



The University of  
the West Indies  
Centre for Gender and  
Development Studies



Issue 3 – 2009

## **Creating (Im)moral Citizens: Gender, Sexuality and Lawmaking in Trinidad and Tobago, 1986**

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### **Abstract**

Since the 1980s, constructions of gender and the organization of sexuality have become subjects of acrimonious debate in the public arena of law-making in certain postcolonial states. Rooted in the process that led to the revision of the Penal Code of Trinidad and Tobago in 1986, and engaging with the pioneering work of Trinidadian scholar, M. Jacqui Alexander, this paper examines how gender and sexuality interconnected with nationalism and notions of modernity to generate “moral” and “immoral” citizens in parliamentary discourse and legal terrains, with particular implications for women and for persons who did not conform to normative sexual behaviours.

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## Introduction

I first read Jacqui Alexander's phenomenal essays on law and sexuality in postcolonial Trinidad and Tobago (Alexander 1991 and 1994)<sup>ii</sup> while writing a paper on sexuality and human rights for an international women's human rights initiative that was to coincide with the United Nations World Conference on Women, 1995. Within a few pages of reading her work, I realized hers was the kind of project with which I wanted to be engaged. Little did I anticipate then, that in a few years I would be working on a comparative study that focused on the process and implications of Penal Code changes in Sri Lanka (where I am from) and Trinidad and Tobago. Alexander's work became both inspiration and site of critical engagement. While this paper focuses on Trinidad and Tobago, the insights gleaned from the comparative study inform its analytical content, just as Alexander's pioneering scholarship undergirds the theoretical framework for the whole.

In November 1986, the Parliament of Trinidad and Tobago passed the Sexual Offences Act. Its passage had been marked by controversy within Parliament and widespread public debate on "Clause 4"—the marital rape provision. If a married woman's presumed perpetual consent to sex with her husband was capable of being questioned, then heterosexual marriage itself could be under threat. The continuous privileging of marriage was achieved not only by underscoring a sexually compliant female spouse, but also by delineating legitimate, and thus illegitimate, sexual behaviours. Defining acceptable sex was possible only by simultaneously defining unacceptable sex, just as privilege is possible only because its lack is simultaneously authorized. Thus, the debates in Parliament were haunted by the spectre of non-normative sexual behaviour. This paper is concerned with how, in the course of the Sexual Offences Bill and the parliamentary debates that refined it, the category of "woman" was understood and (re)constructed. It is occupied with how sexual deviance was constructed so as to elevate marital heterosexuality, and with the configuring of morality as "proper" sexual behaviour, which constitutes the basis for being citizens. Drawing on parliamentary debates and legal texts, complemented by newspaper reports and interviews, it examines how particular discourses of gender and sexuality in law-making and the domain of criminal law intersected with other social concerns and with political imperatives that were informed by nationalism and notions of modernity, to constrain female citizens and

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### Author's note and acknowledgements

This paper draws selectively from my study, "Defining the female 'body politic': Women, sexuality and the state", which examines comparatively the impact of sexual offences legislation on women and sexually marginalized persons in Sri Lanka and Trinidad and Tobago. It was supported by a Postdoctoral Research Fellowship from SEPHIS (South-South Exchange Program for Research on the History of Development), 1997–1998, 2000–2002. A copy of the original study is deposited with SEPHIS. The manuscript is currently being revised for publication. At the time of holding the Fellowship, I was a Research Fellow at the International Centre for Ethnic Studies, Colombo, Sri Lanka. At present, I am an Honorary Associate, Department of History, School of Philosophical and Historical Inquiry, Faculty of Arts, University of Sydney. My deepest appreciation to SEPHIS, to the regional office of the Caribbean Association for Feminist Research and Action (CAFRA), to all who agreed to be interviewed, and to friends whose critical feedback, support and examples of scholarship have enriched my thinking on this project—especially Ratna Kapur and Tracy Robinson. My gratitude also to the Editor, Guest Editor and staff of *CRGS*, and to the anonymous reviewers. And thank you to Parvani Pinnewala.

<sup>ii</sup> Alexander revisits these issues in her book, *Pedagogies of Crossing*, 2005, p. 180 ff.

(some) male citizens in new ways. In doing these analyses, I engage with Jacqui Alexander's work and test the validity and limits of her conclusions.

In discussing the general so as to situate the particular, it is notable that over the past three decades, sexual behaviours and their organization have often been bitterly contested in legal terrains of the global south (consider Trinidad and Tobago, Sri Lanka, and most recently, Singapore). Scholars of twentieth-century postcolonial challenges have demonstrated how definitions of the reproductive and sexual roles of citizens (especially if female) in "state" texts such as constitutions and other collections of law have held critical implications for the reconstruction and self-representation of a postcolonial state. Nationalist leaders, charting the course of political, economic and social development of postcolonial states, negotiated between embracing a secular, scientific model for modernization—one that drew on post-European Enlightenment schemes of reasoning and knowledge—and recalling or reinventing cultural and religious traditions from an inevitably glorious, autonomous, pre-colonial past.<sup>iii</sup> This tension between the presumed opposites of modernity and tradition remains at the core of procedural, epistemological and public moral dilemmas being negotiated by postcolonial states in the global south.

We are familiar with how women have been charged with bearing the nation, either biologically or as preservers and transmitters of cultural symbols, in anti-colonial, nationalist movements. Central to the efficacy of this programme is women's compliance with prescriptions that reify female sexual containment through compulsory heterosexuality, marriage and motherhood, and a general adherence to social norms that constantly re-inscribe "woman" as a natural, predetermined, already evident category requiring protection, whether by individual men, families, communities or the state (Parker et al. 1992; Kapur 2005). Law has been implicated in each instance, and definitions of sexuality and sexual actors, and the companion constructions of morality and respectability, both within and outside law, have played key roles in both justifying the colonial project as well as informing anti-colonial movements.

Anxieties regarding sex are often easily stoked. Sometimes sexual behaviour itself may be the primary issue under public debate. At other moments sexuality and sexual discourse serve as a proxy or site of strategic displacement for issues such as censorship and other restrictions on the freedom of expression (Kapur 2005, 51–94). Couched in concerns for morality and public order, and through these implicating the law in the constructions of normative and deviant behaviours, such anxieties continue to intrude upon, and be informed by, contemporary economic, political and social developments at

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<sup>iii</sup> Partha Chatterjee locates the problem, in relation to knowledge and power, as follows: [T]he problem of nationalist thought becomes the particular manifestation of...the problem of the bourgeois-rationalist conception of knowledge, established in the post-Enlightenment period of European intellectual history, as the moral and epistemic foundation for a supposedly universal framework of thought which perpetuates, in a real and not merely metaphorical sense, a colonial domination. It is a framework of knowledge which proclaims its own universality; its validity, it pronounces, is independent of cultures. Nationalist thought, in agreeing to become 'modern', accepts the claim to universality of this modern framework of knowledge. Yet it also asserts the autonomous identity of a national culture. It thus simultaneously rejects and accepts the dominance, both epistemic and moral, of an alien culture. (Chatterjee 1986, 11).

local and global levels. For instance, against a background of increasing international migration (whether to meet labour demands or escape armed conflict), state authorities are alarmed by the challenge posed by HIV/AIDS. They are also concerned about their population's easy access to globalized information and images. Authorities must thus reckon with the compromise of national boundaries as conventionally scripted. They see threats posed to national culture, with culture constructed as essentialist, exclusivist, ahistorical and static. Such constructions often eschew all but the most conservative sexual stereotypes, and the law is deployed to uphold the stereotypes. The law then, intimately linked with the processes of governance and ordering of society, has been, and increasingly in new ways has become, a site of discursive contest regarding sexuality. In particular, criminal law and its interpretations are implicated in the permissions and denials of sexual behaviour, the constructions of legitimate and illegitimate sexualities where sexual behaviour enmeshes with morality, and the frequent gendered differentiations that underpin such binaries. It is at such a point of contestation that this paper is located, while acknowledging the particularities of place and historical moment.

### **Legislating sex and sexual offences in Trinidad and Tobago**

The genesis of the Sexual Offences Bill (henceforth SOB) in the early 1980s in Trinidad and Tobago is rooted in a historical period that witnessed a high level of sexual violence against women accompanied by a growing feminist consciousness in response to this violence and its implications, both locally and internationally. Some Trinbagonian women's rights advocates have suggested that the increase in levels of misogynistic violence over this time may be linked with growing economic hardship and men's unemployment at the end of the oil boom (Johnson 1990, 127; Gopaul et al. 1994, 38-39).<sup>iv</sup> Women, who were likely to be employed in clerical and service-oriented jobs more than men who dominated the fields of production/labour, transport and construction, earned much less than men (Yelvington 1995, 82; Reddock 1991; R. Clarke 1993, 5). This reflected the sexual division of labour that informed both the nature of the occupation as well as related remuneration. These elements would have a direct impact on the level of material autonomy a woman might enjoy, which in turn would affect her capacity to exercise informed choices elsewhere in her life, including the sexual.

### **The earliest draft**

Work on the Sexual Offences Bill (SOB) was initiated by the Law Reform Commission of Trinidad and Tobago in the latter part of the 1970s. The Commission's choice of recommendations for the SOB appears to have taken into account violence against women, the vulnerable locations of youth, children and others in positions of dependency, as well as existing legal provisions affecting sexually stigmatized persons such as homosexual men.<sup>v</sup> There was also a decision to bring under a single rubric, namely "Sexual Offences", those laws pertaining to sexual offences located until then within the Offences Against the Person Act. Relevant new legislation, including revised penalties, was also subsumed therein.

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<sup>iv</sup> My gratitude to Cathy Shepherd for these sources.

<sup>v</sup> I have avoided referring to homosexual men as gay men because, contextually, in the Trinbagonian debates, the term "homosexual" was used, linked also with legal conventions.

The Commission drew upon legal reforms in other countries of the British Commonwealth, such as the United Kingdom, Australia, Canada and certain Caribbean states, to develop the new legislation for Trinidad and Tobago.<sup>vi</sup> It considered issues such as criminalizing sexual assault in marriage, and modifying the statute on buggery so that it no longer penalized consenting adults.<sup>vii</sup> As a former Law Commissioner remarked, the utilizing of Canadian and British models was informed by the Commissioners' belief that the social values in Trinidad and Tobago had changed in a more liberal direction.<sup>viii</sup> At the same time, to quote from Jacqui Alexander, this process "represent[ed] the first time that the coercive arm of the postcolonial state had confronted the legacy of its colonial trauma", specifically in the realm of the regulation of sexuality (Alexander 1991, 135).

The Commission, multiracial in composition and constituted entirely of lawyers, appears to have been guided by the need to find the best examples of legislative reform within the British Commonwealth, which would then also yield reforms rooted in the shared heritage of British law. Simultaneously, it is evident that the main systems drawn on were advanced capitalist states that also, while multiethnic, had white-majority governments (United Kingdom, Canada and Australia). These were the states whose legal developments were perceived as guided by contemporary liberal values such as gender equality and women's autonomy. Such values were reflected in the proposed legislation regarding marital rape (drawn mainly from Canada), and notions of privacy, as in the suggestion that consensual homosexual acts between adults in private be decriminalized (as in the United Kingdom). In drawing on the legal precedents set by these states, it appears that the Commissioners did not comprehend Trinidad and Tobago as anything other than a society functioning within a broadly "Western" scheme of values regarding equality and privacy, now imagined to be approaching those of the global north, albeit with different ethno-racial communities in contests for political and economic power.

Another former Law Commissioner was of the pragmatic view that, given the proximity of Trinbagonian law to British law, where the Privy Council of the United Kingdom was the highest court of appeal for Trinidad and Tobago, it was generally easier to have legal reforms accepted locally if there was a British precedent than if initiatives had purely local roots.<sup>ix</sup> Such assumptions by the Commissioners regarding values and strategies accounted for their great surprise when several of their key recommendations for change were rejected, first by the Ministry of Legal Affairs and, later, by other Members of

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<sup>vi</sup> Verbatim notes from the debates of the House of Representatives, and of the Senate, Republic of Trinidad and Tobago, 1986, MG/pjc, 21.2.86, 2:10-2:20 pm, p. 1. Henceforth referred to as "Debates".

Parliamentary proceedings, usually published as the Hansard, were unavailable for the debate on the Sexual Offences Bill in 1986. I worked from the transcripts very kindly made available to me by the Parliamentary Library, Port of Spain, in 1998 and 2001. The notations refer to identification markings at the top of each 10-minute segment on the transcript pages. Verbatim notes are identified by the initials of the parliamentary reporter in block letters, after a slash followed by initials of the typist in lower case, then by the date, time block of reporting, and page number, e.g. LR/cmi, 86.02.21, 1:52 - 2:00 pm, p 3. I have changed the order of the date to read day/month/year (e.g. 21.02.86).

<sup>vii</sup> Commentary on the Sexual Offences Bill, 1984 Draft (henceforth "1984 Commentary"), p. 1, 4, 6.

<sup>viii</sup> Interview, Port of Spain, 1998.

<sup>ix</sup> Interview, Port of Spain, 2001.

Parliament. Thus, one camp of lawmakers, those who conceptualized the reforms (the Law Commissioners), was pitted against the other, those whose business it was to concretize the reforms through legislative enactment and implementation (the Members of Parliament).

The 1984 Draft of the SOB was significantly modified in areas such as marital rape and homosexuality by the time the Bill came before Parliament for the second reading in 1986. The 1984 Draft is therefore important as the articulation of the Law Commission that would have had least interference from the Ministry of Legal Affairs or other parliamentarians. The Explanatory Note of the 1984 Draft asserted that the SOB's main purpose was "to codify the law on sexual offences and to bring the law more in accord with modern day thinking in Trinidad and Tobago". It would "interfere as little as possible in the sexual lives of husbands and wives and of consenting adults".<sup>x</sup> These suggest the belief that social values in late 1970s–early 1980s Trinidad and Tobago had altered significantly enough to merit changes in these laws; the Clauses criminalizing marital rape and those permitting acts of "serious indecency" and buggery between consenting adults being cases in point. This simultaneously signalled the assumption, at least on the part of the Commissioners, that the changing values encompassed recognition of rights such as that of a woman to her bodily integrity and her capacity and right to negotiate sex within marriage. It also signalled, at the least, social tolerance for consensual acts such as oral sex and anal intercourse in both heterosexual *and* homosexual contexts. I would suggest it also presumed an equation of modernity with the capacity for such recognitions and acceptances.

However, some notions of equality and rights were tempered, as in the case of the married woman. While drawing on Canadian legislation for its formulation, and declaring that it positioned the wife as equal, not inferior, to non-married women, the proposed Trinbagonian law posited its difference from the Canadian through a preference *not* to construct the husband-rapist as similar to any other rapist. Instead of calling such an offence marital rape, it would be termed sexual assault, because "the position of the husband is peculiar to that of other men".<sup>xi</sup> Thus, it suggests that at least some Commissioners were uncomfortable with equating a husband with any other man on the question of rape. Through this move, while recognizing that "a wife must not be placed in an inferior position as regards other women",<sup>xii</sup> heterosexual marriage continued to be cast as a privileged site for both sex and procreation in comparison with other non-marital heterosexual, and indeed, all non-heterosexual arrangements. There was no indication that a male partner in a common-law arrangement, for example, would have a similar special status even if children were part of that family. I would argue that the variable that accords this special position to marriage is the status of the man within that arrangement, since all women are presumed equally vulnerable to coercive sex, regardless of their marital status. But not all convicted rapists would receive the same

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<sup>x</sup> "Bill: An Act to repeal and replace the laws of Trinidad and Tobago relating to sexual crimes, to the procurement, abduction and prostitution of persons and to kindred offences", 1984 (henceforth "1984 Draft"), Explanatory Note, p. 1.

<sup>xi</sup> 1984 Commentary, p. 4.

<sup>xii</sup> 1984 Commentary, p. 4.

punishment, even if the assaulted subject is the same. Thus, the status of the man and the formation within which he carried out the assault determined the meaning assigned to sexual assault for the woman, and the penalty for the man; in the 1984 Draft legislation, a convicted husband-rapist could be imprisoned for up to ten years,<sup>xiii</sup> while any other convicted rapist could be imprisoned for life.<sup>xiv</sup>

The 1984 Commentary drew attention to the key challenge posed to Trinbagonian law makers: “[T]o decide what conduct is generally thought to be morally wrong and what conduct should be subject to the criminal law. The question is, ‘To what extent should the criminal law reflect the fact that certain kinds of sexual conduct are commonly thought to be morally wrong or an outrage to public standards of decency?’”<sup>xv</sup> Essentially then, they had to ask: What is the relationship between criminal law and morality? The Commentary pointed out that a similar conundrum faced the Wolfenden Committee in the United Kingdom, which convened in 1957 to address legislation pertaining to homosexual offences and prostitution.<sup>xvi</sup> Citing the following excerpt from the Wolfenden Report regarding the function of criminal law, the Commentary indicates that these conclusions are contained in the approach attempted by the SOB: “[T]o preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specifically vulnerable because they are young, weak in body or mind, inexperienced or in a state of special physical, official or economic dependence....[I]t is not, in our view, to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour...”<sup>xvii</sup>

The Law Commissioners’ decision to link the reasoning behind the SOB with that informing the mandate of the Wolfenden Report places this particular example of postcolonial law-making squarely in the bind observed by Partha Chatterjee (1986, 11): How do we articulate cultural and epistemological autonomy from a postcolonial location while at the same time drawing upon the scheme of knowledge and reason universalized by the (former) colonial power? One may add: How do we do so where law seeks to be a hegemonic discourse par excellence which, in its invocations and enactments, continuously recalls colonial domination, especially potent given that Trinidad and Tobago’s highest court of appeal is the British Privy Council? From the treatment of Clause 4 it appears that some of the Commissioners sought to extricate themselves from this bind by naming marital rape “sexual assault”, and thereby asserting “Trinbagonian-ness” through granting marriage a privileged place in sexual arrangements and a reduced sentence for the husband-rapist. The treatment of women who have the legal status of “wives” as equal with all other women in the context of vulnerability to rape is traded for the assertion of an aspect of presumed national uniqueness. As the Legal Affairs Minister

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<sup>xiii</sup> 1984 Draft, p. 2, Clause 4 (2).

<sup>xiv</sup> 1984 Draft, p. 2, Clause 3(2).

<sup>xv</sup> 1984 Commentary, p. 1.

<sup>xvi</sup> United Kingdom, Home Office and Scottish Home Department, 1957. Henceforth, “Wolfenden Report”. Here and elsewhere, I have used the term “prostitution” rather than sex work to retain the wording of the legal and parliamentary texts.

<sup>xvii</sup> 1984 Commentary, p. 1; and Wolfenden Report, para. 13, p. 9.

would later echo in Parliament, although the new legislation under consideration was influenced by experiences elsewhere in the British Commonwealth and the Caribbean, the standards of morality, he pointed out, would have a unique cast: “[W]hat has been paramount in our minds is the consideration of our moral standards as obtained in our beloved Republic of Trinidad and Tobago. We hold firm to the view that what is good for England or Canada or Australia is not necessarily good for Trinidad and Tobago”.<sup>xviii</sup> He later added, “We feel we have to bring our laws relating to sexual offences into the twentieth and twenty-first century”. On the one hand then, what works elsewhere, specifically in the advanced capitalist, white-dominated states, is not necessarily acceptable at home. On the other, some standard was required by which the antiquity or modernity of national laws could be measured. But what would constitute such a standard?

As the citation from the Wolfenden Report suggests, central to the entire scheme was the assumption of the content of the term “morality”. Having no discernibly separate definition in the context under scrutiny, one is led to assume that morality, and therefore its negation or lack, was linked with sexual behaviour. Jacqui Alexander concludes: “*Morality* [had] become a euphemism for *sex*. To be moral [was] to be asexual, hetero(sexual), or sexual in ways that presumably carry the weight of the ‘natural’” (Alexander 1991, 133). Additionally, the values accorded to (sexual) morality and immorality emerged in relation to the preservation of public order and decency. Sex acts in private, between consenting adults, whether or not they were married, were (allegedly) not the criminal law’s concern.<sup>xix</sup> Sex then, even when consensual, has the capacity to disrupt, disorder and dismay when enacted in public because it has already been scripted as a private activity, where the public and private are imagined as discontinuous, discrete spaces with an infallible, impervious boundary in between. This is imagined not only by “normal” persons using their common sense, but also in law. This in turn presumes that all members of society, not only lawmakers and law enforcers, are already in consensus as to what constitutes “sex” and its disruptive potentials, including what is indecent, offensive or injurious. Thus, the question of what constitutes a shared understanding of (sexual) morality is neatly avoided. For its part, criminal law textually purports to recognize “sex” when it encounters it, either through explicit, codified definitions, as in the case of gross indecency, or through common law traditions, as in the case of sexual intercourse, whether “natural” or “unnatural”.

### **The Bill, 1985**

In the 1985 version of the Bill, accessible to the public,<sup>xx</sup> some noteworthy modifications had been made compared with the 1984 Draft. Among others, Clause 4 covering sexual assault of a wife by her husband had an additional subsection, (4), which barred proceedings except with the consent of the Director of Public Prosecutions.<sup>xxi</sup>

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<sup>xviii</sup> Debates, MG/pjc, 21/2/86, 2:10-2:20 p.m., p. 1.

<sup>xix</sup> 1984 Draft, Explanatory Note, p. 1.

<sup>xx</sup> Trinidad and Tobago, Bill 1985. The Explanatory Note in this version of the Bill covers pp.2-5. Henceforth Bill, 1985.

<sup>xxi</sup> Bill, 1985, p. 9.



While Clause 11 (formerly Clause 10) on serious indecency remained unaltered, accommodating all consenting adults irrespective of marital status or gender combinations in sexual activity, Clause 13 (formerly Clause 12) on buggery had been re-criminalized for everyone, regardless of marital status or sexual orientation.<sup>xxii</sup> What may have provoked such a reversal on Clause 13?

Rhoda Reddock,<sup>xxiii</sup> academic and feminist scholar long active in the Women's Movement, wondered whether the public forum convened in 1985 by the group, Working Women, to both examine as well as formulate a public response to the 1984 Draft, may have contributed to the re-criminalizing of buggery. This public forum was quite likely the first inkling the Trinbagonian public had of the impending legislation because, although the public had been invited to comment on the Bill, it proved difficult to obtain copies.<sup>xxiv</sup> While several in the Women's Movement welcomed the positive changes the Bill heralded, especially for girls and women, and for stigmatized sexual practices and communities premised on these, wider public approval for certain aspects of the reforms, especially those with a positive impact on homosexual behaviour, was not forthcoming. Most Trinbagonians regarded homosexuality as repugnant and deviant, and also as sinful from a Christian context (Pantin 1985). Tina Johnson pointed out that the first publicizing of the Bill coincided with the initial wave of panic regarding HIV/AIDS in the country (Johnson 1990,129). Since HIV was still regarded as a "homosexual disease" in the mid 1980s, it took little to prompt the Archbishop of Port of Spain, among others, to condemn sex between men as instrumental in the spread of the virus. Stigmatized as homosexual men already were, and given the popular elision between buggery and homosexuality (echoed also by the Legal Affairs Minister during the debate<sup>xxv</sup>) it would have required little additional justification for the Ministry of Legal Affairs to suppress the Law Commission's recommendation to decriminalize consensual anal intercourse.

The published version of the SOB was released a week after the first day of the debate in 1986, with some crucial changes. At Clause 4, the provision covering sexual assault within an existing marriage had been deleted, while it remained applicable in instances where the spouses were separated under a decree nisi or by judicial separation.<sup>xxvi</sup> The criminalization of buggery persisted, but it also re-inscribed permissible acts of serious indecency as the exclusive right of consenting heterosexuals, whether married or not (Clause 15).<sup>xxvii</sup> By the same move, it criminalized forms of sex between men other than anal intercourse (already covered under the buggery clause) and, for the first time, sex between women as well.

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<sup>xxii</sup> Bill, 1985, p. 12-13. The content of the other clauses under consideration remained unchanged, although some re-numbering occurred.

<sup>xxiii</sup> Rhoda Reddock. Interview, St. Augustine, 1998.

<sup>xxiv</sup> Rhoda Reddock, Interview, and Johnson 1990, 129.

<sup>xxv</sup> Debates, MG/pjc, 21.2.86, 2:10-2:20 pm, p. 1.

<sup>xxvi</sup> Bill, 1986, p.7, Clause 4.

<sup>xxvii</sup> Bill, 1986, p.10, Clause 15.

### **The second reading of the Bill, 1986**

The second reading of the Sexual Offences Bill took place in the House of Representatives between 21 February and 5 March 1986, and in the Senate on 4 November 1986. It signalled also the beginning of a sustained public debate in the media, which engaged lawyers, academics, clergy, newspaper columnists and newspaper readers. In discussing the parliamentary debate on the second reading and its fallout I shall also engage more closely with some of Jacqui Alexander's analyses and insights, bearing in mind that Alexander did not have access to the parliamentary transcripts when she conducted her research (Alexander 1991, 136) and relied primarily on newspaper reports and the different versions of the Bill. In comparison, my analysis and critiques arise from having had access to the parliamentary transcripts and therefore having read the debates themselves, as well as from interviewing some of the actors directly involved in the events—especially law commissioners and women's rights advocates.

In her essays, Alexander traces discursively the production of morality in a legal text, the Sexual Offences Bill, where morality or its lack comes to be equated with the "naturalness" or "unnaturalness" of a sexual act. Through this she assesses how legislators established sexual activity as the basis for different hierarchical relationships between various categories of persons. Essential to this exercise, which included the production of morality, was the construction of categories of illicit sex (sex between men, sex between women, prostitution, sex between adults and youth) in order to establish the arena of licit sex articulated as normative (hetero)sexuality, idealized in marriage and procreation. In the legal text, women become the terrain upon which ideas about sexuality, gendered behaviour, constructions of family, and consequently a citizen's worth are contested and negotiated. But in the debates around the text, women actively engaged with certain of its terms, refusing simply to be the objects of privileged discourse, especially evident in the matter of Clause 4. Alexander is particularly concerned to demonstrate how homosexuality and lesbianism become exceptionally qualified to be designated as unnatural, therefore immoral and criminal: male homosexuality continued to be criminalized while lesbian sex, by its newness, was specially targeted. While most of her central theses are confirmed in the themes I explore below, there are some significant differences, most notably on the place accorded to same-sex activity, whether between men or between women, in the delineation of normative sexuality in the course of the debates.

In presenting the Bill, the Minister of Legal Affairs argued that the crux of the Bill was the question, "to what extent must the criminal law deal with sexual conduct—conduct involving morality and indeed public standards of decency." He recognized that there would be diverse opinions on this, concluding that, as a country, a consensus had to be sought on what standards the law should protect, cautioning that "the criminal law never does and must never try...to make everything you consider to be immoral or wrong something that is punishable by the criminal law. We know for example in the field of literature that what today is forbidden reading, tomorrow is a bestseller."<sup>28</sup>

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<sup>28</sup> Debates, HC/as, 21.2.86, 2:00-2:10 pm, p. 1-2.

These introductory comments of the Legal Affairs Minister may be read as an attempt to set the parameters of the debate to follow, both drawing upon and going beyond the language of the Commentary to the 1984 Draft. As before, morality and public standards of decency are explicitly connected with sexual conduct, but there is also the caution against criminalizing certain behaviour simply on the grounds that it is disagreeable. Simultaneously, there is a move that recognizes the diversities of value systems, and asserts the need to serve national interests by establishing a consensus, presumably out of such diversities, on what constitutes morality within the context of this Bill. There is, however, a contradictory core. By invoking a literary example, the Minister appears to recognize the dynamic, therefore changing, nature of social values, but at the same time he seems to presume that whatever constitutes (sexual) immorality, not simply the idea of immorality itself, would be universal and timeless within Trinbagonian society. This is best exemplified by the ongoing characteristic of unnatural-ness accorded to buggery, and through that to homosexuality. The question he poses then becomes not whether notions of what constitutes sexual immorality will change with time, but whether (allegedly) timeless notions of what constitutes sexual immorality will at all times be criminalized.

The Minister declared that the Bill was also propelled by a need to protect citizens from the offensive and injurious, and to provide safeguards against sexual exploitation not only of females, as had hitherto been the case, but males as well.<sup>29</sup> Paternalism thus marked the deployment of protection here, and the insinuation was that lawmakers, especially parliamentarians, were best positioned to determine the nature of such protection. Its implications are especially apparent in regard to women of all ages. For, while asserting the need to “uphold the dignity of the female sex”, it also suggests the linking of female dignity with (economic) dependency, and female respectability (in order to deserve such protection) with compliance with certain social constructs of respectable femininity. That is, women exercising sexual autonomy, which would take them outside the sexual-moral categories approved by lawmakers, would preclude the possibility of protection by the state if they found themselves in situations of risk. It is when we reckon that in each instance for women, dignity, respectability and autonomy all hinge upon the constructions and deployments of permissible and impermissible sex set within the extremely powerful discourse of law, that the nature of the anxieties underlying the debate emerge more fully. The location of women in relation to marriage and the availability or denial of female sexual autonomy are also, as we shall see, linked with the construction of the “homosexual”.

### **Homosexual behaviours and persons**

The content of consensus on standards of (sexual) morality appears to have already been presumed by the Legal Affairs Minister prior to the debate. He seemed reasonably certain that male homosexual behaviour, including buggery, would not be decriminalized by his fellow parliamentarians, strong recommendations to the contrary by the Law Reform Commission and the Bar Council of Trinidad and Tobago notwithstanding. Equating buggery with homosexuality<sup>30</sup> (a slippage with thought-provoking implications, since

<sup>29</sup> Debates, HC/as, 21.2.86, 2:00-2:10 pm, p. 3.

<sup>30</sup> Debates, 21.2.86, MG/pjc, 2:10-2:20 p.m. p. 1.

the 1985 Bill had criminalized it for all, regardless of sexual orientation or marital status) he argued that anal intercourse, like bestiality, was an activity to which humans were “not naturally given”, and that legislation to discourage it was connected with the need to maintain certain standards of public decency.<sup>31</sup> As has become evident above, legal understandings of the natural in the realm of sexual activity was coded as (almost) any sex that occurred between a single man and a single woman, whether within or outside marriage, while all other combinations of sex partners occupied the unnatural space, as did their sexual activity. Buggery became the exception for parliamentarians, even if it was between a man and a woman. Buggery was not only unnatural and equated with male homo-sex,<sup>32</sup> but it also defined an essential state of being homosexual. How one had sex overwhelmingly defined one’s personality and being; sex acts were equal to a persona. It was acceptable to retain the full (British) spirit of the Wolfenden Report when it came to marking the “unnatural”.

By implication then, the sexual/moral society envisaged by lawmakers who shared the Legal Affairs Minister’s view could not accommodate homo-sex, any more than it could have a wife prosecute a husband for rape. The criminalization of buggery across all sex-partner combinations and sexual orientations again underscores the point that the Legal Affairs Minister and other parliamentarians (since none contested him in this regard)—besides taking on board intact the content of what might constitute natural and unnatural sexual intercourse—deemed as mutually exclusive categories that which constituted the natural and the unnatural in sexual behaviour. At the same time, one is compelled to inquire whether the prior, essentialized connection of buggery with homosexual sex made heterosexuals who engaged in it more like homosexuals, thereby threatening to undermine the exclusive binary of natural and unnatural sexual behaviours. Therefore buggery needed to be criminalized so totally as to preempt this possibility.

The continued criminalization of homo-sex and homosexuals found support among some women MPs as well. One MP, who had vigorously protested the removal of Clause 4 from the SOB,<sup>33</sup> crafted the male homosexual as a direct physiological threat to the heterosexual conjugal union, when she remarked that a married man who has sex with a homosexual man could infect his chaste wife with HIV/AIDS. She called for a clause in the SOB that would specially penalize such an instance of transmission.<sup>34</sup> In her case, the conjugal union needed to be premised on sexual respect between spouses, but the sexual protection of the moral wife necessitated ensuring that extramarital sex by the husband, if it occurred, took place with a partner who was not of a category as contaminating and as stigmatized as a man who had sex with other men. It also suggests that a wife could expect the protection of the law only if she had behaved in such a way as to comply with the prescription of heterosexual monogamy. As indicated in the public debate in the newspapers, the man who has sex with a woman and also with another man is not deemed bisexual or marked by any other term. The MP too does not mark him, implying that it is the unmarried, habitual homosexual who is thrice marked—as

<sup>31</sup> Debates, 4.11.86, CLJ/sh, 3:15-3:25 pm, p. 2. This part of the articulation was made before the Senate.

<sup>32</sup> Homo-sex = sexual activity between persons of the same sex.

<sup>33</sup> Debates, CN/gf, 21.2.86, 4:00-4:10 pm, pp. 2-3

<sup>34</sup> Debates, LR/gf, 21.2.86, 5:40-5:50 pm, p. 1

engaging in unnatural sex; as carrying a sexually transmitted, even lethal, infection such as HIV; and as being a detonator who, through anally penetrating a “heterosexual” male, explodes infection into (marital) heterosexuality, thus afflicting marriage partners with a debilitating and terminal disease heterosexuality/heterosexuals could not otherwise acquire.<sup>35</sup> The male homosexual thus facilitated the *physical* disintegration of (hetero)sexual/moral/marital society.

Throughout the debate, it is male homosexuality that was explicitly scripted as the overt threat to institutionalized heterosexuality. Sex between women was barely discussed, and when it was, it was not with the same notion of threat and danger. By the sole MP who made an issue of it in Parliament (or at least in those parliamentary reports accessible to public scrutiny), lesbian sex was invoked as a means by which older women could “corrupt” young girls. By basing his argument in anxieties about the seduction of female youth by other women into sexual activity, the MP<sup>36</sup> scripted lesbian sex as being not only unnatural, but also as predatory and premised on intergenerational sex. Thus it became a performance, I would argue, that emulated a heterosexual script where older men seduced young girls, toying thereby with the stereotype of the “manly” lesbian. In such a context then, a female subject who demonstrated a capacity for sexual agency outside heterosexuality could be accorded recognition *only* as simultaneously unnatural and criminal.

The Legal Affairs Minister’s own reluctance to make an especially big issue about criminalizing sex between women, both in general and in response to the MP, when compared with his reactions to male homosexuality, also supports the position that it was not perceived to be as threatening to institutionalized heterosexuality as sex between men. I would further posit that this was because the reference point for sex meriting discussion, whether natural or unnatural, heterosexual or homosexual, was penetration by the penis, that is, which orifice a penis made contact with determined whether or not it was sex worth discoursing on in the realm of law. For instance, not only does penetration by the penis establish whether or not rape has taken place,<sup>37</sup> but consonantly, whether a married man has been penetrated by another man is what renders him an explicit threat to his wife and to marriage itself.

Thus, Jacqui Alexander’s compelling theses have some key shortcomings, of which I offer two. Firstly, the argument that the possibility of sex between men being decriminalized was as responsible as Clause 4 for the public furore that resulted in the innovation of a select committee of the entire Parliament to conduct private readings of the Bill (Alexander 1991, 136), is not borne out in those parliamentary transcripts available for public review (bearing in mind that deliberations of closed parliamentary sessions are not publicly accessible). As will be recalled, buggery was re-criminalized for all persons beginning with the Bill of 1985, and there is no traceable indication in the sources to suggest that issues on sex between men also informed the decision to hold

<sup>35</sup> Recall that this was 1986, where information about multiple means for HIV/AIDS transmission was still emerging through medico-scientific research and only recently had begun to be given wide publicity.

<sup>36</sup> Debates, CR/pjc, 5.3.86, 5.30-5.40 pm, pp.1-2

<sup>37</sup> 1986 Bill, Clause 24; Sexual Offences Act 1986, section 25.

closed sessions of Parliament. As discussed above, given the emerging national fear of an HIV/AIDS epidemic, and the scripting of AIDS as a “gay disease” that fuelled that fear, the Legal Affairs Minister encountered no liberal-minded opponents in the House of Representatives.

Secondly, while one finds sustainable Alexander’s argument that marital heterosexuality and its procreative promise were elevated by the simultaneous, continued, or new criminalizing of sexual practices that were posited as “other” (such as prostitution, pleasure-premised non-marital heterosexual sex, and same-sex sexual activity), her point that legislators felt prompted “to ensnare and to specifically control lesbian sex” (Alexander 1991, 136, 138-139) is not supportable, either in the accessible parliamentary transcripts or in the contours of changes in the 1985 and 1986 Bills. Rather, from these sources as well as from the public debate in the newspapers, it appears more likely that male anger at men being exclusively scripted as perpetrators, as vividly articulated in the reactions to Clause 4,<sup>38</sup> prompted the gender-neutral language of Clause 15 of the Bill (Section 16 in the final Sexual Offences Act). The clause criminalized serious indecency in all instances except in the case of marital heterosexual sex and non-marital, consensual, heterosexual sex. This observation supports Rhoda Reddock’s suggestion that such hostility fuelled the demand for “equality” as in men and women being equally culpable for sexual offences, with sex between women subsumed under this. As Reddock cautioned, the deployment of the “equality” principle in the SOB, where equality was equated with equal culpability, is a salutary warning about the use to which equality arguments may be put.<sup>39</sup> I propose it would be more accurate to conclude that *all* sexual activity between consenting adults that did not fall within the frame of normative/natural conjugal sex, shared almost equal dishonours (prostitution, sex between women, sex between men, group sex in whatever combination) with the exception of sex between two adults, one male, one female, who were not married, but who did not include anal intercourse in their sexual repertoire.

### **Through the lenses of ethnicity/race and religion<sup>40</sup>**

It would be remiss not to comment, even if briefly, on the impact of the country’s ethno-racial and religious diversity, associated hostilities and accommodations, on the Penal Code debates. As noted above, the Law Commission was multiracial, with its representatives drawn from a cosmopolitan, well-educated group of lawyers. Parliamentarians too came from a range of ethno-racial backgrounds. In regard to education and outlook, some parliamentarians came from locations similar to the Law Commissioners’. Overall, however, political representation was, in 1986, still informed by deployments of power begun under British colonial rule, with political mobilizing along racial lines inhering in postcolonial electoral politics and government (Meighoo 2003). This found expression in the political domination by the People’s National

<sup>38</sup> Debates, EE/ct, 21.2.86, 4:10-4:20 pm, p. 3, and CI3/cmi, 21.2.86, 4:20-4:30 pm, p. 1.

<sup>39</sup> Rhoda Reddock. Interview, St. Augustine, 1998.

<sup>40</sup> I use African, East Indian, etc. to denote different ethno-racial identities as used within Trinidad and Tobago. These terms are used with cognizance that ethnicity and race are constructed, not natural, categories. Using the descriptive terms above is also with acknowledgement of their inadequacy in accounting for the considerable racial intermingling that characterizes Trinidad in particular, and the lack of comfortable fit between politically-catalysed categories and this long and variable history of miscegenation.

Movement (PNM) from independence through to 1986. While the PNM attracted votes from all ethno-racial groups, nearly three-quarters of its support came from Trinbagonians of African descent (Ryan 1991). PNM-dominated governments did bring on board East Indian supporters as Members of Parliament and state ministers, but it drew on the card of religious distinction among East Indians. In the PNM's long history governing Trinidad and Tobago, until the National Alliance for Reconstruction (NAR) victory of 1986, East Indian members of PNM Cabinets had been exclusively Muslim. Hindus, who constituted the majority of East Indians (C. Clarke 1993), and approximately one quarter of the entire population of Trinidad and Tobago, were excluded from the highest levels of elected government, even though some were appointed to the Senate (Premdas 1993, 141-142).

In the context of the parliamentary debate on the SOB, then, religious arguments, when made, drew on Christianity and Islam. These were largely directed to the issue of whether or not to criminalize marital rape. Perhaps predictably, divine law was often interpreted by male MPs to support the suspension of women's consent in marriage.<sup>41</sup> To the contrary, a female MP invoked religion as the basis from which she too defended the institution of marriage, but with a wife's entitlement to bodily integrity and sexual safety as intrinsic to that institution.<sup>42</sup> Considering the overall flow of the debate, however, it appears that neither racialized socio-political unease and its reflection in parliamentary representation, nor different religious loyalties, significantly affected the terms of the debate in parliament. Antagonisms rooted in ethno-racial or religious differences appeared to have been either suspended or mutually accommodated when it came to curtailing women's sexual autonomy and integrity, and to re-inscribing normative sexuality.

### **Conclusion**

The two issues discussed in the context of the Sexual Offences Bill in Trinidad and Tobago in 1986 (marital rape and homosexuality), their discursive representations in the various versions of the Bill, as well as the parliamentary debates, offer insight into the ways a small, postcolonial state may use law to refine or re-define gender roles, gendered/sexual performances and normative sexual behaviour, while simultaneously consolidating its notion of nation. From the outset, lawmakers engaged with transnational ideas, several of which were drawn from a shared, international heritage of law. Much of this law was rooted in colonial impositions and inheritances, prompting the concerns to determine authenticity and uniqueness for a postcolonial state while simultaneously addressing the subjects of legal reform. The subjects themselves (women, youth, persons defined through their non-normative sexual behaviours) were spoken for and discursively defined by state authorities. At the same time that such legal reforms were under consideration, these same authorities were contending with local and global forces, which informed the process of legal change. For instance, in Trinidad and Tobago, economic crises and the emerging pandemic of HIV/AIDS framed the parliamentary debate (even if the latter was not a pressing consideration when the 1984 Draft Bill was produced). Countering the paternalism of the state, and the temporary patriarchal alliances across

<sup>41</sup> Debates, JS/gf, 21.2.86, 2:20-2:30 pm, p. 1-2, and Debates, LR/gf, 21.2.86, 5:40-5:50 pm, p. 3.

<sup>42</sup> Debates, JS/cmi, 5.3.86, 4:10-4:20 pm, p. 2.

ethnicity/race and religion, were the coalitions of articulate women and their occasional male supporters. Often, they too transcended ethno-racial, religious, and even political, differences. Like the Law Commissioners, women mobilizing in Trinidad and Tobago to support Clause 4 were informed as much by critical reflections on national needs as they were by international movements of ideas, especially on women's rights advocacy and analyses of gender violence.<sup>43</sup>

The processes that informed Penal Code changes and related parliamentary debates elsewhere in the world over time—Sri Lanka in 1995 and Singapore in 2007, for instance—underscore the point that sexual behaviours and privileged sexual arrangements continue to be sites fraught with anxieties concerning postcolonial, national identity and membership in the national body. This is particularly potent where local consequences of global economic forces, and transnationally disseminated ideas and images, are perceived as threats to national sovereignty, identity and borders. The (re)construction of gender roles and “culturally” appropriate sexual behaviours remains important in attempts to assuage such anxieties. The terms of negotiation and resolution often massage already existing unease related to sexuality and gendered behaviours, serving to foreground constantly the notion of women as embodied nation (and youth as the reproduced/future nation) in need of direction and protection by a paternalistic state.

Legal processes of regulating sexuality and female decorum become convenient sites of displacement for social and political tensions or accommodations. Even if its representatives are not active “peeping toms”, the law is empowered to lie comfortably with other systems of moral policing in order to determine who can be constituted as a fit or unfit citizen. As the coalitions of women and their allies in Trinidad and Tobago in 1986 demonstrated, given that such a terrain of power is not uniform, it is possible to locate capacities for disruption and resistance within its fissures. The challenge remains, how best to use those capacities, and to what end, in determining the contours of the national body.

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<sup>43</sup> Such ideas circulated across the global south, as much as between global south and global north. For instance, at the 1985 Women's Forum in Nairobi, to coincide with the United Nations Decade Conference on Women, many lively debates and much sharing of information took place between women from the geographical “Third World”, with key speakers among them being from the Caribbean.



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