the European Convention being **gender identity**, according to the Court in the light of the previous cases, “one of the most intimate areas of a person’s private life”(emphasis added).*

16. Some countries have adopted express or implied protections based on gender identity, in domestic legislation²⁵. This trend is set to continue in light of robust case law development in this area.

Conclusion

17. In order to develop a full sense of common citizenship among people of all sexual orientations and gender identities, conduct that reinforces inequality must be proscribed by law, investigated where it exists and dealt with according to laws that offer relevant human rights protection. In describing the normative scope that underpins the framework for equality before the law, Sachs J in the case of *National Coalition of Gay and Lesbian Equality v Minister of Justice* in the South African Constitutional Court, opined as follows:

“ ... What the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal ceases to be the basis for establishing what is legally normative. More broadly speaking, the scope of what is constitutionally normal is expanded to include the widest range of perspectives and to

²⁴ Appl. No. 30968/97 (12 June 2003).

²⁵ See International Lesbian and Gay Association (ILGA) *World Legal Survey on Anti Discrimination Law (Gender Identity)*; “*European Treaties and Legislation and Selected National Legislation Expressly or Impliedly Prohibiting Discrimination based on Gender Identity*” by Dr. Robert Wintemute (last updated September 20, 2002) at: http://www.ilga.info/Information/Legal_survey/Legislation%20Prohibiting%20Discrimination%20Based%20n%20Gender%20Identity.htm

acknowledge, accommodate and accept the largest spread of difference. What becomes normal in an open society, then, is not an imposed and standardized form of behavior that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behavior."²⁶

Philip Dayle

Legal Officer, Sexual Orientation & Gender Identity

International Commission of Jurists

33, rue des Bains

1211 Geneva 8

Switzerland

Tel: +41 (0) 22 979 3824

Fax: +41 (0) 22 979 3801

²⁶ National Coalition of Gay and Lesbian Equality and another v Minister of Justice, *para 134 at:* http://hrw.org/lgbt/pdfs/africa_sodomy_1998.pdf

Philip Dayle

International Commission of Jurists

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Yogyakarta Principles: Presentation for NY UN launch

In the 1994 case of *Toonen v Australia*, the United Nations Human Rights Committee, which monitors States' compliance with the International Covenant on Civil and Political Rights (ICCPR), decided that laws criminalizing homosexuality constituted an unlawful interference to the right to privacy under its article 17. Toonen – the petitioner in this case - was a gay Australian citizen, resident in the State of Tasmania. He argued that the Tasmania Criminal Code charging the offences of unnatural sexual intercourse and indecent practice between men, violated his rights of privacy and discrimination under the ICCPR.

The Committee did not decide on the question of discrimination and whether protection of sexual orientation may be considered under the “other status” heading in the non-discrimination categories of the Covenant. The Committee opined nevertheless, that:

“...the reference to "sex" in (the Covenant) articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.”

Some have argued that the UN Human Rights Committee should have found a violation of discrimination in this case. This school of thought believes that the Committee’s observation that “sexual orientation” is protected under the definition of “sex” was not entirely satisfying, since both these descriptions are capable of separate and distinct meanings. As the argument goes, the Committee might have observed that “sexual orientation” is protected under the “other status” provision of the Covenant, in the absence of a specifically named category of sexual orientation.

Undoubtedly, the *Toonen* case has been enormously useful in making arguments for human rights protection based on sexual orientation. This is evidenced by its multiple references in UN Concluding observations. Domestic courts have cited *Toonen* as persuasive authority in judgments.

Various UN bodies have propounded “sexual orientation” as a self-identified category of non-discrimination. The Committee on Economic, Social and Cultural Rights, the Committee on the

Rights of the Child and the UN Working Group on Arbitrary Detention are prominent examples of this practice.

There is a continuing need however, to build on and refine the existing arguments for human rights protection of sexual orientation and gender identity. Recent events in the Republic of Trinidad and Tobago provide an example of the need for this.

In 2000, an *Equal Opportunity Act* was enacted by the Parliament of the Republic of Trinidad & Tobago. It included a provision that “sex” did not include “sexual orientation.” This could be seen as a cynical attempt to close the protection for sexual orientation put forward in *Toonen*.

In October of this year, the Judicial Committee of the Privy Council – the final Court of Appeal for Trinidad & Tobago - ruled in a case concerning the constitutionality of this *Equal Opportunity Act*, that **“sex’ does not include sexual preference or orientation;”** and that such a provision was NOT an infringement of the Trinidad & Tobago constitution.

This scenario offers a good example of why we should continue to develop and consolidate the juridical arguments in our work on

these issues. There is ample evidence in the international human rights project for advancing “sexual orientation” – and gender identity – as distinct grounds or categories of non-discrimination. The international refugee initiative has been brilliant in constructing arguments for “sexual orientation” as a basis of a “particular social group” in asylum claims, for example. There are great successes in constitutional reform, where “sexual orientation” has been specifically written as prohibited categories of discrimination (*eg: Ecuador*). In addition, there has been legislative progress (*eg: Mexico*) and successes in domestic court cases (*eg: Colombia, Peru*)

The **Yogyakarta Principles** – which reflect an authoritative interpretation of applicable international human rights law – challenges legislators, judges, lawyers and activists to pursue work that solidifies these standards both in domestic law and in the daily lives of all those who may rely on them. The Principles are not an end *in and of* themselves. They instead provide an important opportunity for us to further strengthen the human rights protection of sexual orientation and gender identity.



**International Commission of
Jurists
Commission internationale de
juristes
Comisión Internacional de
Juristas**

P.O. BOX 91
33, rue des Bains
1211 Geneva 8,
Switzerland

TELEPHONE: +41 (0) 22 979 3800
FAX: +41 (0) 22 979 3801
EMAIL: info@icj.org
WEBSITE: <http://www.icj.org>

Beyond the Polemics: the continuing “gay rights” project and the post-colonial South. ¹

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**The Global Politics of LGBT Human Rights Conference,
Glasgow University, Scotland, UK**

I. Historical context

The seemingly forgotten fact is that “gay rights” as a human rights concern is not a very old pursuit. In the British common law tradition, the germ of gay rights developed in the 1957 “Wolfenden Report” in the UK, which concluded that homosexual behaviour between consenting adults in private was part of the “*realm of private morality which is, in brief and crude terms, not the law’s business*” and should no longer be criminal.

¹ Reference to “gay rights” in this paper is an in-disciplined attempt to capture the concerns of gay, lesbian, bisexual and transgender (LGBT) concerns.

In the UK's 1967 Sexual Offences Act, the offences of buggery and gross indecency that together outlawed the basic gamut of male homosexual acts were decriminalized for consenting men above age 21.² These law reforms were however, not replicated in former British colonies. Instead, these offences became symbolic markers distinguishing independent, formerly British territories from the erstwhile colonial masters.

This colonial break — i.e the difference between how law developed in its metropolitan points of origin, and how it continued in post-colonial settings — is clearly seen in how the trajectory of international rights mechanisms *has* and *has not* affected domestic laws. The European human rights system was friendly to sexual-orientation-based claims particularly and significantly early. In 1981, the European Court on Human Rights declared the offences of buggery and gross indecency in Northern Ireland to violate the right to privacy under article 8 of the European Convention in the case of *Dudgeon v UK*. Dudgeon, a gay man, argued that the very existence of the offences in Northern Ireland made him liable to criminal prosecution and infringed his right to privacy. The court agreed with these arguments and decided similarly in 1988 and 1993 in the cases of *Norris v Ireland*³ and *Modinos v Cyprus*⁴ respectively.

² See below for definitions and a short history of these offences.

³ *Norris v Ireland* (1988) 13 EHRR 186.

⁴ *Modinos v Cyprus* (1993) 16 EHRR 485.

The member states in the aforementioned cases fielded arguments of strong opposition to homosexuality based on religion. The “legitimate aim” of the legislation was noted as the “protection of morals.” The European Court decided however that it would not defer to the margin of appreciation or the individual state practice in these cases. It cited the overwhelming practice in other member states of the European human rights system that had long decriminalized consensual sex between adults of the same sex and found that there was no “pressing social need” for the maintenance of the legislation in either situation.

One notes that by the mid-1990s, “sodomy” had been decriminalized in nearly all states in Western Europe. The resistance in some post colonial States is all the more peculiar, because many of the offending sodomy laws actually *comes from* England and has a genealogical relationship to the United Kingdom provision that the first European Court decision overturned.

Our thesis here, is that the very colonial origin of homophobic laws in the “developing world” makes those countries resistant to examples of change that come from the old colonial centre. A strategy for advancing rights related to sexuality must therefore take into account not just the power of European precedents, but the history of European power relationships and the peculiar paradoxes of the colonial and post-colonial political environments.

II. Empire and its aftermath: the Caribbean example

The break-up of the British Empire and the ensuing adventures with nationalism provided a moment of self-definition for newly autonomous States. This historical episode was dominated by male nationalist leaders and at its best, constituted a laudable quest for defining nationhood, for formerly colonized peoples. Lawmaking in this environment was thus formative as well as normative, one might say. It meant not just laying down rules, but the framing of ethical limits and the defining of communities through laws. This symbolic function of law in states recovering from the trauma of colonialism contributes important exigencies, angers, and insecurities to any ongoing debate over legal reform.

The Caribbean nationalist project, for example, was motivated by an impulse to prove competence, and make assurances about the continued viability of the former colonial territories.⁵ Slavery as a

⁵ In reflecting on the failed Federal experiment of West Indian States, Jamaica's Premier Norman Manley noted that nationalist leaders had a "duty ...to let the world at large know that we had no doubt whatever about the future of our own country, about our ability to sustain independence alone [and] ...to maintain confidence at a time when confidence in the country was greatly needed". See N. Manley, *Norman Washington Manley and the New Jamaica: Selected speeches and writings 1938–68*, ed. R. Nettleford, New York: Africana Publishing Corporation, 1971, p. 365 (Speech on 4 July 1968, "A mission to perform")

backdrop contributed to the degrading image of the virile but uncerebral black male. Independence made it urgent that black men, in their newly won capacity as citizens, “prove themselves the masculine equals of Englishmen.”⁶ The impulse to assess the success of new political power *in relation to* white male colonial stewardship provided the psychic frame for the new black male leaders.

A covertly but exceptionally significant gesture in this regard was the insertion of “savings law” clauses in many constitutions. These preserved the constitutionality of pre-existing laws by stipulating that no challenge in the new constitutional arrangements could render previous laws unconstitutional.⁷ Accepting colonial laws and their continued administration was pre-eminent proof of the competence of the new leaders. The elite of independence could prove its capacity through its commitment to certain key aspects of the *status quo ante*. The continued application of the 1861 provisions of the UK Offences against the Persons, proscribing buggery and gross indecency — and of the colonial-law provisions, which had preceded them and later were modelled after them — fell into this stream of competence through continuity.

The retention of these laws in independent, former-British territories has been radicalised as *the* moment of disjuncture that now

⁶ B. Edmonson, *Making Men: Gender, Literary Authority, and Women's Writing in Caribbean Narrative* Durham: Duke University Press, 1999, p. 8.

defines newly independent States in contradistinction to the former British colonizers (and the liberal tradition of the European Convention on Human Rights system). Through this auspicious departure from the former colonial masters (ironically, by the retention of British Victorian laws), there is a chance to assert an *original* moral authenticity.

Law enforces the disapproval of non-procreative sex such as gay and lesbian sex, and its practitioners are debarred from full moral citizenship, for which there is a heterosexual imperative.⁸ The values have reversed, so that a colonial provision becomes the seal of post-colonial identity: what is consistent is that heterosexuality is promoted as the only viable and self-sustaining option for the Nation. Modern states are imbued with the old, “modernizing” colonial responsibility to protect the boundaries of nationhood, through laws that proscribe sex “against the order of nature.” The spectre of unnaturalness and criminality dispossesses lesbians and gays and bisexuals, as well as transgender people, of full moral citizenship. At the same time, in the ultimate paradox — and the most satisfying to post-colonial politicians — it marks the new nations as distinctly morally superior to the former colonial power.

⁷ See constitutions of Barbados, s 26, Jamaica, s 26(8); Trinidad retained its saving clause even after it became a republic.

⁸ M. Jacqui Alexander, “*Not Just Any Body Can Be A Citizen, Sexuality and Postcoloniality in Trinidad & Tobago and the Bahamas*”, 4 *Feminist Review*, p 6.

III. Mapping the rhetoric

The objection to homosexuality as being *un-Caribbean* is of course not unique: it is not just Southern countries that invoke “nation” as the criterion for the unacceptability of homosexuality. In the now-overruled 1987 US Supreme Court decision *Bowers v Hardwick*⁹, the majority deployed reasoning that perfectly resembles the rhetoric used in southern countries to retain sodomy laws. One justice pronounced that the Federal constitution did not confer a “fundamental right upon homosexuals to engage in sodomy”—finding the prohibition of sodomy “deeply rooted in this Nation’s history and tradition.” This kind of reasoning may explain how the rhetoric that defends “sodomy laws” and the suppression of sexual rights has its roots in discourses and strategies of power originating in the colonizing states and their history.

Symbolically, the gay man and lesbian woman have become tropes for many political battles that are not exclusively connected to sexuality. Anti-homosexual laws are the idealized ethical limit of post-colonial nations. The spectre of homosexuality is propagandised as a marker of “western decadence”¹⁰ and can be revisited and updated, even as the issues of colonialism, racism and sexism still

⁹ 478 US 186 (1986)

¹⁰ “Let them be gay in the United States, Europe and elsewhere. They shall be sad people there,” said President Robert Mugabe, President of Zimbabwe. *Supra* n 18

linger and define the experience of many Southern countries. In this context, the image of “gayness” may unsurprisingly be demonised as white, European and neo-imperialist – implicating unhealed political troubles that remain real concerns in these countries.

IV. Strategic considerations

Till recently – and still for the most part – gay rights advocacy in the South has been a hugely top-down experience, with overseas activists from prosperous Northern countries assuming the visible charge of spokespersons for fearful and invisible “LGBT” communities of the South. This has not been due to a willed passivity in the South, but rather, has often reflected real fears and dangers for LGBT organizing in many countries.

The promise of nationalism was the fruition of the liberation struggle. Suggesting that constituents of newly independent countries remain un-emancipated is an affront to national dignity. Activists from overseas who come and claim to “liberate” can seem, in the countries where their evangelical efforts are received, to be practicing a politics of insult. The prevailing image of “rescue” plays out against a colonial background that is understandably suspicious of

“missionaries.”¹¹ International activists therefore face profound questioning of their moral authority — which can connect in turn to colonial history, the “war on terror,” racism and inequities in international economic order. These questions litter the terrain of contemporary sexual-rights advocacy, and are not easily—indeed cannot properly be — dismissed as tangential.

The global “gay rights” project must commit to a more rigorous engagement with the challenges of nascent LGBT communities. A few broad strategic suggestions can be offered from the start.

- Activists must educate themselves on the issues that fashion sexual-rights discourses in different locales. The ultimate objective is for local activists to claim ownership of challenges in their own local circumstances. The overseas intervener is a partner and not a rescuer.
- It is crucial for all sides to be aware of the colonial origins of many of the laws on sexuality that are now exalted as reserves of authentic cultural value in post-colonial societies. If the *problem* comes from the old colonial centre, there should also be an openness to explore answers that are consistent with human rights norms, that emanate from other sources

¹¹ In both slavery and colonialism, religious missionaries were often cohorts of Empire and

- The language of the *universality* of human rights must be stressed, along with *interrelatedness* and *indivisibility*. This must acknowledge the lived experience of each individual and not pursue a linear and exclusive focus on sexuality, but acknowledge other aspects of identity, as well as social forces, which intersect to create unique experiences.

administered religion as a means of pacifying subjects into an acceptance of the status quo.