

# Homosexual laws in history

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ening to become really amorous and was using his hands in a manner too intimate for Nicky's taste. He was really getting frightened when a figure carelessly dressed in slacks and shirt stepped out of the shadows, and it was with considerable relief that he realised that it was Steve.

«If you don't mind,» he said to the three youths, at the same time taking Nicky by the arm, «this young lady is with me.»

The youths were so amazed that they mumbled a few words of apology as the night porter, who by this time had also appeared, opened the doors to admit Nicky and Steve. Together they went up in the lift.

«That, my dear, must have been rather unpleasant», said Steve as they left the lift. «If you don't mind coming to my room I can offer you a whisky.»

Nicky wanted to go to Steve's room and he also felt he needed a drink, but he was very much aware of the dark shadow on his face and he felt a little reluctant. However, Steve did not seem to notice anything and Nicky decided to take a chance. In the room Steve helped him remove his silver fox furs and drew up a chair.

«I lock my whisky in the wardrobe,» he said with a laugh. «If I don't, the housemaid gets at it.»

He took a key and unlocked the door of the wardrobe and searched inside for the whisky, eventually finding it. In the meantime Nicky's very surprised eyes had opened very wide, and his mouth had fallen open. This time he really had received a shock, for hanging in the wardrobe was the lovely velvet gown in royal purple and the ermine cape. Steve, quick to notice Nicky's surprise, looked first at Nicky, then at the gown, and back at Nicky. He grinned as he poured the whisky.

«I'm getting a little tired of that old bit of drag,» he said. «I've worn it at least a dozen times. If you would like it, Nicky dear, I'd love to give it to you.»

*Ned Kelly.*

## Homosexual Laws in History

The Wolfenden committee has stated a reasoned case against continuing to punish the private behaviour of two homosexually disposed men. Public reactions have been confused and emotional. This is hardly surprising. This was the first official inquiry ever into an unsavoury problem customarily ignored, coming not 60 years since Havelock Ellis's pioneering study of sexual inversion was held at the Old Bailey to be a «lewd, wicked, bawdy, scandalous, and obscene libel.»

Few people ever knowingly meet an invert, or realize that there are one or two persons in every busload whose affections and impulses are irretrievably directed towards others of the same sex. Homosexual, like heterosexual, relations run the whole range from the altruistic and tender to the selfish and commercial. Most of what the average man and woman know about homosexuality derives, however, from scandals in the courts. Whether homosexual or heterosexual in character, these mostly involve indecent or offensive behavior in public, assault, or interference with children. Homosexual offenders of these sorts are no more typical of the majority of their kind than are the more numerous «normal» offenders typical of theirs. Unaware of all this, and naturally stern on sins to which he is not tempted, the ordinary citizen tends to respond with the loaded phrases with which custom has stereotyped discussion of sexual inversion.

## Bronze Age Sins

Nor are the two laws which have kept such phrases alive well known. One is Henry VIII's Act against «Buggery, committed with Mankind or Beast»—penalizing, that is, both sodomy (whether homosexual or heterosexual) and what is now called «bestiality». The other is the «gross indecency» clause of a late Victorian statute punishing all other male homosexual practices. The history of the first is bound up with that of the laws against heresy and witchcraft. Parliament adopted the second probably through misunderstanding of its true import.

Henry's Act derives from the laws the Roman Empire bequeathed to Christendom. Theodosius in 390 had enacted «the avenging flames» for sodomists. Justinian in 538 and 544 had earnestly reminded sinners of this penalty and exhorted them to repentance. These enactments themselves reflected the revulsion of pagan jurists as well as of Christians against the sexual corruption of boys and the general promiscuity of the Hellenistic world. The early Church Fathers had, moreover, convinced themselves that the supposed iniquities of a Middle Bronze Age community in Canaan some 2,000 years previously were, like heresy and sorcery, sins which could bring destruction to whole cities.

«Because of like impious conduct,» declared Justinian, «cities have indeed perished . . . Because of such crimes there are famines, earthquakes, and pestilences.» Dr. Sherwin Bailey recalls that Justinian's second edict immediately followed a great plague in Constantinople, and that the natural disasters which destroyed Corinth, Antioch, and other cities in a. d. 525 were still unforgotten. (Likewise, after the great plague and fire of London, popular superstition led Parliament to consider a Bill against «atheism, blasphemy, and profaneness,» with particular reference to «the book of Mr. Hobbes called the *Leviathan*.»)

## Medieval View

Throughout the Middle Ages the Church's courts, which regulated the faith and morals of the laity, were dominated by the Theodosian and Justinian codes. The spread of Manichean beliefs strengthened the coupling of sodomy with heresy, since the original Bulgarian heretics regarded marriage and procreation as more sinful than casual promiscuity. By degrees *Bougrerie* became a term of popular abuse referring to the supposed sexual habits of the heretics. Academic jurists maintained the conventional view that unrepentant sodomists should be burned, like heretics and apostates.

In practice, as Dr. Bailey has convincingly argued, in England at least, Church law did not specially stress the wickedness of sodomy, treating it only as one of many sins punishable with the traditional penalties of degrading, penance, and fining. It is certainly hard to discover any instance of the secular power being asked to execute a sodomist. Legal historians concur with Fitzjames Stephen's view that until the Reformation sodomy was a «merely ecclesiastical» offence. Indeed, Henry's Act of 1533, punishing it with death, was introduced «forasmuch as there is not yet sufficient and condign Punishment appointed . . . for the detestable and abominable Vice of Buggery.»

This Act inaugurated a trend which eventually made England notorious for savage use of the death penalty for small offences (petty theft, vagrancy, even bigamy under James I). It also marked a phase in which temporal authority

sought to intrude more draconically into private life than spiritual authority had ever dared. The right of lay courts both to judge and to destroy sinners extended not only to heretics and sodomists but to witches, gypsies and those consorting with them. The Commonwealth added a law for suppressing «the abominable and crying sins of Incest, Adultery, and Fornication, wherewith this Land is much defiled and Almighty God highly displeased.» (Fornicators were jailed, and two or three adulterers were hanged before juries revolted.)

### *Era of Hanging*

The Commonwealth's laws perished with it. The death penalty was abolished for heresy in 1677, and even for rape in 1841. After a melancholy mania of witch-hunting the witch laws were wholly repealed in 1736. The punishment of adult sodomy (as distinct from abuse of minors) has lingered on. Though few men were charged, most of those convicted of the offence were hanged up to the 1830s (for instance, four of the five convicted in 1810), and the death penalty remained in theory the sole punishment until 1861. The maximum penalty then became life imprisonment (as still to-day) and the minimum, until 1891, 10 years.

If continuing public horror, rather than inertia, accounted for this law's survival, similarly drastic action might have been expected centuries ago against homosexual acts not classed as sodomy, since these are equally repulsive to normal folk. Yet the law now mainly used, which punishes any act of «gross indecency» between one man and another, «whether in public or private,» dates only from 1885, and its maximum penalty is only two years. A clause creating this new offence was added to a Bill which (among other things) raised the female age of consent from 13 to 16. Labouchere, who moved the clause late one August night, probably intended precisely what the clause states. If so, his differing explanations of it were highly misleading.

### *Recent Debates*

Years later he wrote: «I took the clause *mutatis mutandis* from the French Code.» This would suggest that he wanted the Bill protecting girls below a certain age against seduction to apply also (as in France) to boys. For French law has not since the Revolution forbidden homosexual relations between adults, but protects children and juveniles against sexual interference, whether heterosexual or homosexual. Yet the clause had no age limit. It was entitled «outrages on *public* decency.» In the single sentence with which he explained it to the House of Commons, Labouchere said its purpose was to protect men as well as boys against «assault». The clause was adopted wholly undiscussed. It remains a mystery whether Labouchere misled himself or Parliament, wittingly or unwittingly, and whether Parliament understood what it was agreeing to.

Parliament would not, to-day, alter the law so casually. A parallel episode in 1921 ended quite differently. Even later, on another August night, a thinly attended Commons added to another protection of women Bill, transmitted from the Lords, a last-minute amendment to apply the 1885 Act to female homosexual conduct (unpunished then as now). A week later the Lords deliberately killed the Bill, which they wanted, rather than accept this new clause.

The Earl of Malmesbury feared a great increase in blackmail; the Archbishop of Canterbury could not support the clause; the Lord Chancellor found it «most highly disputable upon its merits.»

Discussing in the Lords recently the laws still applying to men, the present Lord Chancellor declared the Government's unwillingness to take the «serious step» of reversing «provisions of the criminal law which have stood for a long time.» The Englishman's wellknown aversion from even appearing to condone sins that only tempt others cannot, it seems, be overcome by the knowledge that virtually all European nations have long since found reasons of justice and common sense for abolishing their own antique laws against adult homosexual behaviour.

## Wolfenden Report

TO THE EDITOR OF THE TIMES

Sir, — Sir Henry Slessor asserts in his letter on December 16 that «homosexuality is contrary to the natural law,» but the examples he furnishes merely show that it has long been contrary to the law. It is a questionable contention whether homosexual behaviour, which, according to Kinsey, occurs at some time in the lives of about one-third of the male population, can be regarded as contrary to nature. All that can be said is that it has no biological value, as it does not lead to procreation.

But is the moral obliquity of «normal sexual depravities» — presumably «normal» because procreation may result — so much less, as Sir Henry Slessor seems to imply? Acts which may cause the birth of illegitimate unwanted children, who may even be infected by venereal disease, are surely the cause of greater social evil, than two adult homosexuals cohabiting in private? Yet while the former acts are not regarded as criminal offences, the latter are the subject of what Mannheim has referred to as «Draconian penalties.» It is true most courts now act humanely, yet shockingly severe sentences are inflicted at times.

A great deal of misunderstanding on this subject arises, I am sure, through the public confusing the stable, otherwise perfectly respectable homosexual with the licentious psychopath, in whom the homosexuality is only one facet of a disordered personality. The real «objection» and tragedy of homosexuality lies in the inability to have a proper home, the companionship of marriage and children, which the sufferers feel keenly.

That punishment is no way of dealing with the problem was forcefully brought out in the recent debate in the Lords by the Archbishop of Canterbury, who contended that if the law was changed homosexual activities might diminish. Though impossible to put to the test, I have the impression that if public conduct were no longer an offence this too would diminish, as the danger is an added stimulus.

In the same debate the Lord Chancellor, speaking of prostitution, said allowances must be made for human nature, and that imprisonment would not solve the problem. In homosexuality it presumably can! Finally I submit this is not a question of seeking changes in the law on account of this being an «enlightened» age, but in the hopes that it might be regarded as a rational one.

*Both from: The Times, London.*

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*Foolishness and loneliness are never far apart, but one of the stupidest things a man can do is «to have fun» because he is lonely.*

*C. H. Lejeune.*