Religious and medical discourses at the core of the legitimization process of penal law. The management of homoerotic mores in Quebec (1892-1969)

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1 The history of the penal repression of homosexual mores in Quebec is a persuasive example of the social construction of deviance. This history will demonstrate how in less than two decades, a behavior once subject to the death penalty came to be normalized by that same penal law. While during the 17th and 18th centuries, the penal law condemned to the stake people practicing sodomy, today, the Canadian Criminal Code criminalizes not homoerotic behaviors, but rather acts of homophobia (articles 318 and 319). Thus, in Quebec there has been a complete reversal of the penal logic in relation to the management of homosexual mores, which has gone from sentencing to death to the specific protection of «homosexuals» (Corriveau, 2006). This reversal of penal logic is instructive because it obliges the researcher to consider the reasons a behavior can stop being identified institutionally as a crime, in this case, homoerotic mores.

2 Historico-legal studies suggest that it is the rationality of the penal law with regard to the «homoerotic problem» that has been modified in the course of history, moving from a penal rationality largely influenced by religious discourse to another dominated by a medical one (Hurteau, 1991; Hekma, 1994; Leroy-Forgeot, 1997; Tamagne, 2001; Corriveau, 2006). However, the system of penal law should not be conceived as an empty shell, that only needs to be «filled» by a discourse that transcends it, that is above it. As suggested by Pires (1998), the system of penal law is never passive in the face of discursive formulations of other social systems that impinge upon it: here the medical and the religious in their management of homosexual mores. On the contrary, it interacts...
with them: sometimes referring to them as a source of legitimization, sometimes creating distance between them in order to affirm its autonomy. In sum, according to this perspective, the penal management of homoerotic mores results from interactions between the various discursive systems, which try to have their conceptions of « normality » and the common good prevail (Debuyst, 1973, 159). In other words, the system of penal law, because it defines crime and offers a certain representation of the social world (Becker, 1985, 229), is a privileged place of power where the different dominant discourses attempt to impose their definitions of homosexual mores, and the correct approaches for dealing with them. On the other hand, to favor such an approach presents several limits that merit being raised at the outset. First it involves an analysis centered around a single penal discourse (which excludes other forms of control, formal or informal). We would also add that if the penal discourse is one thing, repressive practice is another. Just because a behavior is defined as criminal in the penal Code does not mean it will have an immediate effect on repressive practice in this regard.

3 The central objective of this article is thus to present the evolution of these dominant discourses which have interfered with the system of penal law in its regulation of homosexual behavior in Quebec during the first three quarters of the 20th century. We will focus more specifically on the period from the creation of the Canadian Criminal Code in 1892 until the adoption of the Omnibus Bill in 1969, which decriminalized all sexual relations that occur in private and between consenting adults. This historical period is particularly interesting because it is characterized by new conjunctions among medical science, religion and penal law in the definition and explanation of what is and is not deviant, where the condemnation (or none) of that which is abnormal is part of the social institution of deviance seen as crime (Clain, 2005, 10): homosexuality, in the case of this paper. Indeed, from a legitimization of penal repression that was until then based almost exclusively on religious discourses, a change occurred in the perception and understanding of homosexual mores when medicine and psychiatry emerged as the new dominant discourses. From the criminal before God that he was, the individual with homosexual behaviors becomes progressively a « deviant/ sick/ » person who must be isolated and handled in order to prevent the spread of his illness.

4 We will see that even if law and religion, law and « science » sometimes clash while trying to impose their understandings of the « homosexual phenomenon », they are not always mutually exclusive. Our goal is to show the interactions among the penal law system and two other types of discourse (medical and religious) in the conceptualization and management of homoerotic mores in examining the evolution of penal practice and the attendant legitimating discourse. Special attention will be devoted to the respective elective affinities that each of these two discourses will develop with the system of penal law. On the contrary, since we will see that beyond their divergences, they will strengthen each other. Also, besides the different versions of the Canadian Criminal Code since its creation in 1892, some jurisprudences, the penal statistics of the Annuaire du Québec and several medical publications (for example, of The American Psychiatric Association and the Diagnostic and Statistical Manual of Mental Diseases) will serve as our empirical foundations.

5 Firstly, we will see that the first Canadian Criminal Code was influenced primarily by a religious dominant discourse since the foundation of the colony, but that with regard to homoerotic mores, a pathologizing medical discourse emerged at the beginning of the 20th century. We will note that this medical discourse did not have an immediately
strong influence on the system of penal law since the days following the Second World War were above all characterized by a return to puritanism in Quebec. We have to wait for the 1950s to see the pathologizing medical discourse take the preeminent position within the legitimization and operation of the penal law system with regard to homoerotic mores. Finally, this back and forth between medicine and penal law would lead to a scenario different from what we might have expected. Indeed, the pathologization of homosexuality by the medical discourse seems to have facilitated its « depathologization » in penal law as a crime, and having assisted in its decriminalization.

1. The First Canadian Criminal Code (1892): when the medical discourse is still subservient to the clerical one

Since the founding of New France, homosexual mores had been strongly repressed in penal doctrine through a divine interpretation of human sexuality. The religious discourse was basically « the » prime source for the legitimization of penal law’s intervention in relation to behaviors between individuals of the same sex (Gigeroff, 1968). Indeed, since the middle of the 19th century, mainly since the failure of the Rebellions (1837-1838), the Catholic Church wielded great ideological, political and social power in French Canada. The clergy had preeminence in the social control of the population of the St. Lawrence Valley and strongly condemned industrialization, civil marriage, divorce, and freedom of opinion, going even as far as not completely recognizing the legitimacy of the State when it came to controlling the moral conduct of the population (Hamelin, Gagnon, 1984 ; Lemieux, Montminy, 2000). Its immense political power allowed it, among other things, to influence the legislator in using religious doctrine as a basis to apply divine rules, particularly in relation to homosexual mores (Hurteau, 1991 ; Corriveau, 2006).

And so, from its inception in 1892, the Canadian Criminal Code incorporated the crime of sodomy, a term with religious connotations based on the biblical story of the destruction by fire of the city of Sodom, under the category of « unnatural offence », placed under the heading of crimes against morality. The influence of religious discourse was also felt in the use of « indictable offence » in the wording of the law, its definition as « crime against nature » and a « non-distinction » between sodomy and bestiality in the Criminal Code. This legislative confusion between two nevertheless different behaviors persisted in French until 1953-1954 and the crime of sodomy was not secularized in the Criminal Code until 1988 by the use of the expression « anal sexual relations » (article 159).

Other articles of the Canadian Criminal Code have also been adopted to specifically control homosexual practices other than sodomy and attempted sodomy. On the one hand, there is the crime of indecent assault, which distinguishes assaults on women (article 259) from those on men (article 260). While an indecent assault on a woman is punishable by five years in prison and requires the corroboration of a witness, the latter condition is unnecessary in the case of an assault on a man, subject in this case to ten years of imprisonment and flogging, which is an exceptional punishment in Canadian law. On the other hand, the offence of gross indecency (article 178) can only be committed by « an individual of the masculine sex who, in public or private, commits with another individual of...
the same sex» the forbidden act. This suggests that the penal law focusses a special attention upon homoerotic behaviours. The statistical surveys of Hurteau (1993, 47) show the impact of the coming into force of this law upon the penal repression of homosexuals by demonstrating that, from that point on, sexual practices, other than sodomy or attempted sodomy, constitute grounds for condemnation.

In addition, in all likelihood, the majority of convictions deriving from the article on gross indecency are aimed at public indecencies relating to minors (Demers, 1984, 793 ; Hurteau, 1991, 158). For Hurteau, this means «a reversal of social, especially familial, tolerance in relation to adolescents’ sexuality», where the 19th century’s fear that masturbation is associated with homosexuality and madness, is still alive. More globally, the medical discourse warns society against a possible depravity in the mores of the young, that jeopardizes the family and national values. Chauncey (1998) and Jenkins (1998) notice, in this sense, the progression in the media of the image of the psychopath suggested by the psychiatric discourse: the newspapers fueling the idea of the invisible homosexual, one difficult to detect. The homosexual, Chauncey (1998, 100) emphasizes, was presented as an individual «capable of committing the most horrible crimes against children». Moreover, all medical research on the invert or homosexual at the beginning of the century went further than a simple understanding of this character and his impulses. As Bonello indicates (2000, 72, 78), medicine tried more and more to take its place as a social control to avoid any sort of spread of this contagious condition.

However, it is pertinent to note that the stream of medical theories attempting to explain homosexuality did not gain credibility until after World War I. Justifiably, Tamagne (2000, 310) recalls that between the two wars, «the image of the homosexual, was constructed, mixing a curious blend of old prejudices, new medical definitions and visual cliches». In French Canada, the emerging medical science presented itself as above all the defender of the traditional values promoted by the Church. The illness was also defined more as a problem of a religious nature than a biological one (Corriveau, 2006, 98). The medical discourse is, so to speak, in the service of religious doctrine. At the very least, it is intertwined with the theology. As Jarrell (1987, 51) indicates, in French Canada, «most of those who are [part of] the scientific domain, at least as professors, [are] clerics».

In sum, at the beginning of the 20th century, the religious discourse of the past remained strongly influential in Quebec society and in the system of penal law. Nevertheless, a pathologizing medical discourse came to increasingly penetrate the definition and explanations of homosexual practices and of «the homosexual». For example, the religious and medical discourses together took over the morality of the young and demanded a return to family values. According to Hurteau (1991), that encouraged the family to pay special attention to homoerotic behaviours likely to happen in the family environment, and a collective sense of insecurity developed regarding homosexuality, which provoked police entrapment of homosexuals through various strategies.

The statistics of the Annuaires du Quebec allow us to discern a surge in convictions for sodomy and bestiality from the 1930s. From an annual average of seven convictions in Canada at the beginning of the century, the provincial annual average oscillates around 40 convictions for the 1930s in Quebec. Even if these statistics do not distinguish between accusations of sodomy between two men and between a man and woman, they turn out to be indirectly useful because they underline the increase in convictions for sodomy, a crime generally associated with homoerotic behaviours. For example, they allow one to observe that the number of convictions rose considerably in 1932 (+55%) and 1933 (+42%).
As a corollary, the rates of conviction in the early 1930s, that is to say, the relationship between the number of convicted and the number of accused, were also high: they were around 89% (80 convicted for 90 accused) in the years 1931-1932. By way of comparison, in the same period, the rates of conviction for murder and rape were respectively 55% (17 convictions for 31 accused) and 65.5% (188 convictions for 287 accused), the average rate of conviction for all the crimes combined reaching 79%. Is it not surprising to observe that it seemed to be easier to prove an often private act of sodomy, than a murder or rape? This situation is partially explained by the socio-economic crisis which raged at the time. Indeed, at all times, the « homosexuals » were heavily persecuted whenever such crises arose, especially during a drop in the birthrate (Corriveau, 2006). As noted by Linteau et al. (1989, 17), the crisis of the 1930s went beyond the purely economic aspect and was expressed by a lowered birth-rate and this, in spite of a traditionalist ideology that promoted the duty to procreate and the reinforcement of religious fervour. In this context, it is less surprising to see homosexuals strongly repressed because they defied the divine order and their sexual behaviours were non-reproductive.

2. The post-war context: the perpetuation but above all the return in force of the religious discourse in penal law

The influence of the religious discourse in the penal management of homoerotic mores strengthened after the Second World War and with the election of Maurice Duplessis as premier of the Province of Quebec. Duplessis indeed saw himself as the defender of religious values in Quebec and began a new wave of repression upon non-conforming minorities he considered subversive, especially homosexuals. In order to promote traditional, religious and rural Québécois society, Duplessis did not hesitate to fight these non-conforming elements by using judicial, police and legislative measures. In this socio-political context, the Church sought to increase its control of sexuality in order to protect the Québécois family and the institution of marriage from any sort of depravity (Linteau et al., 1989, 334; Hurteau, 1993, 42). The Church saw the rural exodus and the separation between the family and the work place as dangers posed by industrial capital to the institution of marriage, which allowed for the control of male sexuality.

In other words, in Quebec, the ultramontaine ideology, based on conservatism and a certain form of rejection of pleasure, remained present. By the same token, it is not surprising to note that Québécois society judged homosexuality more severely than adultery, homosexuality being based only on a hedonism that shattered the sacrosanct rigidity of sexual roles. In this regard, the clergy distrusted the freedom of the urban young who, they thought, might favor the emergence of a homosexual sub-culture, the city being perceived by the clergy as a veritable den of iniquity (Lemieux, Montminy, 2000, 44). This is how « the Quebecois bishops mobilize their troops against public immorality and, through the movements of Catholic Action, organize the Crusade of Purity » (Hurteau, 1993, 49). The Church opposed the distribution of the Kinsey report (1948), which outlined the extent and frequency of homoerotic relations in American society. The protection of children became one of the principal arguments of the Church in the legitimization of its fight for the maintenance of good mores. At the same time, it monopolized the task of providing sex education for the young and their families. As for...
the medical discourse, in some ways it supported the dominant conservative ideology by providing « a scientific varnish and an appearance of objectivity to the dangers of sexual pleasure, the necessary maintenance of public hygie ne and the sexual division » (Hurteau, 1993, 42). This did not prevent certain tribunals from using the pathologizing medical discourse in order to declare homosexuals as being insane.  

3. The 1950s: the affirmation of the medical discourse within the system of penal law

It is from the 1950s that the medical discourse imposed itself within penal administrations in North America (Laplante, 1989), especially in the control of homoerotic behaviors. Many North American researchers repeated the idea of the previous century, according to which homosexuality, as a « pathological sexuality », could and had to be cured. For example, from 1952, homosexuality was classified as a sociopathic personality disorder by the American Psychiatric Association and Spencer (1998, 407) mentions an article published in the Journal of Social Hygiene in 1953 that recommended therapeutic castration of homosexuals. The medical discourse rarely legitimized homosexuality. As pointed out by Migneault (2001, 5), the media mainly relayed the scientific discourse that reinforced the image of the homosexual as sick, even as sexually perverted. Hence, between 1940 and 1960, homosexuals were described mainly as a menace to children, often as pedophiles (Higgins, 1999, 58).

It was in this hygienist environment that the courts adopted therapy in order to control the homoerotic impulses of remand prisoners and, if possible, direct them towards heterosexuality. As early as 1949, Hurteau (1991, 1971) shows that the courts referred some homosexuals to social workers in Montreal and that the Social Welfare Court sent young delinquents claiming to be homosexual to centers in order to be rehabilitated. A quick analysis of Article 661 of the Criminal Code dealing with sexual psychopaths (1948), which sentences the convicted person to an indeterminate prison term, shows that only an indecent assault upon a male (article 293) was initially included, not such an assault upon a woman, thus suggesting that it was above all homoerotic behaviors that the justice system associated with sexual psychopathy. The crimes of gross indecency (article 149) and sodomy (article 147), also associated with homosexuality, would be added to this list in 1954. According to Kinsman (1987), this showed that the legislature considered homoerotic behavior as a danger in itself for the community.

Several years later, the Royal Commission on the Criminal Law Relating to the Criminal Sexual Psychopath (1959, 25-26) emphasized that « with respect, homosexuality creates serious problems ». Surprisingly, the Commission took care to point out that Article 661 was only applied in relation to offenses involving young people: as though the homosexual « malady » was in some way connected to attacks on youth. Moreover, it is of interest to point out that the report of the Commission (1959) dedicated one of its sub-sections to homosexuality, and that even if there was no scientific consensus about the inclusion of homosexuals on the list of sexual psychopaths, the Commission adopted « homophobic panic, based on the stereotype of the homosexual as a corruptor of children » (Hurteau, 1991, 174). This conception of homosexuality as pathological was made concrete in the Criminal Code in 1961 with the definition of the sexual psychopath, which aimed at « incarcerating everyone unable to control his homosexual impulses, even if he presents

The image of the homosexual « as a risk» was growing in Quebec and in Canada and this was seen in a growing surveillance of homosexuals by the authorities (Kinsman, 1987, 120). On the one hand, the Royal Canadian Mounted Police (RCMP) created a special investigations unit for the purpose of unmasking homosexuals. According to Ryan (2003), more than 8,000 gays and lesbians were investigated by the RCMP during the 1960s. On the other hand, homosexuals were added to a list of undesirable persons in the immigration statutes (Sawatsky, 1980 ; Kinsman, 1987). Relating to criminal law more specifically, in 1950 the jurisprudence confirmed that « any type of masturbation between two people of the same sex is always an act of gross indecency », « physical contact between these two people is not essential for the commission of the crime ; an indecent exhibition by one in the presence of the other is sufficient if both are acting together »15. And during the revision of the Criminal Code of 1953-195416, the wording « individual of the masculine sex » was removed, which widened the penal net and made possible the arrest of homosexuals, lesbians and heterosexuals (Canada, 1992, 350).

There was a notable increase in the condemnations for gross indecency, especially in the total area of the City of Montreal. As Montreal represented close to 40% of the population of Quebec at the end of the 1950s and that homosexuality in Quebec was mostly connected to the urban life of the Metropolis, it is plausible that these penal statistics strongly influenced those of the province as a whole, particularly in relation to homoerotic behaviors. Keeping this in mind, we note that the number of convictions in Montreal rose from 65 in 1953 to 311 in 1954. According to Allen (1998), this growth was a response to a demand in public opinion and that of the ruling class in order to preserve the moral and social order of the city : the mayor Drapeau had promised to actively fight, as had Duplessis before him, against homosexuality, seen as a real « social plague ».

In this regard, a significant increase in the number of convictions for sodomy occurred between the 1930s and the 1960s : the penal statistics of the Annuaire du Quebec show that from the annual average of 39.5 convictions during the 1930s, this figure more than tripled during the 1960s to around 129 convictions annually. This statistical upsurge is partly explained by the renewed interest in this type of crime apparent in the revised Criminal Code of 1954, the adoption of the law dealing with sexual psychopaths, and by the increase in urbanization (to about 78% in 1966), which increased the visibility of the phenomenon because of the development of bars and other meeting places for homosexuals : the concentration of the homosexual phenomenon simultaneously facilitates and encourages interventions by the police (Corriveau, 2006).

4. The end of the 1960s: medical discourse prevails?

The medical discourse which pathologized homosexuality remained prevalent at the end of the 1960s. American psychiatrists in particular considered homosexuality to be a pathology properly characterized in the Diagnostic and Statistical Manual of Mental Diseases (DSM-II), some insisting that it was possible to cure homosexuals through psychological treatment17. And consequently we note that it is not only an issue of homoerotic acts punishable before the law, but more a particular type of individuality that must be
controlled, cured for the dangers attributed to it, particularly with regard to the young. In this way, the medical discourse occupied a prominent place during the debates surrounding the decriminalization of homoerotic practices between consenting adults in the Omnibus Bill of 1968 (Hurteau, 1991). Some Canadian MPs and Senators even feared that such a legislative initiative would compromise the protection of youth. In the opinion of many, homosexuality was still and would always be associated with the perversion and corruption of youth: if one considers the actual number of convictions, the image of the homosexual corruptor of children was overrepresented in the public mind (Grigeroff, 1968, 173).

For Demczuk and Remiggi (1998, 18), the popular press, the gutter press and popular novels reinforced the stereotypes about the perverted homosexual, especially « those of the homosexual pedophile ». The dominant medical discourse, which presented homosexuality as some kind of anomaly, was thus transmitted by the mass media to Canadian and Quebecois society in the late 1960s. Indeed, the publications relating to homosexuality remained, until 1969, framed in terms of crime. Out of the 157 articles about homosexuality surveyed by Migneault (2001, 4) between 1952 and 1970, 25% dealt with criminal matters and 41% with homosexual mores. The remaining 34%, related more to the comprehension of homosexuality, resulted from the increased interest in the subject during the adoption of the Omnibus Bill in 1969. Moreover, as indicated by Hocquenghem (2000, 61), the medical discourse did not completely replace the religious discourse in the legitimization of penal repression, it only accompanied it, or could supplement it.

On the other hand, because it was an alternative to the religious interpretation with regard to the penal control of homoerotic behaviors, the medical discourse still minimized the influence of the religious discourse relating to penal law. In other words, the rise of the medical discourse in the domain of human sexuality and penal justice coincided with the distancing of penal legitimization from the religious discourse. To paraphrase Lasch (1979/2000, 33), one can say that « the atmosphere [of the period] was not religious but therapeutic ». An interesting paradox emerges here. It was when the medical discourse pathologizing homosexuality was progressing throughout North America-homosexuality being considered as a mental illness by the American Psychiatric Association (APA) until 1974 and by the World Health Organization until 1993, that the Canadian penal law system in 1968 initiated its decriminalization of homoerotic practices with the adoption of the Omnibus Bill18. How can we explain this decriminalization of homoerotic practices in Canada while the dominant medical discourse was presenting these practices as posing a danger of national degeneracy and a risk of contagion to the young (Girard, 1981; Danet, 1998; Higgins, 1999; Tamagne, 2000)?

A part of the answer is undoubtedly in the conception of the system of penal law presented by way of introduction, where penal law appears as a discursive system likely to become autonomous in relation to other dominant discourses that interfere with it in its definition and management of homosexual behaviors. We might thus consider that the emergence of a medical discourse, even if it was mainly pathologizing, initially helped the penal law system to free itself from the influence of the religious discourse to then favor its emancipation from it. And it was this autonomy of penal law in relation to religion and medicine that finally allowed it to initiate the decriminalization and legal protection of homosexuals in the name of human rights. On the other hand, it is necessary to remain aware that this decriminalization of homoerotic behaviors did not put an end to social...
« control » of homosexuality. A certain segment of medical knowledge, as well as religious doctrine will always advocate a non-penal form of control of these « risky » mores.

5. Conclusion: from one legitimizing discourse to another

25 This history of the legal repression of homoerotic behaviors in Quebec during the first three quarters of the 20th century suggests that the meaning of « homosexual crime » was modified with the emergence of new dominant discourses (medical and psychiatric), which came to be in competition, at the very least in interaction, with the omnipresent religious discourse in the legitimization of penal repression since the founding of New France. The historian Cellard (1991, 116) notes in this context that for a long period in Quebec, the priest remained the « specialist of the soul, censor, director of consciences, guardian of mores », « the Francophones [being] for the most part cut off from scientific ties they would have been able to have with French medicine ». It is not surprising then that the penal control of homoerotic behavior was largely legitimized by the religious discourse.

26 This situation continued in Quebec until the middle of the 1950s, when the progressive weakening of the Church, the secularization and desacralization of social institutions contributed to the emergence of « the modern individual », in opposition to « the communal identity » which characterized the Quebecois people (Dagenais, 2000, 181). For that which relates to the penal repression of homoerotic behaviors, we note that it is no longer so much the sexual act in itself that disturbs (sodomy, for example), but rather the associated risks, especially as they relate to young people. The pathologizing medical discourse ensures that homosexuality is no longer condemned as behaviour that is against Nature (a crime against religion). On the other hand, these were the risks of contagion that it engendered, or caused to be incurred by individuals and the community that must be controlled. The system of penal law granted pre-eminence to the medical discourses and their expertises in order to assist in the control of the deviant homosexual. Nevertheless, this medicalization of homoerotic practices would not prevent Quebec and Canada from initiating, less than 20 years later, a process of decriminalization of these practices, as though they brushed aside religious prescriptions as well as the then current medical expertise.

27 We have interpreted the penal system’s deaf ear towards the dominant medical discourse as being a proof of a certain autonomy on the part of penal law in relation to many exterior elements that influenced it when trying to define the « the problematic of homoerotic mores », and its corresponding control. We have also suggested the idea according to which the influence of the discourse of human rights also promoted the decriminalization of homoerotic behaviors. Because, it must be recalled, this « Charter » vision of human rights took a greater and greater place in Quebecois and Canadian society in the early 1970s ; the adoption of the Quebec Charter of Human Rights and Freedoms in 1976 and the Canadian Charter in 1982 being excellent examples. Another possible hypothesis that should be examined is that it was mostly the political courage of Pierre-Elliott Trudeau, then Minister of Justice, that led the House of Commons to adopt the famous Omnibus Bill, which, it should be recalled, was very controversial. A deeper examination of the parliamentary debates and editorials on the subject would be...
necessary. In sum, this study tried to show the interactions between the penal law and two other institutional discourses (the medical and religious), that have interfered both together and competitively in the legitimization of the penal control of homoerotic behaviors, paradoxically leading to the decriminalization and legal protection of homosexuals in Quebec.

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NOTES

1. The expression “homoerotic mores” is used because this concept proved to be less charged than homosexuality as it refers to behaviors between people of the same sex rather than a way of being, or a person defined only by his “sexual orientation”; the homosexual. The conceptualization of homosexuality did not take shape until the end of the 19th century and did not spread into popular and medical usage until the 1920s to 1930s (Halperin, 2000; Tamagne, 2001). Before the emergence of these medical discourses, there was no question of controlling a specific individual (a homosexual) but indeed to repress certain behaviors judged to be immoral, such as sodomy. Thus, according to the period studied, penal repression oscillated between the repression of an act (sodomy) and a specific identity (the homosexual).

2. The empirical basis of this article results from a more general research on the repression of homosexuality conducted as part of a Ph.D. in sociology (see Corriveau, 2004). I want to thank Jean-François Cauchie, André Cellard, Olivier Clain, Dominique Robert and the anonymous evaluators for reading and sharing their pertinent remarks which greatly contributed to the improvement of this text.

3. It is important to emphasize here that our comments relate essentially to “masculine homosexuality” because although the lesbians were “under surveillance” by the police since the creation of the Canadian Criminal Code, their repression remained limited (Eaton, 1990; Chamberland, 1996). Moreover, lesbian mores have in practice eluded the penal discourse: men,
having long defined the norm, “the lesbian relationship has been constantly undervalued” and “rarely seen as an end in itself” (Tamagne, 2001; Bonnet, 1981).

4. The concept of a discursive formation (or discourse) refers to us to a cognitive structure or to a discursive system having the following characteristics: 1) it has an historical-cultural dimension, that is to say, it represents a strong concentration of meaning; 2) it continues in time; 3) it is macrosocial; 4) it can contain internal tensions, options and bifurcations; 5) it is institutionalized by a system of communications and practices; 6) it tightly binds facts and social values; 7) it sees itself as knowledgeable; 8) it is socially available and more or less understood according to the period under consideration. See Pires (2004, 188).

5. The concept of elective affinities is used in the sense of Weber (2000), that is to say that it refers to relationships among different phenomena that are mutually attracted and reinforcing.

6. S.C. 1892, c. 29, article 174. Part XIII - Offences Against Morality. The applicable sentence is life imprisonment. In order to emphasize the seriousness of this crime in penal law, let us note, by way of comparison, that incest is punishable by 14 years in prison.

7. “Every one is guilty of an indictable offence (...) who commits buggery, either with a human being or with other living creature”, Criminal Code, 1893, article 174. In the English language, sodomy and bestiality are thus grouped under the term buggery.

8. The maximum sentence for the crime of sodomy is thus reduced to 14 years of imprisonment by virtue of Article 147. Criminal Code, 1953-1954, c.51, s. 147. Let us emphasize that Article 147 of the 1892 Code was abrogated in 1906 by Article 202 (Criminal Code, 1906, c.146, s.202). Let us also note that the main revisions of the Canadian Criminal Code, that is to say the general revisions, were effected in 1906, 1927, 1954 and 1969.

9. This article was abrogated in 1983.

10. Before the Criminal Code of 1954-1955, flogging was imposed for 12 counts of indictment only. The sentence of flogging was ordered only once for an indecent assault by one man upon another. For more information see G.E. Parker (1964-1965, 193-211).

11. According to the Kinsey Report, 37% of American men between 16 and 55 had had at least one homosexual relationship leading to orgasm and around 50% of them had already felt sexual attraction for another man.


13. Article 293 replaced Article 260 in 1906, and was in its turn abrogated in 1953-1954 by Article 148.


15. R. v. Hunt, 34 Cr. App. R. 135. The maximum sentence is imprisonment for 5 years with the possibility of flogging.

16. The crime of gross indecency was not modified during the general revisions in 1906 and 1927. It was simply reintegrated under Article 206. See S.C. 1954, c.51, s. 149.

17. See especially Bieber et al. (1962); Bieber (1987); Stekel in Lance (2000). For an excellent critique of different essentialist theories about homosexuality, see Dorais (1994, 92-146)

18. The law would enter into force in 1969.
This article describes the evolution of two dominant discourses (the medical and the religious) that interfered with the system of penal law in its conceptualization and management of homoerotic mores in Quebec from the creation of the first Canadian Criminal Code in 1892 until the adoption of the Omnibus Bill in 1969. The analysis of interactions between these discursive formations and the system of penal law shows that even if the viewpoints of law and religion as well as law and « science » on the « homosexual phenomenon » are sometimes in opposition, they are not always mutually exclusive. On the contrary, they often reinforce each other.

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