

relatively small, about 90 percent of the AIDS cases affect homosexual men.

**BIBLIOGRAPHY.** William Crawford, ed., *Homosexuality in Canada: A Bibliography*, Toronto: Canadian Gay Archives, 1984; Gary Kinsman, *The Regulation of Desire: Sexuality in Canada*, Montreal: Black Rose, 1987; Paul-François Sylvestre, *Bougrerie en Nouvelle France*, Hull: Editions Asticou, 1983.

Wayne R. Dynes

## CANON LAW

Canon law, *jus canonicum*, is the totality of the established rules of the Roman Catholic Church: canons (the decisions of councils), disciplinary regulations, decretals, and other texts collected from local bishops and councils as well as from the New Testament. Like Roman civil law, canon law is divided into public—the constitution of the church and its relation to other bodies—and private—the internal discipline of members.

*History.* Canon law falls into three periods: (1) from the beginning to the decretum of Gratian, *Concordia discordantium canonum*, completed shortly before 1150; (2) from then to the Council of Trent (1545–63); and (3) from the Tridentine Council to the present. Gratian's collection completely superseded all earlier compilations and remained the text of the scholastics at medieval universities. In order to build a coherent system out of various precedents and writings of the Church Fathers, Gratian organized his five books on Roman law principles, thus introducing natural law, which became important in antisodomy provisions. In 1234 Gregory IX expanded the collection and created what in time came to be known as the *Corpus juris canonici*, the Five Books of Canon Law, as opposed to the *Corpus juris civilis*, the codification of Roman secular law by Justinian, to which were added the later Sextus in 1298 and the Clementines in 1317 to form seven books (to which two *extravagantes* were later added), all of which were over time glossed.

Increasingly homophobic theologians, often fanatic friars from Thomas Aquinas to Luca da Penne, continued to influence the glossators. With the aid of philosophy the Inquisition inspired feudal, royal, and municipal laws to order the fining, castration, and even burning of sodomites—all penalties that remained foreign to Canon law proper. The Council of Trent reformed doctrine and discipline, elevating Thomas Aquinas to the rank of the most important doctor of the church. In the twentieth century the canon law was twice recodified.

*Early Antisodomy Provisions.* As early as 177, Athenagoras had characterized adulterers and pederasts as foes of Christianity and subjected them to the harshest penalty the Church, itself still persecuted by the Roman state, could inflict: excommunication. Even before Constantine had ended the Roman state's persecution, the council of Elvira (305) had severely condemned pederasts. Canons 16 and 17 of the Council of Ancyra (314), mainly concerned with defining penance for those guilty of sin rather than with prescribing legal penalties, were interpreted as inflicting lengthy penances upon those guilty of sexual intercourse with males and excommunicating them from the church. Christian Emperors when they became heads of the church meted out savage penalties for unrepentant sodomites: the sons of Constantine the sword, and Theodosius and Justinian the avenging flames.

Of the Germanic kingdoms that succeeded the Western Empire in the West, only the Visigothic in Spain (ca. 650) enacted any penalty at all, namely castration, in spite of Tacitus' famous remark long interpreted to mean that primitive Germans threw homosexuals into bogs. Irish and other penitentials treated homosexual offenses more severely than heterosexual ones, most often condemning anal intercourse, but prescribing greater severity for anal than for oral sex, whether with a partner of the opposite or of the same

gender. The early canons followed them in prescribing penance despite the death penalty in Leviticus and the fulminations of the Apostle Paul, Clement of Alexandria, St. John Chrysostom, St. Augustine, and other Patristic authors. In fact, some penitentials were soon invested with canonical authority. Writers of rules for monasticism tried to prevent homosexual acts by keeping candles lit in the dormitories all night and having an elderly monk sleep between two young ones, each in single beds.

*Heightened Repression.* Repression reappeared in the eleventh century with an obsessive diatribe against all forms of "unnatural vice," the *Liber Gomorrhianus* of Peter Damian. Asserting that whoever practiced sodomy was "tearing down the ramparts of the heavenly Jerusalem and rebuilding the walls of ruined Sodom," his harsh denunciations presaged the attitude of the later councils and canonists. Burchard of Worms and Ivo of Chartres published collections containing canons that condemned fellation, bestiality, pederasty, and sodomy, and prescribed severe penalties. In the Latin Kingdom of Jerusalem, which created a short-lived interface between Christianity and a more tolerant Islam, the council of Nablus, preoccupied with sodomy, decreed in 1120 that guilty men should be burnt at the stake.

Although Gratian's *Decretum* devoted little space to "unnatural" sexuality, at the end of the twelfth century Peter the Chanter devoted a long chapter of his *Verbum abbreviatum* to sodomy, and his circle seems to have originated a fantastic addition to the legend of the Nativity according to which, at the moment when the Virgin Mary was giving birth to Jesus, all sodomites died a sudden death. From then on, canonists regularly cite Justinian's Novella 77 that disasters such as famine, pestilence, and earthquake, to which many added floods and other natural catastrophes, are divine retribution for "crimes against nature." The Third Lateran Council (1179) adopted a canon specifi-

cally prohibiting "that incontinence which is against nature" and decreed that clerics guilty of unnatural vice must either forfeit clerical status or be confined perpetually in a monastery. Somewhat paradoxically, Bernard of Pavia held that since sodomy did not create affinity, it constituted no impediment to marriage.

*The High and Late Middle Ages.*

From the second half of the thirteenth century, savage penalties for homosexual offenses become part of Western European legislation. Not merely a cause of misfortune for the whole community, sodomy is also repeatedly linked with heresy, and accusations of it become a convenient ingredient of political invective as popes hurled it against Frederick II, and a weapon in power struggles within the feudal ruling class. Popular belief inclined to ascribe this vice to the clergy—probably with much justification. Like the Scholastics, canon law treated homosexuality, bestiality, and masturbation as *contra naturam*, "contrary to nature," because they excluded the possibility of procreation, which thus became the touchstone of sexual morality. Such crimes on the part of a religious constituted *sacrilege*, because his or her body was a vessel consecrated to the service of God. If publicly practiced or widely known, these offenses carried with them the sanction of *infamy* (*infamia*), a deprivation of status that involved unfitness for holding most kinds of public office or positions of trust and deprivation of the right to appear in court as a plaintiff or witness. Ironically enough, the canonist Pierre de La Palud (ca. 1280–1342) had to explain at length why the church did not allow two males to marry each other and so legitimize their relationship.

Formally beginning at least as far back as Gregory IX's commission to the Dominicans in 1232 to hunt down heretics in southern France and elsewhere, the papal Inquisition in due course in certain regions extended its jurisdiction to sodomites as well, now viewed as allied with supernatural powers, demons, devils, and

witches. The convicted were handed over to the secular authorities for punishment; in time the secular governments were to act independently of the Church in prescribing and enforcing the death penalty. Before execution, confessions were wrung from victims by torture, and often the trial records were burnt together with them. St. Bernardino of Siena (1380–1444) denounced homosexual desire as a form of madness.

*Modern Times.* Given that secular laws already prescribed the extreme penalty, canon law provisions against sodomy, renewed in the sixteenth century as part of the Counter-Reformation, had few novelties. Considerable attention was given, however, to **masturbation** as well as to lesbianism and transvestism.

James A. Brundage poses the question: Why have medieval Christian beliefs and practices concerning sex endured so persistently? He offers three reasons: the continuity of the socioeconomic environment, the persistent identification of the erotic with the sacred, and the inertia of the law and its institutions. None of these factors fully explains why medieval beliefs survived even the cataclysm that altered the political and legal face of Europe at the end of the eighteenth century, when under the influence of deistic and freemasonic ideas the law codes were rewritten and a new, liberal ethos began to inspire ever larger strata of society. In no small measure the continuity is rather to be explained by the intolerance that forbade any criticism of Christian sexual morality and branded opponents of its norms as a "justifying their own filthy vices"—an argument reiterated as late as 1957 in a decision of the West German Constitutional Court upholding **Paragraph 175** with specific reference to the doctrines of the Church. In such a climate of opinion the sexual reform trend faced an uphill battle; and without an effective movement to change public opinion and bring pressure upon legislators, liberals were loath to expose themselves to obloquy and ridicule. In the United States it

was only toward the end of the 1960s that a few Congressmen with "safe" seats began to speak in defense of gay rights. As a result of these changes the official position of the Roman curia came to be increasingly isolated, though its champions remained obdurate.

In 1904 the reactionary Pius X appointed a commission to prepare a new codification of the canon law. Because he condemned religious modernism, it is not surprising that the results of this labor, published in 1917 as *Codex Juris Canonici*, offered no innovations in sexual morality.

The hope that the liberal measures adopted in the *aggiornamento* or "renewal" initiated by the Second Vatican Council under John XXIII (pope, 1958–63), when conditions seemed more propitious, would lead to changes in Roman Catholic policy regarding homosexual conduct, was not fulfilled. A pontifical commission charged with the revision of canon law in 1962, when it was finally promulgated in 1983, explicitly reaffirmed traditional doctrines. The "Declaration on Certain Questions Concerning Sexual Ethics," issued by the Vatican Congregation for the Doctrine of the Faith on December 29, 1975, described homosexual acts as deprived of their "essential and indispensable finality" (that is to say, having no procreative function); and being "intrinsically disordered," in no case could they be approved. Reinforcing this statement was another issued by the same body, the "Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons" of October 30, 1986, which led to the gradual expulsion from church premises in the United States of Dignity, the Catholic homosexual organization.

*See also* Law, Germanic; Law, Feudal and Royal; Law, Municipal.

BIBLIOGRAPHY. James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe*, Chicago: University of Chicago Press, 1987; Michael Goodich, *The Unmentionable Vice: Homosexual-*

ity in the Later Medieval Period, Santa Barbara: ABC-Clio, 1979; Jeannine Grammick and Pat Furey, eds., *The Vatican and Homosexuality*, New York: Crossroad, 1988.

William A. Percy

### CAPITAL CRIME, HOMOSEXUALITY AS A

With decriminalization of same-sex relations between consenting adults in many countries, and nonenforcement of existing laws in others, it may come as a shock that homosexual conduct was once judged worthy of death. Although only a few fanatics call for capital punishment nowadays, such barbarism has been a historical reality.

*Judeo-Christian Sources.* According to the Holiness Code of Leviticus (in its present form, probably of the fifth century B.C.), "If a man lie with mankind as he lieth with a woman, both of them have committed an abomination (*tō 'ēbāh*): they shall surely be put to death; their blood shall be upon them." (Leviticus 20:13, reinforcing the earlier prohibition in 18:22). From this dire injunction, which applies to male homosexuals only, stem all later Western laws prescribing the death penalty for sodomy. Although our sources are silent as to how frequently the Levitical sanction was enforced (the method was probably stoning), it was endorsed with new arguments by some later Jewish rigorist thinkers, notably Philo of Alexandria (first century of our era).

After the Roman Empire's recognition of Christianity as effectively the state religion (A.D. 313), capital enactments against male homosexuality made their way into the Civil Law. One statute of 342 prescribed death by the sword, another of 390 indicated burning. As in the case of the Levitical injunction, it is not known how often these capital punishments were carried out; certainly burning would have been unlikely at this point, though decapitation with the sword would not. The emperor Justinian's sixth-century legisla-

tion, however severe its attitude toward sexual variation, does not seem to have insisted on death, and a Visigothic code in Spain of ca. 650 specified castration. The penitentials which appeared in the early Middle Ages prescribe only regimes of penitence ranging from a few months to some years in duration.

*The Later Middle Ages.* A new wave of hostile legislation emerged in the twelfth century, starting with the Nablus Council of 1120, which specified burning. The prevalence of this penalty is based in part on the Sodom story, but it also reflects the parallel with heretics who were usually burned. A somewhat later French law required execution only on the third offense. Unusual (and surely without effect) was the English *Fleta*, which called for death by drowning—probably a reminiscence of Tacitus' *Germania* 12, where the Roman historian says that the ancient Teutons would drown *corpore infames* ("the infamous for their sexual vices") in bogs. (The Nazi Heinrich Himmler was later to urge revival of this practice.)

During the central Middle Ages a vicious rationalization became popular, claiming that sodomy was equivalent to murder (or worse) as it threatened the survival of the human race (found in the ecclesiastical writers Peter Damian, Peter Cantor, and Luca da Penne. This strange notion, anticipated by Philo of Alexandria, was still alive as late as 1895, when the magistrate in Oscar Wilde's trial repeated it in his sentence.

Available evidence suggests that capital penalties were enforced rather selectively: fewer than 1000 executions have been documented from the late Middle Ages and the Renaissance. Apparently it was thought sufficient to stage a public execution from time to time in order to discourage the practice—or at least its public display. Following the Levitical tradition, lesbians were for a long time exempt from any punishment, but the Scholastic predilection for analogy eventually brought them into the purview of