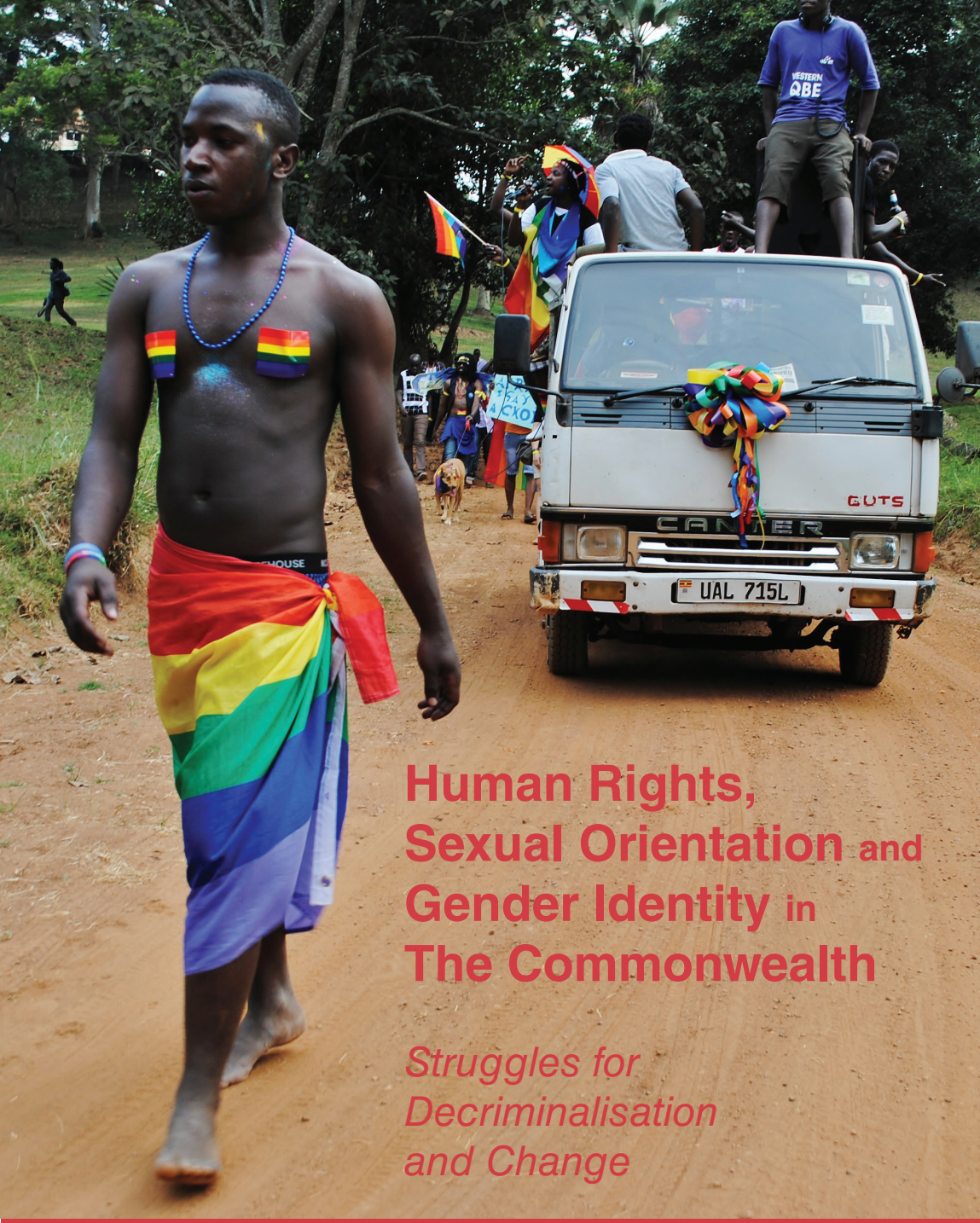

Human Rights, Sexual Orientation and Gender Identity in The Commonwealth

Struggles for Decriminalisation and Change

Edited by Corinne Lennox and Matthew Waites

Institute of Commonwealth Studies
SCHOOL OF ADVANCED STUDY • UNIVERSITY OF LONDON

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Cover image: Activists at Pride in Entebbe, Uganda, August 2012. Photo © D. David Robinson 2013.
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Contents

This book is dedicated to human rights defenders across the Commonwealth.

Abbreviations

ABIM	*Angkatan Belia Islam Malaysia*/Malaysian Muslim Youth Movement
ACDP	African Christian Democratic Party
ACT HLRS	Australian Capital Territory Homosexual Law Reform Society
AI	Amnesty International
AIDS	Acquired Immunodeficiency Syndrome
ALP	Australian Labor Party
AMA	Australian Medical Association
ANC	African National Congress
Arasa	AIDS and Rights Alliance for Southern Africa
ASEAN	Association of Southeast Asian Nations
ASK	Association for Social Knowledge (Canada)
ATR	African Traditional Religion
AWARE	Association of Women for Action and Research
BBC	British Broadcasting Corporation
BDHRL	Bureau of Democracy, Human Rights and Labour (USA)
BDP	Botswana Democratic Party
BGLAD	Bahamian Gays and Lesbians against Discrimination
CAISO	Coalition Advocating for Inclusion of Sexual Orientation
CAMP	Campaign Against Moral Persecution
CCAP	Church of Central Africa Presbyterian
CCRH	Canadian Council on Religion and the Homosexual
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEDEP	Centre for the Development of People (Malawi)
CHAAG	Commonwealth HIV/AIDS Action Group
CHOGM	Commonwealth Heads of Government Meeting
CHOP	Committee on Homosexual Offences and Prostitution (United Kingdom)
CHRI	Commonwealth Human Rights Initiative
CHRR	Centre for Human Rights and Rehabilitation (Malawi)
CJC	Criminal Justice Committee (Australia)
CLA	Commonwealth Lawyers Association

CMAG	Commonwealth Ministerial Action Group
CODESA	Convention for a Democratic South Africa
COJ	Companions On a Journey (Sri Lanka)
CONGOMA	Council for NGOs in Malawi
CONTRALESA	Congress of Traditional Leaders of South Africa
COU	Church of Uganda
COW	Committee of the Whole
CPA	Centre for Policy Alternatives (Sri Lanka)
CRC	Convention on the Rights of the Child
CSCHRCL	Civil Society Coalition on Human Rights and Constitutional Law (Uganda)
CSOs	civil society organisations
CVC	Caribbean Vulnerable Communities coalition
DAP	Democratic Action Party (Malaysia)
DP	Democratic Party (South Africa)
DRC	Dutch Reformed Church
ECC	End Conscription Campaign (South Africa)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EPG	Eminent Persons Group (Commonwealth)
ERT	Equal Rights Trust
FARUG	Freedom and Roam Uganda
FCO	Foreign and Commonwealth Office (United Kingdom)
FNM	Free National Movement (Bahamas)
FOL	Festival of Light
GALCK	Gay and Lesbian Coalition of Kenya
GASA	Gay Association of South Africa
GFM	Gay Freedom Movement (Jamaica)
GLAAD	Gay and Lesbian Alliance Against Defamation (United States)
GLOW	Gay and Lesbian Organisation of the Witwatersrand (South Africa)
GLRG	Gay Law Reform Group of Western Australia
GRL	Gay Rights Lobby
HALO	Homophobic Activists Liberation Organisation
HEL	Homosexual Electoral Lobby
HIV	Human Immunodeficiency Virus
HLRC	Homosexual Law Reform Coalition (Australia)
HLRS	Homosexual Law Reform Society (United Kingdom; Australia)
HOCA	Horizon Community Association (Rwanda)
Hope TEA	Hope Through Education and Awareness

HRC	Human Rights Committee
HRS	Homophile Reform Society (Canada)
HSSP III	Health Sector Strategic Plan III (Uganda)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDAHO	International Day Against Homophobia and Transphobia
IFP	Inkhata Freedom Party (South Africa)
IGLHRC	International Gay and Lesbian Human Rights Commission
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association
IPC	Indian Penal Code
IRF	Islamic Renaissance Front (Malaysia)
J-FLAG	Jamaica Forum for Lesbians, All-Sexuals and Gays
JIM	*Jamaah Islah Malaysia*/Malaysian Reform Movement
LCL	Liberal Country League (Australia)
LeGaBiBo	Lesbians, Gays and Bisexuals of Botswana
LGBT	lesbian, gay, bisexual and transgender
LGBTI	lesbian, gay, bisexual, transgender and intersex
MARPs	Most at Risk Populations
MHRC	Malawi Human Rights Commission
MHRRC	Malawi Human Rights Resource Centre
MPNF	Multiparty Negotiating Forum (South Africa)
MSM	men who have sex with men
NACHO	North American Conference of Homophile Organizations
NACO	National AIDS Control Organisation (India)
NCGLE	National Coalition for Gay and Lesbian Equality (South Africa)
NGK	*Nederduits Gereformeerde Kerk*/Dutch Reformed Church (South Africa)
NGOs	non-governmental organisations
NHRIs	National Human Rights Institutions
NLRF	National Law Reform Fund (South Africa)
NP	National Party (South Africa)
NSW	New South Wales (Australia)
OAS	Organisation of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
OIC	Organisation of Islamic Cooperation
OLGA	Organisation of Lesbian and Gay Activists (South Africa)
PAP	People's Action Party (Singapore)
PAS	*Parti Islam Se-Malaysia*/Islamic Party of Malaysia (Malaysia)

PEMBELA	Muslim Organisations in Defence of Islam (Malaysia)
PKR	*Parti Keadilan Rakyat*/People's Justice Party (Malaysia)
PLP	Progressive Liberal Party (Bahamas)
QAGLR	Queensland Association for Gay Law Reform (Australia)
QPC	Queensland Penal Code (Australia)
RAB	Rainbow Alliance of the Bahamas
RCC	Roman Catholic Church
RCMP	Royal Canadian Mounted Police
RTPC	Right To Privacy Committee (Canada)
SADF	South African Defence Force
SAHRA	South Asian Human Rights Association for Marginalised Sexualities and Genders
SGL	same gender loving
SMUG	Sexual Minorities Uganda
SOLM	Senior Officials of the Law Ministries (Commonwealth)
SUARAM	*Suara Rakyat Malaysia*/Malaysian People's Voice (Malaysia)
TGLRG	Tasmanian Gay Law Reform Group (Australia)
UDF	United Democratic Front (south Africa)
UDHR	Universal Declaration of Human Rights
UHSPA	Uganda Health and Science Press Association
UMNO	United Malays National Organisation
UNDP	United Nations Development Programme
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNIBAM	United Belize Advocacy Movement
UPR	Universal Periodic Review
WHO	World Health Organization
WSG	Women's Support Group (Sri Lanka)

Contributors

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Frederick Cowell worked for the Commonwealth Human Rights Initiative (CHRI) as the head of the London office and later as a legal advisor and researcher. During this time he led CHRI's work on the decriminalisation of sexual orientation in the Commonwealth and has written widely on the subject. He is currently completing his PhD specialising in the postcolonial

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Adrian Jjuuko is a Ugandan human rights lawyer and advocate. He is the executive director of Human Rights Awareness and Promotion Forum (HRAPF), a human rights NGO providing legal aid services to marginalised groups in Uganda. He was coordinator of the Civil Society Coalition on Human Rights and Constitutional Law Uganda (2010–11), which won the US State Department's Human Rights Defenders Award 2011 for its struggles to oppose the Anti Homosexuality Bill in Uganda. Adrian led the team of lawyers and other professionals that testified before the Legal and Parliamentary Affairs Committee of Parliament about the Anti Homosexuality Bill in May 2011 and was instrumental in the successful prosecution of the case of *Kasha Jacqueline*

& 2 others v. The Rollingstone Publications (2010), which upheld the rights to privacy and freedom from inhuman and degrading treatment for persons who are or are perceived to be gay in Uganda. He is the petitioner in the case of *Jjuuko Adrian v. Attorney General of Uganda* (2009), a case that challenges the constitutionality of Section 15(6)(d) of the Equal Opportunities Commission Act which provision denies LGBTI persons, sex workers and other minorities access to the Equal Opportunities Commission. He is a researcher and an author with research interests in human rights, the law, HIV/AIDS, and the rights of sexual minorities.

Gary Kinsman is the author of *The Regulation of Desire: Homo and Hetero Sexualities* (Black Rose, 1996), co-author (with Patrizia Gentile) of *The Canadian War on Queers: National Security as Sexual Regulation* (UBC Press, 2010), and editor of *Whose National Security?* (Between the Lines, 2000) and of *Sociology for Changing the World* (Fernwood, 2006). He is currently working on a new book project called *The Making of the Neo-Liberal Queer*. He teaches sociology at Laurentian University in Sudbury, Ontario, on the historic territories of the Atikameksheng Anishnawbek nation. He is a long-time queer liberation, anti-poverty and anti-capitalist activist.

The Hon. Michael Kirby AC CMG was born and educated in Sydney, Australia. He practised as a solicitor and barrister before being appointed a Deputy President of the Australian Conciliation and Arbitration Commission in 1975. There followed appointments as inaugural chairman of the Australian Law Reform Commission; as a judge of the Federal Court of Australia; as President of the NSW Court of Appeal; and as President of the Solomon Islands Court of Appeal. In 1996 he was elevated to the High Court of Australia, the nation's highest constitutional and appellate court. He retired from that post in 2009. Since then he has been engaged in university teaching, Alternative Dispute Resolution (ADR), law publishing and participation in many national and international conferences. Michael Kirby has a long association with the Commonwealth of Nations. He participated in the Bangalore colloquia on the domestic application of international human rights norms (1988–95). He contributes regularly to the *Commonwealth Law Bulletin*. He is an editorial adviser of the Law Reports of the Commonwealth. Between 2010 and 2011 he served on the Eminent Persons Group of the Commonwealth of Nations examining the future of that body and joined in the unanimous report of that group. That report recommended a Commonwealth Charter and many other proposals to strengthen the organisation. He was awarded in 2010 the Gruber Justice Prize, having earlier been named winner of the Australian Human Rights Medal (1991) and of the UNESCO Prize for Human Rights Education (1998).

Corinne Lennox is lecturer in human rights at the Institute of Commonwealth Studies, School of Advanced Study, University of London and associate director of the Human Rights Consortium, also at the School of Advanced Study. She holds a PhD in international relations from the London School of Economics and Political Science (LSE), and an MA in the Theory and Practice of Human Rights from the University of Essex. Her research focuses on issues of minority and indigenous rights protection, civil society mobilisation for human rights and on human rights and development. She has worked for many years as a human rights practitioner and trainer with various NGOs and has been a consultant on minority rights for several UN institutions. Dr Lennox is a Trustee of the Dalit Solidarity Network-UK, a Visiting Fellow at the Human Rights Centre, University of Essex, a Visiting Fellow at the Indian Institute of Dalit Studies and is a member of the UK Network on Minority Groups and Human Rights. She has published in the *Netherlands Quarterly of Human Rights*, the *International Journal on Minority and Group Rights* and is co-editor of the *Handbook on the Rights of Indigenous Peoples* (Routledge 2013).

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in Canada. Nicol is currently editing a feature documentary on the history of the legal and social movement history challenging section 377 of the Penal Code of India. Her recent scholarly publications and films include: *Legal Struggles and Political Resistance: Same-Sex Marriage in Canada and the U.S.* by Nancy Nicol and Miriam Smith; *Same-Sex Marriage in the Americas*, ed. Adriana Crocker (Pierceson and Schulenberg, Lexington, June 2010); 'Politics of the heart: recognition of homoparental families', in *Who's Your Daddy? And Other Writings on Queer Parenting*, ed. Rachel Epstein (Sumac Press, March 2009) and the four-part documentary series *From Criminality to Equality* on the history of lesbian and gay rights organising in Canada from 1969 to 2009.

Simon Obendorf is senior lecturer in international relations at the University of Lincoln, United Kingdom. He holds degrees in both political science and law from the University of Melbourne and completed his PhD in international relations at that university's School of Social and Political Sciences. Simon's research interests are intellectually situated at the nexus of postcolonial studies, gender and sexuality studies, and discourses of the international. His current research utilises materials from contemporary East and Southeast Asia to explore new ways of thinking about international theory and postcolonial futures. Simon is a founding member of the Melbourne-based Institute of Postcolonial Studies.

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Graham Willett is a historian formerly with the Australian Centre, University of Melbourne, Australia. He is the author of *Living Out Loud* (Allen & Unwin, 2000), a history of gay and lesbian activism in Australia and other works on Gay, Lesbian and Queer (GLQ) history. His current research project is looking at homosexual law reform politics in the British world in the period 1954–72. He is a long-time member of the Australian Lesbian and Gay Archives committee.

1

Human rights, sexual orientation and gender identity in the Commonwealth: from history and law to developing activism and transnational dialogues

Corinne Lennox and Matthew Waites

Sexual orientation and gender identity are reaching the heart of global debates over human rights and social change. Such debates are particularly acute in many Member States of the Commonwealth of Nations. Following the criminalisation of same-sex sexual behaviour across the British Empire from the 19th century, decriminalisation in the Commonwealth commenced in England and Wales in 1967, yet struggles for the decriminalisation of same-sex sexual behaviour still continue in 42 of the 54 Commonwealth states. These struggles are increasingly accompanied by often-interrelated struggles for legal recognition of gender identity. A landmark 'reading down' of Section 377 of the Indian Penal Code by the Delhi High Court in 2009 has given new hope to those fighting for decriminalisation in the states of the global South[1] (Narrain and Gupta 2011; Baudh, this volume).[2] However, in Uganda the reintroduction of an 'Anti-Homosexuality Bill' for parliamentary debate, ongoing in 2013, illustrates that progress cannot be taken for granted (Jjuuko, this volume). These developments show the need to analyse, in different contexts, how struggles for decriminalisation and human rights can succeed.

1 The South is invoked in this chapter as a social and political rather than strictly geographical concept. Despite the geographically problematic associations in relation to Australia, for example, we feel the concept has acquired a political significance that makes it appropriate to use in this way.

2 Following Itaborahy (2012, p.13), throughout this introduction India is not included among the 42 states where criminalisation of sex is continuing. As they note in their key global report, citing *Indian Express* (2009), although there is an ongoing appeal to the Supreme Court, that Court has declined to pass an interim order to stay the Delhi High Court judgement. Hence in legal terms the judgement has taken effect, irrespective of the lack of corresponding legislation from the Indian Parliament. However, as they also note the Indian Penal Code does not cover the state of Jammu and Kashmir (of which sovereignty is contested by Pakistan), so the Delhi High Court decision does not affect that state.

This book is the first to focus on sexual orientation and gender identity in the Commonwealth, the association formed in 1949 of states that were formerly part of the British Empire, joined in recent years by Mozambique and Rwanda (for information see Commonwealth Secretariat 2011a). The Commonwealth encompasses two billion people of many religions, ethnicities and cultures from rich and poor states in six continents, so it is far from surprising that there are differences of view in relation to questions of sexual orientation and gender identity. The book is written and edited to be accessible and engaging for any reader concerned with the profound issues addressed, with a focus on utility for activists, researchers and decision-makers on relevant areas of legislation and public policy. It is hoped the volume can serve both to enable learning from experiences in different states and to advance sometimes-difficult international dialogues within and beyond the Commonwealth. As argued below, the book is also an original and substantial contribution to global comparative literatures on sexual orientation and gender identity, particularly for its coverage of states in the global South.

The book emerges from a conference 'LGBT Rights in the Commonwealth: Historical Legacies and Contemporary Reforms', held at Senate House in London, United Kingdom (UK) on 17 January 2011 (LGBT: Lesbian, Gay, Bisexual and Transgender). The conference was jointly convened by the Institute of Commonwealth Studies, University of London and the Commonwealth Human Rights Initiative, with the modest goal of initiating a sharing of information on decriminalisation among researchers and activists, mostly based in the UK. The present volume includes several of the papers from the conference and also expands international representation with specially commissioned studies of various Commonwealth states. Reviews of chapters from experts with knowledge of particular states (usually two per chapter) make this volume, importantly, a collective and international work.

The central purpose of the book is to inform public debates and share insights from different strategies for decriminalisation and change. As editors, we seek to enable various voices to speak and be heard. We have therefore not imposed a strict editorial framework on contributors, with the advantage that this has enabled us to include chapters from authors with varying disciplinary, political, professional and activist backgrounds – consequently achieving greater coverage of states where decriminalisation movements and gender identity politics are less developed. It is hoped chapters in the book will be read by a range of audiences, including anyone interested in sexual orientation or gender identity in the politics, law or society of their own state, but also more particularly human rights activists and civil society organisations (CSOs), law practitioners and government officials. It is also hoped that governments can learn from one another, and also that movements for decriminalisation and human rights in different states can learn from one another, and that this book can prove a practical tool in that respect.

The contents of the book can be summarised briefly. It commences with this editors' introduction to the Commonwealth and its existing debates over human rights, sexual orientation and gender identity, fully outlined below. The opening section next includes a chapter surveying the current situation in the Commonwealth from Michael Kirby, former Justice of the High Court of Australia, who has played a leading role in work for decriminalisation, including as a member of the Eminent Persons Group which presented a report proposing institutional reforms to the Commonwealth Heads of Government Meeting in October 2011. An edited extract is then reprinted from the agenda-setting and groundbreaking Human Rights Watch report *This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism*, authored by Alok Gupta with contributions from Scott Long, which examined legal legacies of the British Empire and in many respects set an agenda which this book addresses (Human Rights Watch 2008). Fred Cowell, formerly of the Commonwealth Human Rights Initiative, then provides a substantial introduction to the Commonwealth and contemporary debates in the Commonwealth over the organisations' appropriate role.

The main body of the text that follows comprises chapters with an individual state focus, each discussing histories of decriminalisation or more recent and ongoing struggles in a total of 16 states (with some chapters comparing several). The chapters are presented with states in regional groupings, while also commencing in a chronological sequence starting from the United Kingdom (Europe) where the first decriminalisation of same-sex sexual behaviour in the Commonwealth occurred in England and Wales in 1967. The initial UK chapter reviews the variety of existing critical analyses of partial decriminalisation, using this as a means to introduce and appraise various critical concepts and social theories which can help us to interrogate the terms on which decriminalisation in other national contexts is enacted, such as 'privacy', 'citizenship', 'social control', 'moral regulation' and 'power' – while also applying Michel Foucault's concept 'governmentality' to the decriminalisation process for the first time. Chapters on states or state groupings then follow, initially in a chronology in order to suggest how decriminalisation in one state may have impacted on decriminalisation in another. Sections of the book examine regional groupings as follows: North America, with Gary Kinsman on Canada; Australasia, with Graham Willett on Australia, Southeast Asia with Simon Obendorf on Singapore and Shanon Shah on Malaysia; South Asia, with Sumit Baudh covering India, Pakistan, Bangladesh, and Sri Lanka; Africa, with Gustavo Gomes da Costa Santos on South Africa, Monica Tabengwa with Nancy Nicol on Botswana, Undule Mwakasungula on Malawi, Adrian Jjuuko on Uganda and Kevin Ward comparing religious influence in South Africa and Uganda; and the Caribbean, with Joseph Gaskins Jr. comparing Jamaica, Trinidad and Tobago and the Bahamas, and Conway Blake and Philip Dayle, also on Jamaica, usefully deepening discussion of relations between national,

regional and global forms of activism. Through this arrangement the aim is to provide perspective on whether or how past decriminalisations might be invoked in recent and ongoing struggles, and also on regional patterns and effects. Hence the sequence is emphatically not an indication of the relative importance of the chapters, and readers are encouraged to skip forward to the chapters and sections of interest to them.

After the national and regional chapters general thematic issues are returned to in a chapter by Dimitrina Petrova proposing extensions of judicial action and human rights beyond the issue of decriminalisation of sexual behaviour, via the use of equality and non-discrimination law. This chapter is presented here as a contribution to ongoing debates since Petrova's 'unified equality framework' tends to draw together 'equality', 'equal rights' and 'human rights', whereas others, including sociologists of human rights, have argued for the importance of keeping these analytically distinct in order to address citizenship and equality issues beyond human rights (Hynes et al. 2011). Given that some chapters emphasise that limited articulations of the scope of human rights as 'privacy' have been strategically useful in winning decriminalisation (for example, Gaskins on the Bahamas), the issue of the extent to which human rights related to sexual orientation and gender identity should be articulated in broader terms remains a contested political and moral question. Chapters also differ in the extent to which they suggest LGBT rights issues can or should be subsumed in human rights movements and agendas; independent movements with broader agendas focused on sexuality and gender, including 'LGBT' organisations, surely remain vital.

The final chapter of the collection, by ourselves as the editors, presents an international comparative analysis based on material in the state chapters. This draws on political process and social movement theories from political science and sociology to draw out patterns and themes that can inform both future activism and future research, also offering the editors' own analysis of developments. This is a first attempt at comparative analysis in the Commonwealth context; the opportunity to attempt such analysis was too important to miss, but we would emphasise that this is just a preliminary look at the data and therefore is offered to open new conversations, as an invitation for further research and debate.

This opening chapter will now proceed as follows. First, the main themes of the book are outlined by summarising contemporary criminalisation of same-sex sexual behaviour in the Commonwealth, including some current examples of injustice facing people in various states. The chapter raises the theme of human rights and establish understandings of the terms 'sexual orientation' and 'gender identity'. In the second section the volume is explained and situated as an original contribution to international public debates and academic literatures over sexuality and gender, particularly distinctive for its coverage of many states in the global South (a concept used here with reference

to distributions of wealth and relationships to economic globalisation, rather than a strict geographical delineation: Lopéz 2007). The third section gives a historical account of the criminalisation of same-sex sexual behaviour in the United Kingdom, since this is of contextual relevance to all the chapters in the collection. The fourth provides an original summary and the first systematic analysis of data on laws in each of the 54 Commonwealth states, using the world survey of laws related to sexual orientation and gender identity provided by the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA). The data and data-analysis cover criminalisation and decriminalisation of same-sex sexual behaviour, but also issues of employment discrimination, hate crime laws and partnerships, including same-sex marriage (Itaborahy 2012). Finally, the fifth section examines the Commonwealth itself, focusing on existing attempts by activists, independent experts and politicians to put human rights generally, and sexual orientation and gender identity more specifically, on the Commonwealth's agenda. The political debates are discussed concerning whether the Commonwealth should have a role in relation to these issues, which some argue should be the province of individual states. We argue that the Commonwealth's origins in British imperialism hinder the extent to which it can provide a suitable or effective vehicle for advancing human rights. Nevertheless, the Commonwealth presents some potential opportunities for those seeking decriminalisation. The Commonwealth must support moves towards endorsement of human rights in this context, and can also play a useful role as a forum for debates between states from North and South, ensuring selective understandings of human rights on all sides are expanded to address a wider range of human rights concerns.

1. Criminalisation and human rights in relation to sexual orientation and gender identity

Same-sex sexual behaviour between adults remains criminalised in 78 states worldwide according to the most authoritative global survey, published in May 2012 (Itaborahy 2012), and it remains the case that 'More than half those countries have these laws because they were once British colonies' (Human Rights Watch 2008, p. 5; see data in section four below). To 'criminalise' same-sex sexual behaviour, as understood in this book, is to prohibit, restrict or otherwise impede such behaviour – even when consensual and in private – under the criminal or civil law of a given state, with potential penalties for violations of such laws. Criminalisation of same-sex sexual behaviour implies a major form of state stigmatisation, sustaining social prejudices and accompanying violence and discrimination. The impact of such criminalisation, applying even in private, is to generate inequalities between individuals and groups. It degrades the relationships and intimate lives of those affected as international gay, lesbian and bisexual movements have long argued (Blasius

and Phelan 1997; Adam et al. 1999). Crucially, it also neuters prevention and treatment measures to fight HIV/AIDS by driving same-sex sexual behaviour underground, in a context where only 5.2 million of the 15 million people with HIV in low- and middle-income countries have access to antiretroviral drug treatments (UNAIDS 2010). Hence, this book takes the decriminalisation of same-sex sexual behavior as its primary focus. This includes attention to the impact of such laws on certain groups defined by forms of gender identity that problematise the man/woman gender binary, as suggested by transgender political movements (Stryker and Whittle 2006; Currah et al. 2006). The book's chapters also begin to attend, to a lesser degree, to wider 'criminalisation' of various activities and human rights struggles related to both sexual orientation and gender identity.

Conflicts over sexual orientation and, increasingly, gender identity, arise in different national contexts worldwide with worrying frequency. In formerly colonised states this occurs according to persistent patterns. A consistent tendency, identified by scholars such as M. Jacqui Alexander and Oliver Phillips from the 1990s, is the formation of post-colonial nationalisms in many states of the global South, defined against the nationalisms and economic neo-colonialisms of former colonial societies. This occurs through moral discourses involving the exclusion of certain same-sex sexualities and gender forms which become defined as Western[3] and alien (Alexander 1994; Phillips 1997; Gevisser 2000; Weeks et al. 2003). During recent years, in states where same-sex sexual behaviour remains criminalised, we have seen this pattern influencing, for example, threats of anti-gay violence in Jamaica, where leading gay activist Brian Williamson was murdered in 2004 (Blake and Dayle, this volume). This pattern has also been apparent in conflicts in Africa, such as in Malawi where in 2010 Tiwonge Chimbalanga and Steven Monjeza were imprisoned for 'gross indecency', paradoxically under colonial sex offence laws, following a same-sex marriage ceremony that their government refused to recognise (Mwakasungula, this volume). It is also apparent in attempts to introduce new punitive legislation in Uganda, in a state which has seen the anti-gay murder of Ugandan gay rights activist David Kato in January 2011. Such acts are resisted by other heroic activists such as Kasha Jacqueline Nabagesera, founder of the gay rights organisation Freedom and Roam Uganda – awarded the prestigious Martin Ennals Award for Human Rights Defenders in October 2011 (Martin Ennals Award 2011; Office of the High Commissioner for Human Rights 2011; Jjuuko, this volume). We honour and celebrate the inspiring bravery of these human rights defenders.

Yet there are also more complex tendencies elsewhere, as in India where a formerly colonised state's middle classes have sought to define their society as

3 The West is conceived in this chapter as a cultural and political concept rather than strictly geographical, hence including Australia, although the difficulties and complexities in this contested usage are recognised.

modern and democratic since writing rights into the Constitution (1950), and hence move towards endorsement of human rights as in the partial 'reading down' of Section 377 of the Indian Penal Code. National identity in India is defined against neighbours in Pakistan and Bangladesh, and via dynamics related to religion between (and within) Hinduism, Islam and secularism, as much as against colonial forebears (Waites 2010; Baudh, this volume). Such examples are discussed in subsequent chapters in this volume, but illustrate the need for detailed multi-dimensional analysis of divergent tendencies. Understanding how patterns are shaped by the legacies of racism and imperialism, and by contemporary religious and political dynamics, is central to understanding why conflicts over sexual orientation and gender identity continue to arise, and hence the contextual constraints for Commonwealth initiatives.

At the heart of these conflicts and the book's concerns is the concept of human rights. The contributors to this volume all endorse the concept of human rights, although perhaps with some different interpretations. Yet it is not the central purpose of this book to engage in the moral, philosophical and political debates over the validity of human rights; such debates have been extensive and can be considered elsewhere (see for example, Freeman 2002; Woodiwiss 2005). Rather, its central purpose is to document and analyse struggles for human rights, particularly through campaigning for the decriminalisation of same-sex sexual behaviour but also as they relate to sexual orientation and gender identity more widely. The book can also serve to inform reflections on the relationship of human rights to sexual orientation and gender identity, for readers not yet convinced that all persons should be entitled to human rights irrespective of these characteristics or that the scope of human rights can encompass these issues.

Human rights invoked in claims for the decriminalisation of same-sex sexual behaviour have been invoked as universal rights in international law, sometimes in relation to 'sexual orientation', encompassing heterosexuality as much as homosexuality. Therefore, from a human rights perspective, we are discussing the human rights and freedoms of all people, rather than only of LGBT people or sexual minorities, for example. In the understanding of human rights advocates every assertion of a human right for a particular individual or group represents an expression of the human rights of all.

The origin of the contemporary global human rights system is the Universal Declaration of Human Rights of 1948, but this declaration has been translated and developed into United Nations human rights treaties to which states can become parties, and through regional human rights systems, such as the Council of Europe's European Convention on Human Rights (1950) and associated court. Groundbreaking cases asserting international law on human rights in relation to same-sex sexual behaviour included the case of *Dudgeon v. UK*, brought by Jeff Dudgeon, a gay man living in Northern Ireland. This ruling established the right to respect for a private life with respect to same-

sex sexual behaviour for adults under Article 8 of the European Convention on Human Rights – deriving also from the right to privacy in Article 12 of the Universal Declaration of Human Rights. This ruling was key to winning decriminalisation of same-sex sexual behaviour in Northern Ireland in 1982 (European Court of Human Rights 1981; Moran 1996, pp. 174–80).

While the Dudgeon case was legally crucial in Europe and was invoked later in law beyond Europe, globally the legal turning point was the case of Nicholas Toonen in 1994. The applicant was able to overturn laws in the Australian state of Tasmania by appealing to the International Covenant on Civil and Political Rights (1966) to which Australia was a party, asserting the right to privacy under Article 17, together with rights to non-discrimination in the application of rights and of law on grounds including 'sex' in Articles 2 and 26. It was ruled that the non-discrimination provision related to 'sex' 'is to be taken as including sexual orientation' (United Nations Human Rights Committee 1994, para. 8.7). More recent notable decisions include the Delhi High Court 'reading down' of Section 377 of the Indian Penal Code, which referenced the Toonen case (although this decision has been referred by the government to the Supreme Court and a ruling is still awaited) (High Court of Delhi at New Delhi 2009; International Gay and Lesbian Human Rights Commission 2009). There is a growing body of legal literature and case law on sexual orientation, gender identity and human rights (International Commission of Jurists 2011; Jjuuko this volume; Petrova this volume).

The human rights approach is developed by the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, published by a global collective of 29 human rights experts in 2007. The Principles are a re-statement of human rights defined as universal in existing conventions and laws, articulated in relation to sexual orientation and gender identity to make clear their applicability. They have emerged as the most internationally important campaigning document related to sexual orientation and gender identity, and were noted in the Indian judgement on Section 377 (Corrêa and Muntarbhorn 2007).

People in socially marginalised sexual and gender minority groups have experienced the negative effects of legal regulation through much of history. However, to trace the configuration of identities in terms of 'sexual orientation' and 'gender identity', it is useful to attend to the ways in which sexology, the science of sex, formulated new purportedly scientific theories of sexual and gender identity from the late 19th century, as noted by the major social theorist and historian Michel Foucault (1981). The term 'homosexuality' emerged as a concept in the sex research of Krafft-Ebing in Austria-Hungary, reaching Britain via the work of Havelock Ellis at the end of the 19th century, with 'heterosexuality' as a counterpoint (Weeks 1981, pp. 96–121; Katz 1995). 'Homosexuality' subsequently became a central framing concept employed by a British government committee in the Wolfenden report (1957) to

endorse the first partial decriminalisation of same-sex sexual behaviour in the Commonwealth. This was enacted in England and Wales via the Sexual Offences Act (1967), which conflated identities with acts in its formulation that 'a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of twenty-one years' (Committee on Homosexual Offences and Prostitution 1957; for full discussion see Waites, this volume).

In North America, western Europe and Australia and New Zealand, the concepts 'gay and lesbian' subsequently emerged from the 1970s as the affirmative identities associated with an international gay and lesbian movement. From the 1990s 'LGBT' – lesbian, gay, bisexual and transgender (or sometimes 'LGBTI', adding intersex) – became the most prevalent framing of many national and international non-governmental organisations (NGOs) and initiatives. However, from the early 1990s the formerly stigmatising term 'queer' became used by some activists in 'queer politics', and in associated 'queer theory', to challenge understandings of fixed associations between feelings, identity and behaviour which heterosexual, gay and lesbian identities sometimes tended to assume (Warner 1993), influencing what has since been described as an emerging 'global queer politics' (Waites 2009; 2011).

More recently, broad definitions of the concepts 'sexual orientation' and 'gender identity' in the Yogyakarta Principles have become the most internationally significant in legal and human rights debates, as follows:

> Sexual Orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender. (Corrêa and Muntarbhorn 2007, p. 6, fn. 1)

> Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms. (Corrêa and Muntarbhorn 2007, p. 6, fn. 2)

These definitions offer the most inclusive widely used vocabulary available – notwithstanding an existing critique of the restrictive implications of the concepts, the dominant meanings of which problematically ascribe certain kinds of characteristics to individuals (Waites 2009). In this light the volume's title frames our concerns using the internationally recognisable concepts of sexual orientation and gender identity, which as defined in the Yogyakarta Principles are less restrictive than 'lesbian, gay, bisexual and transgender'. The terms are utilised with a consciousness of restrictive dominant interpretations circulating in globalising medical and psychological discourses. In general we

recognise a need to disaggregate rather than conflate identities, feelings and actions, in order to conceptualise diverse experiences. With respect to sexuality our concerns are for the experiences of people who feel same-sex desire, who engage in same-sex sexual behaviour and relationships, and/or who identify in some way in relation to these. Similarly, with respect to gender, our concern is to address the vast spectrum of forms of gender identity and 'gender expression' – generally a broader concept – as suggested by theorists such as Whittle and Currah in research on transgender identities and practices emerging from transgender politics and movements (Whittle 1999; Stryker and Whittle 2006; Currah et al. 2006).

Given that sexual orientation and gender identity may be entirely unrelated for individuals, and given that the conference that was the starting point for this volume focused mainly on the issue of decriminalisation of same-sex sexual behaviour, the question of how to address gender identity in the book has not been straightforward. The editors have decided to include gender identity in the title and central framing of the collection as a way to highlight issues of human rights in relation to gender identity in the Commonwealth, in accordance with important alliances embodied, for example, in the Yogyakarta Principles. Yet it is recognised that the struggles for decriminalisation referred to in the book's title affect only some people who define their gender identity in ways which problematise the dominant man/women gender binary. Most chapters focus primarily on the decriminalisation of same-sex sexual behaviour, the issue with the most commonality in the Commonwealth due to the British Empire's legal legacy. Nevertheless, attention to gender identity issues emerges particularly in certain chapters: for example, in Baudh's discussion of the place of *hijras* in South Asia; in Shah's discussion of Malaysia; and in Mwakasungula's discussion of Malawi. This introduction provides analysis of data on the legal regulation of gender identity and trangenderism in the Commonwealth. Many chapters reference literature on gender identity/transgender experiences and readers are encouraged to explore this literature (see also journals such as the *International Journal of Transgenderism* and key collections on transgender studies and human rights: Stryker and Whittle 2006; Currah et al. 2006). It is the editors hope that the present volume will be a starting point for the development of future research in the Commonwealth context.

Having outlined the core themes, in the following section existing international academic literatures on sexual orientation and gender identity will be surveyed and the distinctiveness of the book's contribution to global debates and research will be explained.

2. Review of literature: a contribution to global research on sexuality, gender and human rights.

In general terms this volume contributes to the development of knowledge of sexualities and genders in relation to power, inequalities and human rights

(Corrêa et al. 2008), while also contributing to specific academic disciplines. Varying in their relation to disciplines, most chapters contribute to several and share the interdisciplinary character of much work in the fields of gender, human rights and sexuality studies. The volume as a whole makes a contribution to the international and comparative history of sexuality and gender in the 20th century by providing the first overview of struggles for decriminalisation in the Commonwealth in the post-World War II period. It also contributes to politics by providing accounts of recent political conflicts, activism and movements contesting sexual orientation and gender identity in relation to political institutions in numerous states; and similarly contributes to sociology where chapters focus more broadly on the social contexts and movements involved. It further contributes to law by offering a unique survey of legal histories in Commonwealth states, expanding socio-legal studies, and has clear implications for ongoing discussions of social policy. Through an emphasis on the transnational legacies of imperialism the volume takes forward interdisciplinary studies of globalisation (Held et al. 1999), the development of a sociology of human rights (Hynes et al. 2011), and post-colonial studies (Said 1978) in ways suggested in works analysing the relationships of empires and racism to sexualities and sex offence laws (for example, Hyam 1991; McClintock 1995; Aldrich 2003; Lecky and Brooks 2010).

In particular, the volume offers a contribution to international studies of conflicts over sexual orientation and gender identity in states worldwide. In recent years there has been an enormous expansion in academic work focusing on such issues in specific states, but much more so in the global North than in the global South. Research on sexual orientation and gender identity in certain regions, especially in Africa, remains scarce. By reviewing existing international collections important past work on Commonwealth states can be highlighted. Simultaneously the distinctive contributions of this volume to international analysis of sexual orientation and gender identity can be highlighted, particularly in Commonwealth states, and in the global South.

Despite tendencies towards a worldwide flowering of LGBT and queer research, global comparative collections on these themes remain remarkably rare. Groundbreaking contributions include *The Global Emergence of Gay and Lesbian Politics: National Imprints of a Worldwide Movement*, which drew together 12 chapters with state case studies using insights from politics and sociology, with a focus on social movement theories (Adam et al. 1998). That volume was strong on coverage of Europe, North America, South America and Australia, and broke ground with a chapter covering southern Africa – South Africa, Zimbabwe and Namibia – but was less strong on Asia, covering only Japan. Around the same time West and Green (1997) published a much more legally focused volume that covered several Commonwealth states: South Africa, Zimbabwe (since suspended and withdrawn from the Commonwealth), Pakistan, Singapore, Canada and England. The legal literature has expanded

since; for example, Andenaes and Wintemute's important collection *Legal Regulation of Same-Sex Partnerships* (2001) contained chapters on six Commonwealth states: Canada, Australia, New Zealand, South Africa, India and the United Kingdom. Until very recently, no other global collections of chapters on individual states oriented towards politics and/or sociology were published.

A new global comparative collection *The Gay and Lesbian Movement and the State: Comparative Insights into a Transformed Relationship* is declared by its editors to be 'the latest edited comparative volume on lesbian and gay movements' since that edited by Adam et al., with chapters from six continents including several covering Commonwealth states: Australia, Canada, India, South Africa, 'Singapore, Indonesia and Malaysia' and the United Kingdom (Tremblay et al. 2011, p. 2). The focus of the volume is towards political science, social movement theory and the state. By contrast, in the present volume many chapters tend towards a broader, more interdisciplinary approach. Other international collections have included Badgett and Frank's collection on *Sexual Orientation Discrimination* (2007) which comments on the Commonwealth states of Canada, the UK, Jamaica and Singapore. *The Global Politics of LGBT Human Rights* included some nationally specific and systematically comparative chapters, but focused more on transnational discussions (Kollman and Waites 2009). Global analyses by individual authors have tended to do the same, not yet providing comparisons of individual state case studies (Altman 2001; Binnie 2004; although see Waites 2005, pp. 40–59; Kollman forthcoming 2013). By contrast, this volume provides sustained comparative analyses – of India, Pakistan, Bangladesh and Sri Lanka (Baudh), of Jamaica, Trinidad and Tobago and the Bahamas (Gaskins), and of Uganda and South Africa (Ward) – while also offering an overall comparative discussion at the conclusion (Lennox and Waites).

Remarkably, there also remain few edited books on LGBT, queer or sexual orientation/gender identity themes which offer state chapters within particular continents. Where such collections exist, the chapters tend to have differing themes, as in the collections *Gay and Lesbian Asia* (Sullivan and Jackson 2001), or *The Politics of Sexuality in Latin America: A Reader on Lesbian, Gay, Bisexual and Transgender Rights* (Corrales and Pecheny 2010). Graupner and Tahmindjis (2005) offer comparative chapters on law and human rights in the continents of Europe, North America and Asia, and on South Africa and Australia. There is more in-depth comparative politics work on Canada and the United States (for example, Rayside 2008; Smith 2008) which suggests the benefits of comparative research. Yet there remains a lack of broader accounts of politics, law and social struggles for change in their social contexts in different states, and obviously there is also a need for more up-to-date work.

We would also draw attention – tentatively, given our English-speaking starting points – to the apparent absence of edited collections of national

case studies which are similar to this Commonwealth volume in addressing the legacies of empires, such as French, Dutch, Belgian, German, Spanish or Portuguese empires, in relation to sexual orientation and gender identity. Kirby comments that laws against same-sex sexual behaviour were generally 'not a feature of other European empires', which probably provides the explanation (Kirby 2011). However, Human Rights Watch has suggested that despite the absence of criminalisation in France, the French authorities did impose sodomy laws as a means of social control in some countries such as Benin, Cameroon and Senegal; *This Alien Legacy* also notes that in Germany's few colonies traces of the colonial legacy in law are 'evanescent' (Human Rights Watch 2008, p. 7). This suggests the distinctiveness of the Commonwealth's legal history and relationship to criminalisation, and hence the unique opportunities it presents for transnational comparative analysis of decriminalisation struggles. The various gaps in existing research we have identified have restricted comparative analysis and so the study of transnational themes, including the legal and social legacies of imperialism in this volume, can make a significant contribution.

The most important strength of the present volume relative to existing works, which we are proud to highlight, is the greater coverage of states in the global South. In this the agenda of Peter Drucker's collection *In a Different Voice* (2000) is followed, which mapped an agenda for understanding lesbian and gay politics in the 'Third World', providing overview chapters on Latin America, Southeast Asia, and the Commonwealth states of India, Kenya and South Africa (including some comment on Zimbabwe, Uganda and Namibia). In the present collection national studies are offered on several states in Africa – Botswana, Malawi and Uganda – which have not been addressed by full chapters in previous international collections surveying law and citizenship. This is in a context where only recently has the analysis of African sexualities in different social contexts developed (Murray and Roscoe 1998), notably in the work of Marc Epprecht (2004, 2008a, 2008b), Oliver Phillips (1997) and Neville Hoad (2006; Hoad et al. 2005), and in the groundbreaking collection *African Sexualities* (Tamale 2011).

Furthermore, Sumit Baudh's chapter on South Asia, covering Pakistan, Bangladesh and Sri Lanka, as well as India, is a groundbreaking contribution to international comparative scholarship on legal regulation and sexual politics in that region. Blake and Dayle's chapter on Jamaica, described by the authors as 'world renowned' for homophobia, is also the first of its kind in a collection such as we have described. The chapters on Malaysia and Singapore also expand and bring up to date accounts of these states, reflecting on dynamics in Southeast Asia. Therefore we suggest that the volume makes a significant contribution to the vital project of re-orienting global scholarship on sexual orientation and gender identity from North to South, to challenging Northern perspectives, and to taking on board Southern epistemologies, theories and perspectives, as proposed by writers such as de Sousa Santos (2007), Connell (2007) and – in

relation to queer politics – Rao (2010). Indeed, this is a project which takes forward agendas and dialogues which were present in certain sections of the gay liberation movement from its inception (Third World Gay Revolution 1970).

Moreover, while individual authors have sometimes commented on the transnational impact of developments such as the Wolfenden report in specific states, this text distinctively focuses on attempts to use the Commonwealth itself as a vehicle to achieve decriminalisation and promote human rights. These processes will be returned to later, but first such discussions are historically contextualised with an explanation of the history of sex laws prohibiting sex between men in the United Kingdom, from which prohibitions emerged across the British Empire.

3. The criminalisation of sex between men in the United Kingdom and the British Empire

The criminalisation of same-sex sexual behaviour between men in Britain has been described as reflecting a 'punitive tradition' of law (West and Wöelke 1997, p. 197), a consequence of what Weeks has referred to as a 'long tradition in the Christian West of hostility towards homosexuality' (Weeks 1989, p. 99). These legal and cultural traditions formed the backdrop to the criminalisation of same-sex behaviour across the British Empire. A discussion of criminalisation and decriminalisation in the United Kingdom is provided in the chapter by Waites (this volume), which explains distinct histories and legal systems in the regions of England and Wales, Scotland and Northern Ireland that comprise the state (together with smaller island territories), but developments can be briefly summarised here.

An Act of Tudor King Henry VIII in 1533 outlawing the 'abominable vice of buggery' brought previous ecclesiastical (Church) law prohibitions into statute law, applying to all forms of anal penetration with woman, man or beast, and subject to the death penalty in England, Wales and Ireland until 1861 (Weeks 1977, pp. 11–22; Moran 1996, pp. 21–88). 'Attempted buggery' could also be tried as an offence. Similarly in Scotland 'sodomy' was outlawed, although this applied only to sex between men; the death penalty was abolished by the Criminal Procedure (Scotland) Act 1887 (Dempsey 1998, p. 156). Harry Cocks (2003) has analysed the way 'attempted buggery' was used to an increasing degree in the 19th century to encompass many broader forms of sexual activity between men – such as masturbation or oral sex (see also Cook 2007). In Scotland the common law offence of 'shameless indecency' was also increasingly used (Dempsey 1998, p. 156). Meanwhile, importantly, same-sex sexual behaviour between women was not encompassed by the laws on buggery or sodomy, and hence tended to escape regulation via criminal law (Edwards 1981).

A key development was the creation of the offence of 'gross indecency' in the Criminal Law Amendment Act 1885 (Weeks 1989, p. 87, pp. 96–121). This Act applied throughout the UK. Section 11 of the Act stated:

> 11. Any male person who, in public or private, commits, or is party to the commission of, or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

This occurred in the context of social purity movements led by middle class moralists and feminists, campaigning against prostitution and for the defence of the family (Waites 2005, pp. 67–87). 'Gross indecency' was significant for broadening the perceived scope of the criminal law; while its scope was not specified in terms of precise sexual acts, the terminology could be interpreted to encompass all sexual acts between men. The new offence was initially little noticed, and did not mark a revolutionary turning point (Brady 2005), but it came into greater prominence and usage when it was used to successfully prosecute the writer Oscar Wilde in 1895 (Weeks 1981; Waites 2005, p. 85).

Lesbianism became more defined by the new sexology of the early 20th century, and there was a deliberate move to regulate same-sex behaviour involving young women under the age of 16 via a gender neutral section on 'indecent assault' in the Criminal Law Amendment Act of 1922 (Waites 2005, pp. 88–96). A parliamentary attempt to criminalise all sex between women in 1921 was unsuccessful, however, due to the desire of MPs to maintain the social invisibility of lesbianism. Therefore sex between women remained almost entirely unregulated by criminal law in Britain through the 20th century.

The way in which English law influenced the creation of criminal laws in the British colonies has been described in detail and critically analysed in the groundbreaking Human Rights Watch report *This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism*, authored by Indian scholar Alok Gupta with Scott Long (Human Rights Watch 2008; an edited version is reprinted in this volume). As that report emphasises, these laws were imposed undemocratically by the British Empire, primarily reflecting dominant British Christian morality, rather than values in the societies concerned. Most such laws were broad prohibitions which applied irrespective of consent. The main starting point for colonial criminalisation was the creation of the Indian Penal Code in 1860. Prohibitions were then enacted in states across the Empire, as *This Alien Legacy* explains (Human Rights Watch, this volume).

The first move by the British authorities to criminalise same-sex behaviour between men in the colonised territories was in India, via Section 377 of the Indian Penal Code when it was first enacted in 1860, subsequently coming into force in 1861 (Ranchhoddas and Thakore 1967; cf. Waites 2010).

> Section 377: Unnatural Offences – Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment … for a term which may extend to 10 years, and shall be liable to fine.
>
> Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this Section.

The terminology used in Section 377 was then extended gradually across other territories during the following century, in Asia, the Pacific Islands and Africa, with a somewhat different process applied in the Caribbean, using the term 'buggery'. Such laws were introduced by imperial rulers with the aim of bringing European morality to the indigenous populations. Their interpretation by courts was often extended over time to encompass 'receiving' partners in penetrative sex and sometimes, as in India, other sexual acts such as oral sex and 'thigh sex' – rubbing the penis between the thighs (Human Rights Watch 2008, pp. 36–45).

But it was after the creation of 'gross indecency' in Britain in 1885 that many new prohibitions across the Empire were created, incorporating versions of that offence to achieve a similarly broad scope. For example these appeared in the Sudanese Penal Code of 1899, and in Malaysia and Singapore in 1938 (Human Rights Watch 2008, pp. 20–1). There were various versions, such as in the Penal Code created for Queensland in Australia in 1901, which made clear that a passive or receiving partner was also criminalised, and also prohibited 'attempts to commit unnatural offences'. This influenced subsequent formulations in Africa, such as Uganda's version which criminalised all attempts at anal intercourse or 'gross indecency' (Human Rights Watch 2008, pp. 7, 22–4).

In relation to sex between women, a potentially significant feature of colonial criminalisation was that the typical legal formulation in terms of 'unnatural offences' and 'carnal intercourse against the order of nature with any man, woman or animal' – as in Section 377 – left the gender of the perpetrator unspecified. Whereas in the UK offences of buggery (in England and Wales) and sodomy (in Scotland) were always interpreted as being perpetrated by a male, colonial legislation left more ambiguity. However, while 'carnal intercourse against the order of nature' in India has been used to apply to masturbation of a penis with fingers (Waites 2010, p. 974), it has 'never been used to prosecute … a lesbian couple' (Narrain 2004, p. 151). 'Gross indecency', when introduced in colonised territories, was also formulated as an offence by a male (Human Rights Watch 2008, pp. 48–51). In practice these formulations thus appear to have had limited effect for women during the period of Empire. Sexual agency between women was in any case usually unimaginable, hidden, or possible for men to socially control in a patriarchal context without turning to law – although there is certainly scope for more empirical legal history research.

Yet from the 1980s, following decolonisation, certain states such as Malaysia and Sri Lanka reformulated 'gross indecency' in gender neutral ways in order to

encompass sex between women (Human Rights Watch 2008, pp. 50–1). In the context of post-colonial anti-homosexual nationalisms, existing laws thus now run the risk of being extended to criminalise same-sex sexual behaviour between women. ILGA's key global report, *State-sponsored Homophobia*, discussed in detail in the following section, presents its overall data without distinguishing between criminalisation of female/female and male/male same-sex sexual behaviour, although distinguishing these in individual state commentaries (Itaborahy 2012). This theme and the exact form of laws in different states with respect to gender merit much further investigation.

Returning to the history of the law in Britain, the turning point in public debates over homosexuality came in 1954, with the British government's creation of a joint committee of the Home Office and Scottish Home Department, which became known (after its chairman John Wolfenden) as the Wolfenden committee, to examine the regulation of homosexuality and prostitution. This led to publication of the Wolfenden report in 1957 (Committee on Homosexual Offences and Prostitution 1957). The Wolfenden report provided the main rationale for the partial decriminalisation of sex between men in England and Wales via the Sexual Offences Act 1967 (Weeks 1977; Weeks 1981, pp. 239–48; Waites 2005, pp. 96–118), later replicated in Scotland in 1980 (Dempsey 1998) and Northern Ireland in 1982 (Jeffery-Poulter 1991, pp. 147–54). An international conference 'Wolfenden50: Sex/life/politics in the British World 1945–1969', organised by Graham Willett, Ian Henderson and others at King's College London in June 2007, took the Wolfenden report's 50th anniversary as an opportunity to assess its impact on decriminalisation struggles in states worldwide (papers have not been published together, but see Weeks 2007; Day 2008; Bennett 2010; Willett, this volume).

Crucially, the Wolfenden report proposed only a *partial* decriminalisation of sex between adult men, to apply only in *private*, with a minimum age of 21, higher than the age of 16 applying for a female engaging in sexual intercourse. Furthermore, when the Sexual Offences Act was considered by the Westminster parliament in 1967 it was amended to create a particularly strict definition of privacy applying only to 'homosexual acts', such that only two men could participate in sexual behaviour together, and that sex in a public toilet cubicle would remain illegal. Moreover, the Wolfenden report endorsed a range of medicalising and psychologising research and treatments for homosexuality, which Moran (1996, p. 115) has termed 'strategies of eradication', illustrating that partial decriminalisation was considered a pragmatic means to manage a social problem medically and socially rather than legally. Homosexuality continued to be regarded as an undesirable condition, within a heteronormative framework of understandings, if we understand heteronormativity as 'the institutions, structures of understanding and practical orientations that make heterosexuality seem not only coherent – that is organised as a sexuality – but also privileged' (Berlant and Warner 1998, p. 548).

Important and enduring analyses of the Wolfenden report and the Sexual Offences Act 1967 were produced in the 1970s by radical sociologists and criminologists, including figures from the National Deviancy Conference (such as Jock Young, Stuart Hall, Jeffrey Weeks, Frank Mort: Waites 2005, pp. 104–14). These emphasised that only partial decriminalisation of sexual acts between men had been enacted, and that this had occurred through a double-sided strategy of both permissiveness and control. This pattern was simultaneously discerned in the Wolfenden report's approach to prostitution, maintaining the legality of an individual act of selling sex while creating harsher penalties for soliciting and running brothels in order (in theory) to keep prostitution out of public view (Day 2008). It was also consistent with reforming approaches to other issues, such as abortion and drugs, which favoured limited decriminalisation accompanied by medicalisation and restricted access mediated by professional authorities – rather than individual choice (Weeks 1989). Leslie J. Moran (1996, pp. 91–117) has provided the most elaborated discussion of how the decriminalisation in 1967, apparently paradoxically, constituted the notion of homosexuality in law through the Act's novel usage of the term 'homosexual act'; hence pre-existing offences of buggery and gross indecency were reinterpreted and reclassified as 'homosexual offences' with reference to the modern category of the homosexual deriving from sexology. Waites's chapter in this volume provides a systematic re-examination of these various existing critical analyses of the Wolfenden report and the 1967 partial decriminalisation, showing how rationales of liberal tolerance and containment were operating, rather than of equality, and offering theoretical frameworks for conceptualising struggles over decriminalisation.

It is important to note that the UK was a founding signatory of the European Convention on Human Rights in 1950, as a member of the Council of Europe. Hence, although the Convention was not a major reference point in the Wolfenden report, the rights within it, including privacy, had some influence on the climate of legal opinion that informed the report's formulation (Waites 2005, pp. 111–13). While initially not possible to invoke directly in British courts, the Convention was the basis for crucial rulings asserting privacy with respect to sexual orientation, such as in the case of Dudgeon (European Court of Human Rights 1981), more so – and on gender identity – since becoming embedded in UK law via the Human Rights Act (1998). Hence Europe and the Convention were factors in decriminalisation, and more so in wider disputes from the 1990s over UK law and policy on sexual orientation and gender identity (Kollman and Waites 2011, pp. 187–9), particularly important in Northern Ireland (Feenan et al. 2001).

Having discussed the history of criminalisation of sex between men across the British Empire, and the first decriminalisation in the Commonwealth in England and Wales, subsequent developments throughout all Commonwealth states will now be explored.

4. Decriminalisation and developing law in the Commonwealth

This section provides the first systematic analysis of data on laws related to sexual orientation and gender identity in Commonwealth states. It provides an original representation, in two tables, of such laws in all Commonwealth states, followed by the first systematic statistical analysis and discussion of data on such laws. If we consider the 54 Commonwealth states listed by the Commonwealth Secretariat (2011b) in relation to the authoritative annual global survey published in May 2012 by ILGA, authored by Lucas Paoli Itaborahy, then legal information can be summarised in Table 1.1, below. There are many further footnotes with additional detailed information in the original report, so readers are strongly advised to check details on all laws in the original report available online (Itaborahy 2012), and to seek primary sources at a national level where possible. Where a date is given in the first column, for Cameroon, this indicates a date given by ILGA for the introduction of a law criminalising same-sex sexual acts. Where information is not given, this reflects the original report.

Table 1.2 compares numbers and percentages of states with laws on sexual orientation and gender identity globally, in the Commonwealth and outside the Commonwealth, presented using all the categories used in the ILGA report.

All numerical data is from the ILGA report (with percentages calculated and added by the present authors), except in the 'Total' categories, where data on UN and Commonwealth membership is from the websites of the United Nations (2013) and Commonwealth Secretariat (2013) as of 11 March 2013. All statistics in Table 1.2 are calculated to one decimal place. For Table 1.2, where only certain regions within a state are covered, the state is not included in calculations, except where noted for the death penalty category. The editors acknowledge that some argue that certain issues covered in Table 1.2 such as 'same-sex marriage' do not relate to this book's theme of 'human rights' – this remains a contested issue – but being concerned with human rights and social change in their broad context, it will be convenient for readers to have all the data in ILGA's report analysed together here. In Table 1.2 figures in column 1 differ in places from headline figures presented by Itaborahy's ILGA report but represent our interpretation of data on individual states as given in that report.

Table 1.1: Sexual orientation, gender identity and law in Commonwealth states

Y = Yes
N = No

Country	Same-sex acts legal	Equal age of consent	Prohibited employment discrimination – sexual orientation	Prohibited employment discrimination – gender identity
Antigua and Barbuda	N	N	N	N
Australia				1996
- South Australia	1972	1975	1986	1986
- Victoria	1981	1981	1996	2000
- New South Wales	1983	2003	1983	1996
- Northern Territory	1984	2004	1993	1993
- Western Australia	1990	2002	2002	2001
- Queensland	1991	N	1992	2003
- Norfolk Island	1993	1993		
- Tasmania	1997	1997	1999	1999
- Capital Territory			1992	1992
The Bahamas	1991	N		
Bangladesh	N			
Barbados	N			
Belize	N			
Botswana	N		2010	
Brunei Darussalam	N			
Cameroon	N (1972)			
Canada	1969	N [higher age for anal sex]	1996	Northwest Territories 2004
Cyprus	1998	2002	2004	
Dominica	N			
Fiji Islands[1]	2010	2010	2007	
The Gambia	N			
Ghana	N			
Grenada	N			
Guyana	N			
India	2009 (except Jammu and Kashmir: N)			

Jamaica	N			
Kenya	N			
Kiribati	N			
Lesotho	N			
Malawi	N			
Malaysia	N			
Maldives	N			
Malta	1973	1973	2004	
Mauritius	N		2008	
Mozambique	N		2007	
Namibia	N		N	
Nauru	N			
New Zealand	1986	1986	1994	
Nigeria	N [death penalty in 12 states]			
Pakistan	N			
Papua New Guinea	N			
Rwanda	Y	N		
Saint Kitts and Nevis	N			
Saint Lucia	N			
Saint Vincent and the Grenadines	N			
Samoa	N			
Seychelles	N		2006	
Sierra Leone	N			
Singapore	N			
Solomon Islands	N			
South Africa	1998	2007	1996	
Sri Lanka	N			
Swaziland	N			
Tonga	N			
Trinidad and Tobago	N			
Tuvalu	N			
Uganda	N			

United Kingdom - England and Wales - Scotland - Northern Ireland	 1967 1981 1982	2001	2003	Y
United Republic of Tanzania	N			
Vanuatu	2007	2007		
Zambia	N			

1 Suspended from Commonwealth since 1 September 2009 (Commonwealth Secretariat 2013).

Table 1.2: Comparison of Commonwealth and non-Commonwealth states

	All States	Commonwealth (C) States	Non-Commonwealth (N-C) States
Total [data from UN and Commonwealth in this row only]	193 (UN Member States)	54 (28% of UN Member States)	139 (72% of UN Member States)
Same-sex acts legal	113 (plus 2 status unclear: India and Iraq)	12 (see Table 1.1) – 22.2% of C states – 10.6% of all states	101 – 72.7% of N-C states
Same-sex acts illegal	78	42 (see Table 1.1) – 77.8% of C states – 53.8% of all states	34 –24.5% of N-C states
Same-sex acts punishable with death penalty in some or all regions	7	1 (12 northern states within Nigeria) – 1.9% of C states – 14.3% of all states	6 – 4.3% of N-C states
Equal age of consent	99	8 (see Table 1.1) – 14.8% of C states – 8.1% of all states	91 – 65.5% of N-C states
Unequal age of consent	15	3 (The Bahamas, Canada, Rwanda) – 5.6% of C states – 20% of all states	12 – 8.6% of N-C states
Prohibited employment discrimination – sexual orientation	52	12 (see Table 1.1) – 22.2% of C states – 23.1% of all states	40 – 28.8% of N-C states

Prohibited employment discrimination – gender identity	19	2 (Australia, United Kingdom) – 3.7% of C states – 10.5 % of all states (Plus Northwest Territories in Canada)	17 – 12.2% of N-C states
Constitutional prohibition of discrimination – sexual orientation	7	1 (South Africa) – 1.9% of C states – 14.3% of all states (Plus UK associate British Virgin Islands)	6 – 4.3% of N-C states
Hate crimes based on sexual orientation considered aggravating circumstance	20	3 (Canada, New Zealand, United Kingdom) – 5.6% of C states – 15% of all states	17 – 12.2 % of N-C states
Hate crimes based on gender identity considered an aggravating offence	5	1 (United Kingdom) – 1.9% of C states – 20% of all states	4 – 3.5% of N-C states
Incitement to hatred based on sexual orientation prohibited	25	3 (Canada, South Africa, United Kingdom) – 5.6% of C states – 12% of all states (Plus majority of federal states of Australia)	22 – 15.8% of N-C states
Same-sex marriage	10	2 (Canada, South Africa) – 3.7% of C states – 20% of all states	8 – 5.8% of N-C states
Same-sex registered partnerships and civil unions other than marriage	13	2 (New Zealand, United Kingdom) – 3.7% of C states – 15.4% of all states (Plus majority of federal states of Australia)	11 – 7.9% of N-C states
Same-sex couples offered some rights of marriage	9 (including Australia)	1 (Australia) – 1.9% of C states – 11.1% of all states	8 – 5.6% of N-C states

Joint adoption by same-sex couples	13 (including UK)	2 (South Africa, United Kingdom) – 3.7% of C states – 15.4% of all states (Plus majority of Canadian provinces and minority of federal states in Australia)	11 – 79.1% of C states
Legal gender recognition after gender reassignment treatment	18	4 (Australia, New Zealand, South Africa, United Kingdom) – 7.4% of C states – 22.2% of all states (Plus most parts of Canada)	14 – 10.1% of N-C states

Analysis of the data from the report, taking the 193 members of the United Nations as the basis for global comparisons, suggests some general patterns and trends. Most importantly, it is clear that Commonwealth countries perform badly relative to all states globally when assessed according to almost all legal measures. As already mentioned, the Commonwealth includes 42 (53.8 per cent) of the 78 states which continue to criminalise same-sex sexual behaviour, and only 12 (10.6 per cent) of 113 where it is legal; the ILGA report shows that almost all the non-Commonwealth states which continue criminalisation are found in Africa and Asia, many with Muslim majority populations. With respect to age of consent laws, only eight of the 99 states that have an equal age of consent are Commonwealth states. This suggests that the criminalisation of same-sex sexual behaviour by the British Empire, and associated colonial culture, have had a lasting negative impact.

It should be recognised, however, that laws in Commonwealth states that criminalise same-sex sexual behaviour do not all exist in the form of the same legal statutes that were enacted by the British. This is clear in one case in the table, where Cameroon has a date of 1972 noted for criminalisation, indicating the creation of new legislation. Individual accounts of states in ILGA's report and website provide more detail, revealing that in several cases the laws have been recodified in new forms; for example Gambia's Criminal Code of 1965 is cited as amended by the Criminal Code (Amendment) Act 2005, which broadens the scope of the law including by encompassing 'any other homosexual act' (The Gambia 2005; Itaborahy 2012, p. 28). However, it can be argued that criminalisation by the British Empire has had longstanding social and legal effects in these societies, as in the Gambia example where colonial prohibitions are renewed through deployment of the Wolfenden committee's concept of a 'homosexual act' (Moran 1996).

As Table 1.1 shows, decriminalisation was initiated in England and Wales in 1967 and such reform initially followed in Canada in 1969, then in Australian states beginning in 1972, Malta (1973), Scotland (1981), Northern Ireland (1982) and New Zealand (1986). However, over the past two decades decriminalisation has also taken place in The Bahamas (1991), Cyprus (1998), South Africa (1998), Vanuatu (2007), India (2009) and Fiji (2010). This demonstrates that change has occurred across continents in recent years, including in Africa, Asia and Oceania. Decriminalisation has occurred in some of the regions that tend to be most sexually conservative with respect to same-sex sexual behaviour, including in the Caribbean, South Asia and Southern Africa. These recent changes bring hope for change throughout the world, and can perhaps provide lessons for struggles in nearby states and elsewhere.

The ILGA report data shows clearly that European states, of which there are now 47 within the Council of Europe's human rights system, are particularly likely to have decriminalised same-sex sexual behaviour and adopted equality laws. Council of Europe states make up almost a quarter of UN-recognised states, yet only three Commonwealth states fall in this European category (UK, Malta, Cyprus). Hence this positive approach in Europe, which has a small proportion of Commonwealth states, partly accounts for the relatively poor showing of Commonwealth states relative to others globally. It also illustrates the potential impact of a human rights approach, since (in the terms of political process and social movement theories used in political science and sociology) where human rights are legally available they significantly change 'political opportunity structures' available to social movements – change cannot only be explained with reference to 'resource mobilisation' theories and movement agency from below (Kollman and Waites 2011, pp. 187–8).

Turning to the equalisation of age of consent laws, we see similar patterns to those for decriminalisation. Equalisation commenced in 1975 in South Australia, although remains an incomplete process in Australia's federal state of Queensland. Some states achieved an equal age at the same time as they decriminalised same-sex sexual behaviour – Malta (1973), New Zealand (1986). In the UK equalisation of the age of consent occurred via legislation in 2000 that came into effect in 2001. More recently, such equalisations have occurred in Cyprus (2002), South Africa (2007), Vanuatu (2007) and Fiji (2010). But, despite some recent changes in the Pacific and South Africa, there are no equalisations yet in South Asia or the Caribbean.

Of the 15 states listed by ILGA as having legal adult same-sex sexual activity but an unequal age of consent, only three (20 per cent) are in the Commonwealth: Canada, The Bahamas and Rwanda (which was not a British colony); the Australian state of Queensland is also mentioned. In Canada and Queensland the legal age for each sexual act has been equal for some time, but there is a higher age of 18 for anal intercourse and for this reason ILGA lists Canada and Queensland as having an unequal age, because of the importance

of anal intercourse in the context of many male same-sex relationships. With this in mind, the pattern suggests that where Commonwealth states formerly in the British Empire have decriminalised in the past decade, they have tended – with the exception of The Bahamas – to formally establish equal age of consent laws. We suggest this might represent a 'Commonwealth effect' whereby there is a social and/or political influence within the Commonwealth from or towards states that have already established an equal age of consent. There is also a 'human rights effect' from the growth of international human rights case law in favour of equality with respect to age of consent laws – as in the European Commission of Human Rights (1997) ruling on the case of UK gay teenager Euan Sutherland (Waites 2005, p. 160).

Waites has analysed the process of equalising the age of consent in the United Kingdom as operating within a 'rationale of containment' which presumed the fixity of sexual identities – as asserted by certain biomedical and psychological authorities – by the time the age of consent of 16 was attained (Waites 2005). More recently, Waites has noted how, in the Indian case, movements for decriminalisation, led by the Voices Against 377 campaign, were influenced by a colonially-originating definition of childhood as under 18, expressed in colonial law on the age of majority and now also circulating in international children's rights discourses (Waites 2010). These analyses suggests theoretical frameworks which can be used or adapted and altered to suggest why equalisation is not happening, or the restricted terms on which it is happening, in various Commonwealth states (see also Waites, this volume).

Turning back to Table 1.1 to consider employment discrimination, it can be seen that the Commonwealth states perform poorly by global average standards. Of 52 states listed by ILGA as providing protection against employment discrimination for sexual orientation, which constitute 26.9 per cent of UN Member States, only 12 are in the Commonwealth. With respect to employment discrimination related to gender identity, only two Commonwealth states – Australia and the United Kingdom – offer protection across their territory, as compared to 19 states worldwide (10.5 per cent). By way of contrast, European states influenced by the Council of Europe's human rights system overwhelmingly offer employment protection related to sexual orientation, and include 18 of the 19 states to offer this in relation to gender identity.

Focusing further on the employment discrimination data in the Commonwealth, however, a more interesting, diverse and promising picture than that existing for decriminalisation or equalisation of the age of consent is to be found. Moves to prohibit employment discrimination again commenced in states of the global North and proceeded in a broadly familiar sequence: Australia (1983–2002), New Zealand (1994), Canada (1996), South Africa (1996) United Kingdom (2003), Cyprus (2004) and Malta (2004). However, recent developments show more diversity: Seychelles (2006), Fiji Islands

(2007), Mozambique (2007), Mauritius (2008) and Botswana (2010). The cases of the Seychelles, Mozambique, Mauritius and Botswana show change in relation to the African continent. While Seychelles and Mauritius are small island states with distinctively multi-ethnic populations and considerable international influence via tourism, the cases of Mozambique and Botswana are more interesting. Both are neighbours of South Africa and hence their adoption of anti-discrimination laws in relation to employment could be interpreted as evidence of a diffusion effect from South Africa's progressive approach – to be discussed below. Mozambique enacted change via articles 4, 5 and 108 of its Labour Law 23/2007, which endorse a 'right to privacy'; Botswana's change in its Employment Act removed both sexual orientation and health as grounds for dismissal (BONELA 2010; Tabengwa with Nicol, this volume).

The ILGA report yields further information. Regarding the death penalty, one Commonwealth state, Nigeria, maintains the death penalty for same-sex sexual behaviour in 12 of its northern states where Islamic shariah laws apply. Regarding constitutional prohibitions on sexual orientation discrimination, these exist in seven states worldwide, but only South Africa within the Commonwealth (14.3 per cent), plus the United Kingdom associate territory of the British Virgin Islands, although Fiji also held such a provision between 1997 and 2009 when its Constitution changed (Itaborahy 2012, p. 17). The contrast between the death penalty and the existence of constitutional protection against discrimination captures the breadth of the spectrum encompassing situations in the Commonwealth today.

'Hate crimes based on sexual orientation' are considered an aggravating circumstance under the law in 20 states worldwide, of which most are in Europe or Latin America but only three are in the Commonwealth: Canada (1996), New Zealand (2002) and the United Kingdom – Northern Ireland (2004), England and Wales (2005), Scotland (2010). That is only 5.6 per cent of Commonwealth states. 'Hate crimes based on gender identity', however, are considered an aggravating circumstance in only five states worldwide including four in Latin America but only one, the United Kingdom, is in the Commonwealth – again, Northern Ireland (2004), England and Wales (2005), Scotland (2010). Incitement to hatred based on sexual orientation is prohibited in 25 states worldwide, largely in Europe, including only three in the Commonwealth, representing 5.6 per cent of Commonwealth states: South Africa (2000), Canada (2004), and most parts of the United Kingdom – Northern Ireland (2004), England and Wales (2010), plus most parts of Australia – New South Wales (1993), Tasmania (1999), Queensland (2003), Capital Territory (2004).[4] Given that there are 54 Commonwealth states and

4 It is not clear why Itaborahy (2012, p. 18) includes the UK but not Australia, given the report's usual methodology of excluding states where only certain geographical

193 UN Member States, and hence approximately 28 per cent of the world's states are from the Commonwealth, it appears that Commonwealth states are much less likely than others to have anti-hate legislation.

Marriage for same-sex couples exists in ten states worldwide including Argentina together with European states but only Canada (2005) and South Africa (2006) in the Commonwealth, a mere 3.7 per cent of Commonwealth states. South Africa stands out as the first state in Africa to legalise same-sex marriage. Other forms of civil partnership, registered partnership or civil union similar to marriage also exist in 13 other states worldwide, including two Commonwealth states: the United Kingdom (2005) and New Zealand (2005), plus many parts of Australia: Tasmania (2004), Victoria (2008), Capital Territory (2008) and New South Wales (2010). Some rights equal to marriage have also existed in Australia's Northern Territory from 2004, Norfolk Island from 2006, Queensland from 1999, South Australia from 2003 and Western Australia from 2002; this applies only to Australia in the Commonwealth, among nine states globally. Joint adoption by same-sex couples is legal in 13 states worldwide including South Africa since 2002, together with the United Kingdom – England and Wales (2005), Scotland (2010) but not Northern Ireland),[5] plus most of Canada's provinces (1996–2009), and most of Australia – Western Australia (2002), Capital Territory (2004), New South Wales (2010). In sum, the Commonwealth performs poorly on same-sex marriage relative to all states globally, and on same-sex couple adoption.

Finally, in relation to gender identity, 18 states worldwide grant legal recognition of gender after gender reassignment surgery. Outside the Commonwealth such states include Japan, Turkey, Panama, Uruguay and ten European states. Within the Commonwealth these include four states, which is only 7.4 per cent of those in the Commonwealth: New Zealand (1995), Australia (federal states changed 1996–2001), South Africa (2004), United Kingdom (2005), plus most of Canada. Here a lack of diffusion of non-discriminatory approaches to gender identity can be noted, but in the African context can also note significant progress on this issue in South Africa.

As previously commented, the data on decriminalisation of same sex sexual behaviour clearly shows important legal reforms in many regions of the world over the past 20 years, including in post-colonial states of the global South such as The Bahamas (1991), South Africa (1998), Vanuatu (2007), India (2009) and Fiji (2010). Nevertheless, one can note a historical pattern in the data overall that the Commonwealth states which initially adopted a tolerant stance towards same-sex sexual behaviour were those still governed largely by ethnic descendants

parts have legal coverage; however, we reproduce the statistics here for consistency.

5 Again, it is not clear why ILGA include the United Kingdom given that joint adoption is not recorded as legal in Northern Ireland, but we repeat their statistics here for consistency.

of colonising populations: Canada, Australia and New Zealand stood out in this respect. The pattern is evident notwithstanding their increasingly multi-ethnic populations and some states' moves towards increased political participation of indigenous peoples and other less powerful ethnic groups.

This historical pattern is important to consider since concerns about racism and colonialism form an important part of the analytical framework through which it is appropriate to approach these issues, particularly because such concerns form part of the spoken or unspoken frameworks of understanding of politicians and/or peoples in many states yet to decriminalise. As social and political theorists have argued there is a need to address the specific issue of racism and its interplay with other inequalities including those related to class, gender and sexuality, nationalism, imperialism and colonialism (Hill Collins 1990; Miles 2003; Gilroy 2004; Puar 2007), not to inappropriately racialise the disputes but in order to identify and challenge existing racialisations. This is in accordance with the stated values of the Commonwealth, for example in the Singapore Declaration of 1971, which stated opposition to 'all forms of colonial domination and racial oppression' (Commonwealth Heads of Government Meeting 1971).

The 'civilising mission' imagined in the British Empire drew upon racist understandings. For some, that mission has contemporary resonances in the discourses and practices of Western governments and LGBT activists supporting a global extension of human rights in relation to matters such as sexual orientation and gender identity. Crude biological racism has somewhat declined and critical concern in the present has shifted to a greater focus on how both cultural dynamics and neo-liberal economics may reproduce power relations between national, ethnic and racialised populations. Yet, while overt racism is no longer part of the discourse of most governments, it remains important to consider how racism continues to operate. In particular there is a need to attend to 'cultural racism', a term used by Frantz Fanon (1998, p. 306) in *The Wretched of the Earth*, now increasingly used (together with others such as 'new racism') to conceptualise contexts in which biologically determinist racisms are repudiated, yet problematic cultural characteristics continue to be attributed to biologically defined groups (Solomos and Back 2000, p. 20). Certainly there is racism among some LGBT tourists (Binnie 2004, pp. 67–106), and sex tourists, for whom racialisation and hypersexualisation of people in a society may be inter-related (Sanchez Taylor 2006). LGBT tourists are often the first self-identified LGBT people to be encountered by those living in states where same-sex sexual behaviour is criminalised, and so play a key role in representations of difference.

However, it is also important to recognise how accusations of racism, as well as of neo-colonialism and cultural imperialism, may be strategically utilised by political leaders to justify continuing criminalisation, often to serve domestic political audiences and circumstances. Nowhere has this been clearer than in the

state of Zimbabwe, suspended as a Commonwealth member in 2002 prior to withdrawing in 2003. President Robert Mugabe has demonised homosexuality since the 1990s. The use of biologising metaphors concerning homosexuality as a 'white man's disease' in Zimbabwe illustrates that racist understandings are in some cases used by politicians, together with anti-colonial rhetoric, to distract from disastrous developments within society (Phillips 1997).

By contrast, if positive developments in the Commonwealth are sought, then South Africa shines as a beacon of hope in many respects – particularly relative to other states in Africa. As apartheid crumbled and the African National Congress (ANC) led by President Nelson Mandela came to power, South Africa was the first state in the world to introduce an anti-discrimination clause concerning sexual orientation in its new interim constitution of 1994, subsequently also in the final Constitution of 1997 (da Costa Santos, this volume; Gevisser and Cameron 1995; Gevisser 2000). This clause has led to developments including prohibitions on employment discrimination from 1996 and an equal age of consent from 2007. But South Africa has gone further, with a prohibition on incitement to hatred in relation to sexual orientation from 2000 and, most spectacularly, the creation of same-sex marriage via the Civil Union Act of 2006. Only Canada in the Commonwealth also has same-sex marriage; the United Kingdom notably does not – although on 5 February 2013 the House of Commons backed the second reading of the Marriage (Same Sex Couples) Bill by 400 to 175. Most recently it was South Africa which presented the first-ever UN Human Rights Council resolution adopted on human rights violations based on sexual orientation and gender identity (South African Permanent Mission to the United Nations 2011). Yet it must also be recognised that support for human rights related to sexual orientation and gender identity is now in jeopardy under the new leadership of President Jacob Zuma, who has described same-sex marriage as a 'disgrace to the nation'; progress cannot be taken for granted (Croucher 2011, pp. 163–4).

Given the distinctiveness of these developments in South Africa relative to all the rest of the Commonwealth, and particularly relative to other states in the global South and in Africa, it is worth carefully considering the causal influences and what they might imply for decriminalisation struggles in other states. This first requires a quick summary of the process of decriminalisation in South Africa, provided in more detail in the chapter by da Costa Santos (this volume). Historically, the common law had made sodomy a criminal offence, and criminal statutes had extended prohibitions – especially the Immorality Amendment Act 1969 which criminalised all sexual acts between two men where more than two were present, or where a man was aged below 19. However, new constitutional rights after the transition from apartheid made it possible to challenge such laws. One of the cornerstones of South Africa's transformation, from a racist authoritarian state to a constitutional democracy with a universal franchise led by President Nelson Mandela, was the adoption

of an entrenched Bill of Rights in the interim Constitution which came into force in 1994 – subsequently also embedded in the final Constitution of the Republic of South Africa, published in 1996.

From the ANC's initial draft Bill of Rights published in 1990 and the interim Constitution which came into force in 1994 onwards, the Bill of Rights included an Equality clause with 'sexual orientation' as an explicit category for which discrimination was prohibited with respect to rights. The Bill of Rights was guarded by a new Constitutional Court, the first members of which were appointed by President Mandela in 1994. These included Albie Sachs, who had argued for inclusion of sexual orientation in the ANC's initial draft Bill of Rights (Christiansen 2000, pp. 1026–7). A case brought to the Court by the National Coalition for Gay and Lesbian Equality (NCGLE) and another *v. Minister of Justice and Others* (1998), concerned the constitutionality of the criminalisation of sodomy. The Court unanimously decided that the prohibition contravened fundamental rights to human dignity, privacy and equality of rights without discrimination. It declared the relevant common law and statutory provisions to be unconstitutional and invalid (Gomes da Costa Santos, this volume).

Having been expelled due to apartheid in 1961, South Africa was not a member of the Commonwealth at the time its new interim Constitution was created. However, one important factor behind the Constitution's mention of sexual orientation seems to have been the establishment of support among the ANC leadership. The personal support of Mandela has been argued to have related to his acquaintance with Cecil Williams 'The Man who Drove with Mandela', a white homosexual chosen by the ANC to smuggle Mandela back into South Africa – a story recounted in the film *The Man Who Drove with Mandela* (1998) with a screenplay by leading South African gay writer Mark Gevisser (Williams gives an account of his own life in Porter and Weeks 1991). Mandela's appointment of Albie Sachs to the Constitutional Court in 1994, following Sachs's arguments for sexual orientation to be in the Bill of Rights' Equality clause, could certainly suggest his sympathies towards non-discrimination in that respect. But more generally it seems that the distinctive experience of exile and international political engagement of many ANC leaders had a significant impact on social attitudes to homosexuality in the ANC leadership – particularly where white homosexuals like Williams were participating activists in anti-racist struggles (Gevisser 2000, p. 118; Croucher 2011, p. 161). Also the activity from the mid 1980s of white gay anti-apartheid activists, who formed the Organisation of Lesbian and Gay Activists (OLGA) and pursued coalition building and membership of the United Democratic Front (UDF), is also credited with influencing leaders of the anti-apartheid struggle (Croucher 2011, pp. 156–7). This suggests the value of thinking about and focusing on how international LGBT movements might seek to work for social justice for states and peoples in the global South; and how this

in turn might lead to more progressive attitudes to sexuality and gender among Commonwealth state leaders.

However, it is also important to attend to more structural factors. Croucher (2011) emphasises the importance of openings in the 'political opportunity structure' – as theorised by Sidney Tarrow (1994) – which the transition to multi-racial democracy yielded. In this context, Croucher argues, 'a broad cultural frame of equality and non-discrimination took shape that made it difficult to deny rights of any sort' (2011, p. 157). From 1990 the ANC facilitated broad participatory processes of consultation on its draft Bill of Rights in which gay and lesbian activists took part (ibid., p. 158). Figures such as Anglican Archbishop Desmond Tutu also played an important role in arguing to the Constitutional Assembly that the final Constitution should ensure a human right to a sexual life for all, including homosexuals (ibid., p. 159). Croucher follows Neville Hoad and Natalie Oswin in placing heaviest emphasis on the global opportunity structure, and the need for South African activists to claim new legitimacy for their state in the international community (Croucher 2011, p. 162; Hoad 2005; Oswin 2007). This raises the strategic question of whether international movements for sexual rights should seek to entice national elites to obtain international recognition and legitimacy, or whether it would be more effective to emphasise the domestic value of human rights, and seek to emphasise the compatibility of human rights with diverse nationalisms. Gomes da Costa Santos discusses South Africa further in his chapter in this volume.

While there are grounds for optimism in places, the situation in Africa as a whole is not promising. It is the continent with the most extensive criminalisation of same-sex sexual behaviour, with a damaging impact on HIV/AIDS prevention. Over the past decade a number of African states have reacted against LGBT rights discourses. ILGA have foregrounded Africa in their annual report, with the comment that 'the possibility of liberation […] has been thrown into chaos' (Bruce-Jones and Itaborahy 2011). Debate has recently commenced in Nigeria over proposed laws to make same-sex marriage illegal. Anti-gay activity, often perceived in the West as an expression of indigenous cultures, is often being incited by certain faith-based organisations funded from abroad (see Ward, this volume). The trends, however, are not consistent: for example, the Rwandan parliament rejected Article 217 of the draft Penal Code of Rwanda that would have criminalised same-sex sexual relations and LGBT activism, citing the need to respect privacy.

This section has illustrated continuing criminalisation and legal discrimination which is pervasive in most Commonwealth countries, demanding urgent attention. Having demonstrated these inequalities, it is now time to examine the history of attempts to address these issues within the Commonwealth as an organisation, and discuss debates over the appropriateness of the Commonwealth as a vehicle for advancing human rights.

5. The role of the Commonwealth and NGOs: transnational and local activism, governmental and legal strategies

To understand debates over the appropriate role of the Commonwealth in relation to human rights disputes, it is first necessary to have an appreciation of the Commonwealth's imperial history, its institutional structures and its stated goals and values. Beyond formal arrangements and discourses an understanding of the economic and social power relations between its members is needed.

The Commonwealth of Nations was a concept originally used from the 1880s to refer to the British Empire, but was reconstituted from the London Declaration of 1949 to refer to a voluntary association of formally equal states. In formal institutional terms, key political decision making and disputes in the Commonwealth tend to come into focus at biennial Commonwealth Heads of Government Meetings (CHOGMs), the decisions of which are implemented by Member States in cooperation with the Commonwealth Secretariat. The Secretary General of the Commonwealth, currently Mr Kamalesh Sharma, is the principal global advocate of the Commonwealth and Chief Executive of the Secretariat. The Head of the Commonwealth has twice been the reigning British monarch, currently Queen Elizabeth II, although the hereditary nature of the position is disputed (Murphy and Cooper 2012).

The key document defining the ideals and values of the Commonwealth was the Singapore Declaration of Commonwealth Principles, agreed at the CHOGM in 1971. This mentioned values including 'peace', 'liberty of the individual', 'equal rights of all citizens', 'free and democratic political processes', 'human dignity and equality', opposing 'racial discrimination' and 'colonial domination' and overcoming 'poverty, ignorance and disease'. Notably this declaration did not explicitly mention human rights. Not until the Harare Commonwealth Declaration, made in Zimbabwe by the CHOGM (1991), was there endorsement of 'fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief', together with 'equality for women' and other themes. This illustrates that a human rights discourse has only arrived at the centre of the Commonwealth's agenda in the past two decades, although clearly preceded by decolonisation and the anti-apartheid struggle. It can also be noted that while there was explicit mention of equal rights in relation to race and in relation to women, there was no mention of sexual orientation or gender identity – a characteristic absence in international declarations of that time. Situations concerning serious or persistent violations of the Harare Declaration are to be addressed by the Commonwealth Ministerial Action Group (CMAG), a rotating group of nine foreign ministers.

The two goals of the Commonwealth Secretariat, stated in its Strategic Plan, focus on promoting 'Peace and Democracy' and 'Pro-Poor Growth and Sustainable Development'. The first 'Democracy pillar' concerns 'promoting

Commonwealth fundamental political values': 'We aim to support member countries to prevent or resolve conflicts, strengthen democratic practices and the rule of law, and achieve greater respect for human rights' (Commonwealth Secretariat 2012). Work for this first goal is carried out under four programmes including one on 'human rights'. Regarding the second goal, it can be noted that human rights are increasingly integrated into many conceptions and measures of 'development'. So it is clear that human rights are now formally central to the goals and programmes of the organisation.

It is important to recognise and document activist lobbying of the CHOGM on sexual orientation and gender identity issues over recent years, particularly that by people in the global South which has involved brave acts of coming out in public forums, sometimes resulting in abuse. Sexual Minorities Uganda (SMUG) lobbied the November 2007 meeting in Kampala, Uganda, by seeking to participate in the Commonwealth People's Space, wearing T-shirts saying 'Sexual Minorities Uganda Embraces CHOGM'. Other NGOs including Gay and Lesbian Coalition of Kenya (GALCK), and Horizon Community Association (HOCA) from Rwanda also participated. Abuse received from certain individuals included 'You don't deserve to be on earth, not here! Lesbians, lesbians … where is security? … lock them up'; and some SMUG members were forcibly ejected (Sexual Minorities Uganda 2007). More positively, the Commonwealth People's Forum statement to the CHOGM that emerged called on Commonwealth Member States for the first time to 'include issues concerning minority rights, such as … the rights of … gay and lesbian people' (Commonwealth Foundation 2007, para. 97e). Yet the limits of Commonwealth government attitudes remained clear in 2008 when only seven Commonwealth states – Australia, Canada, Cyprus, Malta, Mauritius, New Zealand and the UK – initially signed up to the groundbreaking *Statement on Human Rights, Sexual Orientation and Gender Identity* by 66 states at the United Nations General Assembly (United Nations General Assembly 2008).

At the 2009 CHOGM in Trinidad and Tobago there was a contrasting Commonwealth People's Forum in which Stephen Lewis, Co-Director of AIDS-Free World, gave a passionate speech condemning the Anti-Homosexuality Bill first proposed in Uganda in that year, describing the Bill as a 'veritable charter of malice' implying 'a moment of truth for the Commonwealth' which put 'the Commonwealth's legitimacy and integrity to the test' (Lewis 2009). Lewis noted the lack of any comment from President Museveni of Uganda who was chairing the CHOGM: 'he makes a mockery of Commonwealth principles'. As Lewis rightly argued, Uganda's Anti-Homosexuality Bill – which has resurfaced since November 2011 – jeopardises effective action to address HIV/AIDS, contravenes human rights and has 'the taste of fascism'. With Robert Carr of Caribbean Vulnerable Communities Coalition, Lewis made the case at the summit for decriminalisation to allow effective action to address HIV/AIDS (CHOGM 2009).

Around the 2009 CHOGM there was some positive movement forward. The Commonwealth Secretariat, Commonwealth Foundation, International HIV/AIDS Alliance and Commonwealth HIV/AIDS Action Group co-authored a position paper, 'Supporting the Commonwealth response to HIV: Commonwealth Law Reform as a central key to respecting human rights and understanding HIV' (2009). This illustrates broad activist and NGO movements coming together with elements in Commonwealth institutions to advance the case for decriminalisation with an emphasis on the HIV/AIDS issue, illustrating that an emphasis on HIV/AIDS has now emerged as a key argument, allied to a human rights-based approach. The position paper cited research that in Kenya for Men Who Have Sex With Men (MSM) HIV prevalence is 43 per cent compared to 6 per cent national prevalence, while in Jamaica research suggests it is 25–30 per cent for MSM compared to 1.5 per cent nationally (amFAR 2009). It also noted that MSM who do not identify as gay are often particularly difficult to reach via health initiatives, and therefore criminalisation poses a particularly major problem for addressing the health needs of MSM. Over 60 per cent of people with HIV/AIDS globally live in Commonwealth states according to the Commonwealth Secretariat (2007).

The 2009 Commonwealth People's Forum also produced a statement to the CHOGM which advanced human rights issues using more elaborated language than in 2007. This referred to the need to support evidence-based effective HIV prevention, treatment and care for 'sexual minorities', to end 'criminalisation of same sex sexual relationships' and to respect human rights 'without discrimination' on grounds of 'sexual orientation and gender identity and/or expression' (Commonwealth Foundation 2009). 'Transgenders' were mentioned in the Gender section.

In May 2011 the British gay activist Peter Tatchell published criticism of the Commonwealth as a 'bastion of homophobia' (2011a). Within ten days the Secretary General of the Commonwealth Kamalesh Sharma published an article in a Kenyan newspaper clarifying his view that the Commonwealth should support human rights in relation to 'discrimination on grounds of sexual orientation'. He stated that 'homophobia' should be 'challenged'; 'the vilification and targeting of gay and lesbian people runs counter to the fundamental values of the Commonwealth' (Sharma 2011).

In March 2011, at the UN Human Rights Council, 85 states endorsed a groundbreaking joint statement, *Ending acts of violence and related human rights violations based on sexual orientation and gender identity* (UN Human Rights Council 2011). This was signed by 16 Commonwealth states including a number which have not decriminalised same-sex sexual behaviour: Dominica, Nauru, Samoa, Seychelles, Sierra Leone and Tuvalu. Rwanda also backed the motion. This vote thus represented a breakthrough and suggested possibilities for progress in these states in the future. In June 2011 a second landmark event at the Human Rights Council was the passing of the first-ever resolution

on sexual orientation and gender identity at the United Nations (United Nations 2011). This focused on violence but also addressed discriminatory laws. Commonwealth states co-sponsoring the resolution were Australia, Canada, Cyprus, New Zealand, South Africa and the UK, with supporting states including Mauritius. However, more Commonwealth states voted against the resolution: Bangladesh, Cameroon, Ghana, Malaysia, Maldives, Nigeria, Pakistan and Uganda, with Zambia abstaining (International Service on Human Rights 2011).

In the run-up to the most recent CHOGM in Perth, Australia, in October 2011, there was extensive lobbying. The Commonwealth Human Rights Initiative organised a *Civil Society Statement of Action on the Decriminalisation of Same Sex Conduct in the Commonwealth*, which was tabled also at the conference in London from which this book originates. This statement, addressed to both the Commonwealth Secretariat and Member States, was subsequently endorsed by 26 NGOs including Amnesty International, ILGA, Pan Africa ILGA, Naz Foundation International, J-FLAG, Coalition Against Homophobia in Ghana, Justice for Gay Africans, Commonwealth Lawyers Association, and The Equal Rights Trust (Commonwealth Human Rights Initiative 2011). The statement emphasised the incompatibility of criminalisation with Commonwealth values, and described criminalisation laws as operating 'in a manner that is directly analogous to practices that underpinned apartheid and white majority rule'. It called for states to introduce anti-discrimination legislation, together with enforcement of existing laws against threats, harassment and violence, and commented that: 'This is an issue where the Commonwealth now needs to take a clear lead'. The statement called for the Secretary General to make a formal statement on the incompatibility of criminalisation with Commonwealth values; and for the Secretariat to create an official and independent working group, tasked with making biennial reports on the status of decriminalisation in the Commonwealth. The conclusion commented that 'The Commonwealth's future as a values-based organisation is dependent upon action on this issue' (Commonwealth Human Rights Initiative 2011).

The International HIV/AIDS Alliance (2011) also organised a campaign ahead of the CHOGM. It led to 75,000 petition letters to Commonwealth governments to 'take steps to encourage the repeal of laws that may impede the effective response of Commonwealth countries to the HIV/AIDS epidemic' (International HIV/AIDS Alliance 2011). Peter Tatchell wrote to the Secretary General and the British Foreign Secretary William Hague in the run-up to the CHOGM and encouraged wider activist lobbying, urging decriminalisation, anti-discrimination laws on sexual orientation and gender identity and enforcement of laws prohibiting violence against LGBT people (Tatchell 2011b). He also suggested UK Prime Minister David Cameron should apologise at the summit for Britain's imposition of anti-gay laws on Commonwealth countries in the 19th century, to give Britain greater credibility as an advocate

on decriminalisation. The UK-based NGO Justice for Gay Africans, founded in 2009, was also active in lobbying (Justice for Gay Africans 2011), as was the international NGO All Out (2011).

Influenced by such lobbying, and by regional consultation meetings with over 250 CSOs and 14 Commonwealth Associations, the Commonwealth Foundation presented the Commonwealth Civil Society Statement to the CHOGM. The statement's central emphasis was on the need to put civil society 'at the heart of the Commonwealth'; it criticised 'the disconnect between the Commonwealth's high level goals and ideals at an intergovernmental level and the lack of follow through at a national level' (Commonwealth Foundation 2011). A major failure of the statement is its absence of reference to the issue of gender identity. However, in relation to human rights it called for the establishment of a Commissioner on Democracy and the Rule of Law as an independent institution (para. 14a), and for ratification of all international human rights conventions and equal protection under law irrespective of 'gender' and 'sexuality' (para. 14c). Under the 'Health' heading it called for Member States to 'commit to programmes that mitigate the HIV and AIDS pandemic, including decriminalising same-sex sexual conduct' (para. 20b).

At the summit the hosting Australian Foreign Minister Kevin Rudd called for decriminalisation, while the Secretary General criticised criminalisation and discrimination in relation to sexual orientation at the Commonwealth People's Forum, but more substantial progress was lacking. An Eminent Persons Group (EPG) had been formed at the previous CHOGM meeting to advise on institutional reform, including LGBT-equality supporter and former High Court Justice Michael Kirby from Australia (Kirby 2011; Kirby, this volume), and had produced a report which became the heart of discussion. The group reportedly made 'urgent' recommendations for the Commonwealth to create mechanisms for censure of members who contravened human rights, and to create a commissioner on the rule of law, democracy and human rights to track human rights abuses, as well as for a new Charter of the Commonwealth, and for the repeal of laws criminalising homosexuality. However, the summit failed even to publish the report, and no agreement on its recommendations was reached, although many of them were referred on to study groups. Publication of the report was supported by states including Australia, Canada and the UK but opposed by countries including India, Nigeria, Sri Lanka, South Africa and Namibia, marking significant divisions.

David Cameron made a statement following the 2011 CHOGM suggesting that the UK might reduce development aid (specifically, general budget support) to states which did not demonstrate respect for human rights, including, *inter alia*, in their treatment of gays and lesbians. His statement drew sharp criticism from within some aid-recipient states, including from President John Atta Mills of Ghana, who responded that he would 'never initiate or support any attempts to legalise homosexuality in Ghana' and commented that

Cameron 'does not have the right to direct other sovereign nations as to what they should do especially where their societal norms and ideals are different' (National Post 2011). Such developments suggest that attempts by British political figures to instigate and lead change through the Commonwealth have been a poor strategy, given the imperial context. Recent activism at the United Nations probably provides a better model, where LGBT activist alliances and NGOs like ARC International have sought to encourage Southern states into the foreground. For example, South Africa introduced the groundbreaking Human Rights Council resolution on Human Rights, Sexual Orientation and Gender Identity, in June 2011; a previous statement on ending violence in March 2011 was delivered by Colombia on behalf of 85 states (United Nations Human Rights Council 2011c; 2011a). Southern leadership communicates a message of sexual orientation and gender identity being shared issues for the world, rather than reinforcing perceptions of these as Western preoccupations.

Having discussed the Commonwealth itself, simultaneous shifts in the form of international activity by groups and networks seeking decriminalisation and human rights in Commonwealth states will now be considered. The organisation and professionalisation of international action oriented towards these goals is gathering pace, though more so in relation to sexual orientation than gender identity. This intensification is particularly apparent in the emergence of new international NGOs, focusing much of their work on Commonwealth states. These join much more established international NGOs working on sexual orientation and gender identity issues, notably the International Gay and Lesbian Human Rights Commission (IGLHRC 2012), the International Lesbian Gay Bisexual Trans and Intersex Association (ILGA 2011a), and ARC-International based in Canada and Geneva, Switzerland – which has been at the forefront of campaigning since its formation in 2003 (ARC-International 2012). The purpose here is not to survey LGBT NGOs, but rather to draw attention to the recent emergence of new internationally oriented NGOs, and to prompt reflection on this.

One such new organisation is The Kaleidoscope International Diversity Trust, launched at the United Kingdom's parliament in September 2011; it is based in London and has charitable status (Kaleidoscope 2012a). It aims to 'promote diversity and respect for all regardless of sexual orientation' and also states it will deploy resources to support those threatened in relation to 'gender identity' (Kaleidoscope 2012b, p. 3). The aims include 'capacity building' in various countries, 'network development', 'opinion forming' and 'international lobbying and dialogue' (Kaleidoscope 2011b, p. 3). The organisation's formation was led by Lance Price, a former special adviser to Tony Blair as Prime Minister. Significantly, the organisation was able to obtain statements of support at its inception from UK Prime Minister David Cameron, and from the leaders of the other two main political parties: Ed Miliband for Labour and Nick Clegg for the Liberal Democrats. Moreover, the Speaker of the UK House

of Commons, John Bercow, was named honorary president, and celebrity backing was also forthcoming from Elton John. The organisation was Official Charity Partner of World Pride 2012 in London. Yet despite such high profile beginnings, and an ethnically diverse Board of individuals with much collective experience of LGBT activism, the place of gender identity in Kaleidoscope's initial aims was somewhat ambiguous and the organisation's website gave little information on how it would achieve representation of or work with existing activist groups in different states and regions (Kaleidoscope 2012a) – perhaps in contrast to the institutionalised practices of state representation in ILGA, for example. Kaleidoscope's emergence is indicative of both new transnational possibilities and also the need to develop new forms of transnational working.

Another significant new London-based human rights organisation is the Human Dignity Trust, launched at the UK Parliament on 17 November 2011 with a focus on 'decriminalising homosexuality by upholding international law'. The Trust is currently a UK company but seeking registration as a charity; its name echoes the emphasis on the 'inherent dignity' of all human beings in the preamble of the Universal Declaration of Human Rights (1948). However, the Trust focuses only on the criminalisation issue, and not on wider aspects of human rights related to sexual orientation, or on gender identity.

As its website explains, the Trust seeks clarification of national laws through test case litigation; it 'does not campaign', but defines itself as 'a global network mobilising regional and international lawyers and law firms for the decriminalisation of homosexuality', and proposes to 'help local groups and individuals challenge the legality of laws which criminalise private consensual sexual activity between adults of the same sex, wherever those laws exist in the world' (Human Dignity Trust 2011a). The hope is for a 'domino effect' internationally, according to Chief Executive Jonathan Cooper (Bowcott 2011). The organisation plans to work with selected lawyers in specific jurisdictions by offering them legal assistance: 'The Trust's undoubted strength is that it can mobilise some of the finest lawyers working in international human rights law and constitutional law from across the globe and it can harness the resources of some of the largest law firms in the world' (Human Dignity Trust 2011a). The Trust has a small staff and Trustees who determine the litigation strategy; these guide a Legal Panel, which includes major law firms supporting litigation work, entirely *pro bono* ('for the public good' on a voluntary or reduced fee basis); patrons include Sir Shridath Ramphal, the former Secretary General of the Commonwealth, and former Australian Justice Michael Kirby (see Kirby, this volume). The organisation 'aims to work as a partner with local, regional and international NGOs, lawyers, academics, human rights defenders and activists'; it is appointing regional advisers and academic hubs as partners. Importantly, it is affirmed that: 'the Trust relies on its local partners to help it approach the issue of decriminalisation in the most appropriate and sensitive way in each jurisdiction', and 'we … will never bring a case or intervene in an

existing challenge without acting in consultation with these local groups and individuals' (Human Dignity Trust 2011c). Yet while its Legal Panel members can afford to work internationally *pro bono*, the Trust seeks financial donations to fund the work and costs of local lawyers from within different states, as well as the costs of applicants.

The creation of the Human Dignity Trust appears to mark the beginning of a new phase of international legal activity to achieve decriminalisation. While cases like *Dudgeon* and *Toonen* (previously cited) were also international, the formation of this NGO involves a shift from legal work on individual cases in international courts towards more collective, sustained and extensive work by (international) legal professionals, in national courts. There is promise and potential in the positive move to share resources, in the form of expensive legal practitioner time and expertise. But there are also some issues which can constructively be raised for consideration, since the intensification of efforts towards decriminalisation from the North – if realistically understood within a sensitive social analysis of global power relations – will almost certainly bring particular new risks and imbalances for queer peoples and activists in the global South. Given limited space here, the focus will be on the Human Dignity Trust as an important and illuminating example.

One issue for the Trust to consider concerns how legal experts – many from the UK – will interpret 'sexual orientation'. According to the Trust's website, 'the guarantee of an identity requires decriminalisation of homosexuality' (Human Dignity Trust 2011b). This phrasing suggests scope for greater sensitivity to the broader meanings of 'sexual orientation' relative to 'homosexuality' and 'identity' in the global context, as indicated earlier in this introduction and elsewhere (Waites 2009). Understandings more informed by bisexual and queer perspectives, and perhaps more sensitised sociologically and anthropologically to diverse identities and behaviours in different contexts, would be helpful.

Consideration of how the Trust's work has commenced with support for a case in Belize – a Commonwealth state in Central America – presents a better basis for considering its activity. This case deserves attention as an example of emerging inter-relationships between new North-based international NGOs and movements, and those that are nationally and/or regionally-based within a broadly conceived global South. The legal action, which is ongoing at the time of writing, challenges the constitutionality of section 53 of the Belize Criminal Code, which criminalises 'carnal intercourse against the order of nature' with a maximum sentence of ten years. The litigant is Mr Caleb Orozco, supported by the United Belize Advocacy Movement (UNIBAM) (ILGA 2011b); they are being opposed by the group Belize Action, which includes representatives of evangelical Christian churches (Bowcott 2011; Love Television 2011). Becoming involved after the start of the case, the Human Dignity Trust is appearing as an 'interested party' in the proceedings, together with the Commonwealth Lawyers Association and the International

Commission of Jurists, with the consent of Mr Orozco and UNIBAM. The three international organisations are being represented *pro bono* by Godfrey Smith SC, former Attorney General of Belize, and Lord Goldsmith QC and his UK firm Debevoise Plimpton LLP (Human Dignity Trust 2012e).

An important issue that becomes apparent is how the ownership of struggles is understood and represented. For many global South activists it is important that struggles are seen to emerge from and be led by national movements and cultures, and it is through this process that human rights with respect to sexual orientation and gender identity can become articulated as part of new understandings of national identity. Concerns of this kind surfaced when the Human Dignity Trust launched itself at the end of 2011 with an announcement of work in Belize. An initial article in the UK's *Guardian* newspaper, coinciding with the Trust's launch and based on communication with the organisation, stated that the Trust would 'kick off a global campaign to decriminalise homosexuality' when 'it embarks on a first test case' – while foregrounding the involvement of Lord Goldsmith (Bowcott 2011). The article noted that the legal case had been brought by Belizean activist Mr Caleb Orozco, but made no mention of the UNIBAM of which he is Executive President, or any regional NGOs. Nor did it mention the fact that the legal case had already been launched by lawyers within Belize (ILGA 2011b), with a supporting strategy developed regionally by the Caribbean Vulnerable Communities coalition (CVC 2012), an international organisation. The article illustrates the tendency for human rights and LGBT groups in the North to be represented as initiators and leaders of struggles worldwide, when struggles have in fact already been started and are ongoing in states such as Belize. The dangers of fostering such perceptions are readily apparent in the rhetoric of an editorial in *Amandala*, 'Belize's leading newspaper':

> I can think of no more obscene, disgusting, evil, wicked and perverted act that one man could do to another. And you know what? According to news in the international media, Belize is the 'test case' for homosexuals worldwide. There is a plan to attack all countries over the globe where homosexuality is taboo, frowned upon, not tolerated, and punishable under law. And Belize is where the first battle is to be fought. The homosexuals have said that they will do whatever it takes to get a victory here. They will bring all the lawyers, and spend all the money needed to get 'equality' for their kind (Vellos 2011).

In such a context some Caribbean activists associated with organisations such as Trinidad and Tobago's Coalition Advocating for Inclusion of Sexual Orientation (CAISO 2012) questioned whether the case – which had been initiated and framed in the Caribbean – would be damaged by the Human Dignity Trust's late involvement, as a perceived alien intervention. Colin Robinson, co-founder of CAISO in 2009, has stated that, while 'the case is in fact broadly supported by LGBT folks in the Caribbean':

> … the most important and deeply troubling issue with the "Guardian"'s reporting, and with the Human Dignity Trust's framing of the case (on which the reporting is clearly b(i)ased), is that **this is not the Human Dignity Trust's case**. They never brought it. They intervened in it late with toxic consequences […], and they do not represent the plaintiff. But as always since colonisation, our work gets framed as that of those who just arrived from the North. […] It's one of the worst examples of bad GLBT international advocacy I've encountered in all my work. It's also a classic example of how Global North journalism frames all of us as invisible victims with no agency. And it also begs some questions of legal ethics. I have tried to be balanced in my criticisms of the Trust, but this left me stunned and damages North-South GLBT cooperation profoundly (Robinson 2011a).[6]

Furthermore:

> The case was the result of methodical strategic assessment done within the region by Caribbean lawyers and was supposed to be about Caribbean advocates using a Caribbean constitution and Caribbean post-colonial frameworks to expand the enjoyment of liberty and justice in a way that builds on the very Caribbean notion of freedom. The Trust's intervention turned the case into powerful alien gay interests using money and international law to leverage outcomes against the will of the Belizian people. And in my view it will set back the cause of building ownership of GLBT rights and related litigation for years. (Robinson 2011, quoted in Canning 2011).

Overlapping concerns have been raised in Jamaica where the Human Dignity Trust has also commenced involvement (Blake and Dayle, this volume).

While the views of one activist certainly cannot be assumed to represent those of all others, for those in the North, Robinson's comments indicate the vital importance of working 'with' partners in other states, as active contributors in dialogue over decisions on whether (as well as how) to intervene – rather than 'for' them. The example of Belize shows that, rather than international action being initiated from London, it and coalition building has already been taking place in regions such as the Caribbean. However, given the role of global human rights case law and perhaps the Yogyakarta Principles to the legal cases involved, and wider forms of globalisation which mean regions are not culturally discreet, it would seem unrealistic to think that the practical involvement of the Human Dignity Trust – as a non-campaigning organisation – would necessarily be a determining factor in whether a legal case was seen to be driven or determined by non-regional influences.

A fundamental issue is how decisions will be made about the states in which it is appropriate to initiate legal action. Here, an emphasis on the universality and indivisibility of human rights might appear to require the initiation of

6 Author's corrected version quoted here with informed permission from the author.

legal action for decriminalisation immediately, wherever possible, and thus to override any consideration of political strategy or a more multi-dimensional politics. The discussion of Pakistan in the chapter on South Asia (Baudh, this volume) perhaps most starkly poses the question of whether it is really advisable to pursue decriminalisation via human rights law in all times and places. While this is not the space to provide a resolution of such dilemmas, an important way to respond is actually to re-focus on human rights as a lived reality, rather than in their abstracted legal form. The sociology of human rights can help us to identify and keep in mind distinctions between human rights as laws, as social norms and as subjective lived experiences (Hynes et al. 2011). It could be suggested that a certain kind of legal campaign initiated at a particular moment may be counterproductive in its real effects on the lived experiences of human rights of non-heterosexual individuals, and that it is in fact the actual lived realisation of human rights which is most important. Human rights conventions suggest that the indivisibility of human rights means they must be balanced against one another, which means no particular human right should be privileged at the expense of others. These considerations might provide a little ethical room for manoeuvre, perhaps legitimising abstentions from legal action in the most difficult contexts; Jjuuko's proposal for an 'incremental approach' in this volume is another possible strategy. The choice of strategy, and the power relations between decision makers on strategies, certainly goes beyond North-South divisions. These points are part of an ongoing debate, to be returned to briefly in the concluding chapter and the conclusion below.

6. Conclusion: dilemmas for a multi-dimensional politics of human rights

Before considering further the dilemmas for those seeking to advance human rights, a review follows of what has been covered in this opening contribution to *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change.* This chapter has not only introduced various themes and issues to frame the volume and its various chapters; it has also made substantial original contributions of various kinds. Section 1 began by introducing criminalisation in the Commonwealth, and the concepts of human rights, sexual orientation and gender identity. Section 2's review of literature demonstrated the distinctiveness of this volume as a contribution to global literatures on these themes. Section 3 summarised the history of criminalisation of sex between men in the United Kingdom, and how this was extended across the British Empire during the late 19th and early 20th centuries. An original contribution was then made in section 4 with a presentation of the first systematic analysis of data on the existence of discriminatory laws for all Commonwealth states, demonstrating the many ways in which those states have a poor record on these human rights issues relative to all states globally.

In section 5 an original account of recent debates and conflicts over the role of the Commonwealth in relation to these issues was provided, documenting the recent history of activist interventions and intergovernmental diplomacy. A commentary was also offered on the distinctive emergence of new kinds of NGOs oriented to work internationally in pursuit of human rights related to sexual orientation, and in some cases gender identity; this required discussion of dilemmas over the pursuit of human rights in the global context of multi-dimensional forms of power and inequality, themes which are now revisited here.

In this collection we aim, as editors, to raise the issue of human rights into the foreground, providing a platform for others to document and analyse social struggles over human rights. The question of whether promotion of various human rights values represents cultural imperialism has been extensively debated, and those debates cannot be reviewed here, or a philosophical or political defence of human rights from first principles be made. Suffice to say that even in sociology, a discipline disposed to questioning assumptions about purportedly universal aspects of human nature, we find a movement away from previous evasions and refusals to endorsement of human rights, although qualified by critical attention to certain problematic aspects of human rights discourses and many aspects of their deployments (Woodiwiss 2005; Hynes et al. 2011). Such endorsements are echoed in the critical affirmation of human rights by leading commentators on gender and sexuality in global feminism and sexual politics, who have also engaged with sociological and anthropological perspectives (Corrêa et al. 2008, pp. 149–224).

It is nevertheless clear that human rights in relation to sexual orientation and gender identity must be endorsed with a consciousness of criticisms levelled at LGBT human rights movements originating in Western societies. Jasbir Puar is a leading critic of this kind, whose work – notably in her book *Terrorist Assemblages: Homonationalism in Queer Times* – has shown how Western states such as the United Kingdom, the United States and the Netherlands are selective in their utilisations of human rights, mobilising human rights discourse in certain ways to constitute new national identities defined in relation to same-sex sexualities, which she influentially termed 'homonationalisms' (Puar 2007). Puar's work and the concept 'homonationalism' were central reference points at the international conference 'Sexual Nationalisms: Gender, Sexuality and the Politics of Belonging in the New Europe', held at the University of Amsterdam in the Netherlands in January 2011, which many of the world's leading queer intellectuals took part in – such as Judith Butler, Didier Eribon, Jan Willem Duyvendak (Sexual Nationalisms 2011). In the light of debates over Puar's work, affirmations of human rights in relation to sexual orientation must be undertaken in a manner which is careful to also address other human rights issues, including those related to racism, for example, and with a consciousness of global power relations linked to colonialism and imperialism.

In the same vein, what emerges from our discussion of new NGOs like Kaleidoscope and the Human Dignity Trust is a set of dilemmas about how to work for change of sexual orientation and gender identity issues in an international context, in a manner informed by and situated within a multi-dimensional politics that grasps multiple social structures of power and inequality including those related to the global economy and to racism, colonialism and imperialism. In the development of such multi-dimensional political analyses addressing 'race' and ethnicity, class, gender and sexuality, it is the Black feminist tradition that has been foremost among the radical currents of thought that emerged from the 1960s and 1970s, as suggested in the survey of Hill Collins (1990). In recent years there has been a tendency to frame such concerns in a more focused way via the concept 'intersectionality', introduced by Kimberle Crenshaw (1989, 1991), the value of which has since been much debated (Grabham et al. 2009; Taylor et al. 2010).

While social analyses emphasising multiple structural inequalities are helpful for understanding how existing contexts are formed, and intersectionality theory can help us understand how this shapes individual experiences and identities, there are limits to the extent to which existing inequalities constrain possibilities for collective agency, and hence the extent to which such analyses can directly yield guidance on strategies for change or what is to be done, politically. Much of what is at stake in discussions over the role of the Human Dignity Trust in states like Belize and Jamaica is in the realm of cultural politics – judgements about whether perceptions of outside interference will have negative effects that outweigh potential benefits of collaboration with such organisations. Who is speaking can be as important as what is said; rightly or wrongly great significance is attached to national citizens speaking, for example in the anti-colonial cultural context of many Caribbean states (as Blake and Dayle's chapter suggests). The racialised identity of speakers may be attributed significance in relation to national and transnational affairs. Nirmal Puwar has usefully conceptualised the racial aspect of this in another context as the importance of racialised somatic norms in political debates (Puwar 2004); another feminist, Anne Phillips, has emphasised 'The Politics of Presence' in discussing the importance of having more women politicians (Phillips 1995). There may be disagreement with an essentialist standpoint on epistemology or identity politics that regards only subordinated groups as able to have knowledge of their own experiences and social contexts (see discussion by Blake and Dayle, this volume); yet to develop effective strategies, both social *perceptions* and the frequent reality of bodies (for example, skin colour), as associated with political positions, need to be recognised. For example, it is reasonable and realistic for black African groups to be sceptical about whether white gay activists from the UK will share their understandings of the legacies of colonialism. This needs to be understood as a consequence of social power structures, and hence needing to inform the social and political analyses and

strategies of international activists, NGOs and national governments. Activists need to act collaboratively through transnational alliances in ways that systematically move voices from the South to the fore; this is particularly salient in the case of the Commonwealth. Related issues will be discussed further in the concluding comparative chapter, which provides more empirical evidence on the success of different strategies in different contexts.

In considering the question of who is entitled to take moral leadership in the Commonwealth, it can be seen there are few clearly suitable for the role. The UK Government, led by Prime Minister David Cameron of the Conservative Party in coalition with the Liberal Democrats, has made broad statements in support of LGBT rights, which his government now represents as part of British values. The British government states the UK is a 'world leader for lesbian, gay, bisexual and transgender equality', affirming that 'we will use our influence' and 'proactively question the 42 Commonwealth states which retain homophobic legislation' (HM Government 2010). David Cameron's suggested linking of some development aid to conditions related to human rights, including rights related to sexual orientation, has led to deep concern by numerous NGOs and groups, especially in Africa, that the practical impact of such policies could be to hurt rather than assist LGBTI people in affected states (African Social Justice Activists 2011). These concerns about linking LGBTI human rights to aid conditionality are echoed by activists Mwakasungula and Jjuuko in their chapters on Malawi and Uganda in this volume. Scott Long has commented that 'rhetoric almost childlike in its simplicity is what the UK government is offering the domestic constituencies it strains to entice' (Long 2011).

The appropriate way forward, instead, is surely for both activists and governments to build transnational alliances through dialogue, with those seeking decriminalisation and change in formerly colonised states increasingly moving into leading roles. Blake and Dayle, in their chapter on Jamaica in this volume, offer a helpful discussion emphasising the necessity of such transnational alliances. They argue that in place of either a local or nationalist purism, or an arrogant globalist human rights project, led by and orchestrated from former imperial states (or Western states more broadly), a measure of pragmatism is needed. Resources and expertise need to be shared, and there are lessons from one context that can usefully be learned in another – a central premise of this book. As editors we broadly endorse this approach, believing it captures the spirit of the present volume; and we emphasise the major social inequalities and power imbalances which structure the contexts in which transnational alliances must be formed – not least the ongoing significance of the economic and cultural legacies of imperialism for deciding the value and form of political actions through the Commonwealth itself. The task is to develop ways of thinking, speaking and acting politically which are appropriate to such contexts. We now leave it to readers to decide the extent to which this

volume has made steps towards this.

Bibliography

Adam, B.D., J.W. Duyvendak and A. Krouwel (1998) *The Global Emergence of Gay and Lesbian Politics: National Imprints of a Worldwide Movement* (Philadelphia, PA: Temple University Press).

African Social Justice Activists (2011) Statement of African social justice activists on the threats of the British government to 'cut aid' to African countries that violate the rights of LGBTI people in Africa, available at www.awid.org/Library/Statement-of-African-Social-Justice-Activists-on-the-Threats-of-the-British-Government-to-Cut-Aid-to-African-Countries-that-Violate-the-Rights-of-LGBTI-People-in-Africa (accessed 6 Dec. 2012).

Aldrich, R.F. (2003) *Colonialism and Homosexuality* (London: Routledge).

Alexander, M.J. (1994) 'Not just (any)body can be a citizen: the politics of law, sexuality and postcoloniality in Trinidad and Tobago and the Bahamas', *Feminist Review* 48, pp. 5–23.

All Out (2011) *All Out: Equality Everywhere*, available at http://allout.org (accessed 6 Dec. 2012).

Altman, D. (2001) *Global Sex* (Chicago, IL: University of Chicago Press).

AmFAR [American Foundation for AIDS Research] (2009) *MSM, HIV and the Road to Universal Access – How Far Have We Come? Special Report* (AmFAR), available at www.amfar.org/uploadedFiles/In_the_Community/Publications/MSM%20HIV%20and%20the%20Road%20to%20Universal%20Access.pdf (accessed 6Dec. 2012).

ARC-International (2012) *ARC-International*, available at http://arc-international.net/about/ (accessed 6 Dec. 2012).

Badgett, M.V.L. and J. Frank (eds.)(2007) *Sexual Orientation Discrimination: An International Perspective* (London: Routledge).

Bennett, J. (2010) 'Keeping the Wolfenden from the door? Homosexuality and the 'Medical Model' in New Zealand', *Social History of Medicine* 23 (1), pp. 134–52.

Berlant, L. and M. Warner (1998) 'Sex in public', *Critical Inquiry* 24 (2), pp. 547–66.

Binnie, J. (2004) *The Globalisation of Sexuality* (London: Sage).

Blasius, M. and S. Phelan (eds.)(1997) *We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics* (New York: Routledge).

BONELA [Botswana Network on Ethics, Law and HIV/AIDS] (2010)

'BONELA applauds new Employment Act', 30 Aug., available at www.bonela.org/index.php?option=com_k2&view=item&Itemid=223&id=74:30–august-2010 (accessed 6 Dec. 2012).

Bowcott, O. (2011) 'Global campaign to decriminalise homosexuality to kick off in Belize court', *The Guardian*, 16 Nov., available at www.guardian.co.uk/world/2011/nov/16/global-campaign-decriminalise-homosexuality-belize-court?newsfeed=true (accessed 6 Dec. 2012).

Brady, S. (2005) *Masculinity and Male Homosexuality in Britain, 1861–1913* (Basingstoke: Palgrave Macmillan).

Bruce-Jones, E. and L.P. Itaborahy (2011) *State-Sponsored Homophobia: A World Survey of Laws Prohibiting Same Sex Activity Between Consenting Adults* (ILGA, The International Lesbian, Gay, Bisexual, Trans and Intersex Association), May, available at http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2011.pdf (accessed 1 Nov. 2011).

CAISO (2012) CAISO|GSPOTTT|Trinidad&Tobago, available at www.facebook.com/caiso?sk=info (accessed 7 Dec. 2012).

Canning, P. (2011) *Global campaign to decriminalise homosexuality kicks off (Video)*, 20 Nov., available at http://madikazemi.blogspot.com/2011/11/global-campaign-to-decriminalise.html (accessed 7 Dec. 2012).

Caribbean Vulnerable Communities (2012) *Caribbean Vulnerable Communities*, available at www.cvccoalition.org (accessed 6 Dec. 2012).

Christiansen, E.C. (2000) 'Ending the apartheid of the closet: sexual orientation and the South African constitutional process', *New York University Journal of International Law and Politics* 32 (4), pp. 997–1058.

Cocks, H. (2003) *Nameless Offences: Homosexual Desire in the Nineteenth Century* (London: I.B. Tauris).

Committee on Homosexual Offences and Prostitution, Home Office and Scottish Home Department (1957) *Report of the Committee on Homosexual Offences and Prostitution*, Cmnd.247 (London: HMSO).

Commonwealth Foundation (2008) *Realising People's Potential: The Kampala Civil Society Statement to the 2007 Commonwealth Heads of Government Meeting* (London: Commonwealth Foundation), available at www.commonwealthfoundation.com/LinkClick.aspx?fileticket=GGW0u3ukOPs%3D&tabid=327 (accessed 4 Nov. 2011).

— (2009) *Port of Spain Civil Society Statement to the Commonwealth Heads of Government Meeting* (London: Commonwealth Foundation), available at www.thecommonwealth.org/document/166852/hiv_and_aids_strategic_

framework_20072009.htm (accessed 7 Dec. 2012).

— (2011) *Driving Change for a Dynamic Commonwealth: Commonwealth Civil Society Statement* (London: Commonwealth Foundation), available at www.commonwealthfoundation.com/LinkClick.aspx?fileticket=AjQGb0m3JvQ%3d&tabid=39 (accessed 4 Nov. 2011).

Commonwealth Heads of Government meeting (1971) *Singapore Declaration of Commonwealth Principles* (London: Commonwealth Secretariat), available at www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B89D81F68–F851–43DE-B7F0–604A97424903%7D_Singapore%20Declaration.pdf (accessed 7 Dec. 2012).

— (1991) *Harare Commonwealth Declaration* (London: Commonwealth Secretariat), available at www.thecommonwealth.org/shared_asp_files/uploadedfiles/{7F83FE73–6E7D-45FB-BFBC-FA519E255E72}_Harare%20Declaration.pdf (accessed 7 Dec. 2012).

— (2009) *The HIV and AIDS and Law Reform Briefing*, available at www.chogm2009.org/home/node/179?q=node/179 (accessed 4 Nov. 2011).

Commonwealth Human Rights Initiative (2011) *Civil Society Statement of Action on the Decriminalisation of Adult Same Sex Conduct in the Commonwealth*, 15 Aug., available at www.humanrightsinitiative.org/CHRIL/Statement_of_Action_on_Decriminalisation_of_Same_Sex_Conduct%20(2).pdf (accessed 7 Dec. 2012).

Commonwealth Secretariat (2007) *HIV and AIDS Strategic Framework 2007–2009* (London: Commonwealth Secretariat), available at www.thecommonwealth.org/document/166852/hiv_and_aids_strategic_framework_20072009.htm (accessed 7 Dec. 2012).

— (2011a) 'Commonwealth Secretariat', available at www.thecommonwealth.org (accessed 7 Dec. 2012).

— (2011b) Commonwealth Human Rights Initiative, available at www.thecommonwealth.org/Internal/151814/151857/chri/ (accessed 7 Dec. 2012).

— (2012) 'What we do', available at www.thecommonwealth.org/Internal/190957/what_we_do/ (accessed 7 Dec. 2012).

— (2013) 'Member States', available at www.thecommonwealth.org/Internal/142227/members/ (accessed 11 Mar. 2013).

Commonwealth Secretariat, Commonwealth Foundation, International HIV/AIDS Alliance and Commonwealth HIV/AIDS Action Group (2009) *Supporting the Commonwealth response to HIV: Commonwealth*

Law Reform as a central key to respecting human rights and understanding HIV, available at www.aidsalliance.org/includes/document/CWHR.pdf (accessed 7 Dec. 2012).

Connell, R. (2007) *Southern Theory: Social Science and the Global Dynamics of Knowledge* (Cambridge: Polity Press).

Cook, M. (2007) *A Gay History of Britain: Love and Sex Between Men since the Middle Ages* (Oxford: Greenwood World Publishing).

Corrales, J. and M. Pecheny (eds.)(2010) *The Politics of Sexuality in Latin America: A Reader on Lesbian, Gay, Bisexual and Transgender Rights* (Pittsburgh, PA: University of Pittsburgh Press).

Corrêa, S. and V. Muntarbhorn (2007) *The Yogyakarta Principles: principles on the application of international human rights law in relation to sexual orientation and gender identity*, available at www.yogyakartaprinciples.org/principles_en.htm (accessed 7 Dec. 2012).

Corrêa, S., R. Petchesky and R. Parker (2008) *Sexuality, Health and Human Rights* (London: Routledge).

Council of Europe (2010) *Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols No.11 and No.14, available at http://conventions.coe.int/treaty/en/Treaties/Html/005.htm (accessed 7 Dec. 2012).

Crenshaw, K. (1989) 'Demarginalizing the intersection of race and sex: a black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics', *The University of Chicago Legal Forum*, pp. 139–68.

Crenshaw, K. (1991) 'Mapping the margins: intersectionality, identity politics and violence against women of color', *Stanford Law Review* 43 (6), July, pp. 1241–99.

Croucher, S. (2011) 'South Africa: opportunities seized in the post-apartheid era', in M.Tremblay, D. Paternotte and C. Johnson (eds.), *The Lesbian and Gay Movement and the State: Comparative Insights into a Transformed Relationship* (Farnham: Ashgate), pp. 153–66.

Currah, P., R.M. Juang, and S.P. Minter (eds.)(2006) *Transgender Rights* (Minneapolis, MN: University of Minnesota Press).

Day, S. (2008) 'Wolfenden 50: revisiting state policy and the politics of sex work in the UK', in V.E. Munro and M. Della Giusta (eds.), *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Aldershot: Ashgate), pp. 51–66.

de Sousa Santos, Boaventura (ed.)(2007) *Another Knowledge is Possible: Beyond Northern Epistemologies* (London: Verso).

Dempsey, B. (1998) 'Piecemeal to equality: Scottish gay law reform', in L.J.

Moran, D. Monk and S. Beresford (eds.), *Legal Queeries: lesbian, gay and transgender legal studies* (London: Cassell), pp. 155–66.

Drucker, P. (2000) *Different Rainbows* (London: Millivres Ltd).

Edwards, S. (1981) *Female Sexuality and the Law* (London: Robertson).

Epprecht, M. (2004) *Hungochani: The History of a Dissident Sexuality in Southern Africa* (Montreal: McGill-Queen's University Press).

— (2008a) (ed.) *Unspoken Facts: A History of Homosexualities in Africa* (Zimbabwe: GALZ).

— (2008b) *Heterosexual Africa: The History of an Idea from the Age of Exploration to the Age of AIDS* (Athens, OH: Ohio University Press).

European Court of Human Rights (1981) Case of *Dudgeon v. The United Kingdom*, Application no. 7525/76, 22 Oct.

European Commission of Human Rights (1997) *Euan Sutherland against the United Kingdom: Report of the Commission*, adopted 1 July 1997, Application no.25186/94.

Fanon, F. (1998) 'Racism and culture', extract from F. Fanon (1967) *The Wretched of the Earth* (London: HarperCollins), reprinted in E.C. Eze (ed.), *African Philosophy: An Anthology* (Oxford: Blackwell), pp. 305–11.

Feenan, D., B. Fitzpatrick, P. Maxwell, U. O'Hare, T. Ritchie and C. Steele (2001) *Enhancing the Rights of Lesbian, Gay and Bisexual People in Northern Ireland* (Belfast: Northern Ireland Human Rights Commission), available at www.nihrc.org/index.php?page=subresources&category_id=25&from=9&resources_id=46&search_content=&Itemid=61 (accessed 10 Oct. 2011).

Foucault, M. (1981) *The History of Sexuality, Volume One: An Introduction* (London: Penguin).

Freeman, M. (2002) *Human Rights: An Interdisciplinary Approach* (Cambridge: Polity Press).

Gevisser, M. and E. Cameron (eds.)(1995) *Defiant Desire: Gay and Lesbian Lives in South Africa* (New York: Routledge).

Gevisser, M. (2000) 'Mandela's stepchildren: homosexual identity in post-apartheid South Africa', in P. Drucker (ed.), *In a Different Voice* (London: Millivres Ltd.), pp. 111–36.

Gilroy, P. (2004) *After Empire: Melancholia or Convivial Culture?* (London: Routledge).

Grabham, E., D. Cooper, J. Krishnadas and D. Herman (eds.)(2009) *Intersectionality and Beyond: Law, Power and the Politics of Location* (London: Routledge-Cavendish).

Graupner, H. and P. Tahmindjis (eds.)(2005) *Sexuality and Human Rights: A Global Overview* (New York: Harrington Park Press).

Held, D., A. McGrew, D. Goldblatt and J. Perraton (1999) *Global Transformations* (Cambridge: Polity Press).

High Court of Delhi at New Delhi (2009) *Naz Foundation v. Govt. of NCT of Delhi and Others*, 2 July, WP(C)7455/2001, available at www.altlawforum.org/sites/default/files/Delhi%20high%20court%20decision%20–%20Naz%20Foundation_0.pdf (accessed 7 Dec. 2012).

Hill Collins, P. (1990) *Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment* (Boston: Unwin Hyman).

HM Government (2010) *Working for Lesbian, Gay, Bisexual and Transgender Equality. Government Equalities Office*, available at www.homeoffice.gov.uk/publications/equalities/lgbt-equality-publications/lgbt-work-plan?view=Binary (accessed 7 Dec. 2012).

Hoad, N. (2005) 'Introduction', in N. Hoad, K. Martin and G. Reid (eds.), *Sex and Politics in South Africa* (Johannesburg: Double Storey).

— (2006) *African Intimacies: Race, Homosexuality and Globalisation* (Minnesota: Minnesota University Press).

Hoad, N., K. Martin and G. Reid (eds.)(2005) *Sex and Politics in South Africa* (Johannesburg: Double Storey).

Human Dignity Trust (2012a) 'The Human Dignity Trust: legally challenging the illegality of homosexuality', available at www.humandignitytrust.org/pages/ABOUT%20US (accessed 7 Dec. 2012).

— (2012b) 'Human Dignity Trust', available at www.humandignitytrust.org (accessed 7 Dec. 2012).

— (2012c) 'Building a global network working towards the decriminalisation of homosexuality', available at www.humandignitytrust.org/pages/ABOUT%20US/Global%20Partners (accessed 7 Dec. 2012).

— (2012d) 'The Legal Panel of the Human Dignity Trust', available at www.humandignitytrust.org/pages/ABOUT%20US/Legal%20Panel (accessed 7 Dec. 2012).

— (2012e) 'Current legal cases challenging the criminalisation of homosexuality supported by the Human Dignity Trust', available at www.humandignitytrust.org/pages/OUR%20WORK/Current%20Cases (accessed 7 Dec. 2012).

Human Rights Watch (2008) *This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism* (New York: Human Rights Watch).

Hyam, R. (1991) *Empire and Sexuality: British Experience* (Manchester:

Manchester University Press).

Hynes, P., M. Lamb, M., D. Short and M. Waites (2011) 'Sociology and human rights: confrontations, evasions and new engagements', in P. Hynes, M. Lamb, M., D. Short and M. Waites (eds.), *Sociology and Human Rights: New Engagements* (London: Routledge).

IGLHRC (2012) *International Gay and Lesbian Human Rights Commission*, available at www.iglhrc.org (accessed 7 Dec. 2012).

ILGA (2011a) *International Lesbian, Gay, Bisexual, Trans and Intersex Association*, available at http://ilga.org (accessed 7 Dec. 2012).

— (2011b) 'Belize: UNIBAM president says homosexual rights are basic human rights', 9 June, available at http://ilga.org/ilga/en/article/n1kI4cz1uP (accessed 7 Dec. 2012).

Indian Express (2009) 'SC declines to stay HC verdict on homosexuality', 20 July, available at www.indianexpress.com/news/sc-declines-to-stay-hc-verdict-on-homosexual/491686/ (accessed 7 Dec. 2012).

International Gay and Lesbian Human Rights Commission (2009) 'India: Government defers decision on 377 to Supreme Court', 18 Sep., available at www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/974.html (accessed 7 Dec. 2012).

International HIV/AIDS Alliance (2011) 'The Commonwealth must reform laws to stop HIV', available at www.whatspreventingprevention.org/commonwealth-must-reform-laws-to-stop-hiv/ (accessed 7 Dec. 2012).

International Commission of Jurists (2011) *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook* (Geneva: International Commission of Jurists).

International Service for Human Rights (2011) Joint NGO News Release, available at www.ishr.ch/council/428–council-not-in-feed/1098–human-rights-council-adopts-landmark-resolution-on-lgbt-rights#Votes (accessed 7 Dec. 2012).

Itaborahy, L.P. (2012) *State-Sponsored Homophobia: A World Survey of Laws Criminalising Same-Sex Sexual Acts between Consenting Adults* (ILGA), available at http://ilga.org/ilga/en/article/1161 (accessed 11 Mar. 2013).

Jeffery-Poulter, S. (1991) *Peers, Queers and Commons: The Struggle for Gay Law Reform from 1950 to the Present* (London: Routledge).

Justice for Gay Africans (2011) 'Lobbying the Commonwealth on decriminalisation', available at www.jfga.org.uk/?cat=18 (accessed 7 Dec. 2012).

Kaleidoscope (2012a) *Kaleidoscope International Diversity Trust*, available at www.kaleidoscopetrust.com (accessed 7 Dec. 2012).

— (2012b) *Kaleidoscope International Diversity Trust*. September 2011,

available at www.kaleidoscopetrust.com/PDFs/Kaleidoscope%20aims%20and%20beliefs.pdf (accessed 7 Dec. 2012).

Katz, J.N. (1995) *The Invention of Heterosexuality* (New York: Penguin).

Kirby, M. (2011) 'Ending sexual apartheid', *National Times*, 25 Oct., available at www.theage.com.au/opinion/society-and-culture/ending-sexual-apartheid-20111024–1mg9e.html (accessed 7 Dec. 2012).

Kollman, K. (forthcoming 2013) *The Same-Sex Unions Revolution and the Domestic Politics of International Learning* (Manchester: Manchester University Press).

Kollman, K. and M. Waites (eds.)(2009) *The Global Politics of Human Rights*, special issue, *Contemporary Politics* 15 (1), pp. 137–56.

— (2011) 'United Kingdom: changing political opportunity structures, policy success and continuing challenges for lesbian, gay and bisexual movements', in M. Tremblay, D. Paternotte and C. Johnson (eds.), *The Lesbian and Gay Movement and the State: Comparative Insights into a Transformed Relationship* (Farnham: Ashgate), pp. 181–96.

Lecky, R. and K. Brooks (eds.)(2010) *Queer Theory: Law, Culture, Empire* (New York: Routledge).

Lewis, S. (2009) *Remarks by Stephen Lewis, Co-Director of AIDS-Free World delivered at the Commonwealth People's Forum on the eve of the Commonwealth Heads of Government Meeting (CHGOM)*, available at www.commonwealthfoundation.com/LinkClick.aspx?fileticket=Ea3HU1msi4I%3D&tabid=264 (accessed 4 Nov. 2011).

Long, S. (2011) 'Growing pains: more on British aid', available at http://paper-bird.net/2011/11/01/growing-pains-more-on-british-aid/ (accessed 7 Dec. 2012).

Lopéz, A.J. (2007) 'Introduction: The (Post) global South', *The Global South* 1 (1&2), pp. 1–11.

Love Television (2011) 'Belize Action versus UNIBAM', 22 Nov., available at www.lovetv.com.bz/2011/11/22/belize-action-versus-unibam/ (accessed 7 Dec. 2012).

McClintock, A. (1995) *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest* (London: Routledge).

Martin Ennals Award (2011) The Martin Ennals Award for Human Rights Defenders [videos], available at www.martinennalsaward.org (accessed 7 Dec. 2012).

Miles, R. (2003) *Racism*, 2nd edn. (London: Routledge).

Moran, L.J. (1996) *The Homosexual(ity) of Law* (London: Routledge).

Murphy, P. and D. Cooper (2012) 'Queen Elizabeth II should be the final

Head of the Commonwealth', Commonwealth Advisory Bureau *Opinions*, July (London: Commonwealth Advisory Bureau), available at www.commonwealthadvisorybureau.org/opinion/ (accessed 14 Mar. 2013).

Murray, S. and W. Roscoe (eds.)(1998) *Boy-Wives and Female Husbands: Studies in African Homosexualities* (New York: Palgrave).

Narrain, A. (2004) 'The articulation of rights around sexuality and health: subaltern queer cultures in India in the era of the Hindutva', *Health and Human Rights* 7 (2), pp. 143–64.

Narrain, A. and A. Gupta (eds.)(2011) *Law like Love: Queer Perspectives on Law* (Delhi: Yoda Press).

NCGLE and another v. Minister of Justice and Others, 1998. CCT Case No. 11/98.

National Post (2011) 'I will never support legalizing homosexuality, Ghana's President says', 2 Nov., available at http://news.nationalpost.com/2011/11/02/ghanas-president-vows-to-never-support-any-attempts-to-legalise-homosexuality/ (accessed 4 Nov. 2011).

Office of the High Commissioner for Human Rights (2011) 'Courage is our virtue and freedom is our goal', available at www.ohchr.org/EN/NewsEvents/Pages/PrixMartinEnnals.aspx (accessed 7 Dec. 2012).

Oswin, N. (2007) 'The end of queer (as we knew it): globalisation and the making of a gay-friendly South Africa', *Gender, Place and Culture* 14 (1), pp. 93–110.

Phillips, A. (1995) *The Politics of Presence* (Oxford Clarendon).

Phillips, O. (1997) 'Zimbabwean law and the production of a white man's disease', *Social and Legal Studies* 6 (4), pp. 471–91.

Porter, K. and J. Weeks (eds.)(1991) *Between the Acts: Lives of Homosexual Men 1885–1967* (London: Routledge).

Puar, J. (2007) *Terrorist Assemblages: homonationalism in queer times* (Durham, NC: Duke University Press).

Puwar, N. (2004) *Space Invaders: race, gender and bodies out of place* (Oxford: Berg).

Rao, R. (2010) *Third World Protest: Between Home and the World* (Oxford: Oxford University Press).

Ranchhodas, R. and Thakore, D.K. (1967) *The Indian Penal Code*, 24th edn. (Bombay: The Bombay Law Reporter {Private} Ltd.).

Rayside, D. (2008) *Queer Inclusions, Continental Divisions: Public Recognition of Sexual Diversity in Canada and the United States* (Toronto: University of Toronto Press).

Robinson, C. (2011) '[sogi] Global campaign to decriminalise homosexuality to kick off in Belize court', email to sogi-list-bounces@arc-international.net, 18 Nov.

Said, E. (1978) *Orientalism* (London: Routledge and Kegan Paul Ltd.).

Sanchez Taylor, J. (2006) 'Female sex tourism: a contradiction in terms?', *Feminist Review* 83, pp. 42–59.

Sexual Minorities Uganda (2007) *Commonwealth Peoples' Space 2007 Report*, available at http://gayuganda.blogspot.com/2007/11/sexual-minorities-uganda-smug.html (accessed 7 Dec. 2012).

Sexual Nationalisms (2011) *Sexual Nationalisms*, available at www.sexualnationalisms.org (accessed 5 Jan. 2012).

Sharma, K. (2011) 'Commonwealth respects the rights, values of homosexuals, *The Star*, 27 May, available at www.the-star.co.ke/opinions/others/26012–commonwealth-respects-the-rights-values-of-homosexuals– (accessed 4 Nov. 2011).

Smith, M. (2008) *Political Institutions and Lesbian and Gay Rights in the United States and Canada* (London and New York: Routledge).

Solomos, J. and L. Back (2000) 'Introduction: theorising race and racism', in L. Back and J. Solomos (eds.), *Theories of Race and Racism: A Reader* (London: Routledge), pp. 1–32.

South African Permanent Mission to the United Nations and Other International Organisations (2011) Introductory statement for resolution L9 rev1 entitled 'Human rights, sexual orientation and gender identity' by South African Permanent Representative, Ambassador JM Matjila, during the 17th Session of the Human Rights Council, 19 June, available at www.ishr.ch/council/428–council-not-in-feed/1098–human-rights-council-adopts-landmark-resolution-on-lgbt-rights#Votes (accessed 7 Dec. 2012).

Stryker, S. and S. Whittle (eds.)(2006) *The Transgender Studies Reader* (London: Routledge).

Sullivan, G. and Jackson, P. (2001) *Gay and Lesbian Asia: Culture, Identity, Community* (New York: Harrington Park Press).

Tamale, S. (2011) *African Sexualities: A Reader* (Cape Town: Pambazuka Press).

Tarrow, S. (1994) *Power in Movement: Social Movements, Collective Action and Politics* (Cambridge: Cambridge University Press).

Tatchell, P. (2011a) 'The Commonwealth is a bastion of homophobia', *The Guardian*, 17 May, available at www.guardian.co.uk/commentisfree/2011/may/17/commonwealth-homophobia-anti-gay-discrimination (accessed 7

Dec. 2012).

— (2011b) 'Heads of government must address decriminalisation of homosexuality', available at www.petertatchell.net/international/world_general/lobby-commonwealth-secretary-general.htm (accessed 7 Dec. 2012).

Taylor, Y., S. Hines and M. Casey (eds.)(2010) *Theorizing Intersectionality and Sexuality* (Basingstoke: Palgrave Macmillan).

The Gambia (2005) *Criminal Code (Amendment) Act* 2005, available at www.ilo.ch/dyn/natlex/docs/SERIAL/75299/78264/F1686462058/GMB75299.pdf (accessed 7 Dec. 2012).

Third World Gay Revolution (1970) 'The oppressed shall not become the oppressor', reprinted in M. Blasius and S. Phelan (eds.)(1997) *We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics* (New York: Routledge), pp. 400–1.

Tremblay, M., D. Paternotte and C. Johnson (eds.)(2011) *The Gay and Lesbian Movement and the State: Comparative Insights into a Transformed Relationship* (Farnham: Ashgate).

UNAIDS (2010) *Global Report* (UNAIDS), available at www.unaids.org/globalreport/Global_report.htm (accessed 7 Dec. 2012).

United Nations (1948) *Universal Declaration of Human Rights*, available at www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng (accessed 7 Dec. 2012).

— (1966) *International Covenant on Civil and Political Rights* [entry into force 1976], available at www2.ohchr.org/english/law/ccpr.htm (accessed 7 Dec. 2012).

— (2013) *Member States*, available at www.un.org/en/members/growth.shtml (accessed 11 Mar. 2013)

United Nations General Assembly (2008) Letter dated 18 December 2008 from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations, addressed to the President of the General Assembly, UN Doc. A/63/635 (22 Dec. 2008), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/667/99/PDF/N0866799.pdf?OpenElement (accessed 13 Nov. 2011).

United Nations Human Rights Committee (1994) Communication No. 488/1992: Australia, *Nicholas Toonen v. Australia*, UN Doc. CCPR/C/50/D/488/1992 (4 Apr. 1994), available at www.unhchr.ch/tbs/doc.nsf/(Symbol)/d22a00bcd1320c9c80256724005e60d5?Opendocument (accessed 4 Nov. 2011).

United Nations Human Rights Council (2011a) *Joint Statement on Ending acts of violence and related human rights violations based on sexual orientation and gender identity*, 22 Mar., available at www.unhcr.org/refworld/docid/4eb8f32e2.html (accessed 7 Dec. 2012).

— (2011b) *Human Rights, Sexual Orientation and Gender Identity*. UN Doc. A/HRC/17/L.9/Rev.1 (15 June 2011), available at http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G11/141/94/PDF/G1114194.pdf?OpenElement (accessed 13 Nov. 2011).

— (2011c) *Resolution adopted by the Human Rights Council: Human Rights, Sexual Orientation and Gender Identity*, UN Doc. HRC/RES/17/19 (14 July 2011), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/148/76/PDF/G1114876.pdf?OpenElement (accessed 1 May 2013).

Vellos, R. (2011) 'Of this and that', *Amandala Online*. 17 Nov., available at www.amandala.com.bz/index.php?id=11907 (accessed 4 Jan. 2012).

Waites, M. (2005) *The Age of Consent: Young People, Sexuality and Citizenship* (Basingstoke: Palgrave Macmillan).

— (2009) 'Critique of "sexual orientation" and "gender identity" in human rights discourse: global queer politics beyond the Yogyakarta Principles', in K. Kollman and M. Waites (eds.), *The Global Politics of Human Rights*, special issue, *Contemporary Politics* 15 (1), pp. 137–56.

— (2010) 'Human rights, sexual orientation and the generation of childhoods: analysing the partial decriminalisation of "unnatural offences" in India', in P. Hynes, M. Lamb, D. Short and M. Waites (eds.), *Sociology and Human Rights: New Engagements*, special issue, *International Journal of Human Rights* 14 (6), pp. 971–93.

Warner, M. (1993) *Fear of a Queer Planet: Queer Politics and Social Theory* (Minneapolis, MN: University of Minnesota Press).

Weeks, J. (1977) *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present* (London: Quartet Books).

— (1981) *Sex, Politics and Society: The Regulation of Sexuality since 1800* (London: Longman Group Ltd.).

— (1989) *Sex, Politics and Society: The Regulation of Sexuality since 1800*, 2nd edn. (London: Longman Group Ltd.).

— (2007) 'Wolfenden and beyond: the remaking of homosexual history', *History and Policy*, available at www.historyandpolicy.org/papers/policy-paper-51.html (accessed 7 Dec. 2012).

Weeks, J., J. Holland and M. Waites (eds.)(2003) *Sexualities and Society: A Reader* (Cambridge: Polity Press).

West, D. and R. Green (eds.)(1997) *Sociolegal Control of Homosexuality: A Multi-Nation Comparison* (New York: Plenum Press).

West, D. and A. Wöelke (1997) 'England', in D. West and R. Green (eds.), *Sociolegal Control of Homosexuality: A Multi-Nation Comparison* (New York: Plenum Press), pp. 197–220.

Whittle, S. (1999) 'The becoming man: the law's ass brays', in K. More and S. Whittle (eds.), *Reclaiming Genders: Transsexual grammars at the fin de siècle* (London: Cassell), pp. 15–33.

Woodiwiss, A. (2005) *Human Rights* (London: Routledge).

2

The sodomy offence: England's least lovely criminal law export?[1]

The Hon. Michael Kirby AC CMG[2]

1. The past

It all goes back to the Bible. At least it was in the Old Testament *Book of Leviticus*, amongst 'divers laws and ordinances', that a proscription on sexual activity involving members of the same sex first appeared:[3]

> If a man ... lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon you.

The prohibition appears amongst a number dealing with deemed sexual irregularities in ancient Israel. Thus, committing adultery with another man's wife [strangely, not with a husband or a bachelor] attracted the penalty of death. A man who lies with his daughter-in-law shall be put to death with his victim, seemingly however innocent she might be.[4] The penalty is stepped up for a man who takes a wife and her mother. They, inferentially all of them, are to be 'burnt with fire' so that 'there be no wickedness among you'.[5] A man that lies with a beast is to be put to death, as is the poor animal.[6] There is also a specific offence of a woman connecting with a beast.[7] The punishment and

1 An earlier version of this chapter was published in the *Journal of Commonwealth Criminal Law* 22 (Kirby 2011).

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3 *Leviticus*, 20, 13.

4 Ibid. 20, 12.

5 Ibid. 20, 14.

6 Ibid. 20, 15.

7 Ibid. 20, 16.

the offences portray an early, primitive, patriarchal society where the powerful force of sexuality was perceived as a danger and potentially an unclean threat that needed to be held in the closest check.

According to those who have studied these things,[8] the early history of England incorporated into its common law an offence of 'sodomy' in the context of the provision of protection against those who endangered the Christian principles on which the kingdom was founded. In medieval times, the notion of a separation between the Church and the state had not yet developed. The Church had its own courts to try and punish ecclesiastical offences, being those that were perceived as endangering social purity, defiling the kingdom and disturbing the racial or religious order of things (Human Rights Watch 2008, p. 13).

A survey of the English laws produced in Latin in 1290, during the reign of Edward I,[9] mentions sodomy, so described because the crime was attributed to the men of Sodom who thereby attracted the wrath of the Lord and the destruction of their city.[10] In another description of the early English criminal laws, written a little later in Norman French, the punishment of burning alive was recorded for 'sorcerers, sorceresses, renegades, sodomists and heretics publicly convicted'.[11] Sodomy was perceived as an offence against God's will, which thereby attracted society's sternest punishments.

Initially, it seems, the offence was not limited to sexual acts between men. It could include any sexual conduct deemed irregular and extend to sexual intercourse with Turks and 'Saracens', as with Jews and Jewesses (Greenberg 1988, pp. 274ff.). Although traceable to the Old Testament, and Jewish Rabbinical law, the offences were reinforced by a Christian instruction that associated the sexual act with shame and excused it only as it fulfilled a procreative function (cf. Brundidge 1993). Sodomy was a form of pollution. The history of the 11th and 12th centuries in England and in Europe included many instances of repression targeted at polluters, such as Jews, lepers, heretics, witches, prostitutes and sodomites (Moore 1987; see also Douglas 2002; Human Rights Watch 2008, pp. 13–14).

In the 16th century, following the severance by Henry VIII of the link between the English church and Rome, the common law crimes were revised so as to provide for the trial of previously ecclesiastical crimes in the secular courts. A statute of 1533 provided for the crime of sodomy, under the description of the 'detestable and abominable Vice of Buggery committed with mankind or

8 An excellent review of the legal developments collected in this article appears in Human Rights Watch (2008) and Saunders (2009).

9 *Fleta, Seu Commentarius Juris Angicani* was a survey of English law produced in the Court of Edward I in 1290, ed. and trans. by Richardson and Sayles (1955); see Human Rights Watch (2008, p. 13).

10 *Genesis*, 13, 11–12, 19, 5.

11 The work by Britton is described in Brunner (1888). See also Carson (1914), p. 664).

beast'. The offence was punishable by death. Although this statute was repealed in the reign of Mary I (so as to restore the jurisdiction of the Church over such matters), it was re-enacted by Parliament in the reign of Elizabeth I in 1563 (Hyde 1970).[12] The statutory offence, so expressed, survived in England in substance until 1861. The last recorded execution for 'buggery' in England took place in 1836 (Hyde 1970, p. 142; see also Human Rights Watch pp. 13–14).

The great text writers of the English law, exceptionally, denounced sodomy and all its variations in the strongest language. Thus, Edward Coke declared:

> Buggery is a detestable, and abominable sin, amongst Christians not to be named. ... [It is] committed by carnal knowledge against the ordinance of the Creator and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast (Coke 1797, 3rd Part, cap. X *Of Buggery, or Sodomy*, p. 58).

When William Blackstone, between 1765–9, wrote his *Commentaries on the Laws of England*, he too included the 'abominable crime' amongst the precious legacy that English law bequeathed to its people. Because of the contemporaneous severance of the American colonies from allegiance to the British Crown in 1776, Blackstone's *Commentaries* were to have a profound influence on the development and expression of the criminal law in the American settlements and elsewhere (Prest 2009, p. 3). So in this way, by common law, statute law and scholarly taxonomies, the English law criminalising sodomy, and other variations of 'impure' sexual conduct was well-placed to undergo its export to the colonies of England as the British Empire burst forth on the world between the 17th and 20th centuries.

The result of this history was that virtually no jurisdiction which at some stage during that period was ruled by Britain escaped the pervasive influence of its criminal law and, specifically, of the anti-sodomy offence that was part of that law. The British Empire was, at first, highly successful as a model of firm governance and effective social control. At the heart of any such governance and control must be an ordered system of criminal and other public law. What better criminal law could the imperial authorities at Westminster donate to their many new-found colonies, provinces and settlements beyond the seas, than to provide them with criminal laws which they observed and enforced at home?

The result of this historical development and coincidence is that the anti-sodomy laws, applicable in Britain at the time of Coke and Blackstone, came quite quickly to be imposed or adopted in the huge domain of the British Empire, extending to about a quarter of the land surface of the world and about a third of its people. To this day, approximately 80 countries of the

12 The Buggery Act 1533, after its original repeal, was re-enacted as the Buggery Act 1563 during the reign of Elizabeth I.

world impose criminal sanctions on sodomy and other same-sex activities, whether consensual or not or committed in private or not. Over half of these jurisdictions are, or were at one time, British colonies (Human Rights Watch 2008, p. 4; Ottoson 1998). The offence spread like a pestilence.

The 19th century in Europe witnessed a significant challenge to the inherited criminal laws of medieval times. In France, Napoleon's codifiers undertook a complete revision and re-expression of the criminal laws of royal France. This was an enterprise which Napoleon correctly predicted would long outlive his imperial battle honours. In the result, the sodomy offence, which had existed in France, was finally abolished in 1806 in a penal code that was profoundly influential and quickly spread to more countries even than Britain ruled. It did so through derivative codes adopted, following conquest or persuasion, in the Netherlands, Belgium, Spain, Portugal, Scandinavia, Germany, Russia, China, Japan and their respective colonies and dependencies. Although some of the latter occasionally, for local reasons, departed from the original French template[13] provided for sodomy offences, this was the exception. The consequence has been that comparatively few of the countries of the European empires, other than the British, ever imposed criminal sanctions specifically on same-sex consensual activity in private. The existence of such offences has been a peculiar inheritance of British rule and of societies influenced by the *shariah* law of Islam. That law, in its turn, traced its attitudes to religious understanding, in their turn, derived from the same Judeo-Christian scriptural texts as had informed the medieval laws of England.

Just as the Napoleonic codifiers brought change and the removal of the religion-based prohibition on same-sex activities in France and its progeny, so in England a movement for codification of the law, including specifically the criminal law, gained momentum in the early 19th century. A great progenitor of this movement was Jeremy Bentham. He was the jurist and utilitarian philosopher who taught that the principle of utility, or the attainment of the greatest measure of happiness in society, was the sole object both of the legislator and the moralist (Hart 1984, p. 44). Bentham was highly critical of the antique morality that he saw evident in the writings of Blackstone. In his *A Fragment on Government* (1776) and *An Introduction to the Principles of Morals and Legislation* (1789), Bentham strongly criticised Blackstone for his complacency about the content of the law of England as he presented it. Bentham attacked Blackstone's antipathy to the reform that was so evidently needed.

13 Thus French colonies such as Benin (previously Dahomey), Cameroon and Senegal adopted such laws, possibly under the influence of their British-ruled neighbours. Germany, in Bismarck's time, adopted par.175 of the *Penal Code*. This survived the Third Reich, being eliminated by the German Democratic Republic in 1957 and by the Federal German Republic in 1969.

Encouraged by contemporary moves for legal reform in France, Bentham urged a reconsideration of those forms of conduct which should, on utilitarian principles, no longer be regarded as punishable offences under the law of England. He continued to urge the acceptance of the utilitarian conception of punishment as a necessary evil, justified only if it was likely to prevent, at the least cost in human suffering, greater evils arising from putative offences. Bentham eventually turned his reforming zeal to plans for improved school education for the middle class; a sceptical examination of established Christianity and reform of the Church of England; as well as economic matters and essays treating subjects as diverse as logic, the classification of universal grammar and birth control. Somewhat cautiously, he also turned his attention to the law's treatment of what was later named homosexuality (Hart 1984, p. 45).

Bentham died in 1832, but not before influencing profoundly a number of disciples, including John Austin, who wrote his *Province of Jurisprudence Determined* (1832), and John Stuart Mill, who wrote his landmark text *On Liberty* (1859). Mill, like Bentham, urged the replacement of the outdated and chaotic arrangements of the common law by modern criminal codes, based on scientific principles aimed at achieving social progress in order to enable humanity, in Bentham's words, 'to rear the fabric of human felicity by the hands of reason and of law' (Hart 1984, p. 45; see also Anderson 1984, pp. 364–5).

The movement for reform and codification of the criminal law gathered pace in England as a result of the response of scholars and parliamentarians to the efforts of Bentham and his followers. In the result, the attempts in the United Kingdom to introduce a modernised, simplified and codified penal law for Britain came to nothing. The forces of resistance to Bentham's ideas (which he had described as 'Judge and Co', i.e. the Bench and Bar) proved too powerful. He had targeted his great powers of invective against the legal profession, charging it with operating, for its own profit and at great cost to the public, an unnecessarily complex and chaotic legal system in which it was often impossible for litigants to discover in advance their legal rights. The legal profession had their revenge by engineering the defeat of the moves for statutory reforms of the criminal law, although reform of the law of evidence was enacted after 1827.

What could not be enacted in England, however, became an idea and a model that could much more readily be exported to the British colonies, provinces and settlements overseas. There were five principal models which the Colonial Office successively provided, according to the changing attitudes and preferences that prevailed in the last decades of the 19th century, when the British Empire was at the height of its expansion and power. In chronological order, these were:

1. The Elphinstone Code of 1827 for the presidency of Bombay in India (Hart 1984)

2. The Indian Penal Code of 1860 (which came into force in January 1862), known as the Macaulay Code, after Thomas Babbington Macaulay (1800–59), its principal author (Hooker 1984, p. 330)
3. The Fitzjames Stephen Code, based on the work of Sir James Fitzjames Stephen (1829–94), including his *A General View of the Criminal Law* (1863) and *Digest of the Criminal Law* (1877) (Uglo 1984, p. 486)
4. The Griffith Code, named after Sir Samuel Hawker Griffith (1845–1920), first Chief Justice of the High Court of Australia and earlier Premier and Chief Justice of Queensland, who had drafted his criminal code, adopted in Queensland in 1901, drawing on the Italian Penal Code and the Penal Code of New York (Castles 1984, p. 217)
5. The Wright Penal Code. This was based on a draft which was prepared for Jamaica by the liberal British jurist R.S. Wright, who had been heavily influenced by the ideals of John Stuart Mill. Wright's draft code was never enacted in Jamaica. However, curiously, in the ways of that time, it became the basis for the criminal law of the Gold Coast which, on independence in 1957, was renamed Ghana (Freeland 1981, p. 307).

Although there were variations in the concepts, elements and punishments for the respective same-sex offences in the several colonies, provinces and settlements of the British Empire, a common theme existed. Same-sex activity was morally unacceptable to the British rulers and their society. According to the several codified provisions on offer, laws to criminalise and punish such activity were a uniform feature of British imperial rule. The local populations were not consulted concerning the imposition of such laws. No doubt at the time, in some instances (as in the colonies), the settlers, if they ever thought about it, would have shared many of the prejudices and attitudes of their rulers. But in many of the territories in Asia, Africa and elsewhere where the laws were imposed and enforced, there was no (or no clear) pre-existing culture or tradition that required the punishment of such offences. They were simply imposed to stamp out the 'vice' and 'viciousness' amongst native peoples which the British rulers found, or assumed, was intolerable to a properly governed society.

The most copied of the above templates was the Indian Penal Code (IPC) of Macaulay. The relevant provision appeared in Chapter XVI, entitled 'Of Offences Affecting the Human Body'. Within this chapter, section 377 appeared, categorised under the sub-chapter entitled 'Of Unnatural Offences'. The provision (as later expanded) read:

> 377. Unnatural Offences — Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine.

> Explanation — Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section. (*Naz Foundation vs. Govt. of NCT of Delhi and Others* 2009, p. 847 [3])

This provision of the IPC was copied in a large number of British territories from Zambia to Malaysia, and from Singapore to Fiji. The postulate inherent in the provision, so defined, was that carnal activities against the order of nature violated human integrity and polluted society so that, even if the 'victim' claimed that he had consented to it, and was of full age, the act was still punishable because more than the individual's will or body was at stake. The result of the provision was that factors of consent, or of the age of the participants or of the privacy of the happening, were immaterial. Legally, same-sex activities were linked and equated to the conduct of violent sexual criminal offences. Consensual erotic conduct was assimilated to the seriousness of prohibited acts of paedophilia.

The Griffith Penal Code for Queensland (QPC) was not only the basis for the provisions of the criminal codes in those jurisdictions of Australia which opted for a code (Western Australia, Tasmania and eventually the Northern Territory). It was also widely copied outside Australia, not only in the neighbouring territory of Papua New Guinea (where effectively it is still in force) but in many jurisdictions of Africa, including present-day Nigeria, Kenya, Uganda and Tanzania. The QPC introduced into the IPC's template a particular notion stigmatising the category of 'passive' sexual partners who 'permit' themselves to be penetrated by another male. Thus, s208 of the QPC provided:

> Any person who –
> (a) Has carnal knowledge of any person against the order of nature; or
> (b) Has carnal knowledge of an animal; or
> (c) Permits a male person to have carnal knowledge of him or her against the order of nature
>
> Is guilty of a felony and is liable to imprisonment for 14 years.
> (Human Rights Watch 2008, p. 22)

This version of the offence ('person') not only extended it to women participants, but cleared up an ambiguity of the provision in the IPC. It made it clear that both partners to the act were criminals. It also widened the ambit beyond 'penetration' by introducing an independent provision for 'attempts to commit unnatural offences' (QPC ss.6, 29; see Human Rights Watch 2008, p. 23).

In some jurisdictions of the British Empire, when the anomalies of the legislation were pointed out, provisions were made (as in Nigeria and Singapore) to exempt sexual acts between 'a husband and wife' or (as in Sri Lanka) to make it clear that the unspecified offences of carnal acts against the 'order of nature' extended to sexual activities between women.

I can recall clearly the day in my first year of instruction at the Law School of the University of Sydney when I was introduced to this branch of the law of New South Wales, an Australian state that had resisted the persuasion of the codifiers. Like England, it had preferred to remain a common law jurisdiction, so far as the criminal law was concerned. That law was the common law of England, as modified by imperial statutes extended to the colonies and by colonial and later state enactments. In the last year of the reign of Queen Victoria, the colonial parliament of New South Wales, just before federation, enacted the Crimes Act 1900 (NSW), still in force. Part III of that Act provided for the definition of 'Offences against the Person'. A division of those offences was described as 'Unnatural Offences'. The first of these provided, in section 79:

> 79. *Buggery and Bestiality*: Whosoever commits the abominable crime of buggery, or bestiality, with mankind, or with any animal, shall be liable to penal servitude for 14 years.

This provision was followed by one, similar to the QPC, providing for attempts (s80) and another providing for indecent assaults (s81).

Three years before I came to my acquaintance with s79, the State Parliament had enacted new sections, probably in response to the ceaseless urgings of the State Police Commissioner (Colin Delaney) for whom homosexual offences represented a grave crisis for the moral fibre of Australian society. The new offence included additional punishment for those who, in a public place, solicited or incited a male person to commit any of the foregoing unnatural offences.

Possibly in response to concern about the unreliability of police evidence in such offences, the State Parliament added a provision (s81B[2]) requiring that a person should not be convicted of such an offence 'upon the testimony of one person only, unless such testimony is corroborated by some other material evidence implicating the accused in the commission of the offence'. By 1955, in Australia, the infection of hatred had not yet died. But new anxieties were beginning to surface.

As I listened to the law lecturer explaining peculiarities of the unnatural offences, including the fact that, in law, adulthood and consent were no defence and both parties were equally guilty (*R v. McDonald* 1878); the availability of propensity evidence and evidence of similar facts (*O'Leary v. The King* 1947, p. 360);[14] and the heavy penalties imposed upon conviction (*Veslar v. The Queen* 1955), I knew that these provisions were targeted directly and specifically at me. I could never thereafter share an unqualified belief that the inherited criminal law of Australia was beyond criticism. With a growing body of opinion I concluded on the need for modernisation and reform.

14 cf. (1942) 15 *Australian Law Journal* 131.

2. The present

The criminal laws introduced into so many jurisdictions by the British imperial authorities remained in force in virtually all of them long after the Union Jack was hauled down and, one by one, the plumed Britannic viceroys departed their imperial domains.

Occasionally, the needs of a particular territory were reflected in modifications of the statutory provisions before the end of British rule. Thus, in the Anglo-Egyptian Sudan, the Sudanese Penal Code of 1899 contained an adaptation of the IPC. Uniquely among the British colonies, this introduced the requirement of absence of consent for most versions of the offence, but removed the relevance of that consideration where one of the participants was a teacher, guardian, person entrusted with the care or education of the 'victim' or where he was below the age of 16 years. Likewise, in the Sudanese Code, the crime of 'gross indecency' was only punishable where it was non-consensual (Human Rights Watch 2008, p. 22). Inferentially, these variations on the IPC were introduced to reflect the colonial administrators' understanding of the then current sexual customs and practices in that relatively late addition to their area of responsibility. The distinctions in the colonial code survived in Sudan until 1991 when the government imposed an undifferentiated sodomy offence, justified by reference to the requirements of *shariah* law. Similar moves are reported in other post-colonial Islamic societies, including northern Nigeria and Pakistan, described as involving a 'toxic mix' of the influence of the two international streams that explain most of the current criminal prohibitions against consenting adult private same-sex conduct (the British and Islamic) (Human Rights Watch 2008, p. 22).

As the centenary of the formulation of the IPC approached in the middle of the 20th century, moves began to emerge for the repeal or modification of the same-sex criminal offences, commencing in England itself and gradually followed in all of the settler dominions and European jurisdictions.

The forces that gave rise to the movement for reform were many. They included the growing body of scientific research into the common features of human sexuality. This research was undertaken by several scholars, including Richard Krafft-Ebing (1840–1902) in Germany, Henry Havelock Ellis (1859–1939) in Britain, Sigmund Freud (1856–1939) in Austria and Alfred Kinsey (1894–1956) in the United States. The last, in particular, secured enormous public attention because of his unique sampling techniques and the widespread media coverage of his successive reports on variation in sexual conduct on the part of human males and females (Kinsey et al. 1948, 1953).

The emerging global media and the sensational nature of Kinsey's discoveries ensured that they would become known to informed people everywhere. Even if the sampling was flawed in some respects, it demonstrated powerfully that the assumption that same-sex erotic attraction and activity was

confined to a tiny proportion of wilful anti-social people was false. Moreover, experimentation, including acts described in the criminal laws as sodomy and buggery, treated as amongst the gravest crimes, were relatively commonplace both amongst same-sex and different-sex participants. If such acts were so common, the question posed more than a century earlier by Bentham and Mill was starkly re-presented. What social purpose was secured in exposing such conduct to the risk of criminal prosecution, particularly where the offences applied irrespective of consent, age and circumstance and the punishments were so severe?

A number of highly publicised cases in Britain, where the prosecution of titled 'offenders' appeared harsh and unreasoning, set in train in that country widespread public debate and, eventually, the formation of committees throughout the United Kingdom to support parliamentary moves for reform. Eventually, a committee of enquiry was established, chaired by Sir John Wolfenden, a university vice-chancellor (Committee on Homosexual Offences and Prostitution 1957; Kirby 2008). The Commission's report recommended substantial modification and containment of homosexual offences, removing the ambit of the criminal law for consensual conduct. With near unanimity the Wolfenden committee expressed its principle in terms that would have gladdened the heart of Jeremy Bentham:

> Unless a deliberate attempt is made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business (Committee on Homosexual Offences and Prostitution 1957, pp. 187–8).

As a result of the report, important debates were initiated in Britain involving leading jurists (Devlin 1959; Hart 1959).[15] Excuses were advanced by the government of the day for not proceeding with the reform, generally on the footing that British society was 'not yet ready' to accept the proposals (Grey 1992, p. 84). Ultimately, however, private members bills were introduced into the House of Commons and the House of Lords, by proponents of reform, neither of them homosexual.

Within a decade of the Wolfenden report, the United Kingdom Parliament changed the law for England and Wales (Sexual Offences Act 1967). At first, the age of consent was fixed by the reformed law at 21 years but with a number of exceptions (relating to the Armed Forces and multiple parties). The law did not at first apply to Scotland or Northern Ireland. Eventually, the age of consent was lowered to be equal to that applicable to sexual conduct involving persons of the opposite sex. The other exceptions were repealed or confined. Reforming laws were then enacted for Scotland and Northern Ireland. The last-mentioned reform was achieved only after a decision of the European

15 The Devlin/Hart debates are described in Lacey 2004, p. 243.

Court of Human Rights held that the United Kingdom was in breach of its obligations under the European Convention on Human Rights by continuing to criminalise the adult private consenting sexual conduct of homosexuals in that Province (*Dudgeon v. United Kingdom* 1981).

The engagement of the European Court (made up substantially of judges from countries long spared consideration of such offences by the work of Napoleon's codifiers) spread eventually to the removal of the criminal offences from the penal laws of the Republic of Ireland (*Norris v. Republic of Ireland* 1988) and Cyprus (*Modenos v. Cyprus* 1993), to whom Britain had earlier made that gift. In consequence, the law of Malta was also reformed. Later cases (as well as the discipline of the Council of Europe upon Eastern European countries which had followed the Soviet imposition of such offences) led to repeal in each of the European nations aspiring to membership of the Council and of the European Union.

The influence of the legislative reforms in the country from which the imperial criminal codes had been received resulted, within a remarkably short time, in the legislative modification of the same-sex prohibition in the penal laws of Canada (1969), New Zealand (1986), South Australia (1974), Hong Kong (1990) and Fiji (2005, by a High Court decision). Likewise, a decision of the Constitutional Court of South Africa in 1998 struck down the same-sex offences as incompatible with the post-Apartheid Constitution of that country *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (1998, 1999). In that decision, Ackermann J said:

> The way in which we give expression to our sexuality is the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy. (*National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1998, p. 32)

To the same end, the Supreme Court of the United States of America (another country which, with few exceptions, inherited its criminal law from the British template) eventually,[16] by majority, held that the offence enacted by the State of Texas, as expressed, was incompatible with the privacy requirements inherent in the US Constitution (*Lawrence v. Texas*, 2003). Kennedy J, writing for the Court, declared:

> [A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice. ... When homosexual conduct is made criminal by the law of the state, that declaration in and of itself is an invitation to subject homosexual

16 After a false start, in *Bowers v. Hardwick* (1986).

> persons to discrimination both in the public and the private spheres. (*Lawrence v. Texas* 2003, pp. 567, 575)

In Australia, the journey to reform was not always easy. It began with removal of the offences in the Crimes Act 1900 (NSW) which were then (1975) applied to the Australian Capital Territory, a federal responsibility. Full reform of the law in South Australia followed (1976). One by one, the other States of Australia, by parliamentary action, amended their criminal laws to remove the 'unnatural offences'. Among the last to make the change were Western Australia (1989) and Queensland (1990). In each of those States, the distaste at feeling obliged to repeal the template of the QPC, then applicable, was given voice in parliamentary preambles which expressed the legislature's discomfiture. Thus, in Western Australia, the preamble introduced in 1989, and finally settled in 1992, expressly stated:[17]

> Whereas the Parliament disapproves of sexual relations between persons of the same sex; [and] of the promotion or encouragement of homosexual behaviour ...
>
> And whereas the Parliament does not by its act in removing any criminal penalty for sexual acts in private between persons of the same sex wish to create a change in community attitudes to homosexual behaviour ... [or of] urging [young persons] to adopt homosexuality as a life style ...

Still, the old defences were modified by the provision of a defence if the accused believed, on reasonable grounds, that a girl victim was over 16 years of age or a male over 21.[18]

In Queensland, where the legislators were called upon to repeal the provision continued in the original source of the Griffith Code, a preamble only slightly less disapproving was also enacted:[19]

> Whereas Parliament neither condones nor condemns the behaviour which is the subject to this legislation ... [but] reaffirms its determination to enforce its laws prohibiting sexual interference with children and intellectually impaired persons and non-consenting adults.

For the first time, the Queensland law introduced a reference to the growing significance of the dangers of HIV/AIDS, which was by then a consideration in the Australian reform discourse:

> And whereas rational public health policy is undermined by criminal laws that make those who are at high risk of infection unwilling to disclose that they are members of a high-risk group.

17 Law Reform (Decriminalisation of Sodomy) Act 1989 (WA); Acts Amendment (Sexual Offences) Act 1992 (WA).

18 Criminal Code Act 1913 (WA), s186(2) (since repealed).

19 Criminal Code and Another. Act Amendment Act 1990 (Qld), Preamble.

Only one Australian jurisdiction held out, in the end, against repeal and amendment, namely Tasmania. In that state, a variation of the QPC continued to apply.[20] Endeavours to rely on the dangers of HIV/AIDS to secure reform failed to gain traction. Eventually, immediately after Australia, through its federal government, subscribed to the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), a communication was made by way of complaint to the Human Rights Committee in Geneva. This argued that, by criminalising private same-sex conduct between consenting adults, the law of Tasmania brought Australia, in that jurisdiction, into breach of its obligation under the ICCPR.

In March 1994, the Human Rights Committee of the United Nations, in *Toonen v. Australia* (1994), upheld the complaint and found Australia in breach. The majority of the Committee did so, on the basis of a breach of Article 17 of the ICCPR (privacy). A minority report suggested that there were other breaches in relation to discrimination on the grounds of sex and of the requirement to treat persons with equality. Reliant upon the Human Rights Committee's determination, the Australian Federal Parliament enacted a law to override the Tasmanian same-sex prohibition, purporting to act under the external affairs power in the Australian Constitution.[21] The validity of the law so enacted[22] was then challenged by Tasmania in the High Court of Australia. That court, in *Croome v. Tasmania* (1998, p. 119), dismissed an objection to the standing of one of the successful complainants to Geneva in seeking relief against the Tasmania challenge. With this decision, the Tasmanian Parliament surrendered, repealing the anti-sodomy offence of that state. It was not therefore necessary for the High Court of Australia to pass on the constitutional validity of the federal law. In all Australian jurisdictions, the old British legacy had been removed by legislation and the democratic process. It had taken 20 years.

For a long time no further significant moves were made in non-settler countries of the Commonwealth of Nations to follow the lead of the legislatures in the old dominions and the courts in South Africa and Fiji. On the contrary, when a challenge was brought to the Supreme Court of Zimbabwe in *Banana v. The State* (2004), seeking to persuade that court to follow the privacy and equality reasoning of the South African Constitutional Court, the endeavour, by majority, failed.

Another setback was suffered in Singapore, which, like Hong Kong, was a small common law jurisdiction with a prosperous Chinese society unencumbered by cultural norms of Judeo-Christian origin, except as grafted on to them by their temporary British colonial rulers. In Hong Kong, the

20 Criminal Code Act 1924 (Tas), s122.

21 Australian *Constitution*, s51 (xxix).

22 Human Rights (Sexual Conduct) Act 1994 (Cth), s4. The section relied on and recited Art.17 of the ICCPR.

then territory's law reform commission supported the Wolfenden principles and favoured their introduction (Law Reform Commission of Hong Kong 1982). The change was effected in 1990 after vigorous advocacy by the local homosexual community and its friends. But the course of reform in Singapore was less favourable.

In 2006, the Law Society of Singapore delivered a report proposing repeal of s377A of the Singapore Penal Code. Apparent support for the course of reform was given by the influential voice of the foundation Prime Minister (and 'Minister Mentor') Lee Kuan Yew. However, a fiery debate ensued in the Singapore Parliament, where opponents of reform justified the continuance of the colonial provision on the basis that it contributed to 'social cohesiveness'; reflected 'the sentiments of the majority of society'; and that repeal would 'force homosexuality on a conservative population that is not ready for homosexuality' (Aidil 2007). The reform bill was rejected, although the Prime Minister made it clear that the laws would not generally be enforced, so that gays were welcome to stay in, and come to, Singapore, inferentially so long as they preserved a low profile and observed the requirements of 'don't ask don't tell'.

Occasional glimmers of hope of reform arose in particular countries of the Commonwealth, where the same-sex prohibitions were repealed, such as The Bahamas. However, these instances of encouragement had to be counter-balanced against the violence of popular culture in other Caribbean countries (especially Jamaica) in the form of homophobic rap music and against the denunciation of 'the homosexual lifestyle' by leaders in African countries such as Robert Mugabe (Zimbabwe), Daniel arap Moi (Kenya), Olusegun Obasanjo (Nigeria) and Yoweri Museveni (Uganda). The successive prosecutions for sodomy in Malaysia of an opposition politician, Anwar Ibrahim, were strongly supported by that country's leader (Dr Mahatir). In Jamaica (2004) and in Uganda (2011), leading advocates of law reform were brutally murdered against a backdrop of verbal calumny in popular culture, politics and sections of the media. On the face of things, the scene in these Commonwealth countries looks grim and forbidding. Only Nelson Mandela, father of South Africa's multi-racial democracy, spoke strongly in Africa against the proposition that homosexuality was 'un-African'. For him, it was 'just another form of sexuality that has been suppressed for years. ... [It] is something we are living with.'[23] Still, the advocacy of change in many such countries is dangerous and risky. The future looks bleak.

3. The future

Against this background, a remarkable development occurred in India on 2 July 2009. The Delhi High Court (constituted by A.P. Shah CJ and S. Muralidhar J)

23 N. Mandela, in Gift Siso Sipho and B. Atieno (2009) 'United against homosexuality', *New African* (quoted in Human Rights Watch 2008, p. 10).

on that day handed down its long-awaited decision in *Naz Foundation v. Govt. of NCT of Delhi and Others* (2009). The Court unanimously upheld a challenge brought by the Naz Foundation against the validity of the operation of s377 of the IPC, to the extent that the section criminalised consensual sexual conduct between same-sex adults occurring in private. In a stroke, the Court liberated large numbers of the sexual minorities described by the scientists, defended by Wolfenden, freed by legislation elsewhere, but kept in legal chains by the enduring penal code provisions of the British Empire.

Curiously, before the Delhi High Court, the Union Ministry of Health and Family Welfare joined with other health respondents in the proceedings to support the Foundation's challenge. The Union Ministry of Home Affairs, on the other hand, appeared to oppose relief and to assert that s377 of the IPC reflected the moral values of the Indian people. This is not the occasion to recount every detail of the judicial opinion of the Delhi High Court, which was immediately flashed around the world, not only because of its potential importance for India beyond Delhi, but also because of its possible significance in the many other Commonwealth countries that retain identical or like provisions of their criminal codes and enjoy identical or like constitutional provisions such as were the source of the relief provided by the Court.

The participating judges traced:

- The history of the IPC, the nature of the challenge and of the specific interest of the Naz Foundation which works in the field of HIV/AIDS intervention and prevention (*Naz Foundation v. Govt. of NCT of Delhi and Others* 2009, pp. 847–8, [2]–[10]);
- The response of the respective Union governmental agencies and of other respondents in the case, many of them supporting the Naz Foundation (ibid. pp. 850–5, [11]–[23]);
- The invocation of the right to life and the protection of personal dignity, autonomy and privacy under the Indian Constitution (ibid. pp. 856–65, [25]–[52];
- The context of global trends in the protection of the privacy and dignity rights of homosexuals, many of them noted above (ibid. pp. 865–8, [53]–[59]);
- The absence of a compelling state interest in India to intrude into such private and intimate conduct and, on the contrary, the strong conflicting conclusion in the context of the AIDS epidemic (ibid. pp. 868–80, [60]–[87];
- The Court's conclusion that s377 violated the constitutional guarantee of equality under art14 of the Constitution of India (ibid. pp. 880–3, [88]–[93]; and
- The impermissible and disproportionate targeting of homosexuals as a class (ibid. pp. 883–9, [94–115]).

The Delhi Court concluded that the provisions of s377 were severable in so far as they applied to offences against minors (for which there was no other equivalent law in the same-sex context (ibid. pp. 893–5, [120]–[128]) and the ultimate affirmation that the notion of equality in the Indian Constitution, upheld in the decision, represented an underlying theme which was essential because of the very diversity of the Indian society upon which the Constitution operated (ibid. pp. 895–6, [129]–[131]).

The decision of the Delhi High Court in the Naz Foundation case is presently subject to appeal to the Supreme Court of India. At the time of publication of this chapter, the decision is not known. It may be expected later in 2013. But whatever the outcome, no appellate court could ever re-configure the state of the law or of society to the conditions prevailing in India prior to the delivery of the judgment in *Naz*. The discourse has shifted. Significantly, the Government of India elected not to appeal against the decision of the Delhi Court. It was content to leave the authority of the decision to stand as stated, with the high implication thereby that it would be observed in all other parts of the nation beyond Delhi. The Supreme Court of India will in due course reveal its conclusion. But the discourse in India (and in the many other countries where the same or similar provisions of the imported criminal codes apply) has changed.

Notwithstanding this hopeful sign, the prospect of change in the other 41 jurisdictions of the Commonwealth of Nations that continue to criminalise same-sex conduct still appears discouraging. Still, here too, several things are happening which may be occasions for cautious optimism, at least in the long term. Most of these developments arise in the context of responses by the global community to the HIV/AIDS epidemic. It is, to some extent, unpalatable to support the important arguments, advanced by Bentham and many writers since, for the winding back of the criminal law to its proper sphere of operation, on grounds based on the pragmatic concern to respond effectively to the HIV epidemic. At one stage in the reasoning in the Naz Foundation case, as the distinguished Indian judges move to their conclusion, they quote from remarks that I had made, shortly before, to a conference of the Commonwealth Lawyers' Association held in Hong Kong (Kirby 2009). The Delhi High Court must have discovered my remarks on the internet. They noted that my observations had been offered in the context of an analysis (similar to that set out above) concerning the criminal codes 'imposed on colonial people by the imperial rulers of the British Crown' (*Naz Foundation v. Govt. of NCT of Delhi and Others* 2009, p. 879 [85]). As stated in the Naz Foundation case, and accepted by the Delhi High Court, I contended that laws criminalising of private, consensual, adult homosexual acts were wrong:

- Wrong in legal principle because they exceed the proper ambit and function of the criminal law in a modern society;

- Wrong because they oppress a minority in the community and target them for an attribute of their nature that they do not choose and cannot change. In this respect they are like other laws of colonial times that disadvantage people on the ground of their race or sex;
- Wrong because they fly in the face of modern scientific knowledge about the incidence and variety of human sexuality; and
- Wrong because they put a cohort of citizens into a position of stigma and shame that makes it hard to reach them with vital messages about safe sexual conduct, essential in the age of HIV/AIDS (ibid. pp. 889–95, [116]–[128]).

Of the foregoing errors, only the last is relevant to the HIV epidemic and AIDS. Yet this is now an important line of reasoning upon which hang many international attempts to persuade countries still adhering to their colonial legacy to think again and to change, by legislation or judicial decision, their local equivalents to s377 of the IPC that was the provisions before the Delhi High Court.

This is not the occasion to identify all the developments arising. However, they include:

1) Repeated statements by the secretary general of the United Nations (Mr Ban Ki-moon), urging Member States to change their legal prescriptions of this kind without delay. Thus, on 25 January 2011, in remarks to the session of the Human Rights Council in Geneva, the secretary general said:

> Two years ago I came here and issued a challenge. I called on this Council to promote human rights without favour, without selectivity, without any undue influence ... We must reject persecution of people because of their sexual orientation or gender identity ... who may be arrested, detained or executed for being lesbian, gay, bisexual or transgender. They may not have popular or political support, but they deserve our support in safeguarding their fundamental human rights.
>
> I understand that sexual orientation and gender identity raise sensitive cultural issues. But cultural practice cannot justify any violation of human rights ... When our fellow human beings are persecuted because of their sexual orientation or gender identity, we must speak out. That is what I am doing here. That is my consistent position. Human rights are human rights everywhere, for everyone. (Ban 2011)

The secretary general has made many similar statements. They are backed up by strong international declarations of commitment in the context of HIV/AIDS (United Nations General Assembly 2011). His words are supported by like statements on the part of the Administrator of the United Nations Development Programme (UNDP), the director

general of the World Health Organisation (WHO), the United Nations High Commissioner for Human Rights (UNHCHR), the Executive Director of UNAIDS and other United Nations voices. Rarely has the world organisation spoken with such unanimity and unvarnished clarity.

2) Additionally, the UNDP in 2010 established a Global Commission on HIV and the Law. The chairman of this body was Federico Henrique Cardoso, former president of Brazil. It includes in its numbers several distinguished lawyers of the common law tradition, legislators and other experts. I was myself a member of the Commission. In considering the areas of law reform required to strengthen the global response to the ongoing epidemic of HIV/AIDS, the Commission's report recognised that about 2.6 million people every year become infected with HIV. Effective reduction of the impact of these infections required legal reform. These include criminal laws that impede the successful strategies to support prevention of the spread of HIV and to respond effectively to the needs of health and therapy for the infected and those vulnerable to infection. The Global Commission addressed specifically the ongoing legacy of imperial criminal codes as they continue to apply in so many countries of the common law world and beyond (UNDP Global Commission 2012, p. 50).

3) A third source of action was the Eminent Persons Group (EPG) of the Commonwealth of Nations. This body arose out of the Trinidad and Tobago Affirmation that followed the Commonwealth Heads of Government Meeting (CHOGM) held in Port of Spain, Trinidad in October 2009 (Commonwealth Heads of Government Meeting 2009). I was a member of the EPG. Among the priority areas requiring attention, identified by the EPG, was the response of Commonwealth nations to the HIV/AIDS epidemic. Although Commonwealth countries comprise one third of the world's population, it is estimated that two thirds of those who are currently living with HIV or AIDS are Commonwealth citizens.[24] The EPG drew this fact to the notice of the Commonwealth leaders. It was an important component of the EPG report, which recommended that those laws that may impede a successful strategy against HIV and AIDS should be considered for reform and prompt action. The alternative is that the nations that have received the unlovely legacy of same-sex criminal prohibitions will continue to watch as their citizens and residents become infected and die in conditions of poverty, stigma and shame.

24 UNDP Comparative Table of HIV Infection in the World (United Nations Development Programme 2010, pp. 197–201).

In the post-imperial age, there are no gunships that can be sent to enforce the messages of reform voiced in the United Nations, by UNDP or by the Commonwealth EPG. No armed force or coercive military action can be brought to bear. All that is available is the power of ideas and the persuasion which is based on the experience of other countries. But there is also the argument of self-interest because the impact of HIV is not only devastating in personal terms. It is also an enormous burden on the economies of the countries that persist with their current disabling legislation. Where human rights, individual dignity and relief from suffering do not prove persuasive, other means must be deployed including economic arguments and the force of international good opinion.

The Naz Foundation case demonstrates that the power of international law and good example today is a force more potent than even the coercive orders of the Privy Council were in the heyday of British imperial power. Words spoken in conferences will sometimes be read and will enter the minds of legislators and judges worldwide. Decisions of final national courts will be published in the *Law Reports of the Commonwealth*, on the internet and in journals that make their way to equivalent courts in other lands. Books such as this will bring wisdom and good experience beyond our own lands to colleagues elsewhere who, so far, are walking in darkness.

This is now the global reality of the law. In that global community, we who share the English language have a special, added advantage. We can readily communicate ideas with one another in the English language and through courts, legislatures and other institutions that share many commonalities. The anti-sodomy offences and same-sex criminal prohibitions of the British Empire constitute one target of communication that needs to be enhanced, expedited and accelerated.

This imperative does not exist only to achieve an effective response to the AIDS epidemic. It is also there for the proper limitation of the criminal law to its appropriate ambit; for an end to oppression of vulnerable and often defenceless minorities; for the adoption of a rational attitude to empirical scientific evidence about human nature and conduct; and for the removal of a great unkindness and violence by state authorities that has burdened human happiness for too long, precisely as Jeremy Bentham wrote 200 years ago.

Bibliography

Aidil, M. (2007) 'Re-scoping Sec.377A: a juxtaposition of views', *Juris Illuminae* 3 (3).

Anderson, J. (1984) 'J.S. Mill', in A.W.B. Simpson (ed.), *Biographical Dictionary of the Common Law* (London: Butterworths).

Ban, Ki-moon (2011) Remarks to the Human Rights Council, Geneva, 25 Jan. 2011, TSPT.

Brundidge, J.A. (1993) *Sex, Law and Marriage in the Middle Ages: Collected Studies* (Aldershot: Variorum).
Brunner, H. (1888) *The Sources of the Law of England*, trans. Williams Hastie (Edinburgh: T.T. Clark).
Carson, H.L. (1914) 'A plea for the study of Britton', *Yale Law Journal* 23, pp. 664–71.
Castles, A.C. (1984) 'Griffith', in A.W.B. Simpson (ed.), *Biographical Dictionary of the Common Law* (London: Butterworths).
Coke, E. (1797) *The Institutes of the Laws of England* (London: W. Rawlins for T.Baset).
Committee on Homosexual Offences and Prostitution (1957) *Report of the Committee on Homosexual Offences and Prostitution*, Cmnd. 247 (London: HMSO).
Commonwealth of Nations Eminent Persons Group (2011) *A Commonwealth of the People – Time for Urgent Reform* (London).
Commonwealth Heads of Government Meeting (CHOGM) (2009) *Affirmation of Commonwealth Values and Principles* Trinidad and Tobago Outcome Documents.
Devlin, P. (1959) *The Enforcement of Morals*, Maccabean Lecture in Jurisprudence of the British Academy (London: Oxford University Press).
Douglas, M. (2002) *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (London: Routledge).
Freeland, M.L. (1981) 'R.S. Wright's Model Criminal Code: a forgotten chapter in the history of the Criminal Law', *Oxford Journal of Legal Studies* 1.
Greenberg, D.F. (1988) *The Construction of Homosexuality* (Chicago, IL: University of Chicago).
Grey, A. (1992) *Quest for Justice – Towards Homosexual Emancipation* (London: Sinclair-Stevenson).
Hart, H.L.A. (1959) 'Immorality and treason', *The Listener*, 30 July, pp. 162–3.
— 1984. 'Jeremy Bentham', in A.W.B. Simpson (ed.), *Biographical Dictionary of the Common Law* (London: Butterworths).
Hooker, M.B. (1984) 'Macaulay', in A.W.B. Simpson (ed.), *Biographical Dictionary of the Common Law* (London: Butterworths).
Human Rights Watch (2008) *This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism* (New York: Human Rights Watch) (Chapter 5 of this work).
Hyde, M. (1970) *The Love That Dared Not Speak Its Name: A Candid History of Homosexuality in Britain* (Boston: Little Brown).
Kinsey, A., W.B. Pomeroy and C.E. Martin (1948) *Sexual Behaviour in the Human Male* (Philadelphia, PA: W.B. Saunders).

— (1953) *Sexual Behaviour in the Human Female* (Philadelphia, PA: W.B. Saunders).
Kirby, M.D. (2008) 'Lessons from the Wolfenden report', *Commonwealth Law Bulletin* 34 (3), pp. 551–9.
— (2009) Homosexual Law Reform: The Ongoing Blind Spot of the Commonwealth of Nations, speech to the Commonwealth Law Conference, Hong Kong, 8 April.
— (2011) 'The sodomy offence: England's least lovely criminal law export?', *Journal of Commonwealth Criminal Law* 1.
Lacey, N. (2004) *The Life of H.L.A. Hart – the Nightmare and the Noble Dream* (Oxford: Oxford University Press).
Law Reform Commission of Hong Kong (1982) *Laws Governing Homosexual Conduct* (Hong Kong).
Moore, R.I. (1987) *The Formation of a Persecuting Society* (London: Blackwell).
Ottoson, D. (1998) *State-Sponsored Homophobia: A World Survey of Law Prohibiting Same-Sex Activity Between Consenting Adults* (International Gay and Lesbian Association).
Prest, W. (2009) *Blackstone and His Commentaries: Biography, Law, History* (Oxford: Hart).
Richardson, H.G. and G.O. Sayles (eds.) (1955) *Fleta*, *Seu Commentarius Juris Angicani* (London: Quaritch).
Saunders, D. (2009) '377 – and the unnatural afterlife of British colonialism', *Asian Journal of Comparative Law* 165.
Uglo, S. (1984) 'Stephen', in A.W.B. Simpson (ed.), *Biographical Dictionary of the Common Law* (London: Butterworths).
United Nations Development Programme (2010) *Human Development Report. The Real Wealth of Nations – Pathways to Development*. United Nations Development Programme.
United Nations Development Programme (2012) Global Commission on HIV and the Law, *Risks, Rights and Health* (New York)
United Nations, General Assembly (2011) *Uniting for universal access: towards zero new HIV infections, zero discrimination and zero AIDS-related deaths ,* Report of the Secretary General, UN Doc. A/65/797 (28 Mar. 2011).

Legal cases

Banana v. The State (2004) 4 LRC 621 (ZimSC) (Gubbay CJZ dissenting).
Bowers v. Hardwick (1986) 478 US 186.
Croome v. Tasmania (1998) 191 CLR 119.
Dudgeon v. United Kingdom (1981) 4 EHRR 149.
Lawrence v. Texas (2003) 539 US 558.
Modenos v. Cyprus (1993) 16 EHRR 485.

National Coalition for Gay and Lesbian Equality v. Minister of Justice (1998) 3 LRC 648.
National Coalition for Gay and Lesbian Equality v. Minister of Justice (1999) (1) SA 6 (SACC).
Naz Foundation v. Govt. of NCT of Delhi and Others (2009) 4 LRC 846.
Norris v. Republic of Ireland (1988) 13 EHRR 186.
O'Leary v. The King (1947) *Australian Law Journal* 20.
R v. McDonald (1878) 1 SCR(NS) 173.
Toonen v. Australia. 1994. 1 *Int Hum Rts Reports* 97 (No.3).
Veslar v. The Queen (1955). 72 WN(NSW) 98.

3

This alien legacy: the origins of 'sodomy' laws in British colonialism

Human Rights Watch

Editors' note: This abridged version of the original 2008 report – written by Alok Gupta with contributions by Scott Long – has been substantially edited to reduce the length, including via removal of Chapter III and without additions or updates. Omitted text is shown by '[…]'. Readers are strongly encouraged to also consult the original full report, available online from Human Rights Watch (2008a) at www.hrw.org/reports/2008/12/17/alien-legacy-0 (accessed 22 March 2013).

I. Introduction

Three trials

In 2008, a case stood unresolved before India's High Court, calling for reading down Section 377 of the Indian Penal Code. That provision, almost 150 years old, punishes 'carnal intercourse against the order of nature with any man, woman or animal' with imprisonment up to life.[1] This law, understood to criminalise consensual homosexual conduct, allows the state to invade the lives and intimacies of millions of adult Indians.

Five years earlier in the long-running case, India's Ministry of Home Affairs had submitted an affidavit supporting Section 377. It said: 'The law does not

1 As explained below, most law derived from British colonialism makes no distinction between homosexual acts committed with or without consent, or between homosexual acts committed by adults as opposed to adults' abuse of children. Therefore, the petition aims to 'read down' rather than strike down the law. It asks the Court to state that consensual homosexual acts between adults are no longer criminal under the provision, while leaving intact Section 377's application to non-consensual acts and to children – until India passes a modern, gender-neutral rape law and provides express legal protection for male children against sexual abuse.

run separately from society. It only reflects the perception of the society ... When Section 377 was brought under the statute as an act of criminality, it responded to the values and mores of the time in the Indian society'. The ministry claimed that, by comparison to the United Kingdom and the United States of America, 'Objectively speaking, there is no such tolerance to [the] practice of homosexuality/lesbianism in the Indian society' (High Court of New Delhi 2005).

This was sheer amnesia. Section 377, at its origin, did not respond to Indian society or its 'values or mores' at all. British colonial governors imposed it on India undemocratically. It reflected only 'the British Judeo-Christian values of the time', as the petitioners in the case told the court in reply (High Court of New Delhi 2005; see also Baudh 2008). Indeed, on 16 August 2008 – the 61st anniversary of India's freedom – the law's opponents marched in Mumbai and demanded the UK government 'apologise for the immense suffering that has resulted from their imposition of Section 377. And we call on the Indian government to abandon this abhorrent alien legacy … that should have left our shores when the British did' (Taylor 2008). They chose the day because while 'India had got its independence from the British on this date in 1947, queer Indians were still bound by a British Raj law' (QueerAzaadi 2008).

In a second case in the same month, in *Malaysia*, a court arraigned Anwar Ibrahim, former deputy prime minister and now a leader of the opposition. He stood charged with sexual relations with a male former aide, under Section 377 of Malaysia's penal code, which also criminalises 'carnal intercourse against the order of nature'.

It was Anwar's second trial for what the Malaysian press universally called 'sodomy'. Like the first charges, nine years earlier, these showed every sign of a political frame-up. Anwar had been preparing to return to political life in a parliamentary by-election when the allegations broke. If Malaysia's government believed, as India's apparently did, that the colonial-era law mirrored deep social prejudices, then the case was a perfect tool to discredit him.

Yet according to an opinion poll, two thirds of Malaysians thought politics lurked behind the charges, and only one third believed the criminal justice system could handle Anwar's case fairly (Human Rights Watch 2008b). Regardless of how Malaysians felt about homosexual conduct, they did not trust the government to administer the law. The state's handling of the evidence fed suspicions. Police had sent the man who filed the complaint to a hospital, for anal examinations designed to prove the charges: standard procedure in many countries. Embarrassingly, however, the tests – later leaked on the internet – apparently found no proof. The government vacillated, too, between charging Anwar with consensual and non-consensual 'sodomy'. The uncertainty came easy. The law had only relatively recently made a distinction between the two – and it still provided virtually identical punishments, regardless of consent.

A third case came in *Uganda*, where three members of an organisation defending lesbian, gay, bisexual, and transgender (LGBT) people's rights faced trial. They had staged a peaceful protest at an AIDS conference in Kampala, drawing attention to the government's refusal to respond to the pandemic among the country's ... LGBT communities. Police promptly arrested them and charged them with criminal trespass.

Seemingly the case had nothing to do with 'sodomy' or sex, but over it hung the shadow of Uganda's law punishing 'carnal knowledge against the order of nature'. That law, Section 140 of the criminal code, was also a British colonial inheritance, though in 1990 legislators had strengthened it, raising the highest penalty to life imprisonment. The government used the revised law to harass both individuals and activists who were lesbian or gay, censoring their speech, threatening them with prison, raiding their homes. Officials also relied on the law to explain, or excuse, their failure to support HIV/AIDS prevention efforts among LGBT people – the inaction that sparked the protest. Four years earlier, the Minister of Information had demanded that both the United Nations and national AIDS authorities shut out all LGBT people from HIV/AIDS programs and planning. He cited the law against homosexual conduct (*The Daily Monitor* 2004).

[…]

There was no doubt, then, that the 'trespass' charges against the protesters aimed not just to suppress dissent, but to send a message that some people – 'sodomites', violators of the 'carnal knowledge' law – should not be seen or heard in public at all. President Yoweri Museveni, who had campaigned against LGBT people's rights for a decade, reinforced that message at every opportunity. He called homosexuality 'a decadent culture … being passed by Western nations', warning: 'It is a danger not only to the [Christian] believers but to the whole of Africa' (New Vision 2008a). He praised Ugandans for 'rejecting' it, and claimed that 'having spinsters and bachelors was quite alien to Ugandan traditions' (New Vision 2008b).

[…]

The atmosphere crackled with explosive menace. Hundreds marched in 2007 to threaten punishment for LGBT people, calling them 'criminal' and 'against the laws of nature' (Human Rights Watch 2007c). Yet government ministers still warned that tougher anti-gay measures were needed. 'Satan,' one said, 'is having an upper hand in our country'.[2]

2 James Nsaba Butoro, ethics and integrity minister in the Museveni government, quoted in *New Vision* (2007).

Colonial laws and contemporary defenders

More than 80 countries around the world still criminalise consensual homosexual conduct between adult men, and often between adult women.[3]

These laws invade privacy and create inequality. They relegate people to inferior status because of how they look or who they love. They degrade people's dignity by declaring their most intimate feelings 'unnatural' or illegal. They can be used to discredit enemies and destroy careers and lives. They promote violence and give it impunity. They hand police and others the power to arrest, blackmail, and abuse. They drive people underground to live in invisibility and fear.[4]

More than half those countries have these laws because they once were British colonies.

This report describes the strange afterlife of a colonial legacy. It will tell how one British law – the version of Section 377 the colonisers introduced into the Indian Penal Code in 1860 – spread across immense tracts of the British Empire.

Colonial legislators and jurists introduced such laws, with no debates or 'cultural consultations', to support colonial control. They believed laws could inculcate European morality into resistant masses. They brought in the legislation, in fact, because they thought 'native' cultures did not punish 'perverse' sex enough. The colonised needed compulsory re-education in sexual mores. Imperial rulers held that, as long as they sweltered through the promiscuous proximities of settler societies, 'native' viciousness and 'white' virtue had to be segregated: the latter praised and protected, the former policed and kept subjected.

Section 377 was, and is, a model law in more ways than one. It was a colonial attempt to set standards of behaviour, both to reform the colonised and to protect the colonisers against moral lapses. It was also the first colonial

3 An exact number is hard to calculate. Almost none of these laws mention 'homosexuality' (a term only coined in 1869) or homosexual acts; the terminology differs between legal systems and (as the discussion of the original meanings of 'sodomy' in chapter II below shows) is sometimes difficult to interpret. For instance, Egypt is often excused from lists because its law punishes the 'habitual practice of debauchery [*fujur*]', even though domestic jurisprudence since the 1970s has established that this term refers to consensual sex between men. The best reference work is Ottosson (2008). [Editors: see update Itaborahy 2012, discussed in Lennox and Waites, chapter one, this volume].

4 The principle that criminalising consensual same-sex sexual conduct violates basic human rights was laid down by the UN Human Rights Committee – which interprets and monitors compliance with the International Covenant on Civil and Political Rights (ICCPR) – in the 1994 case of *Toonen v. Australia*. The Committee found that sexual orientation is a status protected against discrimination under articles 2 and 26 of the ICCPR.

'sodomy law' integrated into a penal code – and it became a model anti-sodomy law for countries far beyond India, Malaysia, and Uganda. Its influence stretched across Asia, the Pacific islands, and Africa, almost everywhere the British imperial flag flew.

> In *Asia and the Pacific,* colonies and countries that inherited versions of that British law were: Australia, Bangladesh, Bhutan, Brunei, Fiji, Hong Kong, India, Kiribati, Malaysia, Maldives, Marshall Islands, Myanmar (Burma), Nauru, New Zealand, Pakistan, Papua New Guinea, Singapore, Solomon Islands, Sri Lanka, Tonga, Tuvalu, and Western Samoa.
>
> In *Africa,* countries that inherited versions were: Botswana, Gambia, Ghana,[5] Kenya, Lesotho, Malawi, Mauritius, Nigeria, Seychelles, Sierra Leone, Somalia, Swaziland, Sudan, Tanzania, Uganda, Zambia, and Zimbabwe.[6]

Among these, only New Zealand (in 1986), Australia (state by state and territory by territory), Hong Kong (in 1990, before the colony was returned to China), and Fiji (by a 2005 high court decision) have put the legacy, and the sodomy law, behind them.

5 The Ghanaian code differs from other British-derived Penal Codes in Africa in that consensual 'buggery', while a crime, is defined only as a misdemeanor. Ghanaian law does not derive directly from the Indian Penal Code (or the Queensland Penal Code) – as do most other British-African codes, as explained below. Its ancestor was a draft prepared for Jamaica by the liberal British jurist R.S. Wright, who was heavily influenced by the libertarian ideals of the philosopher John Stuart Mill. (Mill famously wrote that 'the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others' (Mill 1974, p. 68). Wright's draft code was never applied in Jamaica but became the basis for Ghanaian law (Friedland 1981).

6 *South Africa*, although taken over by the British in 1806, retained the Netherlands' common law, known as 'Roman-Dutch' – which also criminalised 'sodomy'. This common-law offence was finally struck down by the Constitutional Court of the post-apartheid country in 1998. (The Netherlands itself decriminalised sodomy in 1809, when Napoleon annexed it. In one of the typical paradoxes of colonial law, this was three years too late to affect the Netherlands' one time African colony, which kept Roman-Dutch law in its pre-1806 form and hence retained the crime.) Roman-Dutch law came to what is now Namibia when, as the territory of South-West Africa, it became a South African mandate in the wake of World War I. It remains Namibia's common law, and sodomy is still a crime there. The same is true of Zimbabwe, which began its colonial existence as a possession of Cecil Rhodes' Cape Town-based British South Africa Company. However, Roman-Dutch law in colonial Rhodesia as well as modern Zimbabwe has been interpreted by judges trained in British common law, and the understanding of sexual offences there has been heavily affected by the Sec 377 tradition. For a fuller discussion, see Long (2003).

Other colonial powers had far less impact in spreading so-called sodomy laws. France decriminalised consensual homosexual conduct in 1791.[7] (It did, however, impose sodomy laws on some French colonies as means of social control, and versions of these survive in countries such as Benin, Cameroon and Senegal). Germany's notorious Paragraph 175 punished homosexual acts between men from Bismarck's time till after the Nazi period.[8] German colonies were few, however, and the legal traces of its presence evanescent.[9]

This report does not pretend to be a comprehensive review of 'sodomy' and European colonial law. It concentrates on the British experience because of the breadth and endurance of its impact. Nor does this report try to look at the career of 'sodomy' and law in all the British colonies. For clarity, it focuses on the descendants of India's Section 377. (Britain's Caribbean possessions received the criminalisation of 'buggery' in British law, but by a different process relatively unaffected by the Indian example. They are not discussed here: Human Rights Watch 2004a).

As Britain tottered towards the terminal days of its imperial power, an official recommendation by a set of legal experts – the famous Wolfenden report of 1957 – urged that 'homosexual behaviour between consenting adults in private should no longer be a criminal offence'. The report said:

> The law's function is to 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 ... It is not, in our view, the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behaviour. (Committee on Homosexual Offences and Prostitution 1963)

England and Wales decriminalised most consensual homosexual conduct in 1967.[10] That came too late for most of Britain's colonies, though. When they won independence in the 1950s and 1960s, they did so with the sodomy laws still in place.

Few of those independent states have undertaken repeal since then. This flies in the face of a growing body of international human rights law and precedents demanding that they do so. They disregard, too, the example of formerly colonised states like Ecuador, Fiji and South Africa that have actually enshrined protections for equality based on sexual orientation in their constitutions.

Still more striking is how judges, public figures, and political leaders have, in recent decades, defended those laws as citadels of nationhood and cultural authenticity. Homosexuality, they now claim, comes from the colonising west.

7 Napoleon's armies then brought decriminalisation to the conquered Netherlands, and thus to most of its colonies.
8 East Germany eliminated it in 1957 and West Germany in 1969.
9 Most of its colonies passed to Britain, France, or Belgium after the First World War.
10 Scotland followed in 1980, and Northern Ireland in 1982.

They forget the west brought in the first laws enabling governments to forbid and repress it.

[…]

Addressing the sodomy law in 1983, India's Supreme Court proudly declared that 'neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking' (*Fazal Rab Choudhary v. State of Bihar* 1983, p. 323).

[…]

Opponents of change have mounted the same argument elsewhere. While Hong Kong was still a British colony, its authorities fought Wolfenden-like law reforms (Petersen 1997). Commissions deputed to investigate the issue heard opinions such as 'Homosexuality may be very common in Britain, but it is definitely not common in Hong Kong. Even if it is, it is still wrong to legalise activities that are in clear breach of our morals'.[11] Only in 1990, after long advocacy by the LGBT community, did the colony decriminalise consensual homosexual sex.[12]

After fiery debate, Singapore's government refused to rid itself of its colonial law against homosexual conduct in 2007. The supporters of this position cited the 'communal cohesiveness' that the British statute supposedly defended.[13] A petition to the prime minister called the law, forced on the colony decades before, 'a reflection of the sentiments of the majority of society … Repealing [it] is a vehicle to force homosexuality on a conservative population that is not ready for homosexuality' (Keep377a.com 2008). In November 2001, the then prime minister of neighbouring Malaysia, who had encouraged Anwar Ibrahim's first 'sodomy' trial, blamed homosexuality on the former colonial power: 'The British people accept homosexual [government] ministers,' he said. 'But if they ever come here bringing their boyfriend along, we will throw them out. We will not accept them' (Human Rights Watch 2002a, 'Lesbian, gay, bisexual and transgender rights', p. 684).

Extreme and extraordinary, however, have been the law's defences from sub-Saharan Africa. Zimbabwe's Robert Mugabe launched the long ferocity in the early 1990s, vilifying lesbians and gays as 'un-African' and 'worse than dogs and pigs'. 'We are against this homosexuality and we as chiefs in Zimbabwe

11 Submission from General Association of Kowloon District Association (quoted in The Law Reform Commission of Hong Kong 1982), (The Law Reform Commission, however, supported the Wolfenden principles).

12 It however retained a discriminatory age of consent – 14 for heterosexual sex, 21 for sex between men – and a draconian punishment of imprisonment up to life for gay men who broke it, as against five years for heterosexuals. This was only overturned in court in 2006.

13 Mohammed Aidil in *Juris Illuminae* (2007).

should fight against such Western practices and respect our culture', he berated crowds (quoted in Human Rights Watch/International Gay and Lesbian Human Rights Commission 2003, p. 23). President Daniel Arap Moi of Kenya blasted homosexuality as 'against African tradition and biblical teachings. We will not shy away from warning Kenyans against the dangers of the scourge' (Sipho and Otieno 1999). In Zambia, a government spokesman proclaimed in 1998 that it was 'un-African and an abomination to society which would cause moral decay'; the vice-president warned that 'if anybody promotes gay rights after this statement the law will take its course. We need to protect public morality' (quoted in Human Rights Watch/International Gay and Lesbian Human Rights Commission 2003, p. 39).

Some reasoned voices spoke up. Nelson Mandela, steering a country proud of its human rights reforms, told a gathering of southern African leaders that homosexuality was not 'un-African', but 'just another form of sexuality that has been suppressed for years … Homosexuality is something we are living with' (Sipho and Otieno 1999). Over the years, though, the desperate defence of western mores in indigenous clothing grew more enraged, and influential. Nigeria's President Olusegun Obasanjo perorated to African Bishops in 2004 that 'homosexual practice' was 'clearly un-Biblical, unnatural, and definitely un-African'. A Nigerian columnist echoed him, claiming those who 'come in the garb of human rights advocates' are 'rationalising and glamorising sexual perversion, alias homosexuality and lesbianism … The urgent task now is to put up the barricades against this invading army of cultural and moral renegades before they overwhelm us' (Olawunmi 2004).

From Singapore to Nigeria, much of this fierce opposition stemmed from Christian churches – themselves, of course, hardly homegrown in their origins. Archbishop Peter Akinola, head of the Anglican Church of Nigeria, has threatened to split his global denomination over some Western churches' acceptance of lesbians and gays. He acknowledges that the missionaries who converted much of Africa in colonial days 'hardly saw anything valid in our culture, in our way of life' (Timberg 2005). Yet he also interprets the most stringent moral anathemas of the missionaries' faith, along with an imported law against homosexuality, as essential bulwarks of true African identity.

But the embrace of an alien legal legacy is founded on falsehood. This report documents how it damages lives and distorts the truth. *Sodomy laws throughout Asia and sub-Saharan Africa have consistently been colonial impositions.* No 'native' ever participated in their making. Colonisers saw indigenous cultures as sexually corrupt. A bent towards homosexuality supposedly formed part of their corruption. Where pre-colonial peoples had been permissive, sodomy laws would cure them – and defend their new, white masters against moral contagion.

Chapter ll of the full report traces the history of Britain's law on 'sodomy', or 'buggery', from its medieval origins to the 19th-century attempt to rationalise

the chaos of common law. The draft Indian Penal Code, the first experiment in producing a criminal code anywhere in the Empire, was a test of how systematising law would work. Colonial officials codified sodomy as a criminal offence – and refined its meaning – in the process of writing comprehensive codes. This began in India, and travelled from Nigeria to the Pacific in the imperial bureaucrat's baggage.

[Chapter III omitted in this abridged version]

[…]

Chapter lV [of this report] traces how courts, under colonialism and in the newly independent states, interpreted the vague language laid down in the colonial codes. Key themes emerge.

- *First,* judges tried to bring an ever wider range of sexual acts within the laws' punitive reach: descending, while doing it, into almost-comical obsessions with orifice and organ, desire and detail.

[…]

- British provisions on 'gross indecency' gave police opportunities to arrest people on the basis of suspicion or appearance. And they were an opening for governments looking to criminalise sex between women as well.

Chapter V [of this report] concludes by looking at the actual effects of sodomy laws in these countries. They do not aim just at punishing acts. They post broad moral proclamations that certain kinds of people, singled out by presumption and prejudice, are less than citizens – or less than human.

Eliminating these laws is a human rights obligation. It means freeing part of the population from violence and fear. It also means, though, emancipating post-colonial legal systems themselves from imported, autocratically imposed, and artificial inequalities.

II. 'Sodomy', colonialism and codification

The laws that the Europeans brought dragged a long prehistory behind them. The first recorded mentions of 'sodomy' in English law date back to two medieval treatises called *Fleta* and *Britton.* They suggest how strictures on sex were connected to Christian Europe's other consuming anxieties.[14]

Fleta required that 'Apostate Christians, sorcerers, and the like should be drawn and burnt. Those who have connections with Jews and Jewesses or are

14 *Fleta, seu Commentarius Juris Anglicani*, was a Latin survey of English law produced in Edward I's court in 1290 (allegedly written while the out-of-favor author served time in Fleet prison, accounting for its name: Richardson and Sayles 1955). *Britton* was composed somewhat later, and in Norman French (Brunner 1888; Carson 1914).

guilty of bestiality or sodomy shall be buried alive in the ground, provided they be taken in the act and convicted by lawful and open testimony' (quoted in Moran 1996, p. 213, n. 2). *Britton,* meanwhile, ordered a sentence of burning upon 'sorcerers, sorceresses, renegades, sodomists, and heretics publicly convicted' (quoted in Bailey 1955, p. 86; see also Goodrich 1976). Both treatises saw 'sodomy' as an offence against God. They classed it, though, with other offences against ritual and social purity, involving defilement by Jews or apostates, the racial or religious Other.

The grab-bag of crimes was telling. It matched medieval law's treatment of 'sodomy' elsewhere in Europe. The offence was not limited to sexual acts between men, but could include almost any sexual act seen as polluting. In some places it encompassed intercourse with Turks and 'Saracens' as well as Jews (Long 2003, p. 260; see also Greenberg 1988, pp. 274–92).

In part, this traced to an old strain in Christian theology that held sexual pleasure itself to be contaminating, tolerable only to the degree that it furthered reproduction (specifically, of Christians).[15] More cogently, though, it reflected increasing fears in the advancing Middle Ages about pollution and defilement across social boundaries. The historian R.I. Moore (1987) finds in the 11th and 12th centuries the birth of a 'persecuting society' in Europe, targeting various enemies within – Jews, lepers, heretics, witches, prostitutes, and 'sodomites' – who threatened purity and carried contamination, and had to be cast out and controlled (see also Douglas 2002). Periodic bursts of repression against these and other groups characterised European law for centuries to follow. 'Sodomy' was pollution. Punishing it marked out racial and religious identity. The urgency British authorities later showed in transplanting 'sodomy' laws into colonial contexts – even before they were fully codified at home – may reflect the legal category's origins. It was a way of segregating the Christian, European self from alien entities that menaced it with infection.

In England, King Henry VIII's break with the Catholic Church in the 16th century led to revising much of the country's common law – simply because offences that had formerly been tried in church courts now had to be heard in secular ones. Many sexual offences were among them. A 1533 statute, therefore, reiterated the criminalisation of 'sodomy' as a state rather than Church concern. Under the name of the 'detestable and abominable Vice of Buggery committed with mankind or beast', it was punished by death.[16] In

15 Christian precepts on sexual practice and sexual imagination were refined in patristic literature between the first and eighth centuries AD. The emphasis was on minimising pleasure and maximising procreative possibility in sexual activity. All acts of intercourse, including heterosexual vaginal intercourse outside the 'missionary' position, were graded as 'unnatural' to the degree that pleasure superseded the purely procreative functions of the sexual act (Brundage 1993).

16 The word 'buggery' derived by way of the French '*bougre*' from the medieval Bogomil heresy, which flourished in Bulgaria. Again, sexual and religious (and

one form or another, this law persisted until 1861. The last known execution for 'buggery' in England was in 1836 (Hyde 1970, p. 142).

The sense of the mysterious, polluting power of 'sodomy' or 'buggery' complicated the prosaic legal task of coming up with definitions. Precision was dangerous because it flirted with contamination. The jurist Edward Coke, in his 17th-century compilation of English law, wrote that 'Buggery is a detestable, and abominable sin, amongst Christians not to be named'. He stressed the foreign derivation of the term – 'an Italian word' – as well as the act itself: 'It was complained of in Parliament, that the Lumbards had brought into the realm the shamefull sin of sodomy, that is not to be named'. He nonetheless named it as acts 'committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast' (Coke 1797, Cap. X, 'Of Buggery, or Sodomy', p. 58). Coke specified that anal sex between two men or a man and a woman, along with bestiality, were comprised by the term.

Describing 'sodomy' precisely was risky, to be avoided. In an 1842 British court case that involved a man accused of committing 'nasty, wicked, filthy, lewd, beastly, unnatural and sodomitical practices' in the vicinity of Kensington Gardens, the defence objected that the adjectives gave no indication of what the crime actually was.[17] The vagueness became more an issue as, in the 19th century, reformers set about codifying and imposing order on the chaos of British common law and statute law. The Offences Against the Person Act in 1861 consolidated the bulk of laws on physical offences and acts of violence into one 'modern', streamlined statute – still the basis for most British law of physical assault. It included the offence of (consensual and nonviolent) 'buggery', dropping the death penalty for a prison term of ten years to life.

Less well known is that codifying sexual offences began far earlier, in 1825, when the mandate to devise law for the Indian colony was handed to the politician and historian Thomas Babington Macaulay. Macaulay chaired the first Law Commission of India and was the main drafter of the Indian Penal Code – the first comprehensive codified criminal law produced anywhere in the British Empire (Friedland 1992, p. 1172).

[…]

racial) 'deviance' were intimately associated (Bailey 1955, pp. 147–9; Hyde 1970). The law was repealed 20 years later with the return of Catholicism under Queen Mary, as sexual offences moved back to the jurisdiction of ecclesiastical courts; it was re-enacted under the Protestant Queen Elizabeth I in 1563. See also Kenneth Borris (2004).

17 The judges agreed that the invective in the indictment was unspecific. They concluded, however, that simply adding the term 'buggery' would have the effect of 'shewing the intention implied by the epithets'. *R v. Rowed* (cited in Moran 1996, pp. 38 ff.)

Fears of moral infection from the 'native' environment made it urgent to insert anti-sodomy provisions in the colonial code. A sub-tradition of British imperialist writing warned of widespread homosexuality in the countries Britain colonised. The explorer Richard Burton, for instance, postulated a 'Sotadic Zone' stretching around the planet's midriff from 43 degrees north of the equator to 30 south, in which 'the Vice is popular and endemic … whilst the races to the North and South of the limits here defined practice it only sporadically amid the opprobrium of their fellows' (quoted in Aldrich 2003, p. 31).[18]

The European codifiers certainly felt the mission of moral reform – to correct and Christianise 'native' custom. Yet there was also the need to protect the Christians from corruption. Historians have documented how British officials feared that soldiers and colonial administrators – particularly those without wives at hand – would turn to sodomy in these decadent, hot surroundings. Lord Elgin, viceroy of India, warned that British military camps could become 'replicas of Sodom and Gomorrah' as soldiers acquired the 'special Oriental vices' (quoted in Hyam 1990, p. 116; see also Hyam 1986).

Macaulay finished a draft Indian Penal Code in 1837, though Indian resistance and English hesitation meant that an approved version did not come into force until 1860. Introducing the text in an 1837 speech, he discussed the clauses in detail – except when, reaching his version of the anti-sodomy provision, he showed a traditional discomfort that drafters had to speak to such distasteful issues:

> Clause 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said … [We] are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision. (Indian Law Commission 1837, pp. 3990–1)

Despite this, however, Macaulay tried in fact to rationalise the British offence of 'buggery'. All the old vagueness around the term called out for clarification, and the colonies were the place to put this into practice. Macaulay came up with a broader definition of the violation of the 'order of nature', involving any kind of offending 'touch'. But he introduced a new axis of classification, according to whether the act was consensual or not – something never relevant in the old crime of 'buggery'. He chose to impose fresh language on India. Two clauses pertained to 'Unnatural Offences', distinguished by the element of consent:

18 Or, as Lord Byron theorised about a similar but heterosexual 'vice': 'What men call gallantry, and Gods adultery/Is much more common where the climate's sultry'. *Don Juan*, Canto I, stanza 63 (Byron 2004).

> Cl. 361 Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is *by his own consent* touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment … for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine.
>
> Cl. 362 Whoever, intending to gratify unnatural lust, touches for that purpose any person *without that person's free and intelligent consent*, shall be punished with imprisonment … for a term which may extend to life and must not be less than seven years, and shall also be liable to fine. [emphasis added]

The 'injunction to silence' (Moran 1996, p. 33) that Coke and other jurists had promoted around the vocabulary of 'sodomy' continued to be powerful, however. When the final draft of the Indian Penal Code came into force in 1860, the 'Unnatural Offences' section was modified. The ultimate, historic text – which, in one form or another, influenced or infested much of the British Empire – read:

> Section 377: Unnatural offences – Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment … for a term which may extend to 10 years, and shall be liable to fine.
>
> Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this Section.

The reasons for the change remain unclear, but its effects are evident. On the one hand, this version went back to the outlines of the old standard of 'buggery', replacing the reference to 'touching' with the criterion of 'penetration'. There were still plenty of ambiguities (including the question of what had to penetrate what). These in turn let future colonial and post-colonial jurists redefine what these provisions actually punished.

On the other hand, the attempt to organise the offence around the axis of consent/non-consent was dropped. In principle, stipulating that the act had to be 'voluntary' meant the victim of forcible 'carnal intercourse' could not be criminalised. But the other actor received the same punishment, and was guilty of the same offence, whether the act was forcible or not. Despite the code's modern pretensions, the provision offered no differing standard of harm based on the use of force.

Thus the separate Penal Code provision addressing rape (Section 375) remained restricted to a man's rape of a woman. No distinct criminal offence was entailed in a man's sexual assault on another man; it was simply lumped with consensual offences in Section 377. Section 377 also had no separate

provision or protection prohibiting an adult male from having sexual relations with a male child. That offence, too, was contained in 377 without distinction.[19]

As a result, India – along with other countries from Zambia to Fiji with legal systems affected by the Indian Penal Code – was left without laws fully covering rape or child protection. To the drafters, the act of 'sodomy' itself was so horrible that the harm seemed uniform: regardless of the other party's age, and regardless of whether he consented or not.

[…]

Section 377 was exported to, and modified in other British colonies, and reinterpreted by their courts. Two themes emerge. They show again how colonial law was a field for exploring the meaning of an old British standard.

- By defining 'carnal knowledge' in terms of penetration, the Indian Penal Code language limited the act and left open the possibility that only the penetrating party might be guilty. As the law was applied in British colonies in subsequent years, one project was to redefine the scope of 'penetration' – and ensure the provision would criminalise as broad a range of acts, and partners, 'against the order of nature' as possible.
- The absence of the factors of age or of consent in the law meant that consensual homosexual conduct was legally indistinguishable from rape or pedophilia. Thus the figure of the 'homosexual' could easily be linked and assimilated – in popular thinking as well as before the law – to violent sexual criminals.

[…]

British law at home underwent a further refinement in 1885, during a revision of laws on the 'protection of women, girls [and] the suppression of brothels'. Henry Labouchere, a member of Parliament, introduced an amendment so unrelated to the debate that it was almost ruled out of order. When finally passed, it punished 'Any male person who in public or private commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person', with two years at hard labor. 'Gross indecency' was a broad offence designed to include virtually all kinds of non-penetrative sexual acts between two men. Unlike the 1861 'buggery' law, the Labouchere Amendment also explicitly extended to private acts. The press quickly dubbed it the 'blackmailer's charter'. Oscar Wilde was convicted under its terms in 1895 (Hyde 1962, pp. 12–13).

Labouchere's law acknowledged that two men could practice many other sexual acts than 'sodomy'. A society ambitious to extirpate such acts needed

19 Meanwhile, a man who had sexual relations with a girl under ten was guilty of statutory rape; the age was raised to 12 in 1891, 14 in 1925 and 16 in 1940 (One India 2008).

an express acknowledgement of its power over privacy, and a wider criminal framework to punish them.

Labouchere's provision came too late to be introduced in the Indian Penal Code itself. However, subsequent colonial codes incorporated versions of it, including codes that derived from the IPC. It appeared in the Sudanese Penal Code in 1899, and in the influential penal law of Queensland in the same year. Malaysia and Singapore received the gross indecency provision jointly through an amendment in 1938.[20] Moreover, as explained below, subsequent jurisprudence in India (particularly the *Khanu* judgment) expanded the scope of 'unnatural offences' to include what would otherwise have been 'gross indecency' under British law. Further, though Labouchere's innovation only spoke of male-male sex, some governments have made 'gross indecency' apply to sex between women – by dropping the 'male' before 'person' (as detailed below in Chapter IV).

The Indian Penal Code became the model for British colonies' legal systems throughout most of Asia and Africa. Each territory took over the newest version, one legal historian writes, 'improving and bringing them up to date, and the resulting product [was] then used as the latest model for an enactment elsewhere' (Morris 1974). The Straits Settlement Law of in 1871, covering territory that today encompasses Singapore, Malaysia, and Brunei, effectively duplicated the IPC (Chan 2004). Between 1897 and 1902 administrators applied the Indian Penal Code in Britain's African colonies, including Kenya and Uganda (Read 1963). Some British residents complained about the undemocratic character of the codes. British East Africans, for instance, protested a policy of placing 'white men under laws intended for a coloured population despotically governed' (Morris 1974, p. 13).

The Sudanese Penal Code of 1899 also adapted the IPC, but shows a different strain in codifying 'unnatural offences'. It reintroduced, uniquely among British colonies, the axis of consent and a form of differentiation by age. Its version of Section 377 reads:

> S. 318 Whoever has carnal intercourse against the order of nature with any person *without his consent,* shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine; provided that a consent given by a person below the age of sixteen years to such intercourse by his teacher, guardian or any person entrusted

20 Sec 377A was introduced into the Singapore Penal Code by Sec 7 of the Penal Code (Amendment) Ordinance 1938 (No 12 of 1938). The reason, as stated in the Proceedings of the Legislative Council of the Straits Settlements in 1938 was to '[make] punishable acts of gross indecency between male persons which do not amount to an unnatural offence within the meaning of s 377 of the Code': p. C81, 25 April 1938. See microfiche no 672, Straits Settlements Legislative Council, Proceedings (SE 102), Vol. 1938 (Central Library Reprographic Dept, National University of Singapore).

> with his care or education shall not be deemed to be a consent within the meaning of this section [emphasis added]. (Gledhill 1963, p. 443)

Similarly, while the Sudanese code adopted the 'gross indecency' provision, it only punished it when non-consensual (Gledhill 1963, p. 444, Sec 319). These distinctions were lost after independence, however, when in 1991 Sudan's government imposed a *shari'a*-inspired penal code.[21]

The Penal Code of the Australian colony of Queensland (QPC) was drafted in 1899 by the colony's chief justice, Sir Samuel Griffith (Friedland 1992, p. 1177).[22] It came into force in 1901 and was the second most influential penal code after the IPC, especially in British Africa. The QPC introduced into the IPC's version of 'unnatural offences' the category of the 'passive' sexual partner – the one who 'permits'. Section 208 read:

> Any person who —
>
> (a) has carnal knowledge of any person against the order of nature; or
>
> (b) has carnal knowledge of an animal; or
>
> *(c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years* [emphasis added].

This eliminated one of the ambiguities in the IPC, making clear that both partners in the act were criminal. The QPC also widened the ambit beyond 'penetration', by introducing an independent provision for 'attempts to commit unnatural offences'.[23] Thus any sexual act or approach not resulting in penetration could be called an 'attempt'.

21 The Sudanese Penal Code of 1991, Sec 148, 'Sodomy: (1) Any man who inserts his penis or its equivalent into a woman's or a man's anus or permitted another man to insert his penis or its equivalent in his anus is said to have committed Sodomy; (2) (a) Whoever commits Sodomy shall be punished with flogging one hundred lashes and he shall also be liable to five years imprisonment; (b) If the offender is convicted for the second time he shall be punished with flogging one hundred lashes and imprisonment for a term which may not exceed five years. (c) If the offender is convicted for the third time he shall be punished with death or life imprisonment' As chapter V discusses below, in a number of countries – Pakistan and Nigeria among them – the modern resurgence of supposedly shari'a-influenced or -derived laws has not so much revived 'indigenous' legal values as further entrenched colonial ones. This toxic mix is an important topic in its own right, but beyond the scope of this report.

22 It was based on an earlier proposal from 1878.

23 Unnatural offences themselves continued to be defined by penetration, as in Sec 6: 'Carnal Knowledge: When the term "carnal knowledge" or the term "carnal connection" is used in defining an offence, it is implied that the offence, so far as regards that element of it, is complete upon penetration'. However, Sec 2–9 of the QPC reads that 'Any person who attempts to commit any of the crimes defined in the last preceding section is guilty of a crime, and is liable to imprisonment with hard labor for seven years'.

Outside Australia, the QPC first took root in Papua New Guinea. The chief justice of Northern Nigeria, H.C. Gollan, then decided to adopt it as the model for his colony's penal code, which came into force in 1904. It then became the subject of bureaucratic battles between colonial administrators; officials in Southern Nigeria were divided between proponents of the QPC and supporters of the Indian Penal Code.[24] The former finally won out. In 1916, two years after Nigeria combined into a single colony, a common criminal code based on the QPC was adopted (Morris 1970; see also Adewoye 1977).

That process reveals a point. Despite the claims of modern political leaders that anti-sodomy laws represent the values of their independent nations, the ... [QPC] spread across Africa indifferently to the will of Africans.

The whims, preferences, and power struggles of bureaucrats drove it. After the Criminal Code of Nigeria was imposed, colonial officials in East Africa – modern Kenya, Uganda, and Tanzania – moved gradually to imitate it. A legal historian observes that the 'personal views and prejudices' of colonial officials, rather than any logic or respect for indigenous customs, led to replacing IPC-based codes with QPC-based codes in much of the continent (Morris 1974, p. 6).

The versions of 'unnatural offences' that spread with the QPC now encompassed a variety of acts: they punished a passive partner in sodomy, attempts at sodomy, and also 'gross indecency'. For instance, Uganda's Penal Code provided that:

> S. 140: Any person who (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or(c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years.
>
> S. 141 Any person who attempts to commit any of the offences specified in the last preceding section is guilty of a felony and is liable to imprisonment for seven years.
>
> S.143 Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.

Nigeria did offer variations from the trend. Its version narrowed 'carnal knowledge' to exempt sex between 'a husband and wife', making clearer what

24 Broader issues than 'unnatural offences' divided supporters of the two codes. The QPC was heavily inflected by European civil law, particularly the Italian Penal Code, and omitted the common-law requirement of *mens rea*, or criminal intent.

it understood by the 'order of nature'.[25] The law zeroed in towards its primary focus on sex between men.[26]

Three generalisations arise from the confused history of 'carnal knowledge' in colonial penal codes.

- The anti-sodomy provisions that contemporary politicians defend as part of indigenous values never drew on local customary law, nor were they drafted through a deliberative process. Colonial officers devised and imposed them. They saw the sex laws as necessary precisely because they viewed local cultures as lax, a haven for 'unnatural offences'.
- Colonial authorities continuously grappled with terms and definitions, trying to arrive at both adequate language and common understandings around 'unnatural offences. But they did so under the shadow of a moral anxiety about the effects of debate, an injunction to silence that helped justify autocratic lawmaking with no discussion among the 'subject' peoples.
- Redefinition tended to widen the scope of the law – and to criminalise not just sexual acts, but a kind of person.

[Chapter III is omitted in this abridged version of the report]

[…]

IV. Interpreting sodomy laws: the scope expands

Forensic medical exams display the particularity to which the state descends when it tries to parse out the specifics and the evidence of sexual acts. The story of how courts in the colonial period and beyond interpreted the various versions of Section 377 also shows state authorities stuck in morasses of sexual detail. Together, they exhibit the logical gymnastics states get into in defining the line between permissible and punishable sexual acts – and trying to keep a rationale for the distinction.

25 Sec 6: '"Unlawful carnal knowledge" means carnal connection which takes place otherwise than between husband and wife'.

26 Later, in 1960, during the waning days of colonial rule, the territory of Northern Nigeria chose to have a separate Penal Code, independent of the new country's Federal Criminal Code. It took as a basis the Sudanese Penal Code of 1899, ironically based on the IPC, which Northern Nigeria had earlier rejected (Morris 1970, p. 153). However, the fact that the Sudanese code had decriminalised consensual sodomy did not go unnoticed – or unchanged. The Northern Nigeria Penal Code reverted back to the old consent-neutral definition from the Indian Penal Code. To multiply confusion, though, the drafters neglected to make the same change to the 'gross indecency' provision, which remained applicable only to non-consensual activities (Gledhill 1963, p. 444).

One distinction that never mattered much, in 'unnatural offences', was the axis of consent. Most of the surviving jurisprudence under colonialism and since independence (what reached the law reports were largely cases on appeal, undoubtedly representing only a fraction of convictions) deals with charges of non-consensual sodomy. Nearly universally – as one Zimbabwean legal expert writes – the fact that 'an assault (possibly violent) has taken place is of secondary importance' to the court (Phillips 1999, p. 193). The law's silence on consent translates into judges' indifference to the victim. It also reaffirms that 'the non-existence of a victim', where there was consent, is no hindrance to prosecution (Phillips 1999, p. 193).

This chapter will show:

- First, investigating the details of sexual acts led to further expanding the scope of acts covered by Section 377. The law came to recognise broader categories of 'sexual perversion', and while that extended into acts committed by heterosexual couples, the 'sodomite' or 'catamite' or 'homosexual' was at the centre of its meaning.

[…]

- British law never punished sex between women – and hence British colonialism never imported criminal penalties for it. However, the breadth of the British 'gross indecency' provision has given states an opening to penalise lesbians as well.

Jurisprudence: from 'crimes against nature' to communal values

In 1930s India, police captured a young man called Ratansi while he and another man were trying to have sex. In court, Ratansi did not deny it. The furious judge called him a 'despicable specimen of humanity', addicted to the 'vice of a catamite' on his own admission (*Noshirwan v. Emperor* 1934, p. 206). It was not just the act in isolation that appalled the court: it was the contemptible class of person. Yet the judge could not punish the two accused: they were caught before they could finish the act. A gap yawned between his repulsion at the arrested men, and the evidentiary limits his understanding of the statute demanded. Conviction required penetration, and physical or other proof.

Much of the later jurisprudence around Section 377, in the many places where it was enforced, would try to close that gap: to re-draw the sexual map of 'immorality' and cram a sufficiently wide range of acts within the criminal compass, so that no 'despicable specimen of humanity' would be acquitted. What counted as 'unnatural' and, as one commentator observes, 'what counted as penetration continued to be an ongoing, arbitrary, and unsystematic discussion' across courts and countries (Bhaskaran 2002, p. 20).

'Carnal intercourse against the order of nature' had never been precisely defined. One of the first Indian cases to reach the law reports on appeal, though, reflected what was probably the usual judicial understanding. The phrase meant anal sex, since 'the act must be in that part where sodomy is usually committed' (*Government v. Bapoji Bhatt* 1884, p. 280).[27]

The 1925 Indian case of *Khanu v. Emperor* (1925, p. 286) took the first step towards redrawing the boundaries of Section 377. It became, for a long time, the guiding judgment on interpreting 377 through British colonies in South Asia, East Asia, and East Africa. The case involved forcible oral sex between an adult male and a minor. The non-consensual nature of the act played no role in the appeals decision. The only question that concerned the court was whether oral sex was an unnatural carnal offence under Section 377.

Khanu said yes. 377 was not limited to anal sex (*Khanu v. Emperor* 1925, p. 286). It cited two lines of reasoning.

The first defined the order of nature in sex as 'the possibility of conception of human beings': oral sex was legally like anal sex in that it was not reproductive. The colonial court's complete divorce from the Indian context – its reliance on purely European traditions of sexual propriety, which conflated nature with procreation – could not have been clearer. Nor did the court consider that other forms of penetrative sex (for instance, using birth control) also foreclosed the 'possibility of conception'. [28]

The second line of thinking redefined penetration. The court defined 'carnal intercourse' as

> a temporary visitation to one organism by a member of the other organism, for certain clearly defined and limited objects. The primary object of the visiting organism is to obtain euphoria by means of a *detente* of the nerves consequent on the sexual crisis. But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity (*Khanu v. Emperor* 1925, p. 286).

As long as there is an orifice (the mouth) to enclose the 'visiting member', there can be carnal intercourse. When it cannot lead to procreation, there is an 'unnatural offence' (*Khanu v. Emperor* 1925, p. 286).[29]

27 The appellant was charged under Sec 377 on allegations of oral sex with a minor.

28 At the same time the colonial court in *Khanu* defined 'unnatural' sex as non-procreative sex, contraception was legal in Britain. Marie Stopes opened Britain's first family planning clinic in 1921, four years before *Khanu*. Birth control had never been criminalised in the home country, though distributing information on contraception risked obscenity charges through the 19th century (Brandser 2004).

29 The *Khanu* court still found oral sex 'less pernicious than the sin of Sodom'. Its peculiar reasons were that 'It cannot be practiced on persons who are unwilling. It is not common and can never be so' – and, most notably, 'it cannot produce the physical changes which the other vice produces'.

Khanu opened the way to bringing other acts under the scope of Section 377. For example, a 1961 case from East Pakistan (present-day Bangladesh) found that the identical provision in the Pakistan Penal Code criminalised what it called 'thigh sex' (*Muhammad Ali v. The State* 1961, p. 447). The court followed the penetration-specific definition of *Khanu* and held that 'the entry of the male organ of the accused into the artificial cavity between the thighs of [the other partner] would mean penetration and would amount to carnal intercourse'.

The post-independence Indian case of *Lohana Vasantlal* also followed and modified the *Khanu* decision (*Lohana Vasantlal Devchand v. The State* 1968, p. 252). On the facts, much like *Khanu*, it involved three men who forced an underage boy to have anal and oral sex with them. However, the judgment neglects the injury caused to the boy who was forced to undergo the sexual act: there is no discussion of coercion. Instead the court concentrated on including oral sex under 377. As with other appealed cases involving coerced sex, the court's reasoning would apply seamlessly to consensual acts.

Lohana Vasantlal agreed with *Khanu* in finding oral sex unnatural: the 'orifice of the mouth is not according to nature meant for sexual or carnal intercourse' (*Lohana Vasantlal Devchand v. The State* 1968, p. 252). The court applied two tests. Its main source, tellingly, came from the UK: the eminent British sexologist Havelock Ellis. Following him, it argued that oral sex might be permissible if it was part of foreplay leading to 'natural' (vaginal) sex: 'If the stage of the aforesaid act was for stimulating the sex urge, it may be urged that it was only a prelude to carnal intercourse'(ibid). However, again citing Ellis, it found that when forms of sex play cease being 'aids to tumescence' and 'replace the desire of coitus', then 'They became deviations … and thus liable to be termed "perversions"'(ibid.). The *Lohana* court also developed an 'imitative test' for sex acts. For example, oral sex imitated anal sex in terms of penetration, orifice, enclosure and sexual pleasure. Therefore it could also be punished under Section 377.

K. Govindan, a 1969 Indian case, used the 'imitative test' from *Lohana* to arrive at the same conclusion as the court in former East Pakistan on 'thigh sex': if 'the male organ is "inserted" or "thrust" between the thighs, there is "penetration" to constitute unnatural offence' (*State of Kerala v. K. Govindan* 1969, p. 20).

The judge in *Khanu* had said, 'I doubt if mutual cheirourgia would be' a form of 'carnal intercourse' – turning to Greek to dredge up a euphemism for masturbation (*Khanu v. Emperor* 1925, p. 286).[30] However, a court moved mutual masturbation under the ambit of Section 377 in the Indian case of *Brother John Antony v. State*[31] (1992, p. 1352). In this case, again, allegations

30 Cheirourgia, in Greek, means 'work done by hands'.

31 The case involved charges of oral sex and mutual masturbation against a boarding school teacher.

of coercion were of no interest to the court. The judgment instead delves into the 'sexually perverse', analysing and analogising practices like 'tribadism', 'bestiality', 'masochism', 'fetishism', 'exhibitionism' and 'sadism' (ibid. p. 1353). Using the imitative test, it concluded that mutual masturbation falls within 377, as 'the male organ of the petitioner is said to be held tight by the hands of the victims, creating an orifice-like thing for manipulation and movement of the penis by way of insertion and withdrawal' (ibid).

In Singapore, two cases from the 1990s – *PP v. Tan Kuan Meng* (1996, p. 16) and *PP v. Kwan Kwong Weng* (1997, p. 697) – followed the distinction (between 'prelude to' and 'substitute for' the act of 'natural' sex) that *Lohana* had laid down. Each of these 377 trials involved a woman's allegation that a man had forced her to have oral sex. The court in *Kwan Kwong Weng* defined the crime as 'fellatio between a man and woman, whether the woman consented or not, which was totally irrelevant' (ibid. para 12).

Kwan Kwong Weng weighed current mores among heterosexuals, taking note of 'statistical evidence … of these forms of oral sex being practised in Singapore. We cannot shut our minds to it' (ibid. para 30). The court granted 'it is a fact of life that foreplay occurs before copulation'. And it held that 'when couples engaged in consensual sexual intercourse willingly indulge in fellatio and cunnilingus as a stimulant to their respective sexual urges, neither act can be considered to be against the order of nature. In every other instance the act ... will be ... punishable' (ibid. para 28).

Heterosexual oral sex was thus like a middling restaurant in the motorists' guide: worth a detour, but never, ever deserving a journey in itself. Heterosexuals, though, had a legal leeway for oral sex that was denied to homosexuals. They could claim that 'natural', vaginal sex was somewhere off in distant view, the long-planned destination after a diversion to a different orifice.

However, both *Lohana* and *Kwan Kwong Weng* subtly undermined the foundations of the old *Khanu* ruling, by quietly discarding the 'procreation' justification. The judge in *Kwan Kwong Weng* accepted implicitly (as the statistics before the Singapore court suggested) that people have sex for pleasure in and of itself – a major judicial concession.

This opened again the question: how confidently can the law distinguish between 'natural' and 'unnatural'? The lack of a self-evident standard in the *Kwan Kwong Weng* case ultimately led to a renewed push in Singapore for reforming the colonial-era provision. That push was given force by more prosecutions of heterosexuals for oral sex. In 2004, Singapore courts sentenced a former policeman to two years in prison for having oral sex with a teenage girl.[32] One judge spoke of 'certain offences that are so repulsive in Asian culture

32 First press accounts suggested that she was 16, above the legal age of consent for (vaginal) sex, and had consented. Later reports, however, suggested she was 15. 'Singapore Reviews Oral Sex Law', *BBC News*, 6 January 2004.

… There are countries where you can go and suck away for all you are worth. […] But this is Asia' (quoted in Baker 2004).

'Asia' was not as conservative as the judge thought. Criminalising *homosexual* acts was one thing; criminalising *heterosexual* acts by now sparked outrage. Press and public opinion rebelled at the presumption that straight 'sucking' was alien to Singapore. Under pressure, the government launched a review of the law. Officials said from the beginning it would aim to decriminalise consensual oral sex between men and women, but leave all oral sex between men banned (Chan 2004).

That was what happened. The review eventually turned into a revision of the entire Penal Code; but homosexual conduct was the only real dispute. The government willingly discarded the 'carnal intercourse' provision of the law, which included heterosexual conduct. A battle line formed, though, at Section 377A – the old Labouchere Amendment text, criminalising 'gross indecency' between men. Human rights activists launched a petition to eliminate the ban on consensual homosexual conduct, as well as liberating heterosexuals; it gained thousands of signatures. LGBT advocates courageously joined in public debate. Yet in 2007, the government at last determined to cling to Section 377A.

Prime Minister Lee Hsien Loong voiced personal sympathy for gay citizens: 'We … do not want them to leave Singapore to go to more congenial places to live'. But, he added, 'homosexuals should not set the tone for Singapore society':

> Singapore is basically a conservative society. The family is the basic building block of our society. It has been so and, by policy, we have reinforced this and we want to keep it so. And by 'family' in Singapore, we mean one man one woman, marrying, having children and bringing up children within that framework of a stable family unit (Yawningbread.org 2007a).

Despite the reference to procreation, one thing was clear in the debate: the criterion of 'nature' had basically been thrown out the window. If heterosexual oral sex could be legally seen as natural in itself – despite its lack of any connection to 'having children' – there was no coherent basis for calling oral sex between two men 'unnatural'.[33]

[…]

33 Lee Kuan Yew, the powerful former prime minister, made the shift from nature-based to culture-based arguments explicit, telling supporters: 'You take this business of homosexuality. It raises tempers all over the world, and even in America. If in fact it is true – and I have asked doctors this – that you are genetically born a homosexual because that's the nature of the genetic random transmission of genes, you can't help it. So why should we criminalise it? But', he went on, 'there's such a strong inhibition in all societies … ' S*traits Time*, 23 April 2007 (Yawningbread.com 2007b).

Even the most virulent defenders of Section 377A argued not by appealing to the 'natural', but by theorising about community values. One parliamentarian declaimed:

> If we seek to copy the sexual libertine ethos of the wild wild West, then repealing s377A is progressive. But that is not our final destination. The onus is on those seeking repeal to prove this will not harm society … We have no need of foreign or neo-colonial moral imperialism in matters of fundamental morality. Heterosexual sodomy unlike homosexual sodomy does not undermine the understanding of heterosexuality as the preferred social norm (*The Online Citizen* 2007).[34]

Yet relying on a 'preferred social norm' actually undermined the original foundations of the law, based on belief that 'sodomy' was 'against the order of nature', not just the order of a particular society. And – most importantly – foreign 'moral imperialism in matters of fundamental morality' was exactly what had brought the law to Singapore in the first place.

The Singapore story tears off the mask. It shows that Section 377's central focus, despite the heterosexual acts it had always punished, lay in eliminating homosexual conduct. It also shows, though, how tenuous the case for that purpose had become. 'Nature' was no longer a credible justification. The mores of particular societies were all that was left. As a Malaysian court had declared in 1979 (addressing a wife's claim that her husband had sexual relations with other men): 'Such despicable conduct though permitted among some Westerners should not be allowed to corrupt the community's way of life' (*Lim Hui Lian v. CM Huddlestan* 1979, p. 134).

[…]

Elsewhere too, though, invoking a vague set of 'national' or 'cultural' norms became the main defence of the colonial-era sodomy laws. […] Now it was the west that threatened to corrupt indigenous standards.

A 1999 verdict from Zambia indicates how sour and weak the argument around 'nature' had turned, and at the same time how unconvincing the appeal to popular beliefs could be. The judge in a local court faced with charges that a man had oral sex with other men, approached them through a muddle of theology and anatomy:

> Surely the mouth is not the same as a vagina. God gave specific functions to each organ … The mouth is for eating etc., and the vagina is for both sex and urinating. … Accused couldn't change God's desire. For behaving in the way he did, he implied God made a mistake [in] his distribution of functions.

Yet the conclusive factor for the judge, as he studied the accusation under

34 She also warned ominously, 'To those who say that 377A penalises only gays not lesbians, note there have been calls to criminalise lesbianism too'.

a British law brought to Zambian territory by colonial invaders less than a hundred years before, was: 'Accused's behavior is alien to the African custom' (Human Rights Watch/IGLHRC 2003, pp. 91–2).

[…]

'Gross indecency' and criminalising lesbians

'Gross indecency' in British-derived penal codes is highly elastic. A Singapore court has stated its meaning depends 'on what would be considered grossly indecent by any right-thinking member of the public' (*NG Huat v. PP* 1995, p. 783).[35] Just slightly more specifically, a 1998 amendment to the Tanzanian Penal Code clarified that gross indecency included any act that 'falls short of actual intercourse and may include masturbation and indecent behaviour without any physical contact'.[36] Thus two men kissing, holding hands, sleeping together, or conceivably even looking at one another with sexual intent, could break the law.

On the one hand, 'gross indecency', like its British ancestor the Labouchere Amendment, only targets acts between men – as opposed to 'carnal knowledge', which could, at least as originally interpreted, also include heterosexual acts. On the other, unlike 'carnal knowledge', gross indecency does not entail penetration. In practice it was used to root out men who have sex with men who were caught in non-sexual circumstances, allowing arrests wherever they gathered or met – parks and railway stations, bathhouses and bars, and private homes and spaces. And unlike 'carnal knowledge', the absence of penetration meant a lower standard of proof. No forensic tests or flower-shaped anuses were needed.

The usefulness of 'gross indecency' in convicting men for homosexual conduct comes clear in the 1946 Singapore case of Captain Marr (*Rex v. Captain Douglas Marr*, p. 77). A naval officer faced charges of committing gross indecency with an Indian man. There were no witnesses, but police found the Indian's shirt in the captain's room. Such circumstantial evidence persuaded the court to convict.

The authorities are free to infer 'gross indecency' from any suspicious activity. The term is insidious, a legal bridge between 'unnatural' sexual acts and the associated identity of a certain kind of person: the 'homosexual' as a criminal offender. Homosexuality becomes a crime of the 'personal condition'. This broader understanding of 'unnatural acts' permits state and police harassment on a wider scale. A homosexual need not be caught in the act:

35 An X-ray technician was charged with 'gross indecency' for allegedly touching the chest, nipples and buttocks of a patient.

36 Section 3 of the Sexual Offences Special Provisions Act (Act no. 4 of 1998), passed by the Parliament of the United Republic of Tanzania, amended several provisions relating to sexual offences of the Tanzanian Penal Code, including the definition of gross indecency.

presumptions fed by prejudice, or stereotypes of attire, manner, or association, are enough (*Hoyle v. Regiman* 1957).[37]

'Gross indecency' has been used to extend criminal penalties to sex between women. Lesbian sex had never been expressly punished in English law. The colonial court in *Khanu* excluded it from 'carnal knowledge' because a woman lacked a penis. A recent Ugandan commentary explains that 'women who perform sexual acts on each other are not caught by the current law because they do not possess a sexual organ with which to penetrate each other' (Tibatemwa-Ekirikubinza 2005, p. 97). Non-penetrative sex is not 'real' sex (Tamale 2003).

Between men, however, it was seen as something sex-like enough to be 'grossly indecent'. There was no reason the same logic could not extend to women. Some modern governments did want lesbian acts and identities moved under the criminal law. They found their chance through public debate about reforming rape laws. In the late 1980s the Malaysian women's movement campaigned for a new, gender-neutral definition of rape, as well as for criminalising marital rape (Beng Hui 2006). Partially in response to their lobbying, the legislature in 1989 moved to amend the Penal Code.[38]

In the end, however, legislators ignored the calls to modernise law on rape, and instead turned their scrutiny to Section 377. Their comprehensive re-write divided the Section into five different parts, while broadening its meaning and reach more than ever before. Their excuse? They could make rape effectively gender-neutral by adding a new crime of non-consensual 'carnal intercourse against the order of nature'.[39] The new provision also offered limited protection

37 A 1957 Ugandan case showed how stereotype and presumption – about relations between the races, as well as sex itself – could also serve as conclusive evidence in cases of 'sodomy'. A British officer had given a 'native' herdsman one shilling and some sugar as gifts. The unusualness of this 'special favor' across the power divide created a presumption of sodomy, leading to the officer's arrest (*Hoyle v. Regiman* 1957).

38 Criminal Code (Amendment) Act 1989 (Act A727).

39 The punishment – five to 20 years' imprisonment – remained almost the same as for consensual homosexual acts, but was equivalent to the punishment for a man's rape of a woman: 377A. Carnal intercourse against the order of nature. Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature. Explanation: Penetration is sufficient to constitute the sexual connection necessary to the offence described in this section. '377B. Punishment for committing carnal intercourse against the order of nature. Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping. 377C. Committing carnal intercourse against the order of nature without consent, etc. Whoever voluntarily commits carnal intercourse against the order of nature on another person without the consent, or against the will, of the other person, or by putting other person in fear of death or hurt to the person or

for children against sexual abuse.[40] But the two most significant changes were:

- For the first time in a British-derived legislative provision, 'carnal intercourse' was expressly defined as both anal and oral sex.
- In a vengeful and almost parodic response to the demands of women's rights activists, the offence of 'gross indecency' was made gender-neutral.[41] It could now be applied to heterosexual couples – and also to lesbian and bisexual women. [42]

A similar, regressive rape law change occurred in Sri Lanka. Falling back on religious and communal values, the state rejected women's rights activists' demands to legalise abortion, criminalise marital rape, and make the crime of rape gender-neutral. However, it did amend the 'gross indecency' provision to make it gender-neutral and apply to sex between women (Tambiah 1998).[43]

Meanwhile, in Botswana, legislators put gender-neutral language in both the 'carnal knowledge' and 'gross indecency' provisions of the British-derived Penal Code, in a general revision aiming at gender equity in 1998 (Long 2003, pp. 272–4).

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any other person, shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping'.

40 The provisions on 'carnal intercourse' continued to make no distinction between adults and children. The only specific protection for children was in the new 377E. 'Inciting a child to an act of gross indecency: Any person who incites a child under the age of fourteen years to any act of gross indecency with him or another person shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to whipping'. However, the punishment for sexual relations with a girl under 16 (under 'Rape', Sec 375) is substantially higher, including imprisonment from five to 20 years. Penetrative rape of male children remained without specific mention in the code.

41 'Sec 377D: Outrages on decency: Any person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be punished with imprisonment for a term which may extend to two years'.

42 Courts have been slow to adopt this interpretation, however. As late as 1998 a court still held that the purpose of Sec 377D was to punish 'gross indecency' between men alone (S*ukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia and Anor* 1998, p. 742). Meanwhile, the introduction of Islamic (Syariah) law in Malaysia has also created new or parallel sexual offences. Some states have passed Syariah Enforcement enactments, punishing not only *Liwat* – sodomy – but also *Musahaqah*, defined as 'sexual relations between female persons' and punished with three years' imprisonment, fines, or whipping: see, for example, Syariah Criminal Offences (Federal Territories) Act 1997, Sec 26.

43 One activist argues that 'the criminalisation of lesbianism' in Sri Lanka derives not just from a 'lack of clarity' about how to classify sexual behaviour before the law, but also from the stigma created by the 'confusion between male homosexuality and pedophilia' (Tambiah 1998).

V. Conclusion: the emancipatory potential of decriminalisation

What are so-called 'sodomy' laws for?

South Africa's Constitutional Court justice Albie Sachs, concurring with the historic decision to overturn his country's law against sodomy, wrote:

> It is important to start the analysis by asking what is really being punished by the anti-sodomy laws. Is it an act, or is it a person? Outside of regulatory control, conduct that deviates from some publicly established norm is usually only punishable when it is violent, dishonest, treacherous or in some other way disturbing of the public peace or provocative of injury. In the case of male homosexuality however, the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than because of its proven harm ... Thus, it is not the act of sodomy that is denounced … but the so-called sodomite who performs it; not any proven social damage, but the threat that same-sex passion in itself is seen as representing to heterosexual hegemony (*National Coalition for Gay and Lesbian Equality v. Minister of Justice and Others* 1999, p. 188).

The legal scholar Dan Kahan writes that 'Sodomy laws, even when unenforced, express contempt for certain classes of citizens' (Kahan 1999, p. 413). This contempt is not simply symbolic. Ryan Goodman, in exhaustive research based on interviews with lesbian and gay South Africans before the sodomy law was repealed, found the statutes have multiple 'micro-level' effects. These impacts are independent of occasions when the law is actually enforced. To the contrary: even without direct enforcement, the laws' malign presence on the books still announces inequality, increases vulnerability, and reinforces second-class status in all areas of life.

The laws 'disempower lesbians and gays in a range of contexts far removed from their sexuality (for example, in disputes with a neighbour or as victims or burglary)', Goodman writes. They influence other areas of knowledge: 'the criminalisation of homosexual practices interacts with other forms of institutional authority, such as religion and medicine'. The statutes empower social and cultural arbiters to call the homosexual a criminal. Goodman concludes that 'The state's relationship to lesbian and gay individuals under a regime of sodomy laws constructs … a dispersed structure of observation and surveillance. The public is sensitive to the visibility of lesbians and gays as socially and legally constructed miscreants' (Goodman 2001).

This report suggests that the colonial-era sodomy laws ultimately became, not punishments for particular acts, but broad instruments of social control. They started as invaders' impositions – an alien framework to subdue subject populations – and have morphed over time into alleged mirrors of a supposedly originary moral sense. States use them today to separate and brutalise those beyond those postulated primal norms. They are terms of division and tools of power.

The real impact of sodomy laws – the way they single out people for legal retaliation, and make them ready victims of other forms of violence and abuse – appears in stories from six countries addressed in this report.

India

In July 2001, police in Lucknow arrested four staff members from two organisations that combated HIV/AIDS among men who have sex with men. The HIV/AIDS outreach workers from Naz Foundation International (NFI)'s Lucknow office and from Bharosa Trust were charged under Section 377 as well as with criminal conspiracy and 'sale of obscene materials': the police interpreted distributing information about AIDS prevention as running a gay 'sex racket'.

They were jailed for 47 days. A Lucknow judge denied them bail, accusing them of 'polluting the entire society'. The prosecutor in the case called homosexuality 'against Indian culture' (Human Rights Watch 2002b).

[…]

Pakistan

In late 2006, in Faisalabad, Shumail Raj and Shehzina Tariq married in a ceremony that Tariq described as 'a love marriage'. Born a woman, Shumail Raj identified himself as a man.

The case led to a full-blown public panic, coursing through the media and eventually the courts. Raj had undergone two operations to alter his physical appearance to match the gender he lived in. Headlines nonetheless called them a 'she-couple', a 'same-sex couple', and two 'girls' or 'lesbians', and described – and dismissed – their union as the country's first same-sex marriage (Stern 2007).

Shehzina Tariq's father complained to police about the marriage, and they launched an investigation, invoking Section 377. Hauled before the High Court in Lahore, the couple told officials that Raj was a man.

A court-appointed panel of forensic doctors had, in the end, to try to settle the issue of legal identity (Stern 2007).

[…]

Prosecutors chose ultimately not to try the pair under 377; the uncertainty over Raj's gender joined with the legal ambiguity over whether the law could be used against what officials now saw as a lesbian relationship. Clearly, though, the stigma the provision created helped set off the investigation and sustain hysterical public pressure. On May 28, 2007, a court sentenced the couple to three years' imprisonment for perjuring themselves – for saying in court that Shumail Raj was a man. The judge called the sentence 'lenient' (The News 2007; Izam 2007).

Sri Lanka

Extending criminal penalties in 1995 to include sexual acts between women led to an increased atmosphere of stigma and menace. The leader of an LGBT support group has reported having to leave the country for a time because of death threats (quoted in Arnold 2005). *In 2000, when a lesbian conference was held on the island, a newspaper printed a letter to the editor urging the participants be raped, 'so that those wanton and misguided wretches may get a taste of the zest and relish of the real thing'.*

The Press Council, a state body, rejected a complaint against the paper, citing the fact that 'Homosexualism is an offence in our law. Lesbianism is at least an act of gross indecency and unnatural'. It stated:

> *Lesbianism itself is an act of sadism and salacious. Publication of any opinion against such activities is not tantamount to promoting sadism or salacity, but any publication which supports such conduct is an obvious promotion of all such violence, sadism, and salacity. Therefore, the complainant is the one who is eager to promote sadism and salicity, not the respondents.*

The Council instead slapped a fine on the complainant, one of the conference's organisers (International Gay and Lesbian Human Rights Commission 2008).

Singapore

Singapore police periodically use its laws on homosexual conduct to raid gay gathering places, including saunas: one raid in 2001 led to four men being charged initially under Section 377A, though the charge was later moved under Section 20 of the Miscellaneous Offences (Public Order and Nuisance) Act. The men received a substantial fine.[44] *Further raids took place in April 2005* (Utopia-Asia.com 2005).[45]

[…]

Uganda

For years, Uganda's government has used the criminalisation of homosexual conduct to threaten and harass Ugandans. In 1998, President Yoweri Museveni told a press conference, 'When I was in America, some time ago, I saw a rally of 300,000 homosexuals. If you have a rally of 20 homosexuals here, I would disperse it'. True to his word, when (inaccurate) press reports the next year recounted a wedding between two men in Uganda, Museveni told a conference on reproductive health, 'I have told the CID [Criminal Investigations Department] to look for homosexuals, lock

44 600 Singapore dollars, the equivalent of about US$400 at the time (Yawningbread.org 2001).

45 Email to Human Rights Watch from a Singapore activist, 20 November 2008.

them up, and charge them'. Police obediently jailed and tortured several suspected lesbians and gays; most later fled the country (Human Rights Watch/IGLHRC 2003, pp. 50–1).

Similarly, in October 2004, the country's information minister, James Nsaba Buturo, ordered police to investigate and 'take appropriate action against' a gay association allegedly organised at Uganda's Makerere University. On July 6, 2005, the government-owned New Vision newspaper urged authorities to crack down on homosexuality. […] That month, local government officers raided the home of Victor Mukasa, an activist for LGBT people's human rights and chairperson of Sexual Minorities Uganda (SMUG). They seized papers and arrested another lesbian activist, holding her overnight (Human Rights Watch 2006).

LGBT activists held a press conference in Kampala in August 2007, launching a public campaign they called 'Let Us Live in Peace'. The next day, Buturo, now ethics and integrity minister, told the BBC that homosexuality was 'unnatural'. He denied police harassment of LGBT people, but added menacingly, 'We know them, we have details of who they are'. Four days later, the press announced that the attorney general had ordered lesbians and gays arrested. 'I call upon the relevant agencies to take appropriate action because homosexuality is an offense under the laws of Uganda', he reportedly said. 'The penal code in no uncertain terms punishes homosexuality and other unnatural offenses' (Human Rights Watch 2007b).

[…]

Nigeria

Arrests under Nigeria's federal sodomy law happen steadily, as local headlines suggest: 'Paraded by Police for Homosexuality, Married Man Blames "Evil Spirit" For His Unholy Act' (The Sun 2003)*; or 'Caught in the Act: 28-yr-old Homosexual Arrested by OPC While in Action'."*[46]

Most of Nigeria's Northern provinces now have their own penal codes. These combine principles of Islamic law with elements of the Northern Nigeria Penal Code adopted at the time of independence.[47]

The penal codes of Kano and Zamfara states have simply taken over the language of the British colonial provisions on 'carnal intercourse against the order of nature', and put it under the shari'a-esque heading of 'sodomy (liwat)'. They provide punishments of 100 lashes for unmarried offenders, and death by stoning for married ones. The Zamfara Penal Code also criminalises 'lesbianism (sihaq)', punishing it with up to 50 lashes and six months' imprisonment:

46 *Sunday Punch* (2003), with picture of the man's face, showing only his eyes blacked out.

47 The entire concept of codification is alien to the spirit and history of *shari'a* law, which traditionally is embodied in the scattered rulings of jurists in the four Sunni schools. That *shari'a* advocates in northern Nigeria have turned to imposing full-fledged codes further reveals how the colonial legacy persists.

> *Whoever being a woman engages another woman in carnal intercourse through her sexual organ or by means of stimulation or sexual excitement of one another has committed the offence of Lesbianism. … The offence is committed by the unnatural fusion of the female sexual organs and or by the use of natural or artificial means to stimulate or attain sexual satisfaction or excitement.*[48]

Courts in the north have handed down death sentences for homosexual conduct under the combined shari'a-and-colonial codes, though there have been no accounts of executions – yet.

[…]

Although draconian provisions were in place at federal and state levels, Nigeria's government tried to go further. In January 2006, the president's office proposed new legislation called the 'Same Sex Marriage (Prohibition) Act'. That was a misnomer: the bill's reach went far beyond marriage. It would punish any 'publicity, procession and public show of same sex amorous relationship through the electronic or print media physically, directly, indirectly or otherwise', and adoption of children by lesbian or gay couples or individuals. It dictated five years' imprisonment for anyone, including a cleric, who abetted a same-sex couple in marrying – and for any person 'involved in the registration of gay clubs, societies and organisations, sustenance, procession or meetings, publicity and public show of same sex amorous relationship directly or indirectly in public and in private'. In addition to condemning to prison human rights defenders who address issues of sexuality, the bill could be used to jail even lesbian or gay couples holding hands (Human Rights Watch 2007a).

Despite a push to rush the bill through the National Assembly in early 2007, it eventually died without a vote. It could, however, be revived at any time. In international arenas, Nigeria has continued its campaign, openly calling for killing people who engage in homosexual conduct. At the UN Human Rights Council in September 2006, Nigeria ridiculed 'the notion that executions for offences such as homosexuality and lesbianism is [sic] excessive'. Its diplomat said: 'What may be seen by some as disproportional penalty in such serious offences and odious conduct, may be seen by others as appropriate and just punishment' (ARC International 2006).

It is appropriate to end with Nigeria, because the 2006 Bill – criminalising all aspects of lesbian and gay identity and life – culminated the arc that Macaulay's Indian Penal Code began. Its all-embracing provisions would render the Bill uniquely severe among the world's anti-gay laws. The trajectory from punishing acts to repressing a whole class of persons was complete.

The paradox remains that a democratic government promoted this repressive legislation as part of indigenous values, although it actually extended old, undemocratic colonial statutes. 'Basically it is un-African to have a

48 Article 135 of the Zamfara Penal Code, www.zamfaraonline.com/sharia/chapter08.html (accessed 25 Aug. 2008). See also Human Rights Watch (2004b).

relationship with the same sex,' the Nigerian minister of justice said in 2006. A national newspaper intoned, 'This progressive legislation is expected to put a check on homosexuality and lesbianism, a deviant social behaviour fast gaining acceptance in Western countries' (*IRIN Africa* 2006).

Sodomy laws encourage all of society to join in surveillance, in a way congenial to the ambitions of police and state authorities. That may explain why large numbers of countries that have emerged from colonialism have assumed and assimilated their sodomy laws as part of the nationalist rhetoric of the modern state. Authorities have kept on refining and fortifying the provisions, in parliaments and courts – spurred by the false proposition they are a bulwark of authentic national identity.

The authoritarian impulse behind legal moves like Nigeria's also points, though, to the emancipatory potential of decriminalising consensual homosexual sex.

The campaigns for law reform are not merely for a right to intimacy, but for the right to live a life without fear of discrimination, exposure, arrest, detention, or harassment. Reform would dismantle part of the legal system's power to divide and discriminate, to criminalise personhood and identity, to attack rights defenders, and to restrict civil society.

Removing the sodomy laws would affirm human rights and dignity. It would also repair a historical wrong that demands to be remembered. The legacy of colonialism should no longer be confused with cultural authenticity or national freedom. An activist from Singapore writes: 'It's amazing', that millions of people 'have so absorbed Victorian prudishness that even now, when their countries are independent – and they are all happy and proud they're free from the yoke of the British – they stoutly defend these laws'. He concludes, 'The sun may have set on the British Empire, but the Empire lives on' (Yawningbread.org 2004). These last holdouts of the Empire have outlived their time.

Recommendations

To all governments, including those that inherited British colonial laws criminalising homosexual conduct:

- Repeal all laws that criminalise consensual sexual activity among adult people of the same sex.
- Ensure that criminal and other legal provisions of general application are not used to punish consensual sexual activity among adults of the same sex.
- Pass laws defining the crime of rape in a gender-neutral way so that the rape of men by men, or of women by women, is included in the definition and subject to equal punishment.
- Pass laws expressly criminalising the rape or sexual abuse of children.

- Consistent with the principle of non-discrimination, ensure that an equal age of consent applies to both same-sex and different-sex sexual activity.
- Repeal any law that prohibits or criminalises the expression of gender identity, including through dress, speech or mannerisms, or that denies individuals the opportunity to change their bodies as a means of expressing their gender identity.

To the Commonwealth Secretariat:

- Consistent with the 1971 Singapore Declaration of Commonwealth Principles, which affirms 'the liberty of the individual', 'equal rights for all citizens', and 'guarantees for personal freedom', condemn and call for the removal of all remaining British colonial laws that criminalise consensual sexual activity among adult people of the same sex.
- As part of Commonwealth programs to help member nations implement international obligations in their laws, promote the decriminalisation of consensual, adult homosexual conduct.
- Also as part of these programs, develop models for gender-neutral legislation on rape and sexual abuse, and for the protection of children.
- Integrate issues of sexual orientation and gender identity into all human rights educational and training activities, including the Commonwealth Human Rights Training Programme for police.

To the United Nations and its human rights mechanisms:

- Consistent with the decision of the UN Human Rights Committee in the 1994 decision of *Toonen v. Australia,* condemn and call for the removal of all remaining laws that criminalise consensual sexual activity among adult people of the same sex, as violations of basic human rights to privacy and equality.

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Bibliography

Adewoye, O. (1977) *The Judicial System in Southern Nigeria, 1854–1954: Law and Justice in a Dependency* (New Jersey: Humanities Press).

Aldrich, R. (2003) *Colonialism and Homosexuality* (London: Routledge).

ARC International (2006) 'Recognizing human rights violations based on sexual orientation and gender identity at the Human Rights Council Session 2'; also available on Human Rights Council website, www.ohchr.org.

Arnold, C. (2005) 'Sri Lanka's gays share their journey', BBC News, 20 May.

Bailey, D.S. (1955) *Homosexuality and the Western Christian Tradition* (London: Longman).

Baker, M. (2004) 'No oral sex please, this is clean-living Singapore', *Sydney Morning Herald* (Australia), 18 Feb.

Baudh, S. (2008) 'Human rights and the criminalisation of consensual same-sex sexual acts in the Commonwealth, South and Southeast Asia', a working paper of the South and Southeast Asia Resource Center on Sexuality (New Delhi: TARSHI).

Beng Hui (2006) 'One step forward, two steps back? Conundrums of the Rape Legal Reform Campaign in Malaysia', *Gender, Technology and Development* 11 (1), pp. 53–74.

Bhaskaran, S. (2002) 'The politics of penetration: Section 377 of the Indian Penal Code', in R. Vanita (ed.), *Queering India: Same-Sex Love and Eroticism in Indian Culture and Society* (London: Routledge).

Borris, K. (2004) *Same-Sex Desire in the English Renaissance: A Sourcebook of Texts, 1470–1650* (London: Routledge).

Brandser, K. (2004) 'Law, literature, and libel: Victorian censorship of "Dirty Filthy" books on birth control', paper presented at the meeting of the Law and Society Association, 27 May, Chicago, Illinois.

Brundage, J.A. (1993) *Sex, Law and Marriage in the Middle Ages: Collected Studies* (Aldershot: Variorum).

Brunner, H. (1888) *The Sources of the Law of England,* trans. William Hastie (Edinburgh: T.T. Clark).

Byron, G. (2004) *Don Juan* (London: Penguin).

Carson, H.L. (1914) 'A plea for the study of Britton', *Yale Law Journal* 23 (8), pp. 664–71.

Chan, D. (2004) 'Oral sex – a case of criminality or morality?' *Singapore Law Gazette*, Sep., available at www.lawgazette.com.sg/2004—9/ (accessed 30 Nov. 2012).

Coke, E. (1797) *The Third Part of the Institutes of the Laws of England* (London: Printed for E. and R. Brooke).

Committee on Homosexual Offences and Prostitution (1963) *The Wolfenden report: Report of the Committee on Homosexual Offences and Prostitution* (New York: Stein and Day).

Douglas, M. (2002) *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (London: Routledge).

Friedland, M.L. (1981) 'R. S. Wright's Model Criminal Code: a forgotten chapter in the history of the Criminal Law', *Oxford Journal of Legal Studies* 1 (3), pp. 307–46.

— (1992) 'Codification in the Commonwealth: earlier efforts', *Commonwealth Law Bulletin* 18.

Gledhill, A. (1963) *The Penal Codes of Northern Nigeria and the Sudan* (London: Sweet & Maxwell).

Goodman, R. (2001) 'Beyond the enforcement principle: sodomy laws, social norms and socialpPanoptics', *California Law Review* 89 (3), pp. 643–740.

Goodrich, M. (1976) 'Sodomy in medieval secular law', *Journal of Homosexuality* 1, pp. 295–302.

Greenberg, D.F. (1988) *The Construction of Homosexuality* (Chicago: University of Chicago).

High Court of Delhi (2005) *Naz Foundation v. Govt. of Delhi and Others* (Special Leave Petition No. 7217–7218 of 2005), Counter affidavit on behalf of respondent no. 5, available at www.lawyerscollective.org/files/Counter%20Affidavit%20%5BGovernment%20of%20India%5D%5B3%5D.pdf (accessed 15 Aug. 2008).

Human Rights Watch (2002a) *Human Rights Watch World Report* (New York: Human Rights Watch).

— (2002b) *Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India*, a Human Rights Watch report (New York: Human Rights Watch).

— (2004a) *Hated to Death: Homophobia, Violence, and Jamaica's HIV/AIDS Epidemic,* a Human Rights Watch report (New York: Human Rights Watch).

— (2004b) *Political Shari'a? Human Rights and Islamic Law in Northern Nigeria,* a Human Rights Watch report (New York: Human Rights Watch).

— (2006) 'Uganda: press homophobia raises fears of crackdown: Government campaign against gay and lesbian community escalates', 8 Sep.

— (2007a) 'Nigeria: anti-gay bill threatens democratic reforms: homophobic legislation restricts free speech, association, assembly', 28 Feb.

— (2007b) 'Uganda: state homophobia threatens health and human rights: Government persecution contributing to HIV pandemic', 23 Aug.

— (2007c) 'Uganda: rising homophobia threatens HIV prevention: US should halt role in funding prejudice and fear', 11 Oct.

— (2008a) *This alien legacy: the origins of 'sodomy' laws in British colonialism*, available at www.hrw.org/reports/2008/12/17/alien-legacy-0 (accessed 30 Nov. 2012).

— (2008b) 'Malaysia: Drop Political Charges against Opposition Leader', 7 August.

Human Rights Watch/International Gay and Lesbian Human Rights Commission (2003) *More than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa,* a Human Rights Watch/ International Gay and Lesbian Human Rights Commission report (New York: Human Rights Watch).

Hyam, R. (1986) 'Empire and sexual opportunity', *Journal of Imperial and Commonwealth History* 14 (2), pp. 34–89.

— (1990) *Empire and Sexuality: The British Experience* (London: Manchester University).

Hyde, H.M. (1962) *The Trials of Oscar Wilde* (New York: Dover).

— (1970) *The Love That Dared Not Speak Its Name: A Candid History of Homosexuality in Britain* (Boston, MA: Little Brown).

Indian Law Commission (1837) *Report of the Indian Law Commission on the Penal Code*, 14 Oct.

International Gay and Lesbian Human Rights Commission (2008) 'National Press Council calls lesbianism "an act of sadism"', available at www.iglhrc.org/cgi-bin/iowa/article/takeaction/globalactionalerts/769.html (accessed 30 Nov. 2012).

IRIN Africa (2006) 'Nigeria: Government proposes law to ban same-sex marriage', 20 Jan., available at www.irinnews.org/report.aspx?reportid=57879 (accessed 30 Nov. 2012).

Izam, M. (2007) 'Victims of inhumane society', *Dawn*, 21 June.

Juris Illuminae (2007) 'Re-scoping Sec 377A: a juxtaposition of views', *Juris Illuminae* 3 (3), available at www.singaporelawreview.org/wp-content/uploads/2007/01/jurisjan07.pdf (accessed 30 Nov. 2012).

Kahan, D.M. (1999) 'The secret ambition of deterrence', *Harvard Law Review* 113, p. 413.

Keep377a.com (2008) Open Letter to the Prime Minister, *Keep377a.com,* www.keep377a.com/Letters.aspx (accessed 25 Aug. 2008).

Long, S. (2003) 'Before the Law: criminalizing sexual conduct in colonial and post-colonial Southern African societies', in Human Rights Watch/International Gay and Lesbian Human Rights Commission, *More than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa,* a Human Rights Watch/International Gay and Lesbian Human Rights Commission report, pp. 256–99.

Mill, J.S. (1974) *On Liberty* (Harmondsworth: Penguin).

Moore, R.I. (1987) *The Formation of a Persecuting Society* (London: Blackwell).

Moran, L.J. (1996) *The Homosexual(ity) of Law* (London: Routledge).

Morris, H.F. (1970) 'How Nigeria got its Criminal Code', *Journal of African Law* 12 (3), pp. 137–54.

— (1974) 'A history of the adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876–1935', *Journal of African Law* 18 (1), pp. 6–23.

New Vision (Uganda) (2007) 'Join politics, Butoro tells Balokole', 18 Dec.

— (2008a) 'Museveni backs Church against gays', 17 Aug.

— (2008b) 'Museveni lauds citizens on anti-gay stand', 14 July.

Olawunmi, B. (2004) 'Homosexuality and its apostles', *Vanguard* (Lagos), 10 Mar.

One India (2008) 'Experts for raising statutory rape age to 16', 6 Feb., available at http://news.oneindia.in/2008/02/06/experts-for-raising-statutory-rape-age-to-16-1202306730.html (accessed 30 Nov. 2012).

Ottosson, D. (2008) *State-Sponsored Homophobia: A world survey of laws prohibiting same-sex activity between consenting adults,* an International Gay and Lesbian Association (ILGA) report, available at www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2008.pdf (accessed 30 Nov. 2012).

Petersen, C.J. (1997) 'Values in transition: the development of the gay and lesbian rights movement in Hong Kong', *Loyola of Los Angeles International and Comparative Law Journal* 19, pp. 337–62.

Phillips, O. (1999) *Sexual Offences in Zimbabwe: Fetishisms of Procreation, Perversion and Individual Autonomy*. Unpublished PhD thesis, University of Cambridge.

QueerAzaadi (2008) 'About queer Azadi', available at http://queerazaadi.wordpress.com/about/ (accessed 30 Nov. 2012).

Read, J.S. (1963) 'Criminal Law in Africa of today and tomorrow', *Journal of African Law* 17 (1), pp. 5–17.

Richardson, H.G. and G. O. Sayles (eds. and trans.) (1955) *Fleta: seu Commentarius Juris Anglicani* (London: Quaritch).

Sipho, G.S. and B. Otieno (1999) 'United Against homosexuality', *New African,* Dec.

Stern, J. (2007) 'An identity under scrutiny', *Dawn* (Pakistan), 21 June, available at http://hrw.org/english/docs/2007/06/21/pakist16231.htm (accessed 30 Nov. 2012).

Sunday Punch (Nigeria) (2003), 10 Aug.

Tamale, S. (2003) 'Out of the closet: unveiling sexuality discourses in Uganda', *Feminist Africa* (February), available at www.feministafrica.org/fa%202/02–2003/sp-tamale.html#_ftn2 (accessed 30 Nov. 2012).

Tambiah, Y. (1998) 'Realising women's sexual rights: challenges in South Asia', *Nordic Journal of International Law* 67, pp. 97–105.

Taylor, J. (2008) 'Minority Report: gay Indians demand a British apology', *The Independent* (UK), 15 Aug.

The Daily Monitor (Uganda) (2004) 'Government warns UNAIDS over gays', 29 Nov.

The Law Reform Commission of Hong Kong (1982) *Report, Laws governing homosexual conduct,* 28 June, available at www.hkreform.gov.hk/en/docs/rhomosexual-e.doc (accessed 30 Nov. 2012).

The News (Pakistan) (2007) 'Same sex couple jailed for perjury', 29 May.

The Online Citizen (2007) '377A serves public morality: NMP Thio Li-Ann', 23 Oct., available at http://the onlinecitizen.com/2007/10/377a-serves-public-morality-nmp-thio-li-ann/ (accessed 30 Nov. 2012).

The Sun (Nigeria) (2003) 27 June.

Tibatemwa-Ekirikubinza, L. (2005) *Criminal Law in Uganda: Sexual Assaults And Offences Against Morality* (Kampala: Fountain Series in Law and Business Studies).

Timberg, C. (2005) 'Nigerian churches tell West to practice what it preached on gays', *Washington Post*, 24 Oct.

Utopia-Asia.com (2005) 'Singapore police arrest four in gay sauna', 3 May, available at www.utopia-asia.com/unews/article_2005_05_3_114741.htm (accessed 30 Nov. 2012).

Yawningbread.org (2001) 'The arrests at One Seven and Section 20', available at www.yawningbread.org/arch_2001/yax-248.htm (accessed 30 Nov. 2012)

— (2004) 'The Map's Tale', available at www.yawningbread.org/arch_2004/yax-350.htm (accessed 30 Nov. 2012).

— (2007a) 'Lee Hsien Loong's speech on Section 377A', available at www.yawningbread.org/apdx_2007/imp-360.htm (accessed 30 Nov. 2012).

— (2007b) 'The Oracle from St James', available at www.yawningbread.org/arch_2007/yax-734.htm (accessed 30 Nov. 2012).

Legal cases

Brother John Antony v. State (1992) *Criminal Law Journa*l 124, p. 1352.

Fazal Rab Choudhary v. State of Bihar (1983) All India Report (Supreme Court).

Government v. Bapoji Bhatt (1884) Mysore Law Report (India) 7, p. 280.

Hoyle v. Regiman (1957) Criminal Appeal No. 242, Uganda Law Report, pp. 314–21.

Khanu v. Emperor (1925) High Court of Sind (India), p. 286.

Lim Hui Lian v. CM Huddlestan (1979) *Malayan Law Journal* 2, p. 134.

Lohana Vasantlal Devchand v. The State (1968) All India Report, High Court of Gujarat, p. 252.

Muhammad Ali v. The State (1961) All Pakistan Law Decisions, High Court of Dacca, p. 447.

National Coalition for Gay and Lesbian Equality v. Minister of Justice and Others, 1999 (1) South Africa 6 (Constitutional Court).

NG Huat v. PP (1995) Singapore Law Report 2, p. 783.
Noshirwan v. Emperor (1934) All India Report, High Court of Sind.
PP v. Tan Kuan Meng (1996) Singapore High Court, p. 16.
PP v. Kwan Kwong Weng (1997) Singapore Law Report 1, p. 697.
Rex v. Captain Douglas Marr (1946) *Malayan Law Journal* 1, p. 77.
State of Kerala v. K. Govindan (1969) *Criminal Law Journal* 818, p. 20.
Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia and Anor (1998) *Malayan Law Journa*l 4, p. 742.

4

LGBT rights in Commonwealth forums: politics, pitfalls and progress?

Frederick Cowell[1]

In October 2010 the Commonwealth Secretariat was criticised in the *Guardian* newspaper for its lack of action on a series of human rights issues, including a failure to respond to the arrest of Tiwonge Chimbalanga and Steven Monjeza for engaging in a gay marriage ceremony in Malawi. This provoked a diplomatic incident and, following international pressure and direct pressure from the UN Secretary General Ban Ki-moon, the two men were eventually pardoned by President Bingu wa Mutharika. This is one of many examples of the complex politics surrounding the rights and treatment of the Lesbian, Gay, Bisexual and Transgender (LGBT) community in Commonwealth countries today. The Commonwealth as an organisation, due to the retention of colonial era sodomy laws in the majority of common law Commonwealth countries, will continue, as Michael Kirby (2009) argues, to be presented with this issue and will be forced to confront it.

Institutionally, the Commonwealth has had difficulty addressing the issue of LGBT rights in spite of its notional support of human rights. The Commonwealth's legacy as a former colonial association, originally designed to promote British foreign policy interests, means that it has a limited capacity to impose human rights norms upon its Member States. As will be shown, many multilateral organisations struggle to advance human rights norms, in particular LGBT rights, due to states feeling that the process of advancing human rights norms through multinational forums implicitly (and sometimes explicitly) interferes with state sovereignty. The capacity limitations of multilateral organisations described here refer to both political and legal

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capacity. As an organisation, the Commonwealth's efficacy in imposing human rights norms is, to an extent, contingent on what Shaw (2003) has described as the emergence of the 'new Commonwealth'; an epistemic community based on a set of shared political values between states. As this chapter argues, however, this has made it difficult for the Commonwealth to advance political and human rights norms aimed at protecting and realising the rights of the LGBT community as there has been some disagreement about what these 'shared values' are. The advancement of human rights norms through the Commonwealth fora is difficult as decisions taken within them are made on a consensual basis and states opposed to the change or reform in question can effectively veto any decision by refusing to reach a consensus.

Although some Commonwealth governments, in particular Canada and the United Kingdom, have prioritised LGBT rights – and in particular decriminalisation of same-sex sexual conduct – within their multilateral foreign policy, others have hardened their stance against LGBT rights. States that maintain an anti-LGBT rights policy within multilateral fora often do so in order to reflect opposition to the LGBT community within their domestic political spheres. This opposition is not monolithic or in any way uniform, it is a product of complex cultural and religious traditions and norms, and states often have an array of different reasons behind their opposition to LGBT rights. Nevertheless, within multilateral forums there is a tendency for issues surrounding LGBT rights to dissolve into bimodal distinctions, with states positioning themselves as either 'pro' or 'anti' the LGBT community, making it hard to build a consensus which could form the basis of positive action. In many ways this is the basis of the modern Commonwealth's problem when it comes to LGBT rights.

Firstly, an overview of the modern Commonwealth is provided for readers who may not be familiar with the Commonwealth or its governing structures. Next, Commonwealth Declarations are examined in an attempt to identify principles of formal equality that could be instrumental in advancing LGBT rights. Thirdly, the human rights case is examined: 42 members of the Commonwealth are signatories to the International Covenant on Civil and Political Rights (ICCPR); and 40 Commonwealth Member States, in some form or the other, criminalise same-sex activity.[2] The two positions would appear to be incompatible, after the decision of the Human Rights Committee

2 In these states laws still exist that enable a prosecution to be brought against someone on the basis of private same sex conduct. At the time of writing the governments of Jamaica and Malawi have indicated support for decriminalisation. Nauru is currently undergoing a process of decriminalisation. The following Commonwealth countries are currently categorised by the Commonwealth Human Rights Initiative as having decriminalised their laws criminalising sexual orientation: Australia, the Bahamas, Canada, Cyprus, Fiji, India, Malta, Mozambique, New Zealand, Rwanda, the Seychelles, South Africa, the United Kingdom, and Vanuatu.

in *Toonen v. Australia*, but many states continue to be committed to protecting human rights while at the same time retaining laws that criminalise sexual orientation. The practice of states engaged within multilateral fora is detailed in the final sections of this chapter.

1. The modern Commonwealth

The modern Commonwealth is a voluntary association of 54 states, who have all, notionally, agreed to common principles. The majority of Member States were associated with, or were members of, the British Empire, and until 2009 when Rwanda was admitted to the Commonwealth, this was generally considered a pre-requisite to membership.[3] In the 1926 Balfour Declaration, Britain and its dominions agreed that they were 'equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations'. These aspects to the relationship were formalised by the Statute of Westminster in 1931 to which Australia, Canada, New Zealand and South Africa eventually acceded. India, on gaining independence in 1947, sought admission to the Commonwealth as a republic and so the requirement to acknowledge the British Monarch as Head of State was removed. This marked the end of the 'British Commonwealth' and the birth of the 'Commonwealth of Nations' but the concept of an informal and voluntary association remained.

The modern Commonwealth's identity as a values-based organisation emerged after the 1971 Singapore Declaration, which enshrined a series of common political principles for Commonwealth states. The 1991 Harare Declaration was the first comprehensive declaration of Commonwealth values and principles and committed Member States to maintaining good governance, democracy and human rights. The Port of Spain summit deepened the definition of Commonwealth values with the Trinidad and Tobago affirmation of Commonwealth values in 2009. Voluntarism remains the defining feature of membership, and has been vital in shaping the 'new Commonwealth'. Voluntarism and collective action formed the basis of the Commonwealth's suspension mechanism – the 1995 Millbrooke Action Plan. This outlined that a state found to be in violation of the values that it had voluntarily agreed to – in particular the maintenance of a democratically elected government – could be legitimately excluded from the Commonwealth.

In the late 1960s and early 1970s the Commonwealth became a leading forum for anti-colonial and anti-apartheid activity. The commitment from the majority of Commonwealth Member States to the struggle against apartheid gained political currency not only because of the racist nature of apartheid

3 Mozambique was admitted into the Commonwealth due to its status as a 'frontline' state against apartheid in South Africa.

and minority rule but also because it was associated with the general struggle for liberty from colonial oppression (Campbell and Penna 1998). The 1971 Singapore Declaration espoused shared values of equality before the law and democracy, and committed states to the struggle. South Africa had withdrawn from the Commonwealth in 1961 following a lengthy dispute with it on a number of matters including its insistence on formally establishing apartheid. The progression of states signing up to human rights treaties and conventions in the early 1990s (see section 3 below) was linked to states redefining their sense of sovereignty in the post-Cold War world and beginning, for a variety of reasons, to regard human rights as an important component of their sovereignty and an important mechanism in legitimating their government to the wider international community (Viljoen 2007). A number of states ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights around this time and there was what was termed a 'rights revival' within the Commonwealth and the international community at large (Heynes and Viljoen 2002). Nonetheless, there remained a sense of political solidarity between Member States in the face of criticism over human rights issues. The suspension of Zimbabwe from the Commonwealth in 2002 saw an increase of anti-imperialist rhetoric in some southern African states that threatened Commonwealth solidarity (Phimister and Raftopoulos 2004).

The Commonwealth has a relatively informal internal structure compared to other international organisations. After 1965 the Commonwealth Secretariat took over the administrative and political functions of the Commonwealth, removing it from the control of the British Foreign and Commonwealth Office. This arguably made the Commonwealth closer to an international organisation, with the Secretariat in charge of the managerial functions of the organisation and the various meetings of state representatives providing the deliberative assemblies. The 80 or more professional and civil society associations, which form part of the 'people's' Commonwealth, are independent from the control or influence of the Secretariat (Mayall 1998). The biennial Commonwealth Heads of Government Meeting (CHOGM) is the principal forum of assembly and is the occasion at which the Secretariat's mandates are formed. The meeting is subject to normal diplomatic protocol, and human rights activists have often criticised the lack of transparency surrounding its deliberations and processes. Alongside this, the apparent impunity that governments responsible for human rights abuses enjoy at the conference has been heavily criticised. Tom Porteous, the then London Director of Human Rights Watch, described the 2009 CHOGM in Port of Spain as 'a jamboree of human rights abusers' (2009). The agendas of the CHOGMs are largely shaped by meetings of Commonwealth foreign ministers who conduct a meeting prior to each CHOGM, which is known as the Committee of the Whole (COW). This meeting is considered vital for forming common consensus and building a Commonwealth agenda.

Ministerial meetings are also held of law, finance and business ministers, ministers for women and other national ministers and officials that help set and influence Commonwealth agendas. They take place at regular intervals and set the agendas and workloads of individual units at the Commonwealth Secretariat. After the 2009 CHOGM Commonwealth structures underwent a review led by an Eminent Persons Group (EPG) consisting of members acting in an individual, rather than governmental, capacity who are representative of the Commonwealth. At the 2011 CHOGM the EPG report recommended enhancing the role of the Commonwealth Ministerial Action Group (CMAG), the body charged with investigating and responding to systematic violations of the Harare Declaration.

2. Searching for the principles of equality in Commonwealth Declarations, Communiqués and Statements

There are references to equality in both the Harare Declaration and the Port of Spain Affirmation of Commonwealth Values but these are largely aspirational political statements and do not bind Member States to specific courses of action. Article 4 of the 1991Harare Declaration states that all signatories believe in 'equal rights for all citizens' – however, this particular clause was more of a procedural statement rather than a declaration of substantive equality. Paragraph 5 of the 2009 Port of Spain 'Affirmation' states that a core Commonwealth value is the 'protection and promotion of civil, political, economic, social and cultural rights for all without discrimination on any grounds' and while this goes further than the Harare Declaration, it is still not as firm as other human rights commitments in the overall corpus of Commonwealth values. The wording of Article 5 found its way into the 2012 Commonwealth Charter which now forms the unified statement of Commonwealth values.

Specific types of equality have featured in Commonwealth declarations and there have been specific commitments made in the fields of gender equality, poverty reduction and the eradication of racial discrimination. The 1994 Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women was the Commonwealth's first substantive declaration on gender and the first to address equality and the concept of ownership of human rights since it stated that human rights 'are perceived to be owned, only or largely, by men.' The Commonwealth gender programme has tried to advance gender equality and the rule of law, both through the work of the Secretariat, and through summit Communiqués and Declarations. The Commonwealth Plan of Action for Gender Equality 2005–15 identified a number of areas to be addressed over the ten-year period, including 'enforcing laws for the achievement of gender equality'. The 2009 Port of Spain Affirmation of Commonwealth Values and Principles also formally commits states to protecting the poorest and most vulnerable and requires

them to 'strengthen the linkages between research and policy making and mainstream issues of gender and gender equality.'

The Commonwealth's stance against apartheid led to the development of a coherent principle of racial equality. The 1971 Singapore Declaration stated that Commonwealth states were committed to a belief in 'equal rights for all citizens regardless of race, creed or political belief' and Article 7 of the Declaration was a statement of Commonwealth opposition to all forms of racial prejudice. While the Singapore Declaration clarified the Commonwealth's position with respect to apartheid, the 1979 Lusaka Declaration went further on the issue of racial discrimination, stating that:

> peoples of the Commonwealth have the right to live freely in dignity and equality, without any distinction or exclusion based on race, colour, sex, descent, or national or ethnic origin.

This presumes a substantive right to equality but the overall text of the Declaration refers primarily to the 'eradication of the infamous policy of apartheid'. The Declaration also refers to the elimination of discrimination against indigenous peoples and immigrant communities, suggesting a more inclusive picture of anti-racism that goes beyond resisting apartheid.

Neither the Singapore nor the Lusaka Declarations are explicitly framed as 'closed list' declarations as it is possible to infer a wider principle of equality into both. Using a formal equality framework it is possible to do a straight substitution of different concepts of discrimination (Hunter 2000; Levit 2000). Examples from the United States illustrate how this process works in practice. Some US court rulings on gay marriage applied the judgment of *Loving v. Virginia,* a landmark case in which racially discriminatory marriage laws in Virginia were struck down, and simply replacing the word 'race' with 'sex' to strike down laws that discriminate against the LGBT community. Laws that treated people differently on grounds of 'sex' were directly analogous to laws that treated people differently on grounds of 'race', and therefore both should be struck down. The logic of formal equality was later applied by the Supreme Court in *Lawrence v. Texas,* which held that anti-sodomy laws, and not just their application, were discriminatory.

Although not a 'closed list' system, it is important to acknowledge that Commonwealth declarations are unlikely to be applied within a broad interpretive framework of this sort. Firstly, all Commonwealth declarations are political instruments and, in the view of Member States at least, are not intended to have the legally binding power of treaties. As Duxbury (1997, p. 352) notes:

> it is important to remember that, as these instruments were entered into after the formation of the Commonwealth, unlike the Charter of the United Nations they do not amount to a formal constitution and were never conceived of as such by the members.

Commonwealth declarations are conceptually closer to 'soft' rather than 'hard' law in that they are not binding on states as international legal obligations and are only effective so long as the states in question remain members of the Commonwealth. The Commonwealth is also at best a 'special case' in relation to other international organisations in that it is not founded on a treaty that imposes international obligations and lacks international legal personality (Chan 1992). This means that the obligation of states to follow the provisions of Commonwealth declarations is chiefly political. Only a 'rule based' system of enforcement (i.e. the membership rules of the Commonwealth) exists to enforce them, a method that is only applicable as long as a state chooses to remain a member. This also means that Commonwealth declarations are non-justiciable in domestic and international tribunals and the interpretation of declarations is limited to intergovernmental meetings and the comparatively limited remit of CMAG.

Commonwealth declarations reflect aspirational values and the intention of states to act in the future. As Shaw (2003) argues, the 'epistemic community' of the Commonwealth that was formed in the 1980s was principally motivated by the collective opposition to apartheid. This conceptually differentiated the new progressive sphere of the Commonwealth from its historical identity as an association of former British colonies. This also situated the 'epistemic community' of the Commonwealth within a broader political movement based on third-world political solidarity that advocated a variety of causes including the promotion of economic development and anti-imperialism.

As Srinivasan (1997) argues the emphasis that the Singapore and Harare Declarations place on democracy and human rights are rooted within the context of contemporary international relations. The Harare Declaration's focus on democracy within countries, as opposed to democracy as an abstract international ideal, was a result of the post-Cold War international climate and the ensuing prioritisation of democratic government over state sovereignty (Franck 1992; Srinivasan 1997). The emphasis of the rights contained in these documents is, however, on the state and the system of government, rather than the individual and the protection of individual liberties. This is not to say that Commonwealth values are incompatible with individualistic concerns but, rather, that the documents setting out Commonwealth human rights norms are primarily concerned with the construction of state institutions, rather than providing positive rights to individuals.

3. International human rights law: a cautionary tale

The protection of human rights was a key part of the Harare Declaration and the repositioning of human rights as a core component of Commonwealth values led to an increase in the number of Commonwealth states signing up to the ICCPR and other human rights treaties over the course of the 1990s.

To date, 42 out of the 54 Commonwealth states have ratified the ICCPR, the Convention on the Rights of the Child (CRC) enjoys universal ratification and that of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is near universal (Commonwealth Secretariat 2010). The 2009 CHOGM communiqué urged all Member States 'to consider acceding to and implementing all major international human rights instruments' (Port of Spain Communiqué 2009, para. 40). While this progress is welcome, the Commonwealth does not possess a human rights enforcement mechanism, nor does it have the capacity to monitor human rights abuses. Commonwealth forums have also resisted scrutinising the actions of individual states with regards to human rights standards, and the work of CMAG has focused almost exclusively on democratic transfers of power, while ignoring other widespread human rights abuses.

The Yogyakarta Principles are principles relating to human rights, sexual orientation and gender identity, formulated by human rights experts and influential at the UN. The preamble to the principles state:

> Human rights violations targeted toward persons because of their actual or perceived sexual orientation or gender identity constitute a global and entrenched pattern of serious concern ... these violations are often compounded by experiences of other forms of violence.

These principles identify the provisions of international human rights treaties that can protect the LGBT community and can broadly assist political and legal movements that aim to decriminalise sexual orientation. For example, Principle 6, affirming the right to privacy, draws on the decision of the Human Rights Committee (HRC), the treaty review body of the ICCPR, in *Toonen v. Australia* to state that legislation criminalising homosexual relations between consenting adults is 'a violation of the right to privacy'. The principles are both interpretative and normative, in that they provide a set of guidelines for interpreting international human rights law to protect the LGBT community, and also aim to generate normative assumptions about the necessity of decriminalising same-sex sexual practices.

Since the decision in *Toonen v. Australia* there have been some significant developments within international human rights law that have helped afford the LGBT community protection. It is worth noting, however, that there have been two forms of resistance within international human rights forums to the promulgation of certain human rights norms. Firstly, there has been a tendency to frame the debate surrounding LGBT rights within a framework of reactionary post-colonial relativism. Secondly, there has been a tendency to see LGBT issues as an attempt by supranational organisations and bodies to impose norms on states, which violate the sovereign prerogative in determining the substance of their legal system.

Relativism, in modern human rights discourse, has been progressively reconsidered and relocated away from polarising debates focusing on the clash

between universalism and relativism (Penna and Campbell 1998; Dembour 2007). In the 1990s, cultural relativism was rejected as grounds for defending systemic human rights abuses and, at the 1993 Vienna World Conference on Human Rights, the then US Secretary of State, Warren Christopher, declared 'we cannot let cultural relativism become the last refuge of repression' (Lau 2003, p. 1689). At the same time, however, it was recognised by many human rights theorists that a cultural margin of appreciation was necessary for the practical realisation of human rights (Donnelly 2003; 2007). Relativism has been used defensively by states to protect the operation of their domestic legal system or to defend against the suspected imposition of 'moral universalism'. Universalism, in the sense of defining moral norms, is often associated with the West or a Western ontological framework, which in contemporary human rights discourse usually refers to the global North (Brems 2001).

The reaction to the Brazilian proposal at the 2003 United Nations Commission on Human Rights (UNHCR) (predecessor to the current Human Rights Council) was an interesting combination of 'classic' relativism and the more contemporary claims of LGBT rights being an exclusively 'Western' concern. Since 2001 Brazil has been at the forefront of efforts to include the language of sexual orientation into international human rights law and, in 2002 and 2003, the Commission debated the inclusion of language on sexual orientation into resolutions on extra-judicial, arbitrary and summary executions. In 2003, with the support of the European Union and other states, Brazil submitted a resolution on human rights and sexual orientation to the Commission. The draft resolution intended to ban all discrimination on the grounds of sexual orientation, simply stating that sexual diversity 'is an integral part of Universal Human Rights' (UN Human Rights Commission 2003). The resolution was defeated by 24 to 22 votes and a number of nations, including Pakistan and Malaysia, actively lobbied to have the phrase 'sexual orientation' removed from the resolution. When Pakistan's delegate was questioned about why they were voting against the resolution, she replied that the resolution was 'sponsored by militant gays from the West' and that the issue 'was not a concern of South-based countries, but a Northern concern' (Narrain 2005).

The imposition of human rights norms formulated at the international or supranational level is often resisted by states from the global South, especially if those human rights are perceived as imposing limitations on a state's autonomy and ability to legislate. States in the global North also resist any perceived interference in their sovereign law making and the 2011 debate over voting rights for prisoners in the UK is a good example of how states are often strongly opposed to an international court's ruling when it is perceived as restricting their power as sovereign law makers.[4] In the global South there is often an

4 The European Court of Human Rights (ECtHR) ruled in *Hirst v. the United Kingdom (No 2)* (2005) ECHR 681 that the blanket ban the UK imposed on

added dimension to this resistance as the composition and history of human rights institutions is often intertwined with the history of colonisation and of economic dominance by the global North (Wright 2001; Mutua 2001).

In his study of the death penalty in the Caribbean, Helfer (2002) warned that it is possible to 'over-legalise' international human rights, causing governments to retreat from their human rights obligations. The countries in question were liberal democracies that maintained and protected the rule of law and had all been willing signatories of international human rights treaties. The death penalty in the Commonwealth Caribbean is a particularly sensitive domestic issue and all 12 states in the region retain it, although several have a moratorium on executions. During the 1990s, following the decision of the UK Privy Council in *Pratt and Morgan v. Jamaica* and a series of judgements by appellate and human rights courts, in particular the Inter-American Court of Human Rights, significantly restricted a state's capacity to carry out executions. In 1997, Jamaica withdrew from the First Optional Protocol to the International Covenant on Civil and Political Rights, ending the right of individual petition to the HRC. In May 1998, Trinidad and Tobago announced its withdrawal from the same Optional Protocol as well the American Convention on Human Rights (McGrory 2001). The government immediately re-acceded to the First Optional Protocol but this time entered a resolution specifically excluding the right of individual petition for prisoners on death row. Guyana followed a similar pattern. The creation of the Caribbean Court of Justice, a regional appellate tribunal with a more favourable death penalty stance, is often interpreted as being a direct consequence of the developments during this period.[5] In his argument Helfer outlines that there is no single set of variables at play that can conclusively demonstrate the threshold that an international human rights institution would have to cross in order to trigger an adverse reaction from its member states. Within the framework of existing human rights treaty systems there remains considerable scope for backlash and resistance to the creation of norms that run contrary to the principles of domestic legal systems or that are politically untenable within the state at large.

Although supranational human rights organisations and treaty review bodies represent a significant opportunity to advance human rights causes and disseminate norms for the protection of human rights, governmental resistance is often justified by the legal principle of non-intervention in domestic affairs

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prisoners voting was contrary to the European Convention on Human Rights. Members of the UK Parliament subsequently debated whether or not accept the ruling and overwhelmingly voted against prisoners being given the right to vote.

5 It is debatable whether the Caribbean Court of Justice actually is pro-death penalty in its operation and its judgments have not shown any pro-death penalty bias. Nevertheless the political context of the Court's formation and the political rhetoric surrounding the Court's operation has been very pro-death penalty. See O'Brien (2007), pp. 189–97.

as enshrined in the Charter of the United Nations. Thus, certain issues can be ring-fenced as private and off-limits to international human rights observers, and this often happens in relation to human rights issues pertaining to women, marriage and the family. It is this distinction that has led numerous countries to register reservations to Articles 2 and 16 of CEDAW – provisions considered to be core to the document – on the grounds that such personal laws should remain beyond the scrutiny of the international community, or are incompatible with culturally or religiously influenced domestic legislation. It is also important to note that such supranational institutions are often caught within a post-colonial paradigm, due to their formation, composition or history, making action on human rights difficult. The UN and the UNHRC, for example, was often accused of engaging in neo-imperialist behaviour in the 1970s when it criticised the human rights records of states in Africa and Asia (Burke 2009). In modern human rights discourse the terminology of post-colonialism has been supplanted by the terminology of the north-south divide but the underlying principle and outcome of such arguments is still the same.

The above cases are as much to do with agency as they are to do with the substance of the right being resisted. The motivations of international human rights institutions are often regarded with suspicion by some states that perceive international human rights as an attempt to 'interfere' in issues regarded as belonging strictly to the domestic legal sphere or, in the case of states in the global South, believe that international human rights norms constitute an assault on 'culture' and cultural values. There was some progress on LGBT rights at the Human Rights Council in 2011 including a resolution on human rights, sexual orientation and gender identity (Human Rights Council 2011) and the Universal Periodic Review process leading to both São Tomé and Príncipe and Mozambique decriminalising same sex conduct. In 2012 Pakistan attempted to bloc consideration of a report from the UN High Commissioner for Human Rights on Decriminalisation at the UN Human Rights Council (UN Watch 2012).

4. Commonwealth forums and LGBT decriminalisation

Issues similar to those outlined above in section 3 arose when the decriminalisation of homosexuality was discussed at the 2010 Commonwealth Senior Officials of the Law Ministries meeting (SOLM). This was the first-ever discussion about LGBT rights in an official Commonwealth forum. At the 2007 CHOGM in Kampala, anti-gay activists in Uganda had urged the Ugandan government to use their platform as the meeting's hosts to speak out against gay rights (PinkNews 2007). LGBT rights were not on the agenda at the Kampala CHOGM but the incident was representative of the growing influence of non-governmental organisations (NGOs) and civil society organisations (CSOs) on Commonwealth processes.

In the communiqué from the 1999 CHOGM in Durban the heads of government recognised the threat of HIV/AIDS, describing it as 'a Global Emergency' (Commonwealth 1999, p. 55). The Commonwealth HIV/AIDS Action Group (CHAAG), a multidisciplinary group of Commonwealth Associations and CSOs, was established to promote and monitor the implementation of paragraph 55 of the 1999 CHOGM communiqué. CHAAG has had some considerable success in relation to focusing Commonwealth resources on HIV/AIDS and helping with the coordination of strategic planning. Recently, the group has begun to focus on laws which criminalise same-sex sexual activity due to the discriminatory impact of such laws on the treatment and prevention of HIV/AIDS, and in a recent letter to members, CHAAG Chair, Anton Kerr, stated that there was a need to 'change legislation that undermines the human rights of the marginalized' (Kerr 2010).

In the run-up to the 2009 CHOGM, the then UK Secretary of State for the Commonwealth, Chris Bryant, stated that the UK government was going to advocate for decriminalisation of laws criminalising same-sex sexual activity at the forthcoming CHOGM (Wintour 2009). This continues to be a key component of the British government's foreign policy. At the Port of Spain CHOGM in 2009, no specific reference was made to decriminalisation of these laws or to LGBT rights, although there was considerable controversy surrounding the proposed Bahati Bill in Uganda and the role of President Museveni as chair of the Commonwealth, given the domestic developments in Uganda. LGBT rights were raised in connection with the terms of gender equality provisions at the Commonwealth Women's Affairs Meeting in Barbados in June 2010, but the reaction to the idea was described as 'lukewarm' by one observer and no mention of the issue was made in the final communiqué.

In the run-up to SOLM, the Commonwealth Lawyers Association (CLA) prepared a paper on the decriminalisation of laws criminalising homosexuality for the meeting which serves as forerunner to the Commonwealth Law Ministers Meeting. This paper was presented by Timothy Otty QC, a specialist human rights barrister and a member of Doughty Street Chambers, London, as an information paper for the delegates urging the decriminalisation of homosexuality. In his presentation to the delegates, Mr Otty stated that the criminalisation of homosexuality is wrong in principle because it exceeds the normal boundaries of the criminal law. It seeks to blur the distinction between public and private life and legitimises state interference, making what is essentially a private matter, a public one. After his presentation the issue was discussed by the delegates.

The divisions between the delegates was interesting as the two issues that had at the time excited much concern from the international community about gay rights in the Commonwealth – the Bahati bill in Uganda and the Malawian gay marriage ceremony – were at the forefront of some of the delegates' minds. The delegate from Malawi outlined at length the reason

why his government was opposed to the decriminalisation of homosexuality. He stated that Malawi was a 'Christian nation' and any acknowledgement of homosexuality being made legal 'would not go down well'. He also stated that Tiwonge Chimbalanga and Steven Monjeza, the two men who were arrested in December 2009 after participating in a marriage ceremony, were 'criminals' who had been 'put up to' participating in the ceremony by Amnesty International. Other African delegates also stated that the reason for retaining legislation criminalising same-sex sexual conduct was that there was no popular appetite for decriminalisation.[6]

Several states spoke out in favour of the paper's decriminalisation proposals. One delegate was of the opinion that countries that have not decriminalised homosexuality do not take their international obligations seriously. This delegate noted that several states continuing to criminalise homosexuality were parties to the ICCPR and had not entered specific reservations to the articles relating to non-discrimination and procedural rights. The Canadian delegate was also of the view that this was an area where the criminal law should not operate and went on to describe the positive experiences Canada had had since decriminalising same sex-sexual conduct in 1969.

Some states supported decriminalisation but urged caution in its implementation. The Indian delegate noted that there were difficult domestic circumstances in many states, but decriminalisation was necessary in order to allow individuals who were from the LGBT community access to basic rights such as healthcare. He also outlined the constitutional 'read down' that had taken place in the Delhi High Court in the Naz Foundation case.[7] Some other delegates also noted that while the domestic climate was often hostile to the repeal of laws that criminalise same-sex sexual activity, the judicial process appeared to be a manageable way of improving human rights in this area.

The SOLM communiqué reports that the delegates 'took note of the paper' (SOLM Communiqué 2010, para. 23(c)) but the issue was not referred to the law ministers for their consideration. In November 2010, the Third Committee of the UN General Assembly voted to remove a reference to sexual orientation from a resolution on extrajudicial, summary or arbitrary executions, weakening the investigative capacity of the UN Special Rapporteur on Extrajudicial Killings to investigate murders of the LGBT community (IGLHRC 2010). The majority of Commonwealth states voted in favour of removing references to sexual orientation from the resolution. After the death of David Kato, the Ugandan LGBT rights activist, in January 2011, Kamalesh Sharma,

6 Malawi has subsequently committed itself to repeal laws criminalising same sex conduct. See Pomy (2012) 'Malawi president vows to decriminalize homosexuality', *Jurist*, 19 May.

7 *Naz Foundation v. Govt. of NCT of Delhi and Others* (2009) read down section 377 of India's penal code and found incompatible with the right to privacy and substantive equality (see Baudh, this volume).

the Commonwealth Secretary General, issued a statement condemning the murder and stated that 'the vilification and targeting of gay and lesbian people runs counter to the fundamental values of the Commonwealth, which include non-discrimination on any grounds' (Commonwealth Secretariat 2011). In a speech in Delhi in February 2011, the Secretary General praised the judgement of the Delhi high court in the Naz Foundation, continuing

> many Commonwealth countries are challenged with reconciling Commonwealth principles of dignity and equality and non-discrimination as well as the fundamental Commonwealth value of respect for fundamental human rights on one hand, with issues of unjust criminalisation found in inherited current domestic legislation in this area, on the other. (Commonwealth Secretariat 2011)

This statement represented a considerable change in attitude from the Secretariat and the Secretary General's office and although it was still relatively non-committal in tone and substance it added considerable weight to the view that criminalisation of individuals on the grounds of sexual orientation was incompatible with Commonwealth values. This was reinforced by his address to the 2011 Law Ministers Meeting, in Sydney in July, when he stated that 'vilification and targeting' by the law 'on grounds of sexual orientation is at odds with the fundamental values of the Commonwealth' (Commonwealth Secretariat 2011). At the 2011 Commonwealth People's Forum civil society organisations urged the Heads of Government to work towards 'repealing all laws' that impede an effective response to HIV/AIDS and ensure 'that all citizens have equal rights and protection, regardless of sexual orientation' (Commonwealth People's Forum 2011; see also Lennox and Waites, chapter 1, this volume). But in spite of considerable pressure from Australian and British government the final communiqué did not expressly refer to LGBT rights or the issue of decriminalisation.

Conclusion

This is a somewhat pessimistic overview of the terrain and options available for human rights advocates working on LGBT rights within the Commonwealth. It is nevertheless intended not to be conservative, but instead to serve as a cautionary overview. Initially, there is room for little but pessimism: the situation appears intractable. The Commonwealth at present could be described as a three-shade map on the issue of LGBT rights, with vocal pro-LGBT rights countries distinguishing themselves from states with a more cautious position. The 'cautious' states appear to favour a less politicised approach, preferring legal challenges akin to the Naz Foundation case in India. However, the states actively opposing the decriminalisation of laws criminalising same-sex sexual conduct are the numerical majority in the Commonwealth. This is likely to continue processes of resistance within multilateral Commonwealth forums on

the issue of LGBT rights and lead to total inertia from the organisation when it comes to action on the decriminalisation of same-sex sexual conduct.

The Naz Foundation case and other grass-roots-orientated activist litigation within individual jurisdictions has shown that localised initiatives can be highly successful on a country-by-country, case-by-case basis. The increasing willingness of the Commonwealth Secretariat to take a more proactive stance with respect to domestic initiatives such as the Naz Foundation judgement is also promising as this could lead to a wider dissemination of the norms surrounding decriminalisation throughout the organisation. This, however, will be an evolutionary process and it is unlikely that much progress will be made through some of the existing Commonwealth mechanisms for monitoring good governance and the rule of law. The shift in favour of a more pro-active and vocal stance on LGBT rights, which occurred at Commonwealth meetings over the course of 2011, has yet to translate into a commitment from the Heads of Government for action. Given that the Heads of Government remain the power brokers in the Commonwealth, any institutional progress on LGBT rights will be marginal in the absence of their support.

The international politicisation of LGBT rights holds many pitfalls and the formation of a declaration in favour of decriminalisation is likely to result in an anti-LGBT rights backlash by some states. The framework of the Commonwealth also means that such a backlash will not be one of substance but rather a reaction that takes place within the context of a 'global North' versus 'global South' debate on the legitimacy of imposing human rights norms. Given that anti-racism is very much written into the Commonwealth's DNA, there is the potential for human rights advocates, using a formal equality framework, to gradually build a consensus in favour of decriminalisation. One thing is certain: this process will be difficult and lengthy.

Bibliography

Borger, J. (2010) 'Commonwealth has abandoned human rights commitment – leaked memo', *The Guardian*, 8 Oct., available at www.guardian.co.uk/law/2010/oct/08/commonwealth-human-rights-leaked-document (accessed 4 Dec. 2012).

Burke, R. (2009) *Decolonization and the Evolution of International Human Rights* (Philadephia, PA: University of Philadelphia Press).

Brems, E. (2001) *Human Rights: Universality and Diversity* (The Hague: Martinus Nijhoff).

Campbell, P. and D. Penna (1998) 'Human rights and culture: beyond universality and relativism', *Third World Quarterly* 19 (1), pp. 7–27.

Chan, S. (1992) 'The Commonwealth as an international organization', in J. Alner (ed.), *Twelve Years of Commonwealth Diplomatic History, Commonwealth Summit Meetings 1979–1991* (Lewiston, NY: Edwin Mellen Press).

Commonwealth Secretariat (2011) 'Commonwealth praises India for decriminalising homosexuality', *PR Newswire United Business Media*, 8 Feb., available at www.prnewswire.com/news-releases/commonwealth-praises-india-for-decriminalising-homosexuality-115480404.html (accessed 4 Dec. 2012).

del Buey, E. (2011) 'Statement on the death of David Kato', *Commonwealth Secretariat,* 27 Jan., available at www.thecommonwealth.org/news/34580/34581/233567/270111davidkato.htm (accessed 4 Dec. 2012).

Dembour, M.B. (2001) 'Following the movement of a pendulum: between universalism and relativism', in J. Cowan, M.B. Dembour and R. Wilson (ed.), *Culture and Rights: Anthropological Perspectives* (Cambridge: Cambridge University Press), pp. 56–89.

Donnelly, J. (1984) 'Cultural relativism and universal human rights', *Human Rights Quarterly* 6 (4), pp. 400–19

Donnelly, J. (2003) *Universal Human Rights in Theory and Practice* (Ithaca, NY: Cornell University Press).

Duxbury, A. (1997) 'Rejuvenating the Commonwealth: the human rights remedy', *The International and Comparative Law Quarterly* 46 (2), pp. 344–77.

Fisher, J. and M. O'Flaherty (2008) 'Sexual orientation identity and international human rights law: contextualising the Yogyakarta Principles', *Human Rights Law Review* 8 (2), pp. 207–48.

Franck, T. (1992) 'The emerging right to democratic governance', *American Journal of International Law* (86) 2, pp. 46–92.

Grew, T. (2007) 'Protests ask Commonwealth to "fight" gays', *Pink News*, 23 Nov., available at www.pinknews.co.uk/news/articles/2005–6144.html (accessed 4 Dec. 2012).

Hunter, N. (2001) 'The sex discrimination argument in gay rights cases', *Journal of Law and Policy* 9 (1), pp. 397–416.

Helfer, L. (2002) 'Overlegalizing human rights: international relations theory and the Commonwealth Caribbean backlash against human rights regimes', *Columbia Law Review* 102 (7), pp. 1832–911.

Heynes C. and F. Viljoen (2002) *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (The Hague: Kulwer Law International).

Human Rights Council (2011) 'Human Rights, Sexual Orientation and Gender Identity', UN Doc. A/HRC/RES/17/19 (14 July 2011).

IGLHRC (2010) 'Governments remove sexual orientation from UN resolution condemning extrajudicial, summary or arbitrary executions', International Gay and Lesbian Human Rights Commission press release, 17 Nov., available at www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1257.html (accessed 4 Dec. 2012).

Kerr, A. (2010) 'Update on Commonwealth HIV/AIDS Action Group (CHAAG)' *Commonwealth Organisation for Social Work*, 7 April, available at www.commonwealthsw.org/News/Update-on-Commonwealth-HIV-AIDS-Action-Group-(CHAAG).aspx (accessed 25 Mar. 2011).

Kirby, M. (2009) 'Legal discrimination against homosexuals – a blind spot of the Commonwealth of Nations', *European Human Rights Law Review* 21 (2), pp. 21–36.

Lau, H. (2004) 'Sexual orientation: testing the universality of international human rights law', *The University of Chicago Law Review* 71 (4), pp. 1689–720.

McGrory, G. (2001) 'Reservations of virtue? Lessons from Trinidad and Tobago's reservation to the first optional protocol', *Human Rights Quarterly* 23 (3), pp. 769–826.

Mayall, J. (1998) 'Democratising the Commonwealth', *International Affairs* (Royal Institute of International Affairs 1944–) 74 (2), pp. 379–92.

Mesfun, M. (2010) 'Meeting of senior officials of Commonwealth law ministries', Commonwealth Human Rights Initiative, 30 Oct., unpublished report on file with author.

Narrain, A. (2005) 'Brazil resolution on sexual orientation: challenges in articulating a sexual rights framework from the viewpoint of the global south', First Conference of Asian Queer Studies, 7–9 July, available at http://hdl.handle.net/1885/8680 (accessed 4 Dec. 2012).

O'Brien D. (2007) '*Attorney General of Barbados v. Joseph and Boyce*: the Caribbean Court of Justice answers its critics?', *Public Law*, summer, pp. 189–97.

Otty, T. (2010) 'The Commonwealth and the criminalisation of homosexuality: an overview', Meeting of Senior Officials of Commonwealth Law Ministers.

Phimister, I. and B. Raftopoulos (2004) 'Mugabe, Mbeki and the politics of anti-imperialism', *Review of African Political Economy* 31 (101), pp. 385–400.

Porteous, T. (2009) 'The Commonwealth is a jamboree of repression', *The Guardian,* 24 Nov., available at www.guardian.co.uk/commentisfree/2009/nov/24/commonwealth-jamboree-of-repression (accessed 4 Dec. 2012).

Shaw, T. (2003) 'The Commonwealth(s): Inter-and non-state: At the start of the twenty-first century: contributions to global development and governance', *Third World Quarterly* 24 (4), pp. 729–44.

Srinivasan, K. (1997) 'A force for democracy, human rights and the rule of law? Do Harare and Millbrook go too far or not far enough?', *The Round Table* 344 , pp. 513–16.

UN Watch (2012) 'Letter from UN's Islamic group to UNHRC President Opposing Panel on Violence Against Gays' UN Watch, 17 Feb. 2012,

available at http://blog.unwatch.org/index.php/2012/02/17/letter-from-uns-islamic-group-to-unhrc-president-opposing-panel-on-violence-against-gays/#more-1760 (accessed 12 Mar. 2013).
Viljoen, F. (2007) *International Human Rights Law in Africa* (Oxford: Oxford University Press).
Wintour, P. (2009) 'Foreign Office to back gay communities around the world', *The Guardian*, 4 July, available at www.guardian.co.uk/world/2009/jul/04/foreign-office-international-gay-community (accessed 4 Dec. 2012).
Wright, S. (2001) *International Human Rights decolonisation and globalisation: becoming human* (London: Routledge).

Commonwealth Declarations and documents

All declarations are accessible at the Commonwealth Secretariat website, www.thecommonwealth.org.

1926 Imperial Conference: Balfour Declaration, 18 November 1926.
Commonwealth Heads of Government Meeting: Singapore Declaration, 22 January 1971.
Commonwealth Heads of Government Meeting: Lusaka Declaration, August 1979.
Commonwealth Heads of Government Meeting: Harare Declaration, 20 October 1991.
The Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women, 1994.
Millbrook Commonwealth Action Programme on the Harare Declaration, 1995
Commonwealth Heads of Government Meeting: The Durban Communiqué, 15 November 1999.
Commonwealth Heads of Government Meeting: The Kampala Communiqué, 25 November 2007.
Commonwealth Heads of Government Meeting: The Port of Spain Communiqué, 27 November 2009.
Commonwealth Senior Law Officials Meeting: Official Communiqué, London 25 October 2010 .
Commonwealth Law Ministers Meeting, Secretary General's Opening Speech, 11 July 2011.
Commonwealth Peoples Forum, Commonwealth Civil Society Statement, 22 September 2011.

Legal cases

Earl Pratt and Ivan Morgan v. Jamaica, Communication No. 210/1986 and 225/1987, U.N. Doc. Supp. No. 40 (A/44/40) at 222 (1989).
Lawrence v. Texas, 539 U.S. 558 (2003).
Loving v. Virginia, 388 US 1 (1967).
Naz Foundation v. Government of NCT of Delhi and Others WP(C) No.7455/2001 (2009).
Toonen v. Australia, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

Legislation

Convention on the Elimination of All Forms of Discrimination against Women 1979 (international).
Convention on the Rights of the Child 1989 (international).
International Covenant on Civil and Political Rights 1966 (international).
Statute of Westminster 1931 (GB, Wales and N. Ireland).
The Charter of the United Nations 1945 (international)

Bills and Resolutions

The Anti-Homosexuality Bill 2009 (proposed), also known as the Bahati Bill.
United Nations Economic and Social Council, Draft Resolution: Human Rights and Sexual Orientation, UN Doc. E/CN.4/2003/L.92 (2003)

5

United Kingdom: confronting criminal histories and theorising decriminalisation as citizenship and governmentality

Matthew Waites

The people of the United Kingdom must come to terms with a shameful history of lives ruined due to criminalisation of sex between men across the British Empire. Responsibility for this extended beyond government into domestic and colonising populations that collectively stigmatised and excluded same-sex relationships. The British of past generations have lacked a moral guilt for this colonial regulation, in stark contrast to the enormity of their historic sexual guilt – an ironic imbalance, possibly unique to a certain kind of Christian country. Yet the United Kingdom's leading role in criminalisation was subsequently inverted when it became the first Commonwealth state in which reform was instigated. The partial decriminalisation enacted in England and Wales in 1967, although extremely narrow in conception, was a landmark event that has offered hope internationally to many peoples – and can still offer insights for the present.

Perhaps the British can now make a more serviceable offering than hope or guilt – that being an intellectual legacy. The radical social analyses of decriminalisation produced since the 1970s by British social theorists, such as Jeffrey Weeks (1981; 1989), Stuart Hall (1980) and Leslie Moran (1996), assisted by engagement with the French theorist Michel Foucault (1978a; 1981), should be considered a critical resource of continuing relevance for analysing contemporary struggles internationally. Hence, these are a major focus of this chapter, reconsidered and engaged for post-colonial adaptation and deployment worldwide.

This chapter[1] thus introduces the history of criminalisation, and of the first decriminalisation in the Commonwealth, but another central purpose

1 Acknowledgement: sections 2–4 of the chapter are an edited reprint from sections of ch. 5, 'Homosexuality and the age of consent', in M. Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (Palgrave Macmillan, 2005), pp. 96–117, reproduced with permission of Palgrave Macmillan, which I gratefully acknowledge. Thanks also to Corinne Lennox and Daniel Monk for feedback on this chapter.

in relation to the volume is to contribute to theorising decriminalisation. The analysis is used to introduce a variety of concepts which can assist in conceptualising decriminalisation generally: 'moral regulation', 'social control', 'hegemony', 'medicalisation', 'sexual citizenship', 'governmentality' and 'power' itself, among others. It is hoped that this, together with a distinctive proposed theorisation of citizenship, will provide valuable conceptual resources to readers engaged in ongoing decriminalisation struggles worldwide.

The chapter first discusses the historical origins of the criminalisation of sex between men in the United Kingdom. Section 1 introduces the peculiarly punitive legal tradition that has shaped the regulation of sex between men in the UK, with attention to differences between England and Wales, Scotland and Northern Ireland. It facilitates understanding of the legal forms and social contexts of state prohibitions on anal intercourse, created from the 16th century, and of new forms of criminalisation of sex between men in the late 19th century. The absence of parallel sex offences regulating sex between women is also explained, although there is not space to examine wider forms of criminalisation of relationships between women, through family law regulating women as wives, mothers and daughters in relation to divorce and parenting (via reference to consummation of marriages, adultery, inheritance etc); or through other laws such as on censorship (see for example Oram and Turnbull 2001, pp. 158–71).

The main focus of section 2 is how the regulation of same-sex sexual behaviour was opened to review by government in the 1950s, and how this shaped a partial decriminalisation of sex between men in England and Wales in 1967 – also eventually achieved in Scotland (1981) and Northern Ireland (1982), and throughout the United Kingdom's territories, as well as in many other Commonwealth states. Also examined is the official committee that produced the influential Wolfenden report in 1957 (Committee on Homosexual Offences and Prostitution 1957), followed by a discussion of subsequent support from the new Homosexual Law Reform Society and politicians of the liberal left, crucial in achieving the 1967 reform. The subsequent extension of decriminalisation, via equalisation of age of consent laws in 2000, is also commented on to demonstrate how a 'rationale of containment' was reproduced (Waites 2005a).

Section 3 provides an examination of the conceptual frameworks underpinning decriminalisation. The focus is on the public/private dichotomy, the relevance of rights, a growth of moral individualism and the interplay of these with the understandings of male sexualities that informed the Wolfenden committee – including with respect to debates over the minimum age. In section 4, a review is presented of existing critical analyses by Jeffrey Weeks (1977; 1981), Stuart Hall (1980), David Evans (1993), Leslie J. Moran (1996) and others, which have deployed radical sociology's theories of deviancy and social constructionism, together with the varying conceptual frames of sexual

citizenship, feminism and queer theory. These have revealed both the restricted legal forms of decriminalisation and the discourses privileging heterosexuality through which it was achieved. Particular attention is given to varying usages of works by French social theorist Michel Foucault (1978a; 1981; Smart 2002). Following the main thrust of these analyses, it is argued that the Wolfenden report's assertion of a realm of individual privacy entailed complex governing processes seeking containment of homosexuality, including through moral and medical regulation.

In section 5, two ways of improving existing analyses of decriminalisation are proposed. First, by giving explicit analytical attention to two new forms of citizenship produced for homosexuals, by focusing on both private sexual acts and on political participation. Second, by engagement with Foucault's (1978b, 2007) later work on governmentality which, somewhat surprisingly, has not previously been applied in a sustained way in the literature on UK decriminalisation. In conclusion it is argued that these more elaborate conceptualisations of citizenship and governmentality, can simultaneously deepen and develop analyses of decriminalisation.

1. The historical origins of criminalisation in the United Kingdom

The history of the criminalisation of sex between men in the United Kingdom has been the focus of extensive academic attention since the gay liberation movement emerged. Jeffrey Weeks was the first to write this history in a way that challenged the presumed inferiority of gay and lesbian lives, analysing the problematic relationships between legal terminology and social identities, using what he called a 'social constructionist' approach emphasising the socially formed meanings given to sexualities (Weeks 1977; 1981). The history can be briefly summarised in the light of such approaches.

The criminalisation of same-sex sexual behaviour between men in Britain has been described as reflecting a 'punitive tradition' of law (West and Wöelke 1997, p. 197), a consequence of what Weeks has referred to as a 'long tradition in the Christian West of hostility towards homosexuality' (Weeks 1989, p. 99). The first recorded mention of 'sodomy' in English law is found in the medieval treatise *Fleta*, surveying the law in 1290, which asserts that those 'taken in the act' of sodomy should be 'buried alive' (Moran 1996, p. 213; Human Rights Watch 2008, pp. 13–14). In Christian doctrine 'sodomy' has been understood as a sin associated with God's punishment of the people in the city of Sodom, as narrated in the Bible, and the punitive legal tradition developed largely from such Catholic Church teachings – although persecution practices had various cultural causes. Such persecution forms a historical backdrop to the later criminalisation across the British Empire.

The legal history of the United Kingdom must be approached with an appreciation of the distinct histories of England and Wales, using what is

known as English law, Scotland with its system of Scots law, and Northern Ireland with its Northern Ireland law, albeit similar to English law (Dempsey 1998, p. 155). As context, England has historically been dominant, largely ruling Ireland from the 12th century and annexing Wales under English law from the 16th century. The Kingdom of England, including Wales, and the Kingdom of Scotland were brought together as Great Britain in law through the Acts of Union in 1707. The United Kingdom of Great Britain and Ireland was subsequently created in 1801, a formality concealing a colonial relationship. After a war of independence, Ireland was divided in 1922 between the Irish Free State and Northern Ireland, with the latter forming part of the United Kingdom of Great Britain and Northern Ireland. In this light the internationally influential notion of an 'English law' tradition, invoked in many legal textbooks, can be problematic if used in ways that erase Scots law and Northern Ireland law. However, with respect to sex offences, Scots law and English law have had shared characteristics and became more similar in the late 20th century.

State regulation of same-sex sexual acts first emerged in the context of an English monarch challenging the Catholic Church, establishing a legal system to extend state governance. An Act of Tudor King Henry VIII in 1533, outlawing the 'abominable vice of buggery', transformed the Church's ecclesiastical law prohibitions into 'statute' (state) law. The offence of buggery in England, Wales and Ireland applied to all forms of anal penetration with woman, man or beast, and was subject to the death penalty until 1861 (Weeks 1977, pp. 11–22; Moran 1996, pp. 21–88). 'Attempted buggery' could also be tried as an offence, described by Weeks as a 'catch-all rather than a refined legal weapon' (Weeks 1989, p. 100). Similarly in Scotland, 'sodomy' was outlawed in common law, although this applied only to sex between men; the death penalty was abolished by the Criminal Procedure (Scotland) Act 1887 (Dempsey 1998, p. 156).

Harry Cocks (2003, pp. 15–49) has used statistical and qualitative forms of analysis to demonstrate the way 'attempted buggery' and 'indecent assault' were increasingly used from the beginning of the 19th century to encompass many forms of sexual activity between men, such as masturbation and oral sex. In Scotland the common law offence of 'shameless indecency' was also increasingly used (Dempsey 1998, p. 156; Davidson and Davis 2004). However same-sex behaviour between women was not encompassed by the laws on buggery or sodomy, and hence tended to escape regulation via criminal law, despite being subject to prohibitions by various social institutions (Edwards 1981; Oram and Turnbull 2001).

The way in which English laws prohibiting sex between men influenced the creation of criminal laws in the British colonies from the mid 19th century has been described and analysed in the groundbreaking Human Rights Watch

report *This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism* (Human Rights Watch 2008; this volume). The process began with the enactment of the Indian Penal Code in 1860, including its infamous Section 377 outlawing sodomy (Baudh, this volume). This was replicated in the Straits Settlement Law of 1871 covering what are now Singapore, Malaysia and Brunei (Human Rights Watch 2008, p. 21; Obendorf, this volume; Shah, this volume).

A key subsequent development in the United Kingdom was the passing of the infamous 'Labouchère amendment', proposed by Henry Labouchère MP to create the offence of 'gross indecency' in the Criminal Law Amendment Act 1885 – a year Weeks has described as an 'annus mirabilis' of sexual politics (Weeks 1989, pp. 87, 96–121). This Act applied throughout England, Wales, Scotland and Ireland. Section 11 of the Act stated:

> 11. Any male person who, in public or private, commits, or is party to the commission of, or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

This occurred in the context of social purity movements, led by middle class moralists and feminists campaigning against prostitution and for the defence of the family (Waites 2005, pp. 67–87). 'Gross indecency' became significant over time for broadening the perceived scope of the criminal law; while not specified precisely in terms of sexual acts, the terminology could be interpreted to encompass all sexual behaviour between men. The new offence was initially little noticed and did not mark a revolutionary turning point (Brady 2005), but it came into greater prominence and usage when used to prosecute the writer Oscar Wilde in 1895 (Waites 2005, p. 85). Further international extensions of criminalisation to colonised territories incorporated versions of 'gross indecency', for example in Sudan and Queensland, Australia, in 1899; and in African colonies between 1897 and 1902 (Human Rights Watch 2008, pp. 20–1).

Lesbianism became more defined by the new sexology of the early 20th century, and its growing visibility generated pressures for legal prohibitions. A parliamentary attempt to criminalise all sex between women in 1921 was only unsuccessful due to the desire of MPs to maintain the social invisibility of lesbianism (Doan 2001, pp. 31–63; Oram and Turnbull 2001, pp. 166–9). Yet there was a deliberate move to regulate same-sex sexual behaviour involving young women under the age of 16, via a gender neutral section on 'indecent assault' in the Criminal Law Amendment Act of 1922 (Waites 2005, pp. 88–96). This climate of state hostility to homosexuality continued until World War II. Only from the mid 1950s did the regulation of homosexuality return to the political agenda.

2. From the Wolfenden report to decriminalisation

A key development came on 24 August 1954 with the government's appointment of the Committee on Homosexual Offences and Prostitution as a joint committee of the Home Office and Scottish Home Department to examine the regulation of homosexuality and prostitution in England, Wales and Scotland. The chairman, Sir John Wolfenden, had an Oxford University background and was regarded as a safe pair of hands by Home Secretary David Maxwell-Fyfe; the committee and its report subsequently became known as the 'Wolfenden committee' and the 'Wolfenden report' (although there were later Wolfenden reports on unrelated topics: Wolfenden 1976; Weeks 2004). The review and the subsequent decriminalisation of male homosexuality have been the subject of extensive commentary,[2] including at the international conference 'Wolfenden50',[3] and therefore this chapter provides only a brief account before proceeding to analyse the committee's view of the role of legislation in defining non-heterosexual citizenship (Committee on Homosexual Offences and Prostitution 1957, cited hereafter as CHOP 1957).

It was, significantly, a Conservative government that appointed the committee to investigate what were perceived as two increasing social problems, in the context of rising prosecutions. The committee comprised various professionals, academics and religious ministers as well as MPs; its terms of reference asked members to consider 'the law and practice' relating to both 'homosexual offences and the treatment of persons convicted of such offences' and to offences connected to 'prostitution and solicitation for immoral purposes' (CHOP 1957, p. 7, para. 1). The association between homosexuality and prostitution reflected the committee's assumption that both were forms of deviance threatening the family as 'the basic unit of society' (p. 22).

The committee's report in 1957 included as its first recommendation 'That homosexual behaviour between consenting adults in private be no longer a criminal offence'; other recommendations sought the tightening of the law concerning public same-sex behaviour and street prostitution, although acts of selling sex would remain legal (CHOP 1957, pp. 115–17). The report offered

2 See: Weeks (1977), pp. 156–82; Weeks 1989, pp. 239–72; Weeks (2007b), pp. 47–55; Hall (1980); Bland et al. (1979), pp. 100–11; Mort (1980; 1999); Jeffery-Poulter (1991), pp. 1–89; Newburn (1992), pp. 49–70; Grey (1992; 1997); Evans (1993), pp. 53–4, 65–88; Higgins (1996); Moran (1995); Moran (1996), pp. 21–32, 91–117; David (1997), pp. 177–96; McGhee (2000; 2001); Davidson and Davis (2004); Houlbrook (2005); Cook (2007); Grimley (2009); Meek (2011).

3 An international conference, 'Wolfenden50: Sex/life/politics in the British World 1945–1969', organised by Graham Willett, Ian Henderson and others at Kings College London in June 2007, took the Wolfenden report's 50th anniversary as an opportunity to assess its impact worldwide (for papers see Weeks (2007a); Day (2008); Bennett (2010); Kinsman, this volume; Willett, this volume).

a crucial statement of reformist principles concerning the role of law in the United Kingdom, providing the conceptual basis for a wide range of subsequent legislation including the partial decriminalisation of male homosexuality in England and Wales via the *Sexual Offences Act* 1967,[4] and on issues including abortion, pornography and divorce. As Stuart Hall later argued, the Wolfenden report is a vital document in understanding state 'reformism' from the 1950s to the early 1970s: 'It set out to articulate the field of moral ideology and practice which defines the dominant tendency in the "legislation of consent"' (Hall 1980, p. 9).

The report subsequently informed further partial decriminalisation in Scotland via section 80 of the Criminal Justice (Scotland) Act 1980, which came into force from 1981, and in Northern Ireland via the Homosexual Offences (Northern Ireland) Order 1982 (Dempsey 1998; Davidson and Davis 2004; Jeffery-Poulter 1991, pp. 147–54; Reekie 1997a, pp. 180–1). Delay in Scotland can be attributed in considerable part to the oppositional stance of the Church of Scotland, in contrast to that of the Church of England, as well as to more conservative moral attitudes generally (Grimley 2009; Meek 2011); in Northern Ireland the wait reflected the influence of competing familial and religious nationalisms, both Unionist and Nationalist (Jeffery-Poulter 1991, pp. 147–54; Duggan 2012). Decriminalisation also followed later in other British territories,[5] and the report influenced debates over the legal regulation of homosexuality in many states including Australia, Canada, the United States, Ireland and New Zealand (Moran 1996, pp. 14–15; Kinsman, this volume; Willett, this volume).

Crucially, the Wolfenden report proposed only a *partial* decriminalisation of sex between adult men, to apply only in *private*, with a minimum age of 21 mirroring the age of majority – much higher than the age of 16 applying for a female engaging in vaginal sexual intercourse. Moreover, the report endorsed a range of medicalising and psychologising research and treatments for homosexuality which Moran (1996, p. 115) has termed 'strategies of eradication', illustrating that partial decriminalisation was conceived as a pragmatic means to manage a social problem medically and socially rather than legally. Homosexuality continued to be regarded as an undesirable condition, within what must be understood as a legal framework embodying 'heteronormativity', understood as 'the institutions, structures of understanding and practical orientations that make heterosexuality seem not only coherent –

4 Some references to this and other reports include paragraph numbers, given in the form (CHOP 1957, p. 1, #1).

5 Bruce-Jones and Itaborahy (2011, p. 9) list Akrotiri and Dhekilia (2000), Anguilla (2001), Bailiwick of Guernsey (1983), Bermuda (1994), British Virgin Islands (2001), Cayman Islands (2001), Falkland Islands (1989), Gibraltar (1993), Isle of Man (1992), Jersey (1990), Montserrat (2001), Pitcairn, South Georgia, St Helena, Turks and Caicos Islands (2001) and 'all other territories'.

that is organized as a sexuality – but also privileged' (Berlant and Warner 1998, p. 548; McGhee 2000; 2001).

The Wolfenden committee was thus not created with a 'permissive' intent, but was a product of increasing social anxieties concerning the increasing incidence and public visibility of homosexuality and prostitution. As Stuart Hall has argued, the immediate circumstances surrounding the Wolfenden committee's creation can legitimately be described as a 'moral panic' (Hall 1980, p. 8; cf. Cohen 1972), generated by a series of high-profile spy scandals and trials (Weeks 1977, pp. 156–67; Jeffery-Poulter 1991, pp. 8–27; Newburn 1992, pp. 49–51). Nevertheless, significant opinions were moving in favour of decriminalisation prior to the committee's creation. An editorial from the *Sunday Times*, proposing a public enquiry, illustrates this:

> Homosexuality is rich pasture for the blackmailer; for the social stigma and the legal penalty of disclosure are alike terrifying to the wretched invert who, perhaps by a single reckless deed, has given way in secret to his warped desires ... One may well ask whether, in regard to consenting acts between adult males, the truth is not that the real offence is to be found out ... Notorious inverts occupy eminent places ... In all this matter our society is riddled with hypocrisy. The law it would seem is not in accord with a large mass of public opinion ... The case for a reform of the law as to acts committed in private between adults is very strong. (*Sunday Times* 1954)

Hence, more tolerant attitudes played a role in the committee's formation (Weeks 1977, p. 164; Weeks 1989, p. 241). The Church of England's Moral Welfare Council published an interim report, *The Problem of Homosexuality*, in 1954, advocating a commission of investigation and decriminalisation, an important factor in achieving the review and eventual reform (Grimley 2009). Committee records suggest that most members expected decriminalisation to be recommended soon after sittings began (Higgins 1996, p. 63).

The review was not only the product of short-term controversy over homosexuality, but must be interpreted in the context of long-term social trends. The social upheavals of World War II contributed to higher levels of same-sex activity, as suggested by the first Kinsey report (Kinsey, Pomeroy and Martin 1948; Cook 2007, pp. 148–50). Partly in reaction to the war's disruptions, the 1950s witnessed a strengthening of the ideology underpinning the nuclear family, with carefully segregated gender roles (Weeks 1977, pp. 157–9; Cook 2007, 167–71). This appears to have encouraged greater policing zeal. Indictable 'homosexual' offences known to police in England and Wales had increased from the 1930s, from 622 in 1931 and 2,000 in 1945, to 4,416 in 1950 and 6,357 in 1954 (CHOP 1957, Appendix I, table I). Recent histories have emphasised this was attributable to a variable 'administrative and cultural basis' of policing practices rather than a politically led 'witch hunt' (Houlbrook 2005, pp. 31–7 (esp. 32), 242), but increasing press coverage of homosexuality led to political concern.

The committee investigated theories of the 'causes' of homosexuality, examined its incidence, and sought to define the relationship between existing sexual offences and the concept of 'homosexual' in its terms of reference (CHOP 1957, pp. 11–20, 37–47; Moran 1995; 1996, pp. 21–32, 91–117). Among those who provided evidence were only three self-declared homosexuals, Peter Wildeblood, Patrick Trevor-Roper and Carl Winter. Wildeblood was a writer and vehement critic of the law who had been convicted of sex offences in a highly publicised trial involving Lord Montagu; Trevor-Roper and Winter, both respected as professionals, used evidence of blackmail and suicide to argue confidently in favour of decriminalisation (Higgins 1996, pp. 39–45).

When completed however, the Wolfenden report was very clear in refuting any intention to fully legitimise homosexuality, emphasising that the argument for decriminalisation was 'not to be taken as saying that society should condone or approve male homosexual behaviour' (CHOP 1957, p. 22):

> It is important that the limited modification of the law which we propose should not be interpreted as an indication that the law can be indifferent to other forms of homosexual behaviour, or as a general licence to adult homosexuals to behave as they please. (CHOP 1957, p. 44, #124)

The approach was one of tolerance, and the limits of official tolerance were clear.

The committee's investigations concerning female homosexuality were extremely brief. The committee considered the sole offence relating to sexual acts between women, 'indecent assault' on a female, for which 'consent' had been removed as a defence for girls aged under 16 by section 1 of the Criminal Law Amendment Act 1922 (re-codified in the Sexual Offences Act 1956, s14.1). This was included in the committee's list of homosexual offences (CHOP 1957, pp. 36–8, #95–103; Moran 1996, pp. 97–8, 100). However, the committee were unable to find a single instance of an act with another female 'which exhibits the libidinous features that characterise sexual acts between males', concluding that all recorded convictions referred to the aiding and abetting of sexual assaults by males (CHOP 1957, p. 38, #103). Hence the existence of 'indecent assault' did little to destabilise the committee's assumption of women's lack of sexual agency and attentions appear not to have focused on lesbianism; 'homosexual offences' were in general assumed to be male (Moran 1996, pp. 97–101). No necessity was seen for reforming age of consent legislation for females. This approach was probably influenced by the rationale of the inter-war period that explicitly prohibitive legal regulation might be counter-productive in spreading knowledge.

The report's conclusions concerning male homosexuality received a 'mixed, but by no means entirely hostile reception', being endorsed by the Church Assembly, as well as *The Times* and the *Daily Mirror* (*Guardian* 1958). However, decriminalisation was dismissed as 'nonsense' by the *Daily Express*, and the *Daily*

Mail claimed decriminalisation would lead to an increase in perversion, though the *Daily Telegraph* remained more ambivalent (*Evening News* 1957). Hence, while the government enacted the report's recommendations concerning prostitution immediately through the *Street Offences Act* 1959, the proposals concerning homosexuality were shelved.

The Wolfenden report's publication was thus followed by a ten-year period of lobbying for decriminalisation. This was led by the Homosexual Law Reform Society, formed in 1958 as the first homosexual organisation in the United Kingdom to campaign for decriminalisation (Waites 2009). The definitive first-hand account is *Quest for Justice* by former Secretary Antony Grey, who died in 2010 yet deserves a place in history as a heroic initiator of collective struggle for decriminalisation (Grey 1992; 1997a). The Homosexual Law Reform Society lobbied MPs and organised public debates, utilising arguments according to the Wolfenden report, but with its public presence already destabilising the report's public/private boundary. Gay liberationists later criticised the Society for its timidity in claiming tolerance rather than equality, but relative to its context the organisation was radical. Grey's account illuminates the dedicated professional work by himself and others, including support for men charged with offences. He later recalled how the Society's respectable image concealed a subversive interior: 'I have vivid memories of several distinctly regal queens and pre-operative transsexuals who enthusiastically helped out in our Shaftesbury Avenue office (wearing full drag)' (Grey 1997b).

A series of attempts were made to implement the Wolfenden report in parliament, though reform proposals were strategically limited to England and Wales due to less sympathetic Scottish politics (Dempsey 1998, p. 157; Davidson and Davis 2004; Meek 2011). The Private Members Bill (non-government bill), which in amended form eventually became the Sexual Offences Act 1967, was first introduced into the House of Commons in June 1960 by Kenneth Robinson MP. Typically for such a bill it was to be debated via free votes without orchestration by party whips, but nevertheless it was defeated by a majority of more than two to one. After years of delay it was introduced again in May 1965, this time to the unelected House of Lords, by Lord Arran. During its passage, senior peers inserted a strict privacy clause, applying a more restrictive standard of privacy than for male/female behaviour. This specified that a 'homosexual act' would not be considered 'private' if 'more than two persons take part or are present', or if occurring in a public lavatory (Sexual Offences Act 1967, s1.2).

The bill passed through the Lords in July 1965 and was brought into the Commons by Conservative MP Humphrey Berkeley, known to be homosexual by many in parliament (Channel 4 1997a). After a general election and Labour victory in 1966, Berkeley lost his seat and was replaced as the bill's sponsor by Labour MP Leo Abse. With backing from the new Home Secretary Roy Jenkins, who from 1959 had criticised the 'brutal and unfair' law and endorsed

the Wolfenden report, parliamentary time was set aside by the government – despite the misgivings of Prime Minister Harold Wilson and many trade unions allied to Labour, and the vehement opposition of Foreign Secretary George Brown (Jenkins 1959; 1991, pp. 180, 209). The Sexual Offences Bill was eventually passed in the Commons by 99 votes to 14 on 3 July 1967, still on a free vote – but this was at 5.44 am after an all-night debate and use of elaborate parliamentary tactics by opponents. It finally passed through the Lords with votes of 111 to 48 at Second Reading, then without a vote at Third Reading, and the Sexual Offences Act received Royal Assent on 27th July (Grey 1992; Jeffery-Poulter 1991, pp. 28–89; Newburn 1992, pp. 55–62; Higgins 1996, pp. 123–48).[6]

John Campbell, a biographer of Roy Jenkins, has captured the flavour of the times:

> Coinciding with Beatlemania, the miniskirt and 'Swinging London', but also with the Rolling Stones, the drug scene and the first Vietnam demonstrations, the period 1966–7 is now seen for good or ill as a turning point in the social history of the country – either a halcyon time of personal liberation or the onset of national decadence. (Campbell 1983)

This was a significantly different context from that in which the Wolfenden report had been published and the cultural politics certainly helped facilitate reform. Yet it was only with the emergence of the gay liberation movement from 1970 that the public vocabulary of campaigners shifted to demanding equality (Weeks 1977).

In government, the role of Roy Jenkins was crucial, both in securing parliamentary time and for his wider promotion of liberal reforms. Jenkins linked the issue to his broader political philosophy: 'To enlarge the area of human choice, socially, politically and economically, not just for the few but for the whole community is very much what democratic socialism is about' (quoted in Campbell 1983, p. 103). As a more recent Labour minister has commented on this 'unashamedly liberal' and 'transformational' Home Secretary:

> It is an astonishing fact that Roy was Home Secretary for only one year and eleven months from 23rd December 1965 to 30th November 1967 … […] But it is not too much to say that in those 23 months he and his allies changed the face of society. The legalisation of abortion. The legalisation of homosexuality. 'No fault' divorce. The prohibition of racial discrimination. The abolition of stage censorship. The abolition of flogging in prisons. Radical reform of the police. Individually these reforms were important, some of them seismic. Taken together … […] they changed the face of society. (Adonis 2011, p. 8)

6 See also the records of the Homosexual Law Reform Society in the Hall-Carpenter Archive, Library of the London School of Economics and Political Science.

This commentary helps us to see decriminalisation in its wider social and political context, as achievable during what Jenkins called 'The Liberal Hour' – never matched when he returned as Home Secretary during 1974–6 (Jenkins 1991, pp. 199–213). Decriminalisation became possible in 1967 under a Labour government of the centre-left which leant towards social liberalism, and was related to allied or similarly framed struggles in the politics of gender, anti-discrimination, criminal justice and individual freedom. Rather than focusing our analytical attention excessively on an individual, this points to the importance of understanding decriminalisation struggles in the context of broader struggles over 'hegemony', the concept used by Marxist theorist Antonio Gramsci (1971) to describe a dominant cultural and political formation in a particular society. As Ernesto Laclau and Chantal Mouffe (1985) have suggested, hegemony can be detached from class reductionism and reconceptualised in the context of multi-dimensional forms of inequality and political resistance. But here we must focus analysis on the specific form of and factors influencing decriminalisation.

The terms of decriminalisation were very restricted. The new law stated:

> Notwithstanding any statutory or common law provisions, but subject to the provisions of the next following section, a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of twenty-one years. (Sexual Offences Act 1967, s1.1)

A 'homosexual act', a concept introduced by the legislation, was defined as follows:

> For the purposes of this section a man shall be treated as doing a homosexual act if, and only if, he commits buggery with another man or commits an act of gross indecency with another man or is party to the commission by a man of such an act. (Sexual Offences Act 1967, s1.7)

Hence the commissioning of homosexual acts, in addition to sexual activity itself, remained prohibited. Leslie J. Moran has provided the most elaborated discussion of how decriminalisation – apparently paradoxically – constituted the notion of homosexuality in law, through the Act's novel usage of the concept 'homosexual act' which conflated an identity with a set of acts (Moran 1996, pp. 91–117). Hence pre-existing offences of buggery and gross indecency were reinterpreted and reclassified as 'homosexual offences' with reference to the modern category of the homosexual from sexology.

Decriminalisation was informed by a growing degree of tolerance of homosexuality among political elites. That John Wolfenden's own son was openly homosexual, within his social circle and to his father, is indicative of establishment dilemmas (Faulks 1996, pp. 209–309). Evidence has emerged that homosexuals such as prospective Conservative Prime Minister Robert Boothby (later Lord Boothby) were peppered throughout parliament and

the establishment, and hence their political colleagues had every interest in decriminalising their activities. It has been credibly claimed that Boothby and Labour MP Tom Driberg, both known homosexuals, were protected from the press and police by cross-party agreement when their links to London gangland killers the Kray twins emerged in 1964. Boothby was involved in a friendship and possibly a sexual relationship with Ronnie Kray, while simultaneously the long-term lover of Lady Dorothy Macmillan, wife of Harold Macmillan – Conservative Prime Minister from 1957 to 1963 (Channel 4 1997b; *Independent on Sunday* 1997; *Pink Paper* 1997, p. 2). The Wolfenden report and decriminalisation should thus be interpreted as being influenced by political elites moving ahead of public opinion.

The political climate which eventually facilitated the passage of the Sexual Offences Act in 1967 was significantly less conservative than that which informed the Wolfenden report. By 1967, after such a long process of debate, 'the heat had largely been dissipated from the question' (Weeks 1977, p. 156; cf. pp. 168–82). Nevertheless, those arguing for decriminalisation employed many of the same arguments advanced by the Wolfenden report. They emphasised that homosexuality was the 'condition' of a particular group, possibly treatable but largely fixed. Leo Abse, the bill's sponsor, argued that homosexuality was a psychological problem requiring prevention and understanding: arguments he subsequently declared to have known were 'absolute crap' (Channel 4 1997a; McGhee 2000, pp. 84–5). Abse and others also emphasised the threat of blackmail under existing law, particularly to protect national security in the light of the Burgess and Maclean spy scandals. These were strategic claims, more assertive than the Wolfenden report, yet still largely within the same framework.

Decriminalisation had the effect of nullifying existing legislation that outlawed acts of buggery and gross indecency between men within a tightly delimited private sphere. However, this partial decriminalisation did not remove the offences of 'buggery' or 'gross indecency' from the statute and many consensual acts remained subject to prosecution. Decriminalisation applied only with no more than two men present, due to the House of Lords amendment imposing a specific, strict definition of privacy (Sexual Offences Act 1967, s2). The merchant navy and armed forces were exempted (Sexual Offences Act 1967, s5). Further regulations were imposed upon public behaviour, with soliciting (cruising or propositioning men) and procuring (inviting, encouraging and facilitating sex) remaining completely illegal, and the reformed law 'provided for the greater use of summary trial procedure as an alternative to jury trial', leading to a 150 per cent increase in prosecutions between 1967 and 1973 (Moran 1996, pp. 120–1). New strict sentences for buggery were also introduced for offences with people aged below 21 (Moran 1996). Additionally, a legal judgement in 1972 by the House of Lords subsequently decided that the 1967 Act exempted homosexuals over 21 from

criminal penalties without making their actions 'lawful in the full sense' (Weeks 1989, p. 275).

With respect to the age of consent, the Wolfenden committee advocated the age of 21 – the age of majority – as the most conservative age available, despite placing emphasis upon medical expertise:

> Our medical witnesses were unanimously of the view that the main sexual pattern is laid down in the early years of life, and the majority of them held that it was usually fixed, in the main outline, by the age of sixteen. (CHOP 1957, p. 26, #68)

The report premised its recommendation of 21 upon a disjuncture between the formation of sexual feelings or desires for most individuals by 16, and attainment of the decision-making competence associated with mature judgements, as discussed elsewhere previously (Waites 2005a, pp. 114–17). The committee justified this with the argument that:

> a boy is incapable at the age of sixteen of forming a mature judgement about actions of a kind which might have the effect of setting him apart from the rest of society. (CHOP 1957, p. 25, #71)

In this context, the committee chose not to employ the phrase 'age of consent' in its recommendations, preferring to describe the minimum age of 21 as an 'age of "adulthood"' (CHOP 1957, p. 115). This choice of language reflected their belief that a young man aged 16 did have the psychological competence to consent to sexual activity, but was not 'sufficiently adult to take decisions about his private conduct and to carry the responsibility for their consequences' (CHOP 1957, p. 26, #69). The Policy Advisory Committee on Sexual Offences, which subsequently reviewed the law in the late 1970s, also rejected 'age of consent' and used 'minimum age' in relation to the post-1967 legislative framework, on the grounds that it would be unrealistic to imply that the law assumed males under 21 were incapable of giving consent. Hence contestation of such terminology became an appropriate strategy for the Campaign for Homosexual Equality (Policy Advisory Committee 1981, p. 11; Waites 2005a, p. 147; pp. 145–55).

As a brief postscript, note that equalisation of the age of consent took place throughout the United Kingdom in 2000 and this should be regarded as an extension of the decriminalisation process. As elaborated elsewhere, this continued to occur within a 'rationale of containment', premised upon biomedical and psychological knowledge-claims asserting the fixity of sexual identities by the age of 16 (Waites 2005a, p. 181). This strongly suggests that contemporary decriminalisation campaigns internationally should not assume that, where a formally equal age of consent law is claimed, this will embody or imply a straightforward movement towards a wider social equality. Moreover, in India, the recent 'reading down' of Section 377 in the Indian Penal Code, through invocation of constitutional and human rights, illustrates

that for some understandable reasons decriminalisation campaigns do not always initially seek, let alone achieve, equal age of consent laws (Waites 2010). This suggests the cross-cultural value of analytical frameworks which problematise decriminalisation discourses for their approaches to youth and childhood. Analysis of conflicts in the United Kingdom suggests activists seeking decriminalisation in Commonwealth states should attend urgently to the social status of children and young people and the questions of whether, when and how to seek equal age of consent laws.

Having outlined and problematised the Wolfenden proposals and subsequent legal reforms, the next section reviews and develops critical analyses of decriminalisation. Analyses using social theory can assist the development of conceptual and political frameworks, and hence of arguments for both decriminalisation and legal equality, to ensure we challenge normative hierarchies and social inequalities rather than leave them intact.

3. Conceptualising decriminalisation: privacy, utilitarianism and the homosexual condition

The critical aspect of the Wolfenden report's conceptual framework was its distinction between the *public*, regarded as being the legitimate realm of state intervention, and the *private* as a realm for individual moral decisions. The report stated that the function of the law:

> is to preserve public order and decency, to protect the citizen from what is offensive and injurious, and to provide sufficient safeguards against exploitation and corruption of others. (CHOP 1957, p. 9, #13)

Hence:

> It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined. (CHOP 1957, p. 10, #14)

The sphere of privacy was to be carefully delimited and tightly patrolled at the boundaries. The public/private dichotomy defined the crucial boundary around which the Wolfenden committee built its case for decriminalisation (CHOP 1957, p. 12, #12; p. 20, #49–52).

Despite this the Wolfenden report made no reference to the 'right' to 'privacy' asserted in Article 12 of the *Universal Declaration of Human Rights* (United Nations 1948), or the right to 'private and family life' in Article 8 of the *European Convention on Human Rights*; or indeed – as a careful reading shows – to human rights more generally. The *European Convention* was created in 1950 and in force from 1953, translating the Universal Declaration into law for states in the Council of Europe (2011). The United Kingdom had been a founding signatory – indeed British lawyers had played a central role in writing

it, conceiving this as a means to bring the civilising influence of British liberties into the continental context of post-war reconstruction.

The Wolfenden report presents a case for allowing a realm of individual privacy that, in the early pages, places considerable emphasis on the limits of appropriate state action and the limited 'function of the law', as quoted above. However, within the main body of the report when reaching conclusions, the committee struck a more affirmative note in relation to the moral status of the individual; one argument is cited as 'decisive':

> the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. [...] to emphasise the personal and private nature of moral or immoral conduct is to emphasise the personal and private responsibility of the individual for his own actions. (CHOP 1957, p. 24, #61)

In light of this the report can be interpreted as articulating a new moral status for homosexuals. Notwithstanding the patronising emphasis on the 'personal responsibility' of individuals which the committee were stigmatising so extensively, the report gave a new affirmation of the moral entitlement to privacy of homosexuals, and this can be interpreted as the emergence of an implicit – although not explicit – understanding of a right to privacy.

That the issue of rights is avoided is remarkable, although not explicitly remarked in existing commentaries; yet, in context, it was unsurprising and typical of the extent to which issues of sexuality were not generally discussed in relation to human rights until the 1970s, much more so from the 1990s (Waites and Kollman 2009). The reference to 'citizens' already quoted demonstrates that an emergent minimal understanding of sexual citizenship was articulated in relation to homosexuals in the report (CHOP 1957, p. 10, #14; cf. Evans 1993), but the paucity of use of the term indicates that homosexual citizens' entitlements were hardly considered.

The Wolfenden report's advocacy of decriminalisation, and its distinction between public and private behaviour, were the product of a number of overlapping tendencies producing change in the principles structuring social life. They derived from a complex interplay of knowledge and beliefs: ethical perspectives, legal philosophies, medical knowledge and social attitudes towards homosexuality. A broad tendency away from ethical collectivism towards moral individualism among adults was one significant factor, drawing sustenance from social experiences of individualisation (Weeks 2007), a more prevalent tendency among middle-class men than other groups. The growing belief that society should respect the choices and feelings of individuals was linked to a growing sense of potential self-determination generated in capitalist societies, characterised by movements of people, rising levels of education, extension of the franchise and formal democratisation. A movement towards secularisation of state activity and increasing acceptance of religious diversity reinforced this shift, inducing doubt over the authority of traditional institutions.

A more specific but related shift in understandings of the role of the law occurred during the 1950s, from what can be described as 'legal moralism' to 'legal utilitarianism'. The Wolfenden report's distinction between public and private spheres was framed squarely in relation to debates between conservative paternalists and utilitarian liberals. It represented a revival of 19th-century liberal utilitarianism espoused by Jeremy Bentham and (especially) John Stuart Mill, asserting a clear distinction between the dictates of morality and the appropriate scope of law (Mill 1962; 1974). The principles at stake were most clearly articulated in the debate between High Court judge Lord Patrick Devlin and Oxford legal philosopher H.L.A. Hart that occurred in response to the report's publication (Devlin 1959; Hart 1963). Lord Devlin used his Maccabean lectures of 1959 to argue that the criminal law should embody key elements of a nation's morality, fostering these values; Hart responded by supporting the Wolfenden committee's distinction between sin and crime, and rejecting the law as an effective medium for transmission of social values.[7] Christie Davies has helpfully described the subsequent shift in the role of law slightly differently, as being from 'moralism' to 'causalism', towards a greater focus upon the practical effectiveness of prohibitive laws; Davies's work makes clear that the advocacy of decriminalisation depended upon a particular conjuncture of legal utilitarianism and ethical individualism with specific understandings of homosexuality (Davies 1975; 1980).

The Wolfenden committee's investigations occurred in the context of two simultaneous tendencies in the cultural definition and social positioning of 'the homosexual': increasing social visibility and increasing delineation. 'Homosexuality' became increasingly visible, due considerably to the agency of 'homosexuals', as the growth of urban subcultures developed and identities hardened, but also due to increasing investigations by modern institutions seeking to define and control the 'problem of homosexuality', including the media, the criminal justice system and medical science. Simultaneously, and through the same dynamics, there was a movement towards the increasing delineation of homosexuality from heterosexuality; proposals for decriminalisation were therefore intertwined with the production of new authoritative conceptions of scientifically defined homosexuals (Moran 1996). The Wolfenden inquiry was thus situated at the juncture of these two general tendencies which are embodied in its conception, its investigations and its conclusions. A limited progressive movement occurred within a wider framework of social forces in which mechanisms for homosexual containment were also embedded.

As argued previously (Waites 2005a, pp. 114–17), echoing the emphasis of Weeks (1981), the committee premised its conclusions largely upon the

7 The enduring influence of these positions in structuring debates over law in the UK was evident in the inclusion of a philosophical summary framed in these terms in Appendix C of the Law Commission's consultation paper (1995).

view that homosexuality was the unfortunate 'condition' of a distinct group of individuals, from which 'a total reorientation … is very unlikely indeed' (CHOP 1957, p. 66). The fixity of sexualities above any legal age was thus the most fundamental element in the decriminalisation rationale. Despite being unconvinced by existing theories of homosexuality as a sickness, the committee tended to emphasise homosexuality as a distinctive 'condition', for example when it recommended the pursuit of further medical research into psychiatric and hormone 'treatments', leading to Home Office-funded electric-shock 'treatment' programmes being inflicted upon prisoners (CHOP 1957, p. 11, #18; p. 116, #xvi-xviii; *The Guardian* 1997). So it was largely by accepting expert claims that adult sexual identity was fixed as a 'condition' by the age of 16, that the committee proceeded. Dominant forms of sexology advanced arguments that, as Moran puts it: 'If homosexuality is fundamental to the sense of self and is innate, it cannot be regarded as punishable by rational persons who respect the laws of nature' (Moran 1996, p. 3). According to Higgins, evidence to the committee confirms that many of the strongest advocates of law reform were those who believed most strongly in homosexuality as a medical condition (Higgins 1996, p. 51).

However McGhee (2000; 2001) has presented a detailed examination of approaches to the age of consent and young people in the Wolfenden report and parliamentary debates leading to decriminalisation, which questions the extent of emphasis on the fixity of the homosexual condition. McGhee, developing themes from Moran (1996, p. 96), emphasises the influence of the Kinsey research which led to acknowledgement that 'homosexuality as a propensity is not an "all or none" condition', and that 'all gradations can exist' (CHOP 1957, p. 12; McGhee 2000, p. 69; cf. Mort 1999). Following on from this he highlights a 16–21 age period of 'unfixed and transitory sexualities' in which some young men were seen to be influenced into same-sex behaviour (McGhee 2000, p. 65). Relatedly, he emphasises that the committee also made unimplemented recommendations for rehabilitation programmes of 'treatment' of young men to contain the perceived threat of homosexuality spreading – through medical treatment via oestrogen, but also through social and moral guidance on appropriate behaviour. McGhee thus convincingly suggests that young men's heterosexuality was regarded as fragile and vulnerable to seduction. He underplays the extent to which 21 was used in 'expediency' by John Wolfenden – as the Chairman later publicly stated – to strategically legitimise decriminalisation as a response to public anxieties (Channel 4 1997a; Waites 2005a, p. 116). Yet McGhee's argument that the committee did perceive some mutable forms of same-sex behaviour in the 16–21 age period, and that this had some influence on the proposal for an age of 21, is convincing.

Nevertheless, the committee's proposals still remained structured around a heterosexuality/homosexuality dichotomy, which bisexuality or an identity/behaviour distinction were not permitted to fundamentally destabilise. The

rationale for decriminalisation thus implied managing the deviant desires of an inherently perverse group in society, who could never aspire to join the dominant moral community. Decriminalisation would not, according to its advocates, increase the quantity of homosexual activity. Despite some recognition of spectrums prompted by Kinsey (McGhee 2000), the medical and psychological conceptions of homosexual identity and behaviour, invoked by the Wolfenden committee, stressed the fixity of the homosexual 'condition' for most individuals by the age of 16 and thus involved a sharpening definition of what Sedgwick (1990) terms the homosexual/heterosexual binary (cf. Bech 1997).

The Wolfenden report's advocacy of partial decriminalisation of homosexuality within a narrowly defined private sphere must therefore be conceptualised as occurring at a complex conjuncture, the product of a variety of simultaneous shifts in culture and prevailing forms of expertise: a tendency towards the individualisation of moral decision-making; an associated though more specific shift towards utilitarian and causalist legal philosophies; a hardening of the homosexual/heterosexual distinction; an apparent failure to find ways to prevent homosexuality; and a limited growth in social tolerance. Only the coincidence of these tendencies facilitated the removal of legal regulation. This context must be understood in order to interpret people's experiences of ongoing power relations after decriminalisation in both the public and private spheres.

4. Developing critical analyses of the Wolfenden report and decriminalisation

Important and enduring analyses of the Wolfenden report and the Sexual Offences Act 1967 were produced in the 1970s by radical sociologists and historians including Jeffrey Weeks, Jock Young, Stuart Hall and Frank Mort, all associated with or influenced by the radical criminology of the National Deviancy Conference, formed in 1968. An analysis of the public and the private spheres can be developed through engagement with these existing critiques, which argued that the Wolfenden report represented an attempt to eradicate the problem of male homosexuality from public view via elements of 'social control', rather than pure 'permissiveness', 'liberalisation' or a straightforward step towards equality (Weeks 1977; 1989; Bland et al. 1979; Mort 1980; Greenwood and Young 1980; Hall 1980; Moran 1996). Jeffrey Weeks expressed this by arguing that Wolfenden was motivated by a desire for 'a more effective regulation of sexual deviance' (Weeks 1989, p. 242). Victoria Greenwood and Jock Young characterised the Wolfenden report as promoting a combination of 'normalisation' (in the sense of 'liberalisation' and formal equalisation within a restricted realm), 'medicalisation' and 'criminalisation' (Greenwood and Young 1980). Stuart Hall has described the report as representing 'a shift

in the disposition of moral regulation', emphasising: 'Wolfenden's "double taxonomy": towards stricter penalty and control, towards greater freedom and leniency, together the "two elements ... in a single strategy"' (Hall 1980, p. 14).

Consistent patterns were discerned by these theorists in the Wolfenden report's approach to prostitution, maintaining the legality of an individual act of selling sex while creating harsher penalties for soliciting and running brothels. Reforming approaches to other issues such as abortion and drugs were also noted to have been influenced by Wolfenden, favouring limited decriminalisation accompanied by medicalisation and restricted access mediated by professional authorities, rather than individual choice (Weeks 1989). Subsequently, Moran has analysed the report as both defining and regulating homosexuality (Moran 1995, pp. 21–2; 1996, pp. 102–17, esp. p. 115), and Evans has considered Wolfenden and 'permissiveness' in his materialist analysis of sexual citizenship (1993, pp. 65–88).

These critical theorists influenced by gay liberationism have drawn upon different strains of radical thought to interpret the Woldfenden report, including deviancy theory, Marxism and feminism, and the work of French post-structuralist Michel Foucault (1981)[8] – challenging assumptions that the rationale for decriminalisation was ever straightforwardly 'liberal' or 'progressive'. Such work has convincingly rejected the appropriation of the Wolfenden report and decriminalisation into liberal progressivist narratives of modernisation, civilisation, development and expanding citizenship, such as the influential citizenship theory of sociologist T.H. Marshall (1950; cf. Evans 1993). It has made the case for a critical reading of the Wolfenden report. Weeks, Mort, Hall, Greenwood and Young, and subsequently Evans and Moran, have advanced broadly similar accounts, emphasising a strengthening of 'public' regulation, while simultaneously drawing attention to new forms of medical and moral regulation applying in 'private' lives.

A further study of the Wolfenden committee by Patrick Higgins in the 1990s, entitled *Heterosexual Dictatorship* was also presented as a critique of liberal commentaries, claiming that: 'Commentary on the report has tended to be favourable to its contents, accepting a liberal spin, and has tended to elevate the importance of Wolfenden ... By the time of his death in 1985, Wolfenden had been elevated to the status of a liberal saint, the emancipator of the British homosexual' (Higgins 1996, p. 12). Higgins's work is important for its detailed examination of the Wolfenden committee's records, archived in the Public Record Office in London. Yet his analysis is flawed: he provides no references to his 'liberal' targets, other than Sir John Wolfenden himself; nor does he engage with any of the existing critiques of liberal readings. Consequently Higgins tends to reproduce the liberal mythology he is ostensibly against and actually

8 For accessible introductions to Foucault and his work on sexuality see Smart (2002), Weeks (1989, pp. 1–18) and Evans (1993, pp. 10–35).

gives a more liberal interpretation than the existing critical commentaries. Therefore it is the critical works employing social theory that can help provide us with the analytical framework needed to conceptualise decriminalisation. The differences between these works merit further sustained attention.

Let us consider in more detail how existing critical accounts of decriminalisation in the United Kingdom have theorised the process and its consequences. Jeffrey Weeks's accounts of decriminalisation have emphasised the increasing vigilance of the law in relation to the extensive scope of regulation applying to 'public' acts beyond the 'private' sphere: 'the logic of their position was that penalties for public displays of sexuality should be strengthened' (Weeks 1977, p. 165; cf. Weeks 1989, p. 243). In relation to 'private' behaviour, Weeks deploys the concept 'moral regulation', described as becoming the 'dominant form' of regulation in the 1960s (Weeks 1989, pp. 13–14, 243–4); this certainly remains a useful concept for describing how decriminalisation may involve new moral discourses about private behaviour from politicians and various institutions such as schools and health services. Weeks commented that 'the key point is that privatisation did not necessarily involve a diminution of control', but that the report accepted the psychologisation of homosexuality, while endorsing a continued search for 'treatments' and 'cures': 'In part at least the Committee was proposing no more than a shift of emphasis away from the law towards the social services as foci for social regulation' (Weeks 1989, p. 244).

Greenwood and Young similarly emphasised the committee's hope that decriminalisation in private might discourage public proselytisation in favour of homosexuality and sexual activities with minors. They note that Wolfenden advocated the more effective criminalisation of public homosexuality. This was coupled with medicalisation of prisoners to quiesce – rather than cure – their desires (Greenwood and Young 1980, pp. 164–6).

A somewhat greater emphasis is placed upon the continuing effects of regulation in the 'private' sphere in the work of Stuart Hall (1980) – in a volume which placed the concept of 'control' at centre-stage – and especially in that of Mort (1980; see also Bland et al. 1979, pp. 100–111). These are more closely framed in relation to 1970s Marxist approaches, including that of Althusser, which would seek to analyse the report as a straightforward expression of ideology working in the maintenance of capitalism, but they also strain to escape the strictures of such approaches. For Mort, Bland and McCabe in particular there is also a framing in relation to feminist theorisations of patriarchal power. These theorists invoke the work of Foucault as a means to theorise the continuing regulation of homosexuals in the private sphere (Bland et al. 1979, pp. 109–11; Mort 1980, pp. 41–4; Hall 1980, pp. 11–14).

Hall, like Weeks, notes the strengthening of public regulation, but places more emphasis on the limits of 'private' freedoms: in place of prohibition came not equal respect, but the 'welfare-statisation' and medicalisation of deviant

groups, who continued to be seen as 'social problems' needing 'treatment' (Hall 1980, pp. 9–11). To attempt to conceptualise this, Hall utilises Foucault's *Discipline and Punish*; he refers briefly to Foucault's concept of a 'micro-physics of power' involving governance via meticulous techniques to achieve 'a certain mode of detailed investment in the body' (Foucault 1978a). Hall thus argues the private arena remained a sphere of 'moral regulation', especially through 'self-regulation':

> There was an underlying philosophy within Wolfenden … […] This involved a new principle for articulating the field of moral ideology. Wolfenden identified and separated more sharply two areas of legal and moral practice – those of sin and crime, of immorality and illegality. In creating a firmer opposition between these two domains, Wolfenden clearly staked out a new relation between the two modes of moral regulation – the modalities of legal compulsion and of self-regulation. This set of distinctions constituted a new, if temporary 'moral economy'. It marked a shift, however small and imperceptible at first, in what Foucault (1978[a]) has called the 'micro-physics of power'. This is the power of disposition, in this instance over sexual conduct. Such a power of disposition, Foucault argues, is 'not … a property but a strategy', not a set of fixed attributions but 'a network of relations, constantly in tension, in activity'. It is a power 'exercised rather than possessed – not the privilege acquired or preserved of the dominant class, but the overall effect of its strategic positions' (Foucault 1978[a], p. 26). Wolfenden signified such a shift in the disposition of moral regulation. (Hall 1980, pp. 11–12)

This helpfully suggested how the moral discourses, through which decriminalisation was enacted, not only acted as external moral constraints upon individuals, but shaped their character and everyday 'dispositions' in a manner achieving 'self-regulation'. Frank Mort also invokes Foucault's 'microphysics of power' in seeking to explore forms of power in the private sphere: 'a variety of non-legal practices … medicine, "therapy", psychology, and forms of applied sociology are all envisaged as forming new principles of regulation' (Mort 1980, pp. 43–4; see also Bland et al. 1979, pp. 109–11). However, following criticism, Foucault later rightly moved away from his disciplinary conception of the microphysics of power in order to allow a greater degree of agency in how we are formed as subjects (Foucault 1982, p. 208). In the commentaries by Hall and Mort 'self-regulation' was asserted in too encompassing a manner. Hall's account nevertheless revealed moral reformism as a 'signifying strategy', which 'declared and represented what its practice was aimed at accomplishing' by 'giving a message' advocating self-restraint by homosexuals after decriminalisation (Hall 1980, p. 20).

Hall's contribution appeared in a volume emphasising 'control', but this was questioned by critics, and subsequently we can see a helpful shift of emphasis in critical accounts from the concept of social control to the concept

of power. 'Control' problematically tends to imply the completeness, and also the external, constraining character, of a process (Miller and Rose 1988, p. 171). By contrast 'power' has increasingly emerged as a more useful concept to theorise inequalities beyond direct legal regulation. Leading theorist Lukes focuses on the importance of power operating to influence the actions of individuals without complete constraint, and often without their awareness (Lukes 2005); indeed Foucault takes this further in his late work with the view that 'there is no relationship of power without the means of escape or possible flight' (Foucault 1982, p. 225).

Subsequent work by Moran (1995; 1996) can be interpreted, in part, as proceeding with investigation of possibilities for a Foucauldian exploration of new forms of public and private regulation, including 'self-regulation'. Moran gives the most empirically rich critical account, drawing on archived Wolfenden committee minutes. He explores the new legal category of 'the homosexual' as, in Foucault's terms, a set of 'technologies', 'a whole machinery for speechifying, analysing and investigating' (Foucault 1981, p. 32; cited in Moran 1996, p. 16). He stresses that the installation of the term 'homosexual' in law itself implied the installation of a new set of regulatory technologies of medical and psychological examination, various forms of treatment and policing (Moran 1995, p. 21). Moran convincingly argues that the committee's report was important in producing certain cultural conceptions of homosexuality, particularly through conjoining 'buggery' and 'homosexual offences', entailing regulative effects spanning public and private realms (Moran 1996, pp. 21–32).

Moran identifies two 'strategies of eradication' through which the committee addressed homosexuality (Moran 1995, pp. 21–2; 1996, pp. 102–17, esp. p. 115). Firstly, 'juridical eradication' – the hope that homosexual acts might disappear into a decriminalised 'space beyond the law'. Secondly, the hope that homosexuals would seek treatment for their condition, leading to heterosexuality or abstinence, in a context where the committee also proposed more research to enable possible future eradication (Moran 1995, pp. 21–2; 1996, pp. 102–17, esp. p. 115). However his approach is a little one-sided – rather like Foucault's approach to modernity – in that it does not simultaneously explore emergent conceptions of individual citizenship, evident in the language of the report as quoted earlier; this does not quite capture the 'Janus-faced' character of the report (Waites 2005, p. 111). Emphasis on Foucault's term 'strategies', as for Foucault himself (1982, pp. 224–6), tends to have the effect of somewhat exaggerating the implied coherence of negative regulative intentionality.

David Evans's work is of some assistance here, as the origin of the concept of sexual citizenship that has subsequently become widely used and sparked global debates (Evans 1993; Bell and Binnie 2000). His theoretical framework is an enduring reference point, remaining the most sustained attempt to develop a materialist approach to sexualities; he argues that in capitalist contexts sexually

defined groups are differentiated and hierarchically positioned, engaging in forms of consumption in sexually defined spaces (Evans 1993). Evans's analysis suggests that certain kinds of citizenship may be granted to sexually defined groups in a manner which has the effect of them remaining in boundaried consumption spaces such as gay scene venues, while defusing demands for more extensive citizenship rights. He comments that decriminalisation in 1967 was associated with 'strengthened policing of public moral space'; yet for the male homosexual, 'legal status enfranchised his consumer status, to purchase, to market and exploit, the homosexual commodity. Necessarily the gay male did so in individualised virilised style' (Evans 1993, pp. 65–88, esp. p. 70). Evans thus helps understanding of how decriminalisation in a capitalist context may be achieved through discourses invoking experiences of freedom which, rather than yielding freedom as an unproblematic category, produce or foster certain understandings of freedom, and hence associated experiences and practices including those associated with individualised masculine sexuality and consumption. Yet his argument that such restricted forms of citizenship would frustrate claims for other forms has proved excessively pessimistic in recent years, as formally equal citizenship rights of most kinds except marriage have been achieved in the United Kingdom, as in the Equality Act 2010. There is an unconvincing dovetailing in Evans's model between sex/gender structures and economic structures. Nevertheless in the context of this book, Evans's work usefully encourages consideration of how some corporations may now have a financial interest in supporting decriminalisation in Commonwealth states in order to create commodified social spaces which only certain wealthy neo-liberal gay and lesbian consumers and tourists will be able to occupy. For example, in Belize the gay tourist website 'gaytravelbelize.com' encourages gay tourists to come to this state, where sex between men remains criminal, advertising property and services in a manner re-shaping social relations (see discussion of Belize in the opening chapter by Lennox and Waites).

The various critical analyses discussed have convincingly challenged liberal interpretations of Wolfenden by demonstrating new public regulation and persistent power in the private sphere. However, these analyses can be improved, as will be shown in the final main section.

5. Theorising decriminalisation as citizenship and governmentality

The existing analyses of the Wolfenden report and decriminalisation can be developed, and critiqued in two respects. First, through more sustained attention to how the process involved the generation of new forms of political and social citizenship; and second, through engagement with Foucault's specific theorisation of 'governmentality', which – perhaps surprisingly – has not been attempted in existing UK discussions (Foucault 1978b; 2007). These two elements can be considered in turn, then brought together.

First citizenship needs to be reconsidered. Existing radical critiques of Wolfenden, it can be argued, do not attribute sufficient significance to aspects of the new conceptions of citizenship informing the report. Clearly, in relation to T.H. Marshall's well-known schema of civil, political and social dimensions of citizenship, the Wolfenden report offered no explicit articulation of homosexuals as deserving of most civil or political forms, and certainly made no case for social citizenship such as welfare rights (cf. Marshall 1950). However, while the Wolfenden report sought ways to eliminate homosexuality, if feasible, it simultaneously proposed granting some minimal citizenship rights. These took the form of two implicit emergent understandings of rights: an implied right to engage in consensual sexual behaviour within the private sphere, already suggested; and an implied right to a limited form of political citizenship. Though each was granted in forms unequal to those available to heterosexuals, each also opened possibilities for advancement.

The report discusses how far the law 'properly applies to the sexual behaviour of the individual citizen', implicitly including homosexuals, and argues for entitlement to privacy (CHOP 1957, p. 20, #52). Hence homosexuals were addressed in the language of 'individual freedom of choice' within a liberal framework of universal citizenship (CHOP 1957, p. 24, #61). While such language is clearly fundamentally at odds with the equally apparent desire to eradicate homosexuality through medical treatment, it is important to acknowledge this Janus-faced, contradictory and ambivalent character of the report, rather than representing the impulse to eradicate as predominant or more fundamental, as Moran (1996) has tended to. The Wolfenden report's tentative invocation of a citizen's privacy drew implicitly upon forms of liberal political philosophy in which liberty and rights represented fundamental and universal aspects of citizenship.

Turning now to the second implied right, a form of political citizenship, it can also be argued that Wolfenden's public sphere was not exclusively characterised by regulation in the way that radical critiques have tended to imply. The decision to decriminalise private sexual behaviour was also associated with some significant informal recognition of other aspects of the civil and political citizenship of homosexuals, relating to the public sphere. The Wolfenden committee's review involved homosexuals speaking for themselves in a process of consultation, in which they were treated with basic respect. These consultations represented very limited engagements, since the committee meetings were held away from public view and only three homosexuals gave evidence in person. Nevertheless the polite exchanges which occurred, in which Wolfenden referred to homosexuals as a 'community', embodied a minimal level of recognition that homosexuals collectively deserved representation and a political voice (Higgins 1996, p. 44, pp. 39–45). The subsequent formation of the Homosexual Law Reform Society (HLRS) illustrates that the report contributed to a shift in the political climate, facilitating greater recognition

of homosexual civil and political rights including free speech and freedom of association (Grey 1992). The Wolfenden committee's review and report tended to suggest an acceptance that homosexuals could participate in certain minimal ways in the public sphere, as political citizens; and the decriminalisation debate involving HLRS embodied this.

Expanded understandings of politics have been endorsed by feminist theorists such as Millett (1971); many have emphasised ways in which 'the personal is political', influencing views of the political aspects of citizenship as existing beyond traditional political institutions, throughout much of social life (Bell and Binnie 2000). Such a perspective implies the need to recognise that the two implied proposals identified here, for a right to privacy and a right to a minimal form of political citizenship, held implications not only for sexual behaviour, but also for homosexual lives, relationships and aspects of citizenship more broadly.

However, to contextualise the two emerging forms of citizenship identified and further theorise decriminalisation, it is necessary to extend discussion of Foucault. Missing from all the critical analyses surveyed is reference to Foucault's works on governmentality – much of it only translated or published since 1991 (Burchell et al. 1991). Governmentality is a concept introduced by Foucault, in his 1977–8 lecture series 'Security, Territory, Population', to address deficiencies in his earlier work, as a synonym for 'governmental rationality' implying a systematic form of thought (Foucault 1978b; 2007; Gordon 1991; Dean 1999, pp. 10–11). Foucault defined government in social life as 'the conduct of conduct', 'a form of activity aiming to shape, guide or affect the conduct of some person or persons' – whether (for example) of the self, or through political sovereignty; but much of his focus was on the state (Gordon 1991, p. 2; cf. Foucault 1982, pp. 220–1).

Foucault focused on 'the era of a "governmentality" first discovered in the 18th century', associated with the rise of the modern state, described as exemplifying 'the art of government' (Foucault 1991, pp. 102–4). His governmentality theorising is associated from the start with analysing 'normalisation' (Foucault 2007, p. 55); for Foucault, this takes a specific form from the 18th century, which shifts from the 'sovereign-subject relationship', promoting direct adherence of individuals to a norm, to the new 'relationship between government and population' (p. 71). This occurs in the context of emerging 'statistics' yielding probabilities and 'curves of normality', measuring relations between individual cases and populations: 'establishing an interplay between […] different distributions of normality and […] acting to bring the most unfavourable in line with the more favourable' (Foucault 2007, pp. 62–3). Rather than law imposing direct constraint, power operates through 'employing tactics rather than laws, or […] employing law as tactics' (Foucault 2007, p. 99).

Foucault used governmentality to think about the emergence of liberalism, and the need to problematise how its freedoms were associated with 'technologies

of power', conceptual frameworks configured with social practices.

> This freedom, both ideology and technique of government, should in fact be understood within the mutations and transformations of technologies of power. (Foucault 2007, p. 48)

Such 'technologies of power' would include, for example, the discourse of the homosexual 'citizen' emerging in the decriminalisation process, psychologised and associated with a new moral responsibilisation.

Governmentality theory has emerged as a major approach in contemporary social theory (Dean 1999); it identifies and challenges ways in which invocations of individual freedom and choice have often been associated with 'responsibilisation'. Power is conceived as achieving self-regulation, and there is a central view that 'the human subject as individuated, choosing, with capacities for self-reflection and striving for autonomy, is a result of practices of subjectification' (Miller and Rose 2008, p. 8). Governmentality, however, helpfully moves on beyond the excessive emphasis on the direct efficacy of disciplinary power in Foucault's works of the mid 1970s, and some who this influenced (Hall 1980). His governmentality theory moves towards a more realistic and consistent view; although Foucault's emphasis on the pervasiveness, scale and extent of power remains somewhat unconvincing.

A focus on the history of what Foucault (1981) calls 'biopower' ('power over life') helps us to situate Wolfenden and decriminalisation in the *longue durée*, and by doing so we see the scale of the rise of the governmentality associated with the modern state as it related to sexuality, from the 18th to the late 20th century. Foucault's account of biopower emphasises the important legacy of confessional processes associated with Christian pastoral power, influencing modern forms of medicine and therapy which proceed through similar confessional processes – of which the institutional expansion in the state, private and voluntary sectors provided a vital context for decriminalisation. This gives us perspective on the scale of structured power hierarchies and the specific professional practices shaping governance of homosexuals that were instituted in the so-called 'private' sphere. To a significant extent, the state could withdraw direct juridical constraints from 'private' life because population becomes 'penetrable' (Foucault 2007, p. 72). Governmentality is a useful approach in conceptualising how authorities seek governance of homosexuals even as criminalisation is withdrawn.

In the United Kingdom's decriminalisation, the 'homosexual' became installed in law as a categorised form of individual, while the law also maintained the stigmatised category 'buggery', articulated with the 'homosexual' through the concept 'homosexual offence' (Moran 1996).[9] Simultaneously the

9 Articulation is defined by Laclau and Mouffe to mean 'any practice establishing a relation among elements such that their identity is modified as a result' (Laclau and Mouffe 1985, p. 105; cf. Waites 2010, p. 973).

homosexual was defined by Wolfenden's experts as both psychologically and morally problematic, needing therapy and guidance on values. Miller and Rose helpfully question the authority of the 'psy disciplines', emphasising that supposedly problematic groups are constituted through discourses which make them amenable to social interventions (Miller and Rose 2008, pp. 7, 15). In this light the Wolfenden report's address of homosexuals using the concept 'citizen' in a highly selective way, placing high emphasis on citizen responsibilities to manage conduct without reference to most civil, political and social citizenship rights, can itself be interpreted as part of a moral discourse constituting responsibilised homosexual citizens. Governmentality works through citizenship.

Social invisibility via privacy or eradication was defined as the norm for homosexuals, ameliorated only by a minimal form of political citizenship; and a variety of moral and medical discourses were developed to pursue 'normalisation' in this respect – alongside the dramatic increase in prosecutions that followed decriminalisation (Moran 1996, p. 132). The age of adulthood and the approach to brothels are examples of the use of law as 'tactics'; the proposal on prisoner hormone treatment is an example of tactics in place of law, seeking to reduce desires and hence sexual behaviours when prisoners were released (Foucault 2007, p. 99).

Central to Foucault's purpose in introducing governmentality was to emphasise practices of governance of entire populations, such that statistical patterns and normalities discerned demographically became the concern, rather than the direct management of every individual case. This is particularly clear in Foucault's lecture of 25 January 1978; he discerns a shift from 'disciplinary' 'normation', associated with 'the primary and fundamental character of the norm' – whereby individuals are categorised as normal or abnormal according to whether or not they adhere to the norm – to a more complex form of 'normalization' associated with a 'calculus of probabilities' (Foucault 2007, pp. 57, 59; pp. 55–86). Foucault's approach here suggests that, rather than being oriented to the universal absolute adherence to norms, the later form of governmentality seeks a wide degree of accordance. This can be used to interpret the Wolfenden report's concluding recommendations which advocated decriminalisation in private with a high 'age of adulthood' of 21, also arguing that the law should explicitly outlaw homosexual brothels and homosexual prisoners should be permitted hormone treatment. In the light of governmentality theory, these recommendations can be interpreted as attempting to lower the statistical incidence of homosexual offences and related criminal proceedings, to quell the rise shown in the report's tables in order to diminish the visibility of homosexuality in the public realm – without an expectation of universal adherence.

Differently from existing approaches, including that of Moran, here Foucault's governmentality analysis suggests that we should not conceive the

operation of power as seeking absolute 'eradication' in practice (cf. Moran 1996, p. 115); rather, it implies dominant forces oriented to a sufficient degree of eradication of homosexuality – mainly from *public* life – to maintain desired social norms in the population. Governmental discourses are formed through assumptions that some individual cases will not comply. Careful consideration of what Foucault says about governmentality in detail thus, perhaps unexpectedly, draws attention to the *limited* extent to which authorities are oriented towards achieving complete compliance. Moreover 'the approach … does not attribute a unity, individuality or rigorous functionality to the state' (Smart 2002, p. 128). An analysis emphasising the direct influence of discourses on individuals is unsatisfactory; the analytical stance proposed here instead emphasises that more diffuse and multiple discursive practices operate to achieve only a sufficient degree of normalisation. Hence, while Weeks (2007b, p. 133) in his most recent work tends to reject governmentality theory for implying too much of a pessimistic top-down view of power, it is important to assert that in a moderated form it can still be one element of our analytical framework, although must be counterbalanced by some acknowledgement, the growing individual choices, rights and liberties irreducible to governmentality that Weeks emphasises. This interpretation moves us towards a better overall analysis.

7. Conclusion

This chapter has sought to put the United Kingdom at the service of the Commonwealth, by presenting a history of criminalisation and decriminalisation in a manner that illuminates analytical concepts and theories that may be useful in conceptualising contemporary decriminalisation struggles worldwide. The chapter began by surveying the history of criminalisation in the United Kingdom, tracing the cultural and religious origins of a punitive legal tradition. It then explored the formation of the Wolfenden committee in 1954 and its internationally influential report recommending partial decriminalisation in 1957. Factors influencing decriminalisation were then examined, suggesting the importance of analysis with a consciousness of what Gramsci, and Laclau and Mouffe, term 'hegemony'. The chapter then proceeded to review and discuss existing analyses of decriminalisation, drawing attention to the value of a variety of concepts and theories for interpreting that process: privacy, moral regulation, medicalisation, social control, power, strategies of eradication and sexual citizenship. All of these have some value and a part to play in an overall analysis, although to varying degrees as suggested by the discussion.

In the chapter's final section it has been argued that analysis of decriminalisation can be refined by developing a better understanding of citizenship, and specifically of the very narrow forms of private and political citizenship granted to 'homosexuals' by the decriminalisation process. Alongside

this, Foucault's (2007) understanding of governmentality was argued to have some value for interpreting the decriminalisation process. Governmentality theory suggests that the homosexual 'citizen' emerging in the Wolfenden report needs to be seen in association with discursive tactics inciting sexual abstinence, medicalisation, privatisation and political restraint, all operating as part of population management described by Foucault as bio-power. Yet there was nevertheless positive potential in this concept of citizenship and the associated, implicit notions of a right to privacy, and a right to a minimal form of political participation.

So how should the relationship between citizenship and governmentality be expressed when combined in an overall analysis? As argued previously, Wolfenden and decriminalisation need to be seen in part as reflecting long term tendencies towards the emerging influence of liberal political philosophies among governing groups and 'the individualisation of moral decision-making among adults', associated with social experiences of individualisation (Waites 2005a, p. 105; cf. Weeks 2007). The use and significance of the emerging concept of citizenship should not be igrnored, or emerging implicit understandings of rights: 'it is important to recognise this Janus-faced, contradictory and ambivalent character of the report' (Waites 2005, p. 111).

As has been argued, the new forms of citizenship and implicit rights have to be seen in the context of governmentality, the various discursive and regulatory tactics used to incite self-restraint and self-governance in the new private realm. But Foucault's conception of governmentality did tend to imply an unconvincing level of coherence emerging from amorphous authorities, with concepts like 'tactics' tending to personify government in a manner which implied excessive intentionality, direction and efficacy. We should interpret and utilise governmentality in a more flexible way, assuming more mediated effects.

To draw the analysis together, it has been argued that the Wolfenden report and decriminalisation *simultaneously* embodied *both* citizenship *and* governmentality. These can be understood as to an extent working through one another, yet with neither reducible to the other. The Wolfenden report can then be seen as socially achievable in 1957 only in the context of expanding state mechanisms and technologies of governmentality. However, by 1967 the increasing support for liberal understandings of citizenship made a limited partial decriminalisation in the private realm viable without being premised on expectations of successful self-medication, abstinence or abjuration of public politics by homosexuals.

What then can the history of the United Kingdom's decriminalisation reveal for the rest of the Commonwealth? This question is partly addressed in the comparative chapter that concludes the present book. Prescriptive lessons are not appropriate and readers in different societies can decide what they are able to draw from this chapter. Time has moved on, so contemporary contexts are different. Nevertheless, it might be beneficial to note certain factors that

were important, including in the short term: support from the dominant church in England and Wales (Grimley 2009); a liberal left government with a talented risk-taking politician, Roy Jenkins, in charge of criminal justice (Jenkins 1959; 1991; Weeks 1981); brave ground-breaking activists like Antony Grey willing to found new organisations and campaign publicly (Grey 1992); and some luck in a 'moral panic' (Hall 1980) leading to a review with a liberal outcome. But in the longer view decriminalisation can be viewed as a consequence of the ascendence of liberal philosophies in law and social policy, political and cultural shifts in 'hegemony' associated with the 1960s, changes in religious attitudes to the relationship between sin and crime and other deep-rooted social changes discerned by historians and sociologists of sexuality (Waites 2005, pp. 96–118). As Foucault's work on governmentality suggests, it also somewhat reflected a confidence of authorities in the efficacy of medicalisation, moral regulation and other tactics of intervention in the private sphere (Foucault 2007). It has been argued here that decriminalisation embodied *both* a shift towards liberal political understandings of citizenship in specific respects *and* to new forms of governmentality; and it is likely that any decriminalisation globally will similarly involve at least some element of both of these tendencies. In considering the present situation in other states, it will therefore be important to estimate the potential for decriminalisation – and develop strategies to achieve it – in a manner attentive to a variety of social processes operating, and with critical analytical frameworks from social and political theory at hand.

Bibliography

Adonis, A. (2011) 'Roy Jenkins as a transformational minister: Mister Speaker's lectures on great 20th-century parliamentarians', 15 Oct., available at www.instituteforgovernment.org.uk/sites/default/files/Roy_Jenkins_as_transformational_minister_FINAL.pdf (accessed 6 Dec. 2012).

Barry, A., T. Osborne and N. Rose (1996) 'Introduction', in A. Barry, T. Osborne and N. Rose (eds.), *Foucault and Political Reason: Liberalism, neo-liberalism and rationalities of government* (London: UCL Press Ltd).

Bech, H. (1997) *When Men Meet: Homosexuality and Modernity* (Cambridge: Polity Press).

Bell, D. and J. Binnie (2000) *The Sexual Citizen: Queer Politics and Beyond* (Cambridge: Polity Press).

Bennett, J. (2010) 'Keeping the Wolfenden from the door? Homosexuality and the 'Medical Model' in New Zealand', *Social History of Medicine* 23 (1), pp. 134–52.

Berlant, L. and M. Warner (1998) 'Sex in public', *Critical Inquiry*, 24 (2), pp. 547–66.

Bland, L., T. McCabe and F. Mort (1979). 'Sexuality and reproduction: three "official" instances', in M. Barrett, P. Corrigan, A. Kuhn and J. Wolff (eds.), *Ideology and Cultural Production* (New York: St. Martin's Press), pp. 78–111.

Burchell, G., C. Gordon and P. Miller (eds.) (1991) *The Foucault Effect: Studies in Governmentality, with two lectures and an interview with Michel Foucault* (Chicago: University of Chicago Press).

Campbell, J. (1983) *Roy Jenkins: A Biography* (London: Weidenfeld and Nicolson).

Channel 4 (1997a) *A Bill Called William* [television documentary] 3 July.

— (1997b) *Secret History: Lords of the Underworld* [television documentary] 23 June.

Committee on Homosexual Offences and Prostitution, Home Office and Scottish Home Department (1957) *Report of the Committee on Homosexual Offences and Prostitution*, Cmnd.247 (London: HMSO).

Connell, R.W. (1995) *Masculinities* (Cambridge: Polity Press).

Cook, M. (2007) 'Queer conflicts: love, sex and war, 1914–1967', in M. Cook (ed.), *A Gay History of Britain: Love and Sex Between Men Since the Middle Ages* (Oxford: Greenwood World Publishing), pp. 145–78.

Council of Europe (2011) *Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No.11 and No.14*, available at http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm (accessed 6 Dec. 2012).

David, H. (1997) *On Queer Street: A Social History of British Homosexuality 1895–1995* (London: HarperCollins).

Davidson, R. and G. Davis (2004) '"A field for private members": the Wolfenden committee and Scottish homosexual law reform', *Twentieth Century British History* 15 (2), pp. 174–201.

Davies, C. (1975) *Permissive Britain: Social Change in the Sixties and Seventies* (London: Pitman).

— (1980) 'Moralists, causalists, sex, law and morality', in W.H.G. Armytage, R. Chester and J. Peel (eds.), *Changing Patterns of Sexual Behaviour* (London: Academic Press), pp. 13–43.

Day, S. (2008) 'Wolfenden 50: revisiting state policy and the politics of sex work in the U.K.', in V. E. Munro and M. Della Giusta (eds.), *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Aldershot: Ashgate), pp. 51–66.

Dean, M. (1999). *Governmentality: Power and Rule in Modern Society* (London: Sage).

Dempsey, B. (1998) 'Piecemeal to equality: Scottish gay law reform', in L.J. Moran, D. Monk and S. Beresford (eds.), *Legal Queeries: lesbian, gay and transgender legal studies* (London: Cassell), pp. 155–66.

Devlin, P. (1959) *The Enforcement of Morals: Maccabean Lecture in Jurisprudence* (London: OUP).

Doan, L. (2001) *Fashioning Sapphism: The Origins of a Modern English Lesbian Culture* (New York: Columbia University Press).

Duggan, M. (2012) *Queering Conflict: Examining Lesbian and Gay Experiences of Homophobia in Northern Ireland* (Farnham: Ashgate).

European Commission of Human Rights (1997) *Sutherland v. United Kingdom: Report of the Commission*, Application 25186/94, 1 July, available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Sutherland&sessionid=82445957&skin=hudoc-en (accessed 24 Nov. 2011).

Evans, D. (1993) *Sexual Citizenship: The Material Construction of Sexualities* (London: Routledge).

Evening News (1957) 'What they say about the Vice Report', 5 Sep.

Faulks, S. (1996) 'Jeremy Wolfenden', in S. Faulks, *The Fatal Englishman: Three Short Lives* (London: Hutchinson), pp. 209–309.

Foucault, M. (1978a) *Discipline and Punish* (New York: Pantheon Books).

— (1978b) 'Governmentality', in G. Burchell, C. Gordon and P. Miller (eds.), *The Foucault Effect: Studies in Governmentality* (Chicago: The University of Chicago Press).

— (1981) *The History of Sexuality, Volume One: An Introduction* (London: Penguin).

— (1982) 'Afterword: the subject and power', in H.L. Dreyfus and P. Rabinow (eds.), *Michel Foucault: Beyond Structuralism and Hermeneutics* (Brighton: Harvester Press Limited), pp. 208–16.

— (2007) *Security, Territory, Population: Lectures at the Collège de France* (London: Palgrave Macmillan).

Gordon, C. (1991) 'Governmental rationality: an introduction', in G. Burchell, C. Gordon and P. Miller (eds.), *The Foucault Effect: Studies in Governmentality, with two lectures and an interview with Michel Foucault* (Chicago: University of Chicago Press), pp. 1–52.

Gramsci, A. (1971) *Selections from the Prison Notebooks* (London: Lawrence & Wishart).

Greenwood, V. and J. Young (1980) 'Ghettos of freedom: an examination of permissiveness', in National Deviancy Conference (ed.), *Permissiveness and Control: The Fate of the Sixties Legislation* (London: Macmillan), pp. 149–74.

Grey, A. (1992) *Quest For Justice: Towards Homosexual Emancipation* (London: Sinclair-Stevenson).

— (1997a) *Speaking Out: Writings on Sex, Law, Politics and Society 1954–1995* (London: Cassell).

— (1997b) *Heterosexual Dictatorship* by Patrick Higgins, reviewed by Antony Grey, *Gay and Lesbian Humanist*, Spring 1997, available at www.pinktriangle.org.uk/glh/163/higgins.html (accessed 6 Dec. 2012).

Grimley, M. (2009) 'Law morality and secularisation: the Church of England and the Wolfenden report, 1954–1957', *The Journal of Ecclesiastical History* 60 (4), pp. 725–41.

Guardian, The (1958) 'Wolfenden Debate' – editorial, 26 Nov.

— (1997) 'Gay prisoners given shock treatment, papers reveal', *The Guardian*, 28 Nov., p. 1.

Hall, S. (1980) 'Reformism and the legislation of consent', in National Deviancy Conference (ed.), *Permissiveness and Control: The Fate of the Sixties Legislation* (London: Macmillan), pp. 1–43.

Hart, H.L.A. (1963) *Law, Liberty and Morality* (London: OUP).

Hauser, R. (1962) *The Homosexual Society* (London: The Bodley Head).

Higgins, P. (1996) *Heterosexual Dictatorship: Male Homosexuality in Post-War Britain* (London: Fourth Estate).

Houlbrook, M. (2005) *Queer London: Perils and Pleasures in the Sexual Metropolis 1918–1957* (Chicago: University of Chicago Press).

Independent on Sunday Magazine (1997), 15 June.

Jeffery-Poulter, S. (1991) *Peers, Queers and Commons: The Struggle for Gay Law Reform from 1950 to the Present* (London: Routledge).

Jenkins, R. (1959) *The Labour Case* (London: Penguin).

— (1991) *A Life at the Centre* (London: Macmillan).

Kinsey, A., W. Pomeroy and C. Martin (1948) *Sexual Behaviour in the Human Male* (London: W.B. Saunders Company).

Laclau, E. and C. Mouffe (1985) *Hegemony and Socialist Strategy* (London: Verso).

Law Commission (1995) *Consent in the Criminal Law*, consultation paper no. 139 (London: HMSO).

Lukes, S. (2005) *Power: A Radical View*, 2nd edn. (Basingstoke: Palgrave Macmillan).

Marshall, T.H. (1950) *Citizenship and Social Class, and Other Essays* (Cambridge: Cambridge University Press).

McGhee, D. (2000) 'Wolfenden and the fear of "homosexual spread": permeable boundaries and legal defences', *Studies in Law, Politics and Society* 21, pp. 65–97.

— (2001) *Homosexuality, Law and Resistance* (London: Routledge).

Meek, J. (2011) *Gay and bisexual men, self-perception and identity in Scotland 1940–1980*, PhD thesis, University of Glasgow.

Mill, J.S. (1962) *Utilitarianism, On Liberty, Essay on Bentham* (London: Collins).

— (1974) *On Liberty*, ed. G.Himmelfarb (Harmondsworth: Penguin).

Miller, P. and N Rose (1988) 'The government of subjectivity and social life', *Sociology* 22 (2), pp. 171–92.

— (2008) *Governing the Present* (Cambridge: Polity Press).

Moran, L.J. (1995) 'The homosexualization of English law', in D. Herman and C. Stychin (eds.), *Legal Inversions: Lesbians, Gay Men and the Politics of Law* (Philadelphia: Temple University Press), pp. 3–28.

— (1996) *The Homosexual(ity) of Law* (London: Routledge).

— (1997) 'Enacting intimacy', *Studies in Law, Politics and Society* 16, pp. 255–74.

Mort, F. (1980) 'Sexuality: regulation and contestation', in Gay Left Collective (ed.), *Homosexuality, Power and Politics* (London: Allison and Busby), pp. 38–51.

— (1999) 'Mapping sexual London: The Wolfenden Committee on Homosexual Offences and Prostitution 1954–1957', *New Formations* 37, pp. 92–113.

Mouffe, C. (1993). *The Return of the Political* (London: Verso).

Newburn, T. (1992) *Permission and Regulation: Law and Morals in Post-War Britain* (London: Routledge).

Oram, A. and A. Turnbull (2001) *The Lesbian History Sourcebook* (London: Routledge).

Osgerby, B. (1998) *Youth in Britain since 1945* (London: Blackwell).

Pink Paper (1997) 'They linked East End to the Establishment', *Pink Paper*, 20 June 1997, p. 2.

Policy Advisory Committee on Sexual Offences (1979) *Working Party on the Age of Consent in Relation to Sexual Offences*, June (London: HMSO).

— (1981) *Report on the Age of Consent in Relation to Sexual Offences*, April, Cmnd. 8216 (London: HMSO).

Reekie, A. (1997) 'European international control', in D.J. West and R. Green (eds.), *Sociolegal Control of Homosexuality: A Multi-Nation Comparison* (London: Plenum Press), pp. 179–95.

Rose, N. (1999) *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press).

Sedgwick, E.K. (1990) *Epistemology of the Closet* (Berkeley: University of California Press).

Smart, B. (2002) *Michel Foucault*, 2nd edn. (London: Routledge).

Squires, J. (1999) *Gender in Political Theory* (Cambridge: Polity Press).

Sunday Times (1954) 'Law and hypocrisy' – editorial, 28 Mar.

United Nations (1948) *Universal Declaration of Human Rights,* available at www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng (accessed 6 Dec. 2012).

Waites, M. (2005a) *The Age of Consent: Young People, Sexuality and Citizenship* (Basingstoke: Palgrave Macmillan).

— (2005b) 'The fixity of sexual identities in the public sphere: biomedical knowledge, liberalism and the heterosexual/homosexual binary in late modernity', *Sexualities* 8 (5), pp. 539–69.

— (2009) 'Lesbian, gay and bisexual NGOs in Britain: past, present and future', in N.J. Crowson, M.Hilton and J. McKay (eds.), *NGOs in Contemporary Britain: Non-State Actors in Society and Politics since 1945* (Basingstoke: Palgrave Macmillan), pp. 95–112.

— (2010) 'Sexual orientation, human rights and the generation of childhoods: analyzing the partial decriminalisation of "unnatural offences" in India', in P. Hynes, M.Lamb, D. Short and M.Waites (eds.), special issue 'Sociology and Human Rights', *International Journal of Human Rights* 14 (6), pp. 971–93.

Weeks, J. (1977) *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present* (London: Quartet Books).

— (1981) *Sex, Politics and Society: The Regulation of Sexuality since 1800* (London: Longman).

— (1989) *Sex, Politics and Society: The Regulation of Sexuality since 1800*, 2nd edn. (London: Longman).

— (1990) *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present*, 2nd edn. (London: Quartet Books).

— (2004) 'Wolfenden, John Frederick, Baron Wolfenden (1906–1985)', *Oxford Dictionary of National Biography* (Oxford: Oxford University Press).

— (2007a) 'Wolfenden and beyond: the remaking of homosexual history', *History and Policy*, available at www.historyandpolicy.org/papers/policy-paper-51.html (accessed 6 Dec. 2012).

— (2007b) *The World We Have Won* (London: Routledge).

Wolfenden, J.F. (1976) *Turning Points: the Memoirs of Lord Wolfenden* (London: Bodley Head).

6

Wolfenden in Canada: within and beyond official discourse in law reform struggles[1]

Gary Kinsman

Decriminalisation, Wolfenden and Canadian social and state formation

In a perceptive critique of the Canadian state law reform process in late 1960s Canada, gay activist Doug Sanders, who was involved in homophile and gay organising at that time, argued that the 1969 reform:

> Takes the gay issue and describes it in non-homosexual terms. [Decriminalisation] occurs in a way in which the issue is never joined. The debate never occurs. And so homosexuals are no more real after the reform than before ... I felt that an issue had been stolen from us. That we had forgotten that the reform issue was an issue that could have been used for public debate and it had been handled in such a way that there had been none. The only thing that had a promise of helping people was a public debate. It didn't happen. (Sanders, cited in Kinsman 1996a, p. 264)

This chapter focuses on the influence of the 'British' Wolfenden report (Committee on Homosexual Offences and Prostitution 1957) and the conceptual practices (D. Smith 1990a) of public/private and adult/youth sexual regulation it articulated on the law reform process in Canada leading up to the 1969 criminal code reform that decriminalised same-gender sex acts in 'private' between two consenting adults. It also points to the continuing legacies of this regulatory strategy on sex political struggles within Canadian social and state formation.

It was in the context of the extension of the criminalisation of homosexuality, in the 1950s and 1960s, under pressure from legislation and social mobilisations

1 An earlier version of this paper was delivered at the Wolfenden 50 Conference as 'Wolfenden in Canada: Using and Moving Beyond the Text in Struggles for Sexual Law Reform' – 29 June 2007, London. I thank Laurel O'Gorman for her assistance on this paper.

in the USA and concerns generated in Canada over how to address 'sex crime' and homosexuality, that the Wolfenden report came to be used as an active text in shaping and re-organising sexual regulatory discussions towards limited law reform within the Canadian state. I use feminist sociologist Dorothy Smith's expression of an active text (D. Smith 1990b) to illustrate how the Wolfenden report is not passive in this process but is activated and used by various groups of people who produce readings of it in their attempts to re-organise practices of moral regulation (Corrigan 1990; Brock 2003) and sexual regulation within Canadian state and social relations.

This chapter highlights how this liberal regulatory strategy was able to be used by activists in a number of different social locations to open up space for law reform efforts, to facilitate popular educational discussions on lesbian and gay concerns, and to articulate an emerging sexual politics, but at the same time how hegemonic interpretations of this strategy within official politics and the professions were able to be used to restrict these efforts. As will be detailed later, this active text is able to be mobilised 'from below'[2] by early gay and lesbian and reform activists, like Doug Sanders. But it is also able to be mobilised 'from above' by professional and state agencies – as Sanders emphasises above – to attempt to contain this process of social transformation within a much narrower legal shift in sexual regulatory practice. Efforts by lesbian and gay activists to move against and beyond the limitations of this official discourse of liberal sexual regulation were able to be contained within it. This approach is also extended to our historical present pointing out how this historical investigation can offer us insights in dealing with the current struggles we are engaged in regarding the limitations of formal legal rights and appeals to the rights of sexual citizenship.

The Wolfenden report became a key text of liberal sexual regulation, in many Commonwealth countries, given the legal frameworks and practices of sexual regulation inherited from British colonialism.[3] This report enters into the textual-mediation (D. Smith 1990b; 1999; 2005) of a number of legal and social policy debates in the English-speaking world and beyond. The struggles leading up to the partial decriminalisation of homosexual sexual practices in 1969 in the Canadian state are linked to uses of the Wolfenden report. This connection is also tied to the related law reform in England and Wales in 1967 which brought about the partial decriminalisation of sex practices between men.

2 'From below' refers to being raised from the grass roots and community forms of self-organisation and not from state, corporate or more professional forms of organisation. See McNally (2006), Subcomandante Marcos and the Zapatistas (2006) and El Kilombo Intergalactico (2008).

3 The Wolfenden perspective also influenced sexual law reform efforts in Australia, New Zealand, Hong Kong before it was reunited with China and many other states around the world.

There is, of course, no unitary Commonwealth experience of sexual regulation and struggles for the decriminalisation of same-gender sexual practices. The situations in different countries are far more differentiated and contextualised and require specific social and historical investigations. The one common feature in the Commonwealth is the history and influence of 'British'[4] colonialism and imperialism, including the imposition of legal regimes regarding the criminalisation of 'homosexuality' and gender and sexual regulation more generally. This is experienced unevenly and differentially, depending on the historical period and character of colonisation, the strength of indigenous gender and sexual practices and the imposition of capitalist relations of 'underdevelopment' or 'development' in very different social formations. Specific investigations of different projects of social and state formation are therefore needed, including in the areas of gender and sexual regulation and the movements of resistance that have developed in response to them. This is done here through a focus on struggles over the use of the Wolfenden report in what is now called Canada.

This chapter describes the impact of this significant text of sexual regulation on the debates and struggles over sexual regulation within Canadian social and state formation in the 1960s and since.[5] In relation to homosexual practices, the Wolfenden report, with all its internal contradictions and struggles (Allen 2007), outlined a public/private and adult/youth strategy of partial decriminalisation of homosexual activities between two consenting adults (defined as age 21 and over) in private. It is important to emphasise that the Wolfenden report as a text does nothing on its own. Various activists, groups and politicians take up the perspectives outlined in the Wolfenden report for their own reasons and use it to try to push forward certain possible tendencies of development in the 1960s.

This association between legal developments and sexual regulatory practices in Britain and Canada is rooted in the history of Canadian state formation, which is bound up with the colonial settler state projects of, first, the French and then of the British that are based on the colonisation of the original indigenous peoples. This includes quite centrally the colonisation and marginalisation of their gender and erotic practices. Eventually it is the British project which wins out, subordinating not only the indigenous peoples but also the French

4 The use of 'British' is problematised, recognising the 'English' character of much of this project of state formation and social regulation, and the general subordination of Scotland, Wales and, of course, Ireland in this project. On this see Corrigan and Sayer (1985), esp. pp. 11–12.

5 This chapter is drawn from my far more detailed historical sociological work on sexual regulation (1996a), esp. pp. 157–345. That book develops the analysis presented here much more fully and will be useful to readers for general reference. Also see Kinsman and Gentile (2010) on the interlinked national security campaigns against queers.

settlers, producing the national and linguistic oppression of the Quebecois and the Acadians, which remain continuing contradictions within Canadian state formation to this day, and also subordinating and regulating the later waves of people of colour brought into Canada to provide cheap labour (Bannerji 2000; Thobani 2007; Kinsman 2001). In response to the struggles for independence in what becomes the USA, there is an attempt to create an east-west based network of British colonies that creates the later basis for Canadian state formation. It is this British colonial project that leads Canadian state formation to be bound up with the history of the Commonwealth.

By the mid 20th century the major British influence in Canadian state formation is unevenly replaced by that of the USA, including in areas of sexual regulation (Kinsman 1996a, pp. 148–287). This includes legal developments, the influence of national security initiatives in the USA and how they get taken up in the Canadian context, the influence of psychiatric and psychological discourses and the growing impact of popular cultural production from the USA in Canadian contexts (Kinsman and Gentile 2010; Chenier 2008).

The influence and struggles over the Wolfenden report occur in a broader social and political context. Sexual, gender and class relations were transformed in the post-war years, setting the stage for a new series of sex-political struggles. Sexuality and sexual discussions (with important restrictions) assumed a social centrality in more people's lives. There was a shift in family formation, particularly a growing integration of married women into the wage-labour force, the development of new birth-control technologies and the generation of new sexological knowledge. The expansion of consumer capitalism led to the increasing commodification of social life, including sexuality, with women's bodies being used to sell commodities, ways of doing gender and discourses of femininity at the same time (Kinsman 1996a; D. Smith 1990b, pp. 159–208). By the 1960s, the massive transformations of capitalist and patriarchal social relations in the postwar years led to less reliance on the centrality of the heterosexual family in capitalist and state relations in countries like Canada and this opened up spaces for struggles over sexual and gender regulation.

The focus in this chapter is on the regulation of sex between men in the broader context of shifting forms of gender, sexual and class regulation. The oppression of lesbianism and women having sex with other women, although overlapping, is socially organised in a different fashion. There is less of a specific criminalisation of the sex practices women engage in with each other, but more of a social denial of the very possibility of women engaging in actual sex and relationships with each other, in the context of a broader social denial of the economic, social and sexual independence of women (Kinsman 1996a, p. 13,

2007, pp. 96–134).[6] Those identified as lesbians and bisexual women have experienced major forms of denial, social invisibility, the loss of custody of their children and forms of police and male violence.

The terrain of struggle over the Wolfenden report in the Canadian context is located within shifts and tensions in legal state formation and social and sexual regulation more generally in the 1950s and 1960s. A central influence in Canadian sexual regulation has been British legal and sexual regulation, especially regarding the criminalisation of sex between men from British state formation, including the criminalisation of 'gross indecency' in the 1892 Canadian Criminal Code. Criminal code categories derived from Britain directed sexual policing against networks of men desiring sex with other men as they emerged in Canada.

Of sexual psychopaths and dangerous sexual offenders

By the late 1940s and early 1950s this situation shifts with a growing invasion of criminal code, psychiatric and psychological practices from south of the border. This is part of a growing influence of USA state and social formation within Canadian social formation. In the postwar USA, in the context of socially organised 'panics' over sexual violence, numerous states passed criminal sexual psychopath legislation. This was in the context of rapid suburbanisation and the mobilisation of sexual fears that were focused on 'strangers'. Often during these years 'sexual psychopath' was code for 'homosexual'. Basically, this legislation operated so that those convicted of specified sexual offences, coupled with 'expert' psychiatric testimony, could be sentenced to indefinite detention if they were determined to be a sexual 'threat' or 'danger' (Freedman 1987; Kinsman and Gentile 2010, pp. 72–4; Chenier 2008). In 1948 a criminal sexual psychopath section was added to the Canadian criminal code. In 1953 the offences of 'gross indecency' and 'buggery' were added as 'triggering' offences for this section, creating the possibility that men who had sex with other men could be put away indefinitely.

The major government commission engaging with sexual regulation in 1950s Britain was the Wolfenden committee, set up in 1954 to investigate the 'problems' of female street prostitution and male homosexuality. In contrast, in Canada in the 1950s, the major government commission regarding sexuality was the McRuer Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths, formed in 1954 and reporting in 1958.[7] The McRuer Commission was formed in the context of official and media concerns over

6 In the Canadian context, the offence of 'gross indecency' was expanded in 1954 to include sex acts between women, but it remained largely applied in practice to oral sex acts between men. See Kinsman (1996a), p. 169.

7 See *Report of the Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths* (1958).

'sex crime' and that not enough men were being sentenced as criminal sexual psychopaths.

This commission had limited terms of reference and was not given the space to develop more innovative forms of social regulation as had been provided for the Wolfenden committee. In its report the commission argued that the 'criminal sexual psychopath' designation should be changed to 'dangerous sexual offender' to remove this designation's specialised psychiatric criteria. At the same time, the court still had to hear from at least two psychiatrists to sentence someone as a dangerous sexual offender. Rejecting the input of the one openly gay man who presented to it, the report argued for the continuation of the criminalisation of homosexual practices under this section. When the commission proposals were being addressed in 1961, the Department of Justice drafters added a new clause, 'Or who is likely to commit another sexual offence', apparently to give an alternative definition so the sentencing rate would increase. This would mean that someone convicted of consensual sex with other men, and who was likely to engage in other consensual homosexual acts, could be classified as a 'dangerous sexual offender' and sentenced indefinitely. This was three years after the release of the Wolfenden report in England of 1957, which argued for the partial decriminalisation of sex between men.

As mentioned earlier, the Wolfenden report's terms of reference mandated it to address the 'problems' of both male homosexuality and female street prostitution. In developing an approach to regulating both of these terrains, the conceptual practices that were developed and refined were distinctions between the 'public' and 'private' and 'adult' and youth': constructing young people as having different social and sexual capacities and vulnerabilities compared to adults and especially constructing participation in sex with other males as a particular 'danger' for teenagers that they needed to be protected from. In particular, the Wolfenden report leads to the more specific application of public/private distinctions to the terrain of sexual regulation and policing. This approach defined 'public' rather broadly and 'private' rather narrowly. Criminalisation of sex workers and gay sex in 'public' was seen as necessary to enforce 'public decency'. At the same time, 'adults' were in some circumstances to be granted a limited 'private' right to do what they wanted in the privacy of their own bedrooms behind closed doors.

The social constructions of public and private

The conceptualisation of 'public' and 'private' is key to this project of liberal sexual reform. The focus here is on how these concepts have been constructed in the 'north' and 'west' which have impacted on countries in the 'global south' in more limited and different ways, given their differing forms of social organisation and the impacts of colonialism and imperialism.

Classifications of 'public' and 'private' are socially constructed and shift and change historically. What is 'public' can become 'private' and what is 'private'

can become 'public.' These are flexible notions that have a history and social organisation. At times the inside of a car has been considered to be a 'private' place, at other times it has legally been considered to be a public place. A police officer gazing through the kitchen window of a house at people having sex on the kitchen table could transform what was in 'private' into a 'public' act. These distinctions are bound up with relations of social power. To clarify these distinctions of public/private it is necessary to delve further into their social histories.

The capitalist societies in which we live are based on private ownership of the means of production (factories, offices, services, information technologies). Historically, prior to the enclosure movements which helped to produce the basis for capitalist social relations, there was more access to the means of production, which were more 'public' and communal in character, where people often had a right of access to the land. As this ownership and control became privatised, understandings of public and private were transformed. A 'private' realm emerged in relation to the ownership of private property.

At the same time, capitalist social relations led to the separation between the realms of waged work, business and official politics (state relations and political parties) as having a 'public' character on the one hand and the increasingly privatised realms of the family, the household and domestic and reproductive labour on the other. This has different gendered, racialised and class dimensions. Women in a patriarchal society became associated with this 'private' realm, and the socially necessary work of domestic labour, child-rearing and nurturing became 'private' forms of labour that are no longer seen as work since no wage was/is attached to them (Dalla Costa and James 1972; Federici 1975). These historical practices shape the deployment and use of 'public' and the 'private' in the Wolfenden report.

Entwined with this, a sexual respectability emerged in the new capitalist and middle classes in which 'proper' sexuality began to be constructed as also 'private' in character and as only taking place in the domestic, familial realm between married couples. This also helped to fuel the social purity and moral reform efforts against public forms of prostitution and 'sex perversion' in the late 19th and early 20th centuries (Walkowitz 1980; Weeks 1977; 1981; Kinsman 1996a, pp. 111–20).

The 'privatisation' of sexual practice had a particular impact on the emerging erotic cultures of queer[8] men. For some of these men, excluded from families and households, there was little 'private' space available for meeting other men

8 'Queer' is used here as a way of reclaiming a term of abuse that has been used against the LGBT population; as broader than homosexual, gay and lesbian, so as to include a range of erotic practices in rupture with institutionalised heterosexuality and the two-gender binary system; and as a place from which to queer (or render strange) normalised social practices. On this use of 'queer' see Kinsman and Gentile (2010) and Jagose (1996), among others.

and for sexual liaisons and adventures. For many men, having sex in 'private' bedrooms was not a possibility and erotic encounters of this nature still had to take place in more 'public' venues. This 'private' or 'personal' space became more available to middle class and elite men who had access to more money, wealth and 'personal' space.

This general denial of 'private' space led many men seeking sex with other men to develop creative ways of cruising and meeting them in state-defined public places (including city streets, parks, washrooms and in quasi-public places like bars and bathhouses). Elaborate rituals also emerged for engaging in intimate erotic adventures in these 'public' places. These efforts resulted in queer men creating their own private and intimate erotic spaces within these public places. This has been an important part of the history of the formation of queer men's erotic cultures. These practices continue to transgress the attempts to confine sexualities to a very limited and narrow 'private' realm (Dangerous Bedfellows 1996; Couture 2008).

In relation to female prostitution, the Wolfenden report called for clampdowns on female street prostitutes. The report claimed female sex workers did the 'parading' and caused the disturbances to 'public decency'. 'Public' forms of prostitution therefore needed to be restricted and eliminated – the public streets needed to be cleared of sex workers. There were clear sexist assumptions here. The women were targeted – not their clients – and women's sexuality was relegated again to the 'private' realm. While they opened up the possibility for a limited 'private' space for sex work, this was never really pursued in the British or Canadian contexts (Self 2007; 2010; Brock 2009).

This public/private regulatory distinction often has an abstract social character, given that there is no fixed definition of what is 'private' and what is 'public,' and that this distinction is capable of being deployed in different ways. This became the basic conceptualisation behind the liberal sexual reform articulated in the Wolfenden report in response to the previous wholesale criminalisation of sex work and same-gender eroticism in moral conservative approaches. Basically, in this approach, moral conservatism was preserved in the 'public' realm but a new and narrow 'private' realm was established, at least for consensual homosexual acts between two adults. The liberal strategy of sex regulation, outlined in the Wolfenden report, maintained and defended an oppressive strategy of sexual regulation, but it was also open to a number of different readings, given the character of the report.

Using the report 'from below'

Early gay activists seized on the Wolfenden text and generated readings of it to attempt to actively legitimise homosexuality and open up homosexual law reform discussions. With a focus on how the report could be read as opening up a limited realm for a 'privatised' homosexuality, they built on and tried

to expand this reading. The context was the post-war expansion of gay and lesbian networks and resulting conflicts with police and other authorities. In the USA, the Mattachine Society, founded by ex-members of the Communist Party, became a more respectable homophile organisation when its early leaders were overthrown in the midst of the Cold War (D'Emilio 1983, pp. 57–125). The homophile movement, made up of people interested or concerned with homosexual issues, relied on tolerance towards homosexuality and often on liberal psychological and medical experts.

In Canada, in the 1960s, the longest-lasting homophile organisation was the Association for Social Knowledge (ASK) in Vancouver, which existed for most of the period from 1964–9. They and other homophile activists across the country used the Wolfenden report to open up and push forward debates on homosexuality and law reform in emerging lesbian and gay networks; in some churches starting off with the Quakers and Unitarians but expanding to include the United and even the Anglican and Catholic Churches in some areas; in the mainstream media which began to publish some stories on homosexuals and the Wolfenden perspective; and in the legal profession itself (Kinsman 1996a, pp. 213–87).

For instance, Doug Sanders – whose quote begins this chapter and who was one of the central people involved in ASK – was a lawyer who, collaborating in 1966 with another Vancouver lawyer, Sidney Simons, tried to propose changes based on the Wolfenden perspective to the Criminal Law Subsection of the British Columbia (one of the Canadian provinces) Division of the Canadian Bar Association. They also suggested an age of consent for homosexual acts set at 18, and not 21, and for decriminalising such acts between two people in private when participants were over the age of 14, provided that the differences in their ages were not more than two years (Kinsman 1996a, p. 243). They supported the public/private aspects of the Wolfenden strategy, but went beyond it on the age of consent question. Their proposal was not well received but the issue had been raised in these legal circles.

Sanders also prepared and circulated an ASK paper on the 'Sentencing of Homosexual Offenders', which demonstrated support for law reform by establishing that the law as it stood was only effective for cases of 'public' acts. This paper was also printed in the *Criminal Law Quarterly* in 1967 (Saunders 1967; Kinsman 1996a, pp. 243–4), where it became part of the legal discussions leading to the 1969 criminal code reform. The Wolfenden report and its perspective were also increasingly taken up by liberal reformers in the churches, in the mass media and the legal profession and, by the mid to late 1960s, were even being raised in legal cases (Kinsman 1996a, pp. 213–87). Gay activists were frequently working behind the scenes to make sure the issue was raised.

In the spring of 1964, Arnold Peters, a maverick New Democratic Party (Canada's social democratic party, historically based in 'English-Canada') Member of Parliament, who identified as heterosexual, moved a private

member's bill along Wolfenden lines on homosexual law reform. The bill went nowhere, but it was the first time the issue had been raised in this venue. Behind the scenes Peters was also involved in the homophile-influenced Canadian Council on Religion and the Homosexual (CCRH) in Ottawa, in which members of a number of churches were involved, especially Anglicans, but there were also unofficial connections with the Roman Catholic Church. The group also involved a number of gay federal civil servants, and several doctors and psychiatrists. Peters was also connected with an early and short-lived attempt to set up a Homophile Reform Society (HRS), in August 1964, that was influenced and pushed on by an early gay activist. This initiative also involved Sidney Katz, a journalist for *Maclean's* (a major Canadian English news magazine), who had written a series of rather liberal articles on homosexuals that were influenced by Jim Egan, an early gay activist.[9]

Gary Nichols, a gay federal civil servant who had previously established the Committee on Social Hygiene in nearby Stitsville, took the initiative in founding the CCRH in Ottawa and was also a central animator in attempts to set up the HRS (Kinsman 1996a, pp. 238–9, esp. p. 242). Nichols was later joined by Bruce Somers, who had been involved in the founding of ASK in Vancouver when he moved to Ottawa later in 1964. The CCRH collapsed in 1967, reflecting the tenuousness of much of this early organising, which often depended on the initiative of one or two gay activists.

The difficulties of this cross-country organising across the vast expanses of the Canadian state were also made clear when ASK wrote to Peters in 1964 to offer their assistance on his law reform bill, which they were ready to support through a letter-writing campaign. Unfortunately, Peters never replied. When Toronto's early gay magazine *Two* attempted to contact the HRS, they were likewise unsuccessful and had to assume it no longer existed (Kinsman 1996a, p. 242).

Nonetheless, these early homophile attempts to open up discussion of gay and lesbian concerns and law reform had an impact in some of the churches, the mass media, the legal profession and even within Parliament itself in initiating early law reform discussions. This helped to set the stage for a more official law reform process that would have a rather different social and political character.

Shifting 'from above'

In a shifting of these efforts 'from above', a particular professional and regulatory reading of the Wolfenden report is created. In the USA and Canada, the Wolfenden report was also taken up as part of a project by medical and psychiatric/psychological professionals to extend and expand their professional

9 On Arnold Peters see Kinsman (1996a), pp. 238–42. On Sidney Katz and his 1964 articles in *Maclean's* see Kinsman (1996a), pp. 242, 251–2. On the HRS see Kinsman (1996a), p. 242.

areas of 'expertise' in conflict with other ruling institutions, especially the fields of criminal justice and policing. This reading of the Wolfenden report placed more weight on the sickness or mental illness conceptualisation of homosexuality than was often there in the actual report's ambiguous formulations. In the introduction to the 'authorised American edition' of the Wolfenden report, Karl Menninger, MD writes:

> From the standpoint of the psychiatrist, both homosexuality and prostitution ... constitute evidence of immature sexuality and either arrested psychological development or repression ... there is no question in the minds of psychiatrists regarding the abnormality of such behaviour. Not all such abnormalities can be cured, but some homosexuals ... can be and are benefited by treatment. (Menninger 1963, p. 7)

This sets out a 'sickness' framing of the report for North American audiences. The chain of reason went as follows: if homosexuals are mentally ill, they should be under a doctor's or therapist's care and should not be simply addressed as a criminal problem. This reading of the public/private strategy of sexual regulation shifted the medicalisation of homosexuality away from the extending criminalisation of homosexuality approach and towards this reform strategy. By the mid to late 1960s, a general professional consensus within the psychiatric, psychological and medical fields was established in support of Wolfenden-type reforms, although there were still many supporting the wholesale criminalisation of same-gender sexual activity. While this reading of the Wolfenden report at times overlapped with more homophile-influenced readings, it shifted this in the direction of professional power and regulation, especially regarding the sickness framing of homosexuality.

Of course, there was a vociferous response to even these limited law reform measures from the police and moral conservatives. The Canadian Association of Police Chiefs voted, at their 1968 conference, to oppose the reform legislation because it would lead to depravity, robbery and murder, continuing their association of homosexuality with criminality (Kinsman 1996a, p. 264).

This emphasis on psychiatric and psychological knowledges in the homosexual law reform discussions was also associated with the extension of medical and psychiatric regulations over the bodies of transsexual and transgendered people. After the gender/sexual disruptions of the World War II mobilisations there was a growing, if uneven, revolt against the two-gender system which no longer fitted with a growing number of people's lives and experiences. The generation of theories of a 'core gender identity', which can conflict with the genitalia one is born with, led to various attempts to 'fix' transgendered individuals by attempting to fit them back into the two-gender binary system and institutionalised heterosexuality, as well as movements of resistance to this (Ireland 2009, pp. 313–19; Irving 2007; Namaste 2000; Kessler and McKenna 1978).

Towards official law reform: partial decriminalisation

By the 1960s, the transformations of capitalist and patriarchal social relations in the postwar years had a major impact on sexual and gender regulation. As part of a broader composition and cycle of social struggle, gay and lesbian organising was shaped by a series of social revolts. This included the emergence of a new wave of feminism, raising the need for access to birth control and abortion services in the context of women's right to control their own bodies and reproductive freedom more generally; the rising militancy of the black liberation, anti-war, and new left movements; and youth movements that challenged the sexual oppression of young people. In this contested context, older moral conservative strategies of the total criminalisation of queer sex, sex work, abortion and the distribution of birth-control information were no longer working. A new approach was needed to try to handle these social contradictions. It is in this context that the Wolfenden strategy of public/private regulation became a cogent strategy for managing and containing these social pressures (Kinsman 1995, pp. 80–95).

A Supreme Court decision, in November 1967, played a key part in facilitating this law reform process on the official level. Everett George Klippert was sentenced as a dangerous sexual offender to indefinite detention for a series of consensual same-gender sex acts. He and his lawyers appealed this all the way to the Supreme Court of Canada.[10] The Supreme Court majority, in a literalist reading of the dangerous sexual offender section, decided that since Klippert was likely to engage in further homosexual acts, he was a 'dangerous sexual offender'. The implication was that all sexually active homosexuals were 'dangerous sexual offenders'. This decision came down ten years after the release of the Wolfenden report and after the government had adopted its recommendations on the partial decriminalisation of homosexuality for England and Wales in the Sexual Offences Act of 1967. This set up a major disjuncture between homosexual law reform which was proceeding in England and Wales, and the legal situation in Canada, which seemed to be moving in a very different direction, continuing the strategy of the extension of the criminalisation of sex between men.

As Doug Sanders put it, this decision 'wiped out any middle ground in the debate', since the 'most sophisticated argument for retaining the anti-homosexual laws was that changing the law was some form of approval' of homosexuality and that those opposed to changing the laws were 'happy with not enforcing the laws but in leaving them on the books' (Sanders cited by Kinsman 1996a, pp. 257–8). This position became quite untenable with the Klippert decision, which suggests that continuing engagement in sex with

10 On the Klippert case see Kinsman (1996), pp. 257–64 and the video documentary *History's Courtroom: The Bedrooms of the Nation* (episode 1001), Leading Cases Productions Limited and Screenlife Productions Limited (Toronto), April 2002.

other men could lead to life imprisonment. The continuing legal resilience of the strategy of extending the criminalisation of homosexuality now came sharply into conflict with the partial decriminalisation strategy.

In response, Wolfenden became very useful as the official response to these pressures. It allowed Canadian state formation to be moved away from the extending criminalisation of homosexual acts approach and aligned it more clearly with legal developments in England and Wales. Pierre Trudeau, then Justice Minister and soon-to-be Prime Minister, stated, in response to the Klippert decision both supporting sexual law reform proposals and borrowing from the Wolfenden approach, that 'there is no place for the state in the bedrooms of the nation'.[11]

The official 'from above' use of the Wolfenden perspective to limit and contain sexual/social transformation that Trudeau developed was an omnibus criminal code reform bill.[12] It brought together homosexual law reform (actually the partial decriminalisation of 'buggery' and 'gross indecency' in 'private' between two 'consenting adults' defined as aged 21 and older), the decriminalisation of the dissemination of birth control, and the very partial and limited decriminalisation of abortion, through providing a 'private right' of access to abortion services on 'health' grounds, if approved by a hospital's therapeutic abortion committee where one had been set up (Kinsman 1996a, p. 267; Brody et al. 1992).

For those supporting the homosexual law reform dimensions of the bill in the parliamentary debates, many arguments were taken directly from the Wolfenden report, but the debate was also inflected with the 'sickness' framing of homosexuality. The debate in the House of Commons was largely divided into two camps – those in favour of the reform including the New Democratic Party, the governing Liberals and some Conservatives, and those opposed, which included most Conservatives and the Creditistes, a rural Catholic-based social credit party from Quebec, who conducted a filibuster against the sections of the omnibus bill dealing with abortion, gross indecency and buggery (Kinsman 1996a, pp. 264–78).

One of the central terrains of the debate was over who could successfully articulate their position to the then socially hegemonic 'sickness' framing of homosexuality. While those supporting the continued total criminalisation of homosexuality attempted to link their argumentation to 'sickness' theories of homosexuality, this debate was won by those supporting the partial decriminalisation strategy, who derived their arguments from a 'sickness' reading of the Wolfenden report. In this official debate no one spoke out in defence of

11 This is reported as 'the state has no place in the bedrooms of the nation' in *The Globe and Mail* (Toronto), 22 Dec.1967, p. 1. It is also quoted as 'the government has no place in the bedrooms of the nation'.

12 This omnibus bill was known as the Criminal Law Amendment Act, 1968–69. It was introduced as Bill C-150 by then Minister of Justice Pierre Trudeau on 21 Dec. 1967.

lesbians, gay men, bisexuals and other queer people. As George Smith suggests, the record of this debate may be the most heterosexist document in Canadian governmental history (G. Smith 1982).

Supporters of the parliamentary reform concentrated on the need to make a distinction between homosexuality in 'public' and 'private', and on the view that privatised homosexual expression was most likely 'sick' and therefore influenced by a medical, psychological, or counselling problem, not a criminal one. This was at the same time that homophile activists influenced by the social movements of the 1960s were moving far beyond 'sickness' theories of homosexuality.

Attempting to move beyond the limitations of the Wolfenden approach, Doug Sanders and ASK challenged the discriminatory age restriction of 21 the reform imposed on participation in homosexual sex. Sanders forwarded to Prime Minister Trudeau a resolution from the North American Conference of Homophile Organizations (NACHO), a network of homophile and gay groups that ASK was involved in and which was also increasingly influenced by the rising militancy of the black civil rights and black power movements as well as the student and anti-war movements. In this resolution, adopted at a conference in Chicago in 1968, NACHO stated that they wished to express their:

> sharp disappointment that Mr Pierre Elliot Trudeau ... has seen fit to introduce the limited and inadequate provisions of the English homosexual law reform bill ... which makes 21 the age of consent for homosexual acts ... the Conference encourages the Canadian government to ... enact provisions for age of consent which are identical for homosexual and heterosexual acts. (cited in Kinsman 1996a, p. 265)

Sanders, informed by the perspective with which this chapter began, also suggested that one way to increase gay and lesbian visibility in the lead-up to reform was for ASK members and supporters to go door-to-door with petitions supporting the law reform measures. This was reluctantly accepted at one meeting and then killed at the next by people who felt that if they rocked the boat they might hurt the chances of reform. The attempts by homophile activists to use the Wolfenden approach to open up space for popular education on homosexual issues and concerns were undermined by this shift to the official use of the report in the 1969 criminal code reform. The reform process gets trapped and contained within politicians' and legal experts' managerial and administrative reading of the Wolfenden text.

Two years later, in August 1971, the first cross-country gay and lesbian rights demonstration took place in Ottawa on Parliament Hill, organised by activists inspired by the gay and lesbian liberation movements emerging out of the Stonewall riots in New York City. The impact of the black civil rights and black power movements was very clear here, as were connections

made between lesbian and gay struggles and those of other oppressed groups that characterised early gay liberation and lesbian feminist struggles. A series of demands were issued, in a declaration entitled 'We Demand', calling for the recognition of lesbian and gay rights including direct challenges to sexual policing and the national security campaigns against lesbians and gay men.[13] The cover letter produced for the the event's statement read in part:

> In 1969 the Criminal Code was amended so as to make certain sexual acts between consenting adults, in private, legal. This was widely misunderstood as 'legalising' homosexuality and thus placing homosexuals on an equal basis with other Canadians. In fact, this amendment was merely a recognition of the non-enforceable nature of the Criminal Code as it existed. Consequently its effects have done but little to alleviate the oppression of homosexual men and women in Canada. In our daily lives we are still confronted with discrimination, police harassment, exploitation and pressures to conform which deny our sexuality.[14]

Here, early gay and lesbian liberation activists, in pointing to the major limitations of the 1969 reform, moved far beyond the confines of the Wolfenden strategy of limited decriminalisation and public/private and adult/youth regulation.

Continuing struggles over public and private: shifting the terms of sexual regulation

As in other jurisdictions, following public/private law reform, the police were now more specifically directed at queer sex in state-defined 'public' places. This clearer direction for police response led to a major increase in the numbers of men arrested for having sex with other men in England and Canada (Greenwood and Young 1980, p. 166; Weeks 1977, p. 11). After the Wolfenden perspective was extended to Northern Ireland in 1982, there was also increased police activity against all forms of homosexual 'public display'. One observer expressed the police position as 'now that you are legal, this should be done in your homes' (Kerrigan 1984, p. 15). In the 1970s this limited 'private' space was used by queer movements and community formations to seize more public

13 On the 40th anniversary of the 'We Demand' demonstration in Ottawa, a conference called 'We Demand, History/Sex/Activism' was held in Vancouver, Canada, 26–28 August 2011. The roundtable discussion, called 'WeDemand: remembering as eesistance', focused on the organising and politics of the 1971 demonstration. This session was held on 26 August 2011

14 The 28 August Gay Day Committee, 'We Demand', see Jackson and Persky (1982), p. 217. The demonstration came under the surveillance of the Canadian security police, the Royal Canadian Mounted Police or RCMP. While many of these demands have been met in some form, many still have not been adequately addressed, see Kinsman and Gentile (2010), pp. 255–69).

and quasi-public space for gay communities and erotic cultures, with more people coming out and with a growing commercialisation of gay ghettoes or sections of cities. In response, the police mobilised against this public visibility as mandated by the Wolfenden approach.

Across the Canadian state there was an escalation of sexual policing against gay bars and baths from 1975 onwards – hundreds of men were arrested, starting with the 1975–6 Olympic 'clean-up' campaign centred on Montreal and continuing through to the massive bath raids in Toronto of the early 1980s. In these raids the police began to use the bawdy-house legislation which not only covered acts of prostitution but also 'acts of indecency'. Sexual activities within bars and bathhouses were claimed as sex acts in 'public' (G. Smith 1988; 2006; Kinsman and Gentile 2010, pp. 302–17, 332–5). George Smith, a leading Canadian gay activist and researcher, referring to the situations established after the 1969 criminal code reform, wrote that:

> The Criminal Code defines 'public' first in terms of a 'public place.' According to Section 138, a public place is 'any place to which the public has access by right or invitation, expressed or implied.' Secondly, section 158 of the Code ... goes on to say that not only is a sexual act public and therefore illegal if it is committed in a public place, but it is also a public act if more than two persons take part or are present. What this means is that what is 'public,' and again illegal as far as sex is concerned, is very broadly defined. It covers all possible situations but one–two individuals behind a locked door. This essentially relegates all sexual activity to the bedroom ... Another important feature of the government's definition of 'public' is that it treats the relation between 'public' and 'private' as proportional, like pieces of a pie. Thus the larger the slice given to the public, the smaller the piece left over for private. (G. Smith 1982)

These raids led to massive resistance in Montreal, following the raid on the Truxx bar in 1977, and in Toronto, in response to the 1981 bath raids. In Toronto, the Right To Privacy Committee (RTPC), the defence organisation formed for those who were charged, fought back in the streets and in the courts with much success (McCaskell 1988). The police were pushed back and became more wary of using the bawdy-house laws for large arrests for fear of provoking mass resistance. The RTPC transformed and expanded the liberal and narrow notion of the right to privacy to include the social making of intimacy and privacy in state-defined 'public' places. It shifted the right to privacy from a narrow, liberal, individualist usage where it participates in 'privatising' those of our sexualities which can easily be accommodated with neo-liberalism. Instead it transformed our right to privacy into a more collective and social way of securing our claims to 'private', 'intimate' *and* social space.

What became crucial were the social practices that people engaged in and not the state defined boundaries of 'public' and 'private'. This transformed the previously narrow right to privacy into part of securing our right to the world.

This expanded and changed use of the right to privacy requires that one looks at sexual practice and social life from the standpoint of queers, and this moves us beyond the boundaries of state-defined categories. From this perspective it is quite possible to engage in a private act in a place defined by state agencies as public (for example, a washroom with no one else present, or a deserted or secluded part of a park). As George Smith put it 'Privacy is something that is socially constructed in this society ... Indeed, in the middle of the night, when it is absolutely pitch dark, a park might be a very private place' (G. Smith 1982). This kind of approach is radically subversive of the strategy of public/private regulation, set out in the Wolfenden report, pointing towards new forms of potentially non-oppressive forms of sexual regulation.

Shifting social regulation away from whether sexual acts occur in 'public' or 'private', or whether they are 'deviant' or 'normal', directs our attention towards the social character and context of erotic practices and the social character of relationships between people. The problem is when violence, coercion, or social power are used in sexual contexts and not whether the practices occur in 'public' or 'private', or whether they are 'homosexual' or 'heterosexual'. This begins to develop a radical pluralist perspective that moves far beyond liberal pluralism to get at expanding the social possibilities for control over people's own bodies and lives, both individually and collectively, and needs to be linked to broader projects of social and sexual transformation (Weeks 1985; Kinsman 2007).

While the mass mobilisations and mass organisation after the bath raids were largely successful in pushing back police efforts to criminalise consensual sex between men in large police raids, when this mass organising subsided it was largely middle-class white men who rose to the top in gay communities. This is referred to here as a shift in class formation with the emergence of a new, professional/managerial strata within gay communities which also developed intimate connections with gay business sectors. Due to their credentials and training, these social strata were able to speak the languages of ruling relations in society and was therefore often able to successfully claim to be the 'legitimate' representatives of the gay community. Given the commonalities these social strata shared with the broader white middle class in society, the radical and transformative dimensions of the gay movements began to be subordinated to a politics that was more defined by a certain 'respectability' and 'responsibility' (Kinsman 1996b) which asked simply to be let into dominant social institutions.

Later legal changes in Canadian state formation led to the abolition, in 1988, of the offence of gross indecency (largely but not entirely used to cover oral sex between men). It was combined with the lowering of the age of consent for anal intercourse in 'private' to 18, even though the general age of consent was at the same time lowered to 14. It continued to be argued that the age of consent for anal sex needed to be higher to protect young men from homosexual advances. This differential age of consent has been successfully

constitutionally challenged in a number of provincial jurisdictions but is still in place. In 2006, as a result of moral conservative organising, the general sexual age of consent was raised to 16, despite the opposition of AIDS educators and organisations of queer youth, while the higher age of consent for anal sex was maintained (Kinsman 2007).

The shifts in class formation within gay and lesbian communities, and the gaining of formal legal rights, has been facilitated by a crucial legal shift in Canadian state formation with the Canadian Charter of Rights and Freedoms, enacted in 1982, which allowed laws to be challenged if they violated equality rights. The equality rights section of the Charter which came into effect in 1985 was eventually, after major legal battles, interpreted to include sexual orientation protection. This has created the basis, along with social and legal struggles, for major advances in formal legal rights for lesbians and gay men regarding spousal rights, familial rights, the right to join the military and same-sex marriage rights. While some of these struggles have had important transformative dimensions, they have largely been defined by requesting the right to be let into and included within existing institutional relations, and have not challenged the social forms of these institutions. There have been major legal advances using this approach which have made important differences in many people's everyday lives (Herman 1994; M. Smith 1999; 2008; Rayside 1998; 2008).

At the same time this shift in state legal formation oriented gay movements much more towards formal legal equality and legal rights as opposed to trying to establish substantive social equality with heterosexuals and the overcoming of heterosexual hegemony and the two-gender binary system. These advances have created the paradoxical situation in which, even though the gay community has achieved many of its stated aims at the level of formal legal rights, major substantive forms of oppression, inequality and violence remain, including heterosexist violence and abuse against queer young people in high schools and on city streets. Major mobilisations opposing queers can still easily arise, since moral conservatives and those they can appeal to do not consider such people to be 'normal'. The social roots and basis for heterosexism have not been substantively challenged, despite these important legal victories.[15]

Some conclusions: avoiding containment and pushing forward social transformation

Early gay activists in Canada were able to both use and at times move beyond the official text of the Wolfenden report. This was a process of creative

15 On this description and analysis of the terrains of struggle – the possibilities and the limitations – opened up by the Charter, see Kinsman (1996a), pp. 360–5, and Kinsman and Gentile (2010), pp. 391–401. On the current terrain of queer struggles within Canadian social and state formation, see Kinsman (1996a), pp. 375–409 and Kinsman and Gentile (2010), pp. 429–58.

engagement and transformation 'from below'. At the same time, these readings of Wolfenden from below were able to be contained within the textual practices of sexual rule of the 1969 criminal code reform, based on a hegemonic reading of Wolfenden 'from above'. Later struggles over public and private regulation and sexual policing allowed queer activists to challenge and move beyond this regulatory strategy.

In the historical present, these historical investigations help clarify more generally the limitations of formal legal equality and sexual 'citizenship' claims that are often made in movements and communities. In the Canadian context, this clarifies both the potential and the limitations of the use of the Charter in which the transformative moment of inclusion into existing social forms of state citizenship, or into the 'citizenship' of the marketplace, has often been subordinated to integrationist, middle-class and neo-liberal strategies. Initially, transgressive demands for the transformation of spousal, family, marriage, military and national security relations (among others) can be tamed and limited 'from above' so that the integration of some white middle-class queer people into existing capitalist and patriarchal (and racist) social forms is accomplished in the end and they remain ensnared in new strategies for the management of their lives. This social and political process is sometimes now referred to as 'homonormativity' and 'homonationalism',[16] although I find these perceptive terms need far more concrete social and historical grounding.[17] LGBT people always need to question on whose terms they are being accepted or integrated, and who is being excluded through this process of incorporation. This has meant that white, middle-class gay men, and to a lesser extent lesbians, have gained the most from these legal victories. And those being excluded are often working-class queers, lesbians, queers of colour, trans people, queer youth and queers living in poverty. Some have gained far more than others from formal legal victories.

It is necessary to avoid these strategies of containment and to always challenge heterosexist, racist, patriarchal, and capitalist social forms. This requires always pushing forward the transformative and transgressive dimensions of LGBT struggles while at the same time avoiding getting trapped within the textual strategies of ruling 'from above' like the strategy of sexual regulation mobilised through official readings of the Wolfenden report. In the historical past, this included challenging public/private and adult/youth strategies of sexual regulation, and in the historical present this requires a refusal to simply be assimilated into existing social forms or institutional relations. There is a

16 On the use of 'homonormativity', see Duggan (2003) and *Radical History Review* 'Queer Futures' issue (2008). Also of relevance is Hennessy (2000). On 'homonationalism' see Puar (2007).

17 This is a project I am working on in relation to the Canadian context from the late 1960s to the present. The tentative title is *The Social Making of the Neo-Liberal Queer*.

need for LGBT people to move beyond the confines of sexual rule to establish control over their own bodies and lives and to see their liberation as bound up, as the early gay liberation movement affirmed, with the social liberation of other oppressed and marginalised peoples.

Bibliography

Allen, J. (2007) 'Alfred Kinsey as Wolfenden's expert witness: contributions and consequences', 'Wolfenden 50' conference, London, 29 June.

Bannerji, H. (2000) *The Dark Side of the Nation, Essays on Multiculturalism, Nationalism and Gender* (Toronto: Canadian Scholar's Press).

Brock, D. (ed.) (2003) *Making Normal, Sexual Regulation in Canada* (Toronto: Thomson/Nelson).

— (2009) *Making Work, Making Trouble, The Social Regulation of Social Labour,* 2nd edn. (Toronto: University of Toronto Press).

Brody, J., S. Gavigan and J. Jenson (1992) *The Politics of Abortion* (Toronto: Oxford University Press).

Chenier, E. (2008) *Strangers in Our Midst, Sexual Deviancy in Postwar Ontario* (Toronto: University of Toronto Press).

Committee on Homosexual Offences and Prostitution (1957) *Report of the Committee on Homosexual Offences and Prostitution* (London: HMSO).

Corrigan, P. (1990) 'On moral regulation: some preliminary remarks', in Philip Corrigan (ed.), *Social Forms, Human Capacities* (London: Routledge).

Corrigan, P. and D. Sayer (1985) *The Great Arch, English State Formation as Cultural Revolution* (Oxford: Basil Blackwell).

Couture, J. (2008) *Peek, Inside the Private World of Public Sex* (New York and London: The Haworth Press/Taylor and Francis Group).

Dalla Costa, M. and S. James (1972) *The Power of Women and the Subversion of the Community* (Bristol: Falling Wall Press).

Dangerous Bedfellows (eds.) (1996) *Policing Public Sex, Queer Politics and the Future of AIDS Activism* (Boston, MA: South End Press).

D'Emilio, J. (1983) *Sexual Politics, Sexual Communities, The Making of a Homosexual Minority In the United States* (Chicago, IL and London: The University of Chicago Press).

Duggan, L. (2003) *The Twilight of Equality? Neoliberalism, Cultural Politics, and the Attack on Democracy* (Boston, MA: Beacon).

El Kilombo Intergalactico (2008) *Beyond Resistance Everything – An Interview with Subcommandante Insurgente Marcos* (Durham, NC: Paperboat Press).

Federici, S. (1975) *Wages Against Housework* (London: Power of Women Collective/Falling Wall Press).

Freedman, E. (1987) '"Uncontrolled desires": the response to the sexual psychopath, 1920–1960', *Journal of American History* 74 (1), pp. 83–106.

Greenwood, V. and J. Young (1980) 'Ghettoes of freedom: an examination of permissiveness', in National Deviance Conference, *Permissiveness and Control*, *The Fate of the Sixties Legislation* (London: Macmillan Press).
Hennessy, R. (2000) *Profit and Pleasure: Sexual Identities in Late Capitalism* (New York: London: Routledge).
Herman, D. (1994) *Rights of Passage: Struggles for Lesbian and Gay Equality* (Toronto: University of Toronto Press).
Ireland, K. (2009) 'Sex assignment surgery in Ontario: adrift in a political and cultural climate', in K. Dubinsky, C. Kull, S. Lord, S. Mills and S. Rutherford (eds.), *New World Coming, The Sixties and the Shaping of Global Consciousness* (Toronto: Between the Lines), pp. 313–19.
Irving, D. (2007) 'Trans politics and anti-capitalism', *Upping the Anti* 4, pp. 63–75.
Jackson, E. and S. Persky (eds.) (1982) *Flaunting It!* (Vancouver and Toronto: New Star Books and Pink Triangle Press).
Jagose, A. (1996) *Queer Theory: An Introduction* (New York: New York University Press).
Kerrigan, C. (1984), interview, 'Gay liberation and national liberation', *Rites* 3 (2), p. 15.
Kessler, S.J. and W. McKenna (1978) *Gender: An Ethnomethodological Approach* (Chicago: University of Chicago Press).
Kinsman, G. (1995) 'The textual practices of sexual rule: sexual policing and gay men', in M. Campbell and A. Manicom (eds.), *Knowledge, Experience, and Ruling Relations: Studies in the Social Organization of Knowledge* (Toronto: University of Toronto Press), pp. 80–95.
— (1996a) *The Regulation of Desire: Homo and Hetero Sexualities* (Montreal: Black Rose).
— (1996b) '"Responsibility" as a strategy of governance: regulating people living with AIDS and lesbians and gay men in Ontario', *Economy and Society*, Aug., pp. 393–409.
— (2001) 'Challenging Canadian and queer nationalisms', in T. Goldie (ed.), *In a Queer Country: Gay and Lesbian Studies in the Canadian Context* (Vancouver: Arsenal Pulp Press), pp. 209–34.
— (2007) 'Constructing sexual problems: "These things could lead to the tragedy of our species"', in W. Anthony and L. Samuelson (eds.), *Power and Resistance: Thinking Critically About Social Issues in Canada*, 4th edn. (Halifax: Fernwood), pp. 96–134.
Kinsman, G. and P. Gentile (2010) *The Canadian War on Queers: National Security as Sexual Regulation* (Vancouver: UBC Press).
McCaskell, T. (1988) 'The Bath Raids and Gay Politics', in F. Cunningham, S. Findlay, M. Kadar, A. Lennon and E. Silva (eds.), *Social Movements/ Social Change, The Politics and Practice of Organizing* (Toronto: Between the Lines/Socialist Studies 4), pp. 169–88.

McNally, D. (2006) *Another World is Possible, Globalization and Anti-Capitalism* (Winnipeg: Arbeiter Ring Publishing).
Marcos, Subcomandante and the Zapatistas (2006) 'Sixth Declaration of the Lacandon Jungle', in *The Other Campaign/la otra campana* (San Francisco: City Lights).
Menninger, K. (1963) 'Introduction', *Wolfenden report, Report of the Committee on Homosexual Offences and Prostitution* (Authorized American Edition) (New York: Stein and Day).
Namaste, V.K. (2000) *Invisible Lives, The Erasure of Transsexual and Transgendered People* (Chicago, IL and London: University of Chicago Press).
Puar, J.K. (2007) *Terrorist Assemblages, Homonationalism in Queer Times* (Durham, NC and London: Duke University Press).
Rayside, D. (1998) *On the Fringe Gays and Lesbians in Politics* (Ithaca, NY and London: Cornell University Press), pp. 105–211 .
— (2008) *Queer Inclusions, Continental Divisions, Public Recognition of Sexual Diversity in Canada and the United Sates* (Toronto: University of Toronto Press).
Radical History Review (2008) 'Queer Futures' issue (Durham, North Carolina: Duke University Press/MARHO: The Radical Historians' Organization).
Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths (1958) *Report of the Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths* (Ottawa: Queen's Printer).
Saunders, D.E. (1967) 'Sentencing of homosexual offenders', *Criminal Law Quarterly* 10.
Self, H.J. (2007) 'Wolfenden and prostitution: an historical review', 'Wolfenden 50' conference, London, June.
— (2010) *Prostitution, Women and the Misuse of the Law* (London: Routledge).
Smith, D.E. (1990a) *The Conceptual Practices of Power: A Feminist Sociology of Knowledge* (Toronto: University of Toronto Press).
— (1990b) *Texts, Facts, and Femininity: Exploring the Relations of Ruling* (London and New York: Routledge).
— (1999) *Writing the Social, Critique, Theory and Investigations* (Toronto: University of Toronto Press).
— (2005) *Institutional Ethnography, A Sociology for People* (Laham, New York, Toronto, Oxford: Altamira).
Smith, G. (1982) 'In defence of privacy: or bluntly put no more shit', *Action!* Publication of the Right to Privacy Committee 3 (1) (Toronto).
— (1988) 'Policing the gay community: an inquiry into textually-mediated social relations', *International Journal of the Sociology of Law* 16, pp. 163–83.

— (2006) 'Political activist as ethnographer', in C. Frampton, G. Kinsman, A. Thompson and K. Tilleczek (eds.), *Sociology for Changing the World: Social Movements/Social Research* (Halifax: Fernwood Publishing), pp. 44–70.
Smith, M. (1999) *Lesbian and Gay Rights in Canada: Social Movements and Equality Seeking, 1971–1995* (Toronto: University of Toronto Press).
— (2008) *Political Institutions and Lesbian and Gay Rights in the United States and Canada* (New York and London: Routledge).
Thobani, S. (2007) *Exalted Subjects, Studies in the Making of Race and Nation in Canada* (Toronto: University of Toronto Press).
Walkowitz, J. (1980) *Prostitution and Victorian Society*, *Women, Class and the State* (New York: Cambridge University Press).
Weeks, J. (1977) *Coming Out* (London: Quartet).
— (1981) *Sex, Politics and Society* (London and New York: Longman).
— (1985) *Sexuality and Its Discontents*, (London: Routledge and Kegan Paul).

7

Australia: nine jurisdictions, one long struggle

Graham Willett

As a medium-sized country overshadowed in the Anglophone world that it largely inhabits, Australia rarely looms large in international histories. This is a pity, because it has much to tell us about the times that Australians have lived through. It is especially true in relation to gay/lesbian/queer issues where the struggle for equality has been fought out over a long period, in a variety of social and historical contexts, and with striking success. With the exception of same-sex marriage, the struggle for legal equality in Australia is now pretty much complete. The Australian story began in the 1960s, with the introduction of homosexual law reform as an element of a broader suite of demands put together as part of its modernisation and liberalisation, through the emergence of a gay and lesbian rights movement, which profoundly reshaped the issue, and through a period of challenge to gay rights from AIDS and a new homophobia. It is a tale of activists adapting to changing circumstances, responding to new opportunities and crafting tactics and strategies. Such tactics have included the globally groundbreaking invocation of human rights instruments via the United Nations to claim a legal right to privacy, in relation to 'sexual orientation', in the case of *Toonen v. Australia* (United Nations Human Rights Committee 1994). The story thus has a continuing relevance well beyond Australia's shores and well beyond the struggle for LGTBI equality.

In this chapter the focus is on the decriminalisation of sex between men in Australia. There are, it is true, problems with this. It reflects a context in which sex between women has never been criminalised, and therefore yields a narrative primarily concerning men. It pushes into the shadows the remarkably diverse range of issues that might also be examined under the banner of 'law reform' – anti-discrimination laws, age of consent, vilification and hate speech, gay and lesbian families (including parenting, de facto/common law relationships and marriage), access to reproductive technologies and so on. This approach also sets aside consideration of the diverse populations who came to be associated with the lesbian and gay community and its issues via quite strikingly different processes of affiliation – bisexuals, transsexuals, transgender and intersex people.

There are minority racially-defined and ethnic populations to be considered, including, in the British settler states (those parts of the empire settled and populated by Britons and their descendants, rather than merely governed by them), Indigenous peoples and their particular sexual and gender categories: for example the growing visibility of groups of transpeople including sistergirls (see Queensland Association for Healthy Communities 2008).

If attention to this remarkable breadth of issues has been sacrificed here to a focus on decriminalisation, this is not unreasonable. The struggle for decriminalisation has a central historical importance for understanding wider struggles for equality. But it also provides a focus that has great value in helping us to understand how social change happens over time. The story of decriminalisation told here develops in stages across nine jurisdictions: the six federal states of South Australia, Victoria, New South Wales, Queensland, Western Australia, Tasmania, and the two territories of Australian Capital Territory and Northern Territory outside states, all within the overarching federal sphere of Australia's 'Commonwealth Government' – and the story would be longer still if extended to cover island territories. The struggles in states and territories over 25 years, which will be discussed chronologically, offer a remarkable case study of the relationships between structure and agency and between institutions and activists, and of how these come together in processes of social, political and cultural change. It is by a close study of this unfolding drama that we can see these relationships at their clearest. This is not, of course, the only way that this history might be understood. In their introduction to *The Lesbian and Gay Movement and the State,* Paternotte et al. (2011) explore some of the methodologies that might be deployed, although in the chapter on Australia, which surveys and analyses the broad developments of recent years with a very good bibliography, Johnson and her colleagues adopt the same historical approach focussed upon social movement activism which I employ here (Johnson et al. 2011). There is a broad-based survey and a discussion of many of the issues in Maddison and Partridge (2007) as well.

This account draws heavily upon my *Living Out Loud* (Willett 2000) where the history of lesbian and gay activism is located within a social movement for liberation and equality via social transformation. I have, accordingly, referenced this chapter somewhat lightly and would refer readers to the more detailed account for more in-depth sources. The account relies heavily, too, on Graham Carbery's brief, but well-researched study of decriminalisation in the states and territories, which has a convenient table of legislation (Carbery 2010).

From colonies to the 1950s

In the settler colonies of Australia, British laws on buggery arrived with the Empire (for this and the following, see McRae 1978). In 1788, the first settlement at Sydney Cove in New South Wales was founded upon British laws, as were the later colonies of Western Australia (1829) and South Australia

(1836). As New South Wales, the mother-colony on the east coast, was carved up, the daughter-colonies inherited the laws as they stood at the time of separation (Van Diemen's Land/Tasmania (1825), Victoria (1851), Queensland (1859), the Australian Capital Territory (1911)). The steady unfolding of self-government in the colonies over the middle decades of the 19th century left them increasingly free to follow their own paths on matters of sex, morals and public decency. But, in fact, they tended to follow the lead of the Westminster parliament in London, albeit at their own pace and with occasional minor variations. Like England, New South Wales stopped executing sodomites in the mid 1830s while retaining the death penalty on the books until 1861. Van Diemen's Land (the earliest name for the colony of Tasmania) continued with its executions until 1863, at which point the legislature followed these changes. England's 1885 law criminalising gross indecency was adopted in the Australian colonies and states between 1892 and 1919. New Zealand followed a similar trajectory, while moving decisively away from the other Australasian colonies towards national independence (Guy 2002).

Many decades later, when the Wolfenden committee issued its report in 1957 calling for the decriminalisation of homosexual acts between consenting adults in private (Committee on Homosexual Offences and Prostitution 1957), this was noticed in Australia, although press reports and politicians' responses were rather more uniformly hostile to the suggestion of reform than in Britain (French 1986, pp. 27–8). The history of the one serious effort to emulate the work of the London-based Homosexual Law Reform Society is an indication of how little was possible in the late 1950s.

In late 1958, Laurence Collinson, a writer and a well-known member of Melbourne's left-wing bohemian literary world, and himself a homosexual, inspired by reports in the British magazines which circulated in Australia, attempted to set up a version of England's Homosexual Law Reform Society (HLRS) (Willett 2000, pp. 15–17). His papers contain correspondence with Andrew Hallidie-Smith, secretary of the HLRS, as well as notes outlining the value of such an organisation, the possibility of setting up executive and general committees, the need for an honorary lawyer and methods of raising finance. In November 1959, Hallidie-Smith advised that he had sent 50 copies of the HLRS pamphlet *Questions and Answers* (Albany Trust n.d.) as well as 'some other literature', but it is not clear that these were received or distributed.

The failure of this effort is not surprising. The idea of a lobby group on the model of the HLRS was reasonable and this is certainly what Hallidie-Smith recommended. But Australia had not in fact experienced any public debate about homosexuality in the way that Britain had during the scandals of the early 1950s and in the aftermath of the Wolfenden report being released (Committee on Homosexual Offences and Prostitution 1957). Nor was there any visible pool of liberal supporters such as had been generated in various parts of Britain (Higgins 1996).

When, in the 1960s, homosexuality did come on to the public agenda in Australia, it was in a rather surprising way. Quite suddenly, it was being talked about in terms of the need to repeal anti-homosexual laws and mitigate anti-homosexual attitudes. These views were part of a new, modernising, liberal current in Australian political life which was arguing for a wide-ranging reform of society (Horne 1980). Within this broader debate and discussion a new understanding of homosexuality was forged. The notion that homosexuals and homosexuality were threats to society was increasingly rejected. Far from the shadowy, dangerous and repulsive figure of the 1950s, the homosexual was coming to be seen as someone to be pitied: homosexuality, like blindness and congenital heart disease, was an abnormality which must be treated accordingly, opined one sympathiser (Anon. 1965).

But this new liberal attitude did not confine itself to a critique of existing ideas. Rather, it set out to construct an alternative basis for social policy. Essentially this revolved around the notion that sexual behaviour was an individual, rather than a social, 'problem'; that where no-one was hurt or coerced, and the acts took place in private, sex ought to be of no concern to the state. The notion of the consenting adult in private is crucial here, a slogan and a set of ideas that came directly from the Wolfenden report and were enacted in England and Wales via the Sexual Offences Act 1967 (Waites this volume). In part, to be sure, this notion embodies a defensive posture: 'consenting' stands against the notion of homosexual-as-predator; 'adult' against the homosexual-as-child-seducer; 'private' against the homosexual-as-public-nuisance. But it also contains within it a decisive shift in how homosexuality should be perceived – as a matter for individual conscience, rather than public policy. Increasingly, this liberal thinking started to be reflected among university students and the student press, in the legal profession and even in the mainstream Christian churches (Willett 1996).

If there is a decisive moment in the rise of the new modernising liberalism to dominance in Australian politics and society, it came with the reform and modernisation of the Australian Labor Party (ALP), spearheaded by its young new leader, Gough Whitlam, who took up the ideas with alacrity. In his rewriting of the ALP's programme, homosexuality was not directly addressed. But the success of the new liberals' project for the reform, renewal and renovation of Australian society advanced the cause of homosexual law reform anyway. By its association with the whole cluster of themes to do with modernising Australia – throwing off old prejudices, deepening personal responsibility, enhancing personal privacy, building a tolerant society, dismantling the influence of religious attitudes, and so on – the decriminalisation and toleration of homosexuality rode into the mainstream on the coat-tails of a broader movement. In September 1970, Whitlam expressed his personal support for homosexual law reform, declaring that private moral decisions should be separated from public political attitudes and calling for a conscience

vote in the parliament (MacCallum 1970). Observing the success of Whitlam's programmatic reforms, others started to speak up. Tom Hughes (1970), the federal Liberal government's attorney general, raised the possibility of reform and, in the Australian capital city of Canberra, the *Canberra Times* (1970) took the opportunity to call for the decriminalisation of homosexual acts. This is where our story of successive conflicts in the territories and states begins.

The Australian Capital Territory

It was in this context of emerging suggestions of reform that 1969 saw the emergence of the Homosexual Law Reform Society of the Australian Capital Territory (ACT HLRS), the earliest, largest and most public attempt by liberals to decriminalise homosexual acts (Willett 2011). It was not an organisation of homosexuals; nor was it particularly concerned with issues other than decriminalisation. Both of these factors mark it off from the soon-to-appear gay movement, and it makes sense to think of the ACT HLRS as being part of that phase of reform politics which centred on a notion of civil liberties and the activism of civil libertarians (Grieve 1995). The ACT HLRS drew upon the by now well-established acceptance within liberal humanist circles of an anti-criminalisation stance (Willett 1996) and it embodied this in the Ordinance it drafted for the minister of the interior's consideration.

The ACT, as a 'territory' in which Canberra is situated rather than a 'state', has powers delegated from the Australian Government rather than by constitutional right, although it has had full internal self-government since 1988. Before the process of introducing self-government started in 1974, the Australian Capital Territory was governed under New South Wales laws inherited at the time of its establishment in 1911, as amended periodically by ordinances proclaimed by the governor general on the advice of his ministers. The HLRS's draft law, guided by the Sexual Offences Act of 1967 applying in England and Wales, relied upon the notion of the consenting adult in private, but with two important differences: the age of consent was to be 18 rather than 21; and 'private' was not to be interpreted in the narrow sense of the presence of not more than two people. Penalties for remaining offences such as soliciting were reduced and the draft Ordinance required that courts seek a medical opinion before passing any sentence of imprisonment upon a homosexual (HLRS 1969). The ACT HLRS commissioned an opinion poll which found that 68 per cent of those interviewed favoured decriminalisation; it published a newsletter and its members participated actively in public debates. Among the targets of its lobbying were the ACT Law Society, clergymen, members of the medical profession and judges. Overwhelmingly, the response from these quarters was supportive of change.

Despite all this activity, homosexual law reform was not achieved in the ACT until 1976 – some years after the Society itself had ceased to exist and

several years after public opinion and professional attitudes had been reformed. It is often assumed that law reform is a simpler task than social and cultural transformation. Certainly, gay and lesbian activists at the time thought this was the case. In September 1970, James Grieve, one of the founders of the ACT HLRS, had written to the founders of the Campaign Against Moral Persecution (CAMP), the first national gay rights organisation, noting that CAMP's goals were 'much wider than law reform', including as they did the changing of public opinion, professional attitudes and so on. Grieve wished them well and declared that CAMP's task would be 'a much harder job' than that of the HLRS, adding that 'no doubt we [the HLRS] shall succeed long before you do' (Ware and Poll 1970; Grieve 1970). But actually, law reform has its own peculiar constraints. The 'public', whose opinions movement activists were keen to change, was a broad and diverse category of people who offered numerous targets for activists. Similarly, medical or religious opinion is held and determined by large, although smaller, numbers of people who are free to debate and change their ideas, usually by incremental processes. Legislators, on the other hand, are a relatively small, tight-knit and somewhat cautious group, and laws can only be changed if a majority of legislators can be induced to openly and publicly commit themselves to a particular policy.

But the ACT HLRS had put homosexual law reform firmly on the agenda and the election of the ALP to federal government in December 1972 promised much. There were early positive signs. On 18 October 1973, the House of Representatives endorsed, by 60 votes to 40, a motion reading: 'That in the opinion of this House homosexual acts between consenting adults in private should not be subject to the criminal law' (Willett 2000). The vote found odd bedfellows. A significant bloc of opposition to the motion came from the right-wing faction of the ALP, reflecting the conservative Catholicism of this group. Among those voting against the motion was a young Paul Keating, who, as prime minister some 20 years later, was to play a very positive role in relation to the gay and lesbian rights agenda. From the other side of politics, a number of conservatives unexpectedly voted for the motion. Doug Anthony, the leader of the Country Party, was one of these. The Country Party, later renamed the National Party, represented rural and regional Australia and could generally be relied upon to uphold the conservative social values of its electorate. Anthony, asked afterwards about his surprising support for the motion, is said to have laughingly declared that, 'You Labor boys think you're so trendy. But what you don't realise is that a lot of us have been to boarding school!' (Blazey 1994, p. 59).

Even now law reform was not in place – the motion had been an expression of opinion only. The new ACT Legislative Assembly turned its attention to the issue in December 1974 but the final bill for reform was only passed in July 1975, and when the federal ALP government fell in November of that year, the Ordinance had still not been signed by the attorney general. In mid 1976

the whole process began all over again under a new Liberal attorney general who had not been happy with the earlier version (Watson 1976a; 1976b). The decriminalisation of male homosexual acts in the ACT finally took place in November 1976 (Australian Capital Territory 1976).

By this time, a new actor arrived on the Australian political stage – the gay and lesbian movement. This was part of a much larger political transformation that began with the movement against the Vietnam War and the eruption of struggles by women, students and Indigenous people, and around issues such as the environment and peace; struggles that radically reshaped Australian society and continue to do so today. The Campaign Against Moral Persecution (CAMP) was founded in Sydney in mid 1970 and by the end of the year it was a national organisation with 1,500 members and branches in every state capital city and on most university campuses (Willett 2000, pp. 33–52). Over the coming years, CAMP continued to play an important role in gay and lesbian politics, joined by a plethora of other organisations. What all these had in common was a determination to change society – to transform by political activism of one sort or another the laws, professional understandings and social attitudes that disadvantaged gay men and lesbians. In later years bisexuals, transgender and intersex people would bring their own insights and demands to this debate. Alongside the modernising liberalism of the 1960s, there was now a new assertive movement, associated with an emerging community, that wanted more than tolerance. These two streams of thought were to profoundly shape the politics of homosexual law reform, and the politics of many other issues, for decades to come.

South Australia

When early gay rights activists turned their minds to the question of decriminalisation, there were a number of candidates for the jurisdiction most likely to lead off. The ACT, where the issue was first raised in 1969, was one. So, too, was Western Australia, where the state branch of the ALP had adopted reform as party policy in 1970. But it was South Australia, where Don Dunstan was leading the state ALP firmly in a liberal direction, just as Whitlam was doing at the national level, that claimed the prize – twice (Reeves 1994; Cowan and Reeves 1998; Hodge 2011).

As early as the mid 1960s, according to his own account, Don Dunstan had been quietly pushing for homosexual law reform as part of a broader programme of change and modernisation. He found himself blocked by caucus and it was only when he was elected as premier in his own right in 1970 that he was able to put the wheels in motion (Dunstan 1981). In December 1971 his government announced the establishment of a broad inquiry into social questions under Justice Roma Mitchell. Homosexual and drug law reform were included but there was no timeframe for their consideration.

This did not unduly perturb the local branch of the CAMP. As a relatively young organisation, with its founding meeting being held only in October 1971, its early efforts were appropriately modest. It saw law reform as very much a long-term project to which its contribution would be, initially at least, largely educative. To this end it set about meeting with opinion-makers such as clergy and medical professionals.

This careful approach on the part of both the Dunstan government and CAMP was thrown off by the murder of University of Adelaide law lecturer George Duncan on 10 May 1972. Duncan had been doing the beat – cruising for sex – on Adelaide's Torrens River bank and his death was widely believed to have been a result of anti-gay violence by off-duty police officers. The national furore that resulted threw everyone's careful plans for homosexual law reform into disarray. Suddenly the oppression of homosexuals was big news and the law-reform genie was out of the bottle. CAMP and civil libertarians and the Adelaide *Advertiser* newspaper declared that the murder showed the need for law reform. Murray Hill, a little-known Liberal Country League (LCL) member of the Legislative Council, the upper House in the state's bicameral Parliament, announced that he intended to introduce a Private Member's Bill to decriminalise homosexuality. Forced to respond, both major parties declared that they would allow their members a free vote, though it seems clear that the ALP had decided to seize the moment and set out to ensure that the bill was passed (Hodge 2011). The Legislative Council was heavily weighted towards rural and conservative interests and no-one put the numbers of supporters there at much better than six or seven.

Hill's bill was far from ideal. CAMP objected to the age of consent being set at 21, to the very narrow definition of 'in private' (in the presence of not more than two people; a law that did not apply, for example, to heterosexual sexual encounters) and to provisions on procuring that made it impossible for one man to proposition another under virtually any circumstances. CAMP argued with Hill on all of these to no avail. And in the end, the final outcome was even worse than Hill intended. In the upper house the bill was amended beyond recognition. No longer did it decriminalise homosexual acts between consenting adults in private. Now, all it did was to make the conditions under which sex took place – two men aged over 21, in a consensual act, in the presence of no other person – a defence in court. That is, homosexual acts were still illegal, arrests could still be made, but where the conditions were met and were proved in court, no conviction would be recorded. Attempts in the lower house to reverse these changes failed and finally ALP members in the upper house reluctantly allowed the bill to pass into law. On 18 October 1972, South Australia became the first place in Australia where homosexual acts were, if not exactly legal, then no longer entirely illegal either (Reeves 1994).

In March 1973, the newly elected ALP member Peter Duncan (no relation to George) immediately flagged his intention to introduce a law to effect the

complete decriminalisation of homosexual acts and an equal age of consent. It took two years, and another election, but finally in 1975 with the numbers now decisively in favour of reform – with the press and the archbishop of Adelaide, the Council of Civil Liberties and the Australian Psychological Association all publicly voicing their support – the bill finally passed through parliament (South Australia 1975; Cowan and Reeves 1998). For all the failures, delays and setbacks, South Australia was still the first (and second) jurisdiction in Australia to enact real homosexual law reform.

In some ways, the surprising fact about the 1972 law reform in South Australia is not that it was as bad as it was; the surprise is that it was not simply voted down by those who had doubts about decriminalisation. It is clear evidence that liberal ideas, such had been argued since at least the mid 1960s, had eroded the arguments for the criminal status of homosexual acts and the confidence of those that held them.

Victoria

In South Australia and the ACT, decriminalisation owed more to liberal values than to the demands of gay activists. But the emergence of a radical gay liberation movement in many Western societies, including Australia from the end of the 1960s, distinctively calling for equality and liberation, increasingly had an impact (Altman 1971). When, in the late 1970s, homosexual law reform suddenly came back on to the political agenda, the presence of gay rights activism was to shape the processes of reform very strongly.

In the early days of the movement, law reform had not loomed large in Victoria. Although the Humanist Society had published the first extended argument for homosexual law reform in its pamphlet *The Homosexual and the Law – A Humanist View* in 1970 (Humanist Society 1970), given the conservative nature of the Liberal government, the likelihood of change was considered small. It is not surprising that neither the Humanists nor Society Five, the Victorian branch of the CAMP, seem to have devoted much energy to the question. But by 1973, forces within both the ALP and the Liberal Party, mostly the youth wings, were openly canvassing the possibility of reform and leaders were responding with cautious support. However, there was no law reform group as such until, in January 1976, a meeting of some 30 activists from six different groups met and founded the Homosexual Electoral Lobby (HEL), later the Homosexual Law Reform Coalition (HLRC), which undertook some lobbying, education work and the drafting of a proposed decriminalisation law (Willett 2000, pp. 148–56).

But just as the Duncan murder had transformed the debate in South Australia, so too in Victoria did police activities launch the state on to the road to reform. In November and December 1976, the phone services operated by Gay Liberation and Society Five received a flurry of calls from men who had

been arrested while doing the beat. The *Age* reported that police had launched a major entrapment exercise, opting to 'go gay to lure homosexuals'; observing gay men in the ti-tree bushes lining the beaches through binoculars, in order to learn the mannerisms, especially the 'particular walk', by which gay men identified each other (Rentsch and Carmen 1977). Politicians, community groups and gay organisations were outraged. Lawyers offered support.

In April 1977, Liberal MPs met to discuss the possibility of changing the laws, and seem to have agreed. The attorney general made it clear in meetings with HLRC members that there would be no equal age of consent and the laws against 'soliciting for homosexual purposes' would remain untouched. It was expected that the bill would be presented within the next three weeks. In fact, the government found itself distracted by an unrelated scandal and it became clear that there would be no reform before 1978. This delay provided the HLRC with a much-needed opportunity to build support for a better law. In September, a public meeting called at short notice attracted some 100 people and provided the spark that mobilised many into action.

It was a period of intense activity for the HLRC, which never numbered more than a dozen or so at its meetings, but which was nonetheless starting to have a major influence on the terms of the debate. Mostly, the work of the HLRC was sheer hard slog, the 'painstaking collection of evidence and details, and boring correspondence and conversation with decision-makers and those who influence them', as members of the group later put it (Gardiner and Talbot 1981). Members met frequently with Haddon Storey, the attorney general, to explore issues, answer questions, soothe fears. When, in mid 1977, Storey expressed doubts about whether the public would support law reform on the basis of equality, the group persuaded a polling company to conduct a survey to test the point. The strong support for an equal age of consent that was revealed was a major factor in shifting the terms of the discussion.

When the law was passed in late 1980, it embodied equality in the age of consent, and amendments to the soliciting laws – all introduced as a government bill, rather than as a Private Member's Bill, making Victoria the first state to take this route (Victoria 1980). Victoria's reform was widely spoken of at the time as the best in the English-speaking world.

New South Wales

In Victoria, the government had put law reform on to the agenda, but without the gay movement's participation the final product would have been very much less satisfactory. In New South Wales (NSW), on the other hand, it was the movement that made the running, leaving the ALP government scrambling to catch up (Willett 2000, pp. 156–65; McLachlan 1998).

The Gay Rights Lobby (GRL) was founded at a public meeting in Sydney in February 1981. It recognised the need for the 'juggling of different

tactics at different times' and included lobbying, a gay rights petition, media management for positive coverage, and education of both opinion-makers and the person in the street (Willett 2000, p. 158). Efforts were to be made to tap into grass-roots and clerical support within the Christian churches and from NSW gay organisations outside Sydney. Support from within the gay sub-culture and the rest of the gay movement was essential, and so, despite its name, the GRL engaged as much in campaigning and agitating within the gay scene as in behind-the-scenes lobbying.

Opportunities for campaigning around the law presented themselves very quickly. In March 1981, the government amended the state's rape laws. It was discovered that, while consenting homosexual acts would continue to attract a 14-year jail sentence, a new sex-neutral offence of 'sexual intercourse without consent' meant that homosexual *rape* would attract a penalty of only seven years! An attempt to use this anomaly as a reason to amend the laws on buggery was quickly quashed by the ALP's powerbrokers, but the issue resurfaced late in 1981 after the state election gave the ALP control of both houses of parliament. Over a four-month period there were no fewer than four attempts to amend the laws on homosexuality. All of them failed (Johnson 1981).

And then, over several months in 1983, the NSW police launched a series of raids on gay sex venues. Once again, as in South Australia and Victoria, police homophobia fed directly into arguments for law reform. In the earlier NSW debates, those opposed to reform had often argued that anti-gay laws were so rarely enforced that change was unnecessary. Here, in the recurring raids on the sex clubs and saunas, was clear evidence that this was not the case. But the most important impact was in prompting large numbers of previously apolitical gay men into action and in bringing them into contact with gay activists for the first time. Meetings of up to 1,000 people voted to condemn the government and the police. Hundreds marched in protest. Many of them continued their commitment by participating in the law reform campaign, and even those who did not at least had some idea now of what it was that activists were on about.

Immediately after the 1984 state election, which again returned an ALP government, the GRL wrote to all MPs, warning them that the issue of homosexual law reform was likely to arise and enclosing its two publications, *Homosexual Law Reform: Questions and Answers* (Johnston 1984) and *Homosexuality: Myths and Reality* (Simes and Johnston 1982), as well as a draft law reform bill. Shortly afterwards, a leaflet directed at the gay community on how to lobby local MPs was being circulated. The GRL was gearing up to relaunch the fight.

Suddenly, Premier Neville Wran announced that he intended to introduce a bill to decriminalise sexual acts between men aged 18 years or older. Wran's intervention virtually guaranteed the passage of the bill, few doubting that his credibility as party leader and Premier was on the line. But, perhaps more than

anything, the fact that the issue had dragged on for so long made it imperative that it be settled once and for all. Finally, after a last ditch effort to get the age of consent reduced to 16 failed, the bill passed remarkably easily through parliament (New South Wales 1984).

Northern Territory

Decriminalisation was also achieved in the Northern Territory in 1984. Geographically comparable in size to the six federal states, the Northern Territory has a different constitutional status like the previously discussed ACT and various island territories. The Territory is self-governing under federal legislation passed in 1978. Decriminalisation in the Northern Territory was enacted by the Liberal Country Party via government legislation. Parliament's structure in the Territory, with only one chamber known as the Legislative Council, made legislative change easier to achieve than in some of the states.

As the changes have been discussed elsewhere (Carbery 2010), they will not be discussed at length here, partly because the struggles involved were less protracted than elsewhere, and partly since they fall in the middle period of the overall decriminalisation struggle, so reveal little about the extremes of the spectrum of changing social attitudes. However the most significant point to note from the Northern Territory context is the use of government legislation, as in Victoria. This differed from previous use of Private Members' Bills in other states and meant less protracted and difficult debates. It is suggestive of the extent of changing social and political attitudes, illustrating that members of a conservative political party were able to confidently adopt a shared position on the issue. The case suggests the benefit which social movements gain when a governing party becomes clearly aligned to their cause, in a context where an executive has significant structural power relative to a legislature.

Queensland

By the late 1980s, there was an air of inevitability about homosexual law reform. Public opinion, which had been in advance of politicians on this question since the early 1970s, had firmed up. Actual change, of varying quality, had been implemented in a majority of states and territories without the sky falling in. Political parties showed that they were not as fearful of the issue as previously. The Liberals in Victoria and the Liberal Country Party in the Northern Territory had even introduced change as government policy.

The only state parliament which had never discussed homosexual law reform was Queensland's (Willett 2000, pp. 219–24; Carbery 2010). The National Party, which governed thanks to a distortion of the electoral system giving a disproportionately large number of seats to the rural areas of the state, had been left untouched by the liberalism of the 1960s and 1970s and there was no chance of decriminalisation being debated, much less of it being permitted

to pass. On the Labor side of politics, on the other hand, there was strong support. As early as 1981, the party had committed itself to decriminalisation and anti-discrimination laws. It also embraced equal rights for gay couples in areas such as tax, probate, property ownership and transfer, pensions and superannuation.

But the Queensland Association for Gay Law Reform (QAGLR), the first gay community-based law reform group, was not set up until 1988. And then it was in the small northern city of Cairns. The group was actively supported by the Queensland AIDS Council's regional office, which had already become the de facto voice of Queensland homosexuals, speaking out against police entrapment and various acts of discrimination. By March 1989, a branch was established in the state capital, Brisbane. Events were moving fast, and the group had plenty to do.

The National Party government was visibly fraying as evidence of corruption and mismanagement was revealed and, as a result, the whole political climate started to shift. On the one hand, the Nationals retreated to an ever-more strident right-wing populism, targeting gays in particular. On the other, it was increasingly likely that the ALP might actually win government in the 1989 state election and that reformers needed to move, even if rather cautiously. In November a 'gay summit' or round table was organised at Queensland University to which all the groups – political, social, religious, counselling, sporting – were invited, reflecting a 'growing recognition that the times make it imperative for the community to come together' (Galbraith 1989). These gatherings were to become regular events at which activists debated developments and decided on co-ordinated approaches to issues.

When Labor was in fact elected in the December 1989 election, it immediately launched an inquiry by the Parliamentary Criminal Justice Committee (CJC) into the issue of decriminalisation. Activists set out about mobilising their community and talking to the new government. The election-time round tables were continued and ministers were lobbied relentlessly. The new attorney general met with QAGLR representatives a mere two weeks after the election and there were some good signs. As a token of good faith, the government repealed the Nationals' 1985 law which had made it illegal to serve homosexuals in hotels (for the original Act see Queensland 1985).

When the CJC reported, it was unequivocal in its support for decriminalisation and for an equal age of consent of 16 (Criminal Justice Commission 1990). It urged, too, that offensive behaviour be defined in terms that applied equally to heterosexual and homosexual acts. Sexual offences, public decency and child protection laws should, it said, all be gender neutral. Widespread support was immediate. Peter Beattie, who had headed the CJC inquiry, spoke out strongly in favour of its recommendations, arguing that 'If we [the government] face up to the tough decisions and deal with them the way we should, that is openly and honestly, we will win the community's support

and respect' (Anon. 1990). He was joined by numerous public figures, who wrote to the government urging its acceptance. Among them were Tony Lee, who had delivered a paper on law reform to CAMP Queensland in 1970; John Gorton, who had moved the 1973 federal parliament motion; Don Dunstan, under whose government South Australia had led off on the whole issue in 1972 and 1975; and Elizabeth Reid, who had been a member of the ACT HLRS. It was as if every person who had ever touched or been touched by the issue in the 1960s and 1970s were rallying for one last push.

By the time the proposals came to Cabinet, there was solid support. A strange little amendment that made anal sex illegal for men and women under the age of 18 was tacked on, and a fairly offensive preamble was permitted, but the results were a foregone conclusion. On 29 November 1990, after a mere five hours of debate, the bill passed through the Legislative Assembly and was proclaimed two weeks later as the Criminal Code and Another Act Amendment Act 1990 (Queensland 1990).

Into the 1990s

Queensland, although a hard-fought thing, had operated with certain advantages. The single-chamber parliament meant that, once the government had made up its mind, there was no risk of amendment by rogue elements in the upper house. The fact that the ALP was in government after 32 years of opposition, imposed a real discipline on party members to demonstrate unity of purpose. The long-standing and intimate association of the far right and moral conservatives with the National Party denied them much influence with the new government. Gay activists, on the other hand, had close links to the ALP, developed over many years.

Western Australia and Tasmania, the last states to decriminalise, were less fortunate. Burdened with two-chamber parliaments and, further, by upper houses that were quite undemocratic in their electoral base, reformers also had to deal with a right-wing backlash that had sunk deep roots in society. In the mid to late 1970s, the Festival of Light (FOL, a movement of conservative Christians) had led anti-gay forces in Australia but, in the late 1980s and early 1990s, its place had been taken by a new grass-roots anti-gay movement; one which differed from the FOL in a number of ways. In the first place, it seems to have developed more or less spontaneously, whereas the FOL was the initiative of leading figures from the upper reaches of the church hierarchy and the professions. Secondly, although the key organisations of this new movement were churches, they were more often the fringe sects rather than the mainstream churches – the Presbyterians, Baptists and Pentecostals, rather than the Anglicans and Catholics. Finally, this new movement seems to have been based primarily in rural and provincial areas. This was especially true in Tasmania – it was in the northern and more rural parts of the state that

hostility to law reform was at its most intense. It is difficult not to see this mobilisation as a precursor of Hansonism, the right-wing populist movement focused around Pauline Hanson that convulsed Australian political life in the last few years of the 1990s. And it provided a pole of attraction for conservative politicians among the National Party and the Liberals, especially when they were freed from the responsibilities of government (as they were in both Western Australia and Tasmania from 1989).

And all this took place in the age of AIDS. In February 1989, the Australian Federation of AIDS Organisations, the peak AIDS organisation in Australia, published a report *AIDS Prevention and Law Reform* (Loff 1989), arguing that the illegality of homosexual acts was hindering the effort to reduce the spread of AIDS. There were obvious ways in which this was true. Men who had sex with men were less likely to report for testing and treatment, or to be honest in reporting on their behaviour, if there was any risk that they might be prosecuted for their admissions. But it was also argued that the law, by stigmatising homosexuality, contributed to low esteem among gay men, encouraging lack of self-respect and self-care and risky behaviour.

One further issue was important. Over the course of the 1980s, the gay rights agenda had widened considerably. One Western Australian member of parliament, who voted for law reform in 1977 and against it in 1984, argued that the issues of the late 1980s were broader than they had been in the past. In 1977, he said, it had been a matter of letting consenting adults do what they wished in private. By the mid to late 1980s, however, 'many more issues were involved, such as the legality of homosexual marriage, a homosexual's right to authorise surgery or medical treatment for his partner and their right to adopt children' (Anon. 1984). He was right in this. As long-time activist David Myers put it in 1984: 'When the religious fundamentalists claim that decriminalisation is the first step towards legitimising homosexuality as a valid lifestyle, they are quite correct. That is our goal' (Myers 1984). Life for politicians had got harder: the easy option of focusing upon the consenting adult in private was fading rapidly and the liberal tide was being challenged by noisy, well-organised minorities from the left and the right.

One other important difference between Queensland compared with Tasmania and Western Australia is that the latter states had long histories of failed law reform attempts, which had led many politicians into cemented oppositional positions. In Tasmania, the issue was floated by politicians in 1973, 1976 and 1977, without success. Western Australia's history was even more tangled, with efforts in 1973–4, 1977, 1983 and 1987.

This, then, was the environment within which Western Australia and Tasmania came to the law reform debate in the late 1980s. Both states experienced significant obstacles to reform – obstacles that were both parliamentary and social. But the ways in which activists chose to respond to these challenges produced remarkably different outcomes. In Tasmania,

although the campaign lasted for ten years, it culminated in total victory, to a considerable extent via a legal ruling which transformed the global human rights regime with respect to sexual orientation and would have continuing implications for states worldwide. The law reform package achieved in Tasmania met all the demands of the movement, laid the grounds for further gains and transformed Tasmanian politics and society in significant ways. In sharp contrast, Western Australia ended up with what may well have been the worst law reform legislation anywhere in the English speaking world.

Western Australia

In Western Australia, a revival of interest in law reform was sparked by formation of an AIDS and law reform task force in May 1988. This grouped several health professionals as well as community leaders, such as the Anglican archbishop, the Moderator of the Uniting Church and the president of the Australian Medical Association (AMA), around the strategy promulgated by AFAO earlier that year (Willett 2000; Carbery 2010). The Gay Law Reform Group of Western Australia (GLRG) was formed soon after, with a steering committee of prominent gay activists such as Graham Douglas, who had been involved in every law reform effort since 1973, and newcomers such as gay newspaper editor Gavin McGurin.

The state attorney general had already made it clear at a meeting with campaigners that the government would require the full support of the gay community before introducing any reform bill and GLRG set out to bring the community together by means of monthly public meetings. Within a short time of its formation, the group was claiming 150 paid-up members and was regularly attracting over 100 people to its public meetings.

The central question for the activists was the age of consent. Although ALP policy set this at 16 (a position re-endorsed by state conference as late at August 1989), the government had made it clear that it would consider nothing lower than 18 years. The movement had to decide whether to take it or leave it. The co-conveners of Breakaway, a gay youth group, spoke up early in an attempt to get GLRG to hold the line: 'As a community,' they said, 'we need to support all its members and this includes the younger members'. Any agreement to an age of consent of 18, would be 'discriminatory and unsupportive of our own' (Reid and Pallott 1980). The June monthly meeting was the scene of 'impassioned debate', with arguments about 'criminality, discrimination, ideology' raging around the two-year gap. The meeting decided that, although the preference was for an age of consent of 16, the campaign would not oppose any bill with one of 18.

The reform bill passed easily through the Assembly but, in November, Peter Foss, a Liberal member of the Legislative Council where the bill would succeed or fail on the conscience votes of Liberals and Nationals, announced

that he was prepared to vote for the bill only on certain conditions. These included an age of consent of 21 and provisions which would make it illegal, as newspaper reports at the time said, to 'promote or encourage homosexual behaviour', particularly in 'any primary or secondary educational institution' (*West Australian* 1989). The GLRG adapted to this surprisingly easily. Having given in on the age of consent of 16, it seemed to have little trouble accepting 21 (*West Australian* 1989). This position was endorsed by a meeting of some 300 people in late November. On 7 December, the bill as amended passed the Assembly (Western Australia 1990). After 25 years of trying, the Western Australian parliament had finally reformed its laws on homosexuality – badly. Laws which had rarely been enforced were struck down, it is true. But large numbers of young gay men were left with a criminalised status. It need not have been this way. As Tasmania was to show, a hard line on the part of gay rights' activists did not necessarily produce defeat.

Tasmania

In 1989 the National AIDS Conference was held in Hobart, and with it the final stage in the campaign for the decriminalisation of sexual acts between men was launched (Willett 2000; Carbery 2010; Morris 1995). The Australian Federation of AIDS Organisations had recently started to draw attention to the relationship between law reform and AIDS prevention, but it was the presence in Tasmania of 1,200 experienced political activists which provided the newly established Tasmanian Gay Law Reform Group (TGLRG) with a new determination to take its issue to the public.

The group set up a weekly stall at the Salamanca Market, a weekend craft market that had become a focus of Hobart's cultural and political life, alongside groups such as the Wilderness Society, the far-left youth group Resistance and other organisations. For a month or so things went smoothly as members collected signatures on their petition. And then, quite suddenly, the local council announced that the TGLRG's presence was offensive and that, if it persisted in turning up, its members would be arrested. By December 1989, 130 people had been carted away and charged. Other market stallholders were arrested for displaying the TGLRG's petition. Observers were arrested. Journalists were among those banned from the site. It was a media and political sensation. Protests and letters of support flooded in from around the world. Carloads of lesbians and gay men came from all over the state, joined by civil libertarians of all stripes. In other Australian cities, gays picketed Tasmanian Tourist Bureau offices. In the end the council caved in entirely, lifting its ban on 10 December.

The TGLRG was immeasurably strengthened over the weeks and months of the Salamanca campaign. Membership grew to 200, many of them politically experienced lesbian feminists whose interest in law reform might

never otherwise have been aroused. The greater involvement of women was reflected in the group changing its name to the Tasmanian Gay and Lesbian Rights Group. Activists acquired years of experience in weeks, thrashing out every possible tactical and strategic question at their Wednesday meetings. Civil libertarians got a crash course in homophobia as rubber-gloved police arrested and abused them.

At the same time, Tasmania experienced something never before seen in Australia – a large-scale, public, popular mobilisation of anti-gay feeling. In mid 1989, in the northern town of Ulverstone, some local councillors, debating a request from the AIDS Council for access to rooms, expressed disgust at the 'arrogant, flagrant types who flaunt their homosexuality with no shame' and declared that safe-sex education was about 'trying to recruit new people to replace the ones they [homosexuals] were losing through death from AIDS' (cited in Morris 1995, p. 32). As their stance was publicised, the councillors became the focal point for a wave of support. In June 1989 some 700 people packed into the Ulverstone community centre to hear speakers denounce the threat to the nation, to its children and families, to civilisation itself, posed by the spread of homosexuality. In Hobart, a week later, a similar crowd listened while the ALP-Greens government was denounced for its pro-gay policy. Around the issue of homosexuality, two movements with radically counterposed sets of demands had emerged.

At the parliamentary level, the half-hearted attempt at decriminalisation by the state ALP-Greens government, announced in 1989, failed in the upper house in December 1991 and the election of a Liberal government in February 1992 sealed the fate of law reform. At which point, the TGLRG embarked on a truly unique strategy – it decided to appeal to the United Nations.

On 25 December 1991, the federal government had ratified that part of the International Covenant on Civil and Political Rights (1976) which allowed an individual, whose civil rights had been infringed by a government, to appeal directly to the United Nations Human Rights Committee (HRC). On the day it came into effect, Nick Toonen, a founding member of the TGLRG, formally lodged a complaint. In 1994, the HRC declared that Tasmania's laws did indeed breach international standards on human rights; in particular, the laws offended against Toonen's right to privacy under Article 17 of the International Covenant (United Nations Human Rights Committee 1994; Henderson 2000). The ruling was globally groundbreaking for interpreting non-discrimination provisions related to 'sex', in Article 26 of the Covenant to encompass 'sexual orientation', a category which was thus introduced into the global human rights law regime associated with the United Nations. The ruling remains a crucial resource which can be used in other states, although it should be noted that the Covenant could only be invoked legally because it had been ratified by the federal government, in a manner which made this possible (Stychin 1998).

The Toonen decision opened the last stage of the long struggle for reform; one marked by a remarkable political mobilisation and polarisation. The appeal to the HRC had reignited anti-gay activism in Tasmania. New organisations were formed – HALO (Homophobic Activists Liberation Organisation) and TasAlert. The groups leafleted MPs and the public, and staged demos and public meetings. But gay people and their supporters were mobilising too. In May, members of the TGLRG confronted Hobart police station with statutory declarations confessing to having engaged in sodomy, daring the police to arrest them. On the mainland, meanwhile, there was a growing determination to do something. Traditional activities, such as picketing of the tourist bureau, were suddenly supplemented by a call for a boycott of Tasmanian products. It is not clear that the economic impact was significant, but as a way for people to express their support nationwide, the boycott was a master stroke.

In September 1994, the federal ALP government, relying upon its rarely-used constitutional power to legislate to meet its international obligations, passed the Human Rights (Sexual Conduct) Act 1994, to provide that consenting sexual conduct between persons over the age of 18 should not be subjected to any 'arbitrary interference' by any law (Australia, 1994). It was modest in the extreme, in fact echoing the 1972 South Australian reform, and it was clear that only a High Court ruling could explicitly apply it to the case of Tasmania. The TGLRG girded its loins for one last fight and appealed. By this time, even the most recalcitrant members of the Tasmanian parliament had had enough. In April 1997, the Liberal government presented a law reform bill. On the night of 1 May 1997, the bill passed (Tasmania 1997). Australia's 25–year struggle for decriminalisation was finally won.

It had been a long and occasionally hard-fought campaign. But, spread as it was over some 40 years (if we take Laurie Collinson's failure in 1958 as the starting point), it was a campaign shaped by evolving social forces – and had, in turn, shaped them. From the early days, when a new liberalism had supplanted a long dark age of conservative homophobia, progress had accelerated with the emergence of a gay and lesbian social movement, the likes of which had never been seen before. Understanding the success of this movement contains lessons that can illuminate processes of social and political change that have shaped the lives of gay people and straight, and the societies in which we live; and not just in Australia. It offers hope and perhaps some guidance for those in so many parts of the world still struggling for these most basic rights.

Bibliography

Albany Trust (n.d.) *Homosexuality: Some Questions and Answers* (London: Albany Trust).

Altman, D. (1971) *Homosexual: Oppression and Liberation* (London: Allen Lane).

Anon. (1965) *Viewpoints* [Newsletter of the NSW Humanist Society], May.

Anon. (1984) 'The Sex Bill – why it was beaten', *News,* 3 May.

Anon. (1990) 'CJC recommends equal age of consent', *Outrage*, Dec.

Blazey P. (1994) 'Big quakes, gay shakes', *OutRage*, Mar.

Canberra Times (1970) 'A case for change', editorial, 29 May.

Carbery, G. (2010) *Towards Homosexual Equality in Australian Criminal Law: A Brief History* (Parkville: Australian Lesbian and Gay Archives).

Cowan M. and T. Reeves (1998) 'The "Gay Rights" movement and the decriminalisation debate in South Australia', in R. Aldrich and G. Wotherspoon (eds.), *Gay and Lesbian Perspectives IV: Studies in Australian Culture* (Sydney: Departmen of Economic History and the Australian Centre for Gay and Lesbian Research), pp. 164–93.

Criminal Justice Commission (1990) *Reforms in Laws Relating to Homosexuality: An Information Paper* (Brisbane: Criminal Justice Commission).

Dunstan, D. (1981) *Felicia: The Political Memoirs of Don Dunstan* (South Melbourne: Macmillan).

French, R. (1986) *Gays Between the Broadsheets: Australian Media References to Homosexuality, 1948–1980* (Sydney: Gay History Project).

Galbraith, L. (1989) 'No land for queens', *Campaign*, Nov., pp. 32–3.

Gardiner, J. and W. Talbot (1981) [form letter], 12 Aug., Homosexual Law Reform Coalition Papers, Australian Lesbian and Gay Archives.

Committee on Homosexual Offences and Prostitution (1957) *Report of the Committee on Homosexual Offences and Prostitution* (London: HMSO).

Grieve, J. (1970) Letter to John Ware, 22 September, Homosexual Law Reform Society of the ACT Records, MS 8898, National Library of Australia.

— (1995) Interview by Graham Willett, 21 Sep.

Guy, L. (2002) *Worlds in Collision: The Gay Debate in New Zealand, 1960–1986* (Wellington: Victoria University Press).

Henderson, E.M. (2000) '"I'd rather be an outlaw": identity, activism, and decriminalisation in Tasmania', in C. Stychin and D. Herman (eds.), *Sexuality in the Legal Arena* (London: Continuum), pp. 35–50.

Higgins, P. (1996) *Heterosexual Dictatorship: Male Homosexuality in Postwar Britain* (London: Fourth Estate).

HLRS (1969) 'Homosexual offences: an ordinance to amend the Crimes Act, 1900 (NSW)', *HLRS Newsletter*, no. 2, 23 Oct.

Hodge, D. (2011) 'The okayness of gayness: Don Dunstan's record in homosexual law reform', in Y. Smaal and G. Willett (eds.), *Out Here: Gay and Lesbian Perspectives VI* (Melbourne: Monash University Publishing), pp. 36–55.

Horne D. (1980) *Time of Hope*: *Australia 1966–72* (Sydney: Angus & Robertson).

Hughes, T.E.F. (1970) 'Deviant behaviour of a criminal nature', paper presented to the Sixth National Conference of the Australian Council of Social Services, Canberra, 27 May. Copy in Homosexual Law Reform Society of the ACT Records, MS 8898, National Library of Australia.

Humanist Society of Victoria (1970) *The Homosexual and the Law: A Humanist View* (East Malvern, Vic.: Humanist Society of Victoria).

International Covenant on Civil and Political Rights (1976),available at www2.ohchr.org/english/law/ccpr.htm (accessed 11 Dec. 2012).

Johnston, C. (1981) 'Losing the battle', *klick!,* May, pp. 6, 18.

— (1984) *Homosexual Law Reform: Questions and Answers* (Darlinghurst, NSW: Gay Rights Lobby and Homosexual Law Reform Coalition NSW).

Johnson, C., S. Maddison and E. Partridge (2011) 'Australia: parties, federalism and rights agendas', in M. Tremblay, D. Paternotte and C. Johnson (eds.), *The Lesbian and Gay Movement and the State: Comparative Insights into a Transformed Relationship* (Farnham: Ashgate), pp. 27–42

Loff, B. (1989) *AIDS Prevention and the Law: A Discussion of the Legal Status of Prostitution and Homosexuality in Western Australia, Queensland and Tasmania* (Sydney: Australian Federation of AIDS Organisations).

MacCallum, M. (1970) 'No party line on morals, says Whitlam', *Australian*, 1 Sep.

Maddison, S. and E. Partridge (2007) *How Well Does Australian Democracy Serve Sexual and Gender Minorities?* Report No. 9 (Canberra: Australian National University).

McLachlan, M. (1998) 'Poofters and politicians: strange bedfellows?', Master of Public Policy thesis, University of New England.

McRae, H. (1978) 'Homosexuality and the Law: The Development of the Law Relating to Homosexuality in England and Australia', PhD thesis, Monash University.

Morris, M. (1995) *Pink Triangle: The Gay Law Reform Debate in Tasmania* (Sydney: UNSW Press).

Myers, D. (1984) President CAMP [WA], Letter to Members of Parliamentary Labor Party, 30 June [in possession of Graham Douglas].
Paternotte, D., M. Tremblay and C. Johnson (2011) 'Introduction', in M. Tremblay, D. Paternotte and C. Johnson (eds.), *The Lesbian and Gay Movement and the State: Comparative Insights into a Transformed Relationship* (Farnham: Ashgate), pp. 1–12.
Queensland Association for Healthy Communities (2008) *Supporting Transgender and Sistergirl Client*s (Brisbane: QAHC).
Reeves, T. (1994) 'The 1972 debate on male homosexuality in South Australia', in R. Aldrich (ed.), *Gay Perspectives II: More Essays in* Australian *Gay Culture* (Sydney: Department of Economic History and the Australian Centre for Gay and Lesbian Research), pp. 149–92.
Reid, M. and D. Pallott (1989) Letter to the editor, *Westside Observer,* June.
Rentsch, J. and G. Carmen (1977) 'Police go gay to lure homosexuals', *Age*, 12 Jan.
Simes, G. and C. Johnston (1982) *Homosexuality: Myths and Realities* (Darlinghurst, NSW: Gay Rights Lobby).
Stychin, C.F. (1998) 'Australia reimagined', in C. Stychin (ed.), *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights* (Philadelphia, PA: Temple University Press), pp. 145–93.
United Nations Human Rights Committee (1994) *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992.
Ware, J. and C. Poll (1970) Letter to Thomas Mautner, 8 Sep., HLRS Papers.
Watson, L. (1976a) 'Old ACT HLR saga', *Speaking Volumes*, July-Aug.
— (1976b) 'Federal poofter bashing resumes', *Nation Review*, 20–26 Feb.
West Australian (1989) 'Premier, MP at odds on gay bill', 24 Nov.
Willett, G. (1996) 'Mostly harmless: liberalism and homosexuality in Australia in the 1960s', in M. Crotty and D. Scobie (eds.), *Raiding Clio's Closet: Postgraduate Presentations in History* (Melbourne: University of Melbourne History Department), pp. 105–18.
— (2000) *Living Out Loud: A History of Gay and Lesbian Activism in Australia* (St Leonards: Allen and Unwin).
— (2011) '"We blew our trumpets and ...": the ACT Homosexual Law Reform Society', in Y. Smaal and G. Willett (eds.), *Out Here: Gay and Lesbian Perspectives VI* (Melbourne: Monash University Publishing), pp. 1–16.

Acts

Australia (1994) Human Rights (Sexual Conduct) Act.
Australian Capital Territory (1976) Law Reform (Sexual Behaviour) Ordinance.
New South Wales (1984) Crimes (Amendment) Act.
Queensland (1985) Liquor Act Amendment Act.
Queensland (1990) Criminal Code and Another Act Amendment Act.
South Australia (1975) Criminal Law (Sexual Offences) Act.
Tasmania (1997) Criminal Code Amendment Act.
Victoria (1980) Crimes (Sexual Offences) Act.
Western Australia (1990) Law Reform (Decriminalisation of Sodomy) Act.

8

A few respectable steps behind the world? Gay and lesbian rights in contemporary Singapore

Simon Obendorf

We will follow the world. A few respectable steps behind.
Lee Kuan Yew, Minister Mentor, Government of Singapore
24 April 2007[1]

Introduction

Singapore usually prefers to advertise the ways in which it leads, rather than follows the world. Political leaders of this tiny Southeast Asian city-state are usually quick to highlight the country's rapid economic growth, enviable living standards, social stability, huge foreign reserves and extensive external trade. Much is made of Singapore's accomplishments in globally competitive industries such as biotechnology, information and communication technology, education, aviation and financial services. The extent of these triumphalist nationalist narratives can be seen in the words of Singapore's former Permanent Representative to the United Nations, who stated in 2008 that 'Singapore is quite simply the most successful society in the history of humanity' (Mahbubani cited in Kampfner 2008). More succinctly, the official narrative of post-independence Singapore's social, economic and national development was encapsulated in the title of political patriarch Lee Kuan Yew's (2000) memoirs: *From Third World to First: The Singapore Story 1965–2000.*

At first glance, then, it appears contradictory for Lee (independent Singapore's first and longest-serving prime minster, and the preeminent figure in the People's Action Party (PAP) government that has ruled Singapore since its independence), to state that the country's government – when it comes to certain issues – is content for Singapore to lag 'a few respectable steps' behind developments elsewhere in the world. The specific issue to which Lee refers is

1 The interview from which this quote is drawn was reported by Reuters (2007) and Trevvy (Trevvy.com 2007), among others. A transcript of the relevant part of the interview is provided by Au (2007a).

the provision and protection of rights for homosexual citizens and residents of the city-state. Authorities in Singapore currently implement a raft of laws and regulations that serve to criminalise homosexual intercourse, censor queer cultural expression and foreclose opportunities for political reform (Youngblood 2007). Given Lee's words, the country's government appears to regard socio-legal reform to benefit Singaporean homosexuals as an outcome to be deferred, preferably into the indefinite future.

This chapter commences by examining the colonial origins and present-day scope of those legal and social structures that seek to marginalise queer Singaporean life, including the recently reaffirmed criminalisation of male homosexual sex within the Singapore Penal Code. It then contextualises the government's resistance to leading change in this area and identifies the sources of current pressures for reform. The government's hesitancy over the likelihood and timing of any potential liberalisation is revealed as all the more incongruous, given the existence of a large, confident and visible gay and lesbian community within contemporary Singapore (Tan and Lee 2007; Ng and Wee 2006; Lo and Huang 2004; Lim 2004). The chapter demonstrates how Singapore's enthusiastic embrace of global economic integration and its attempts to reshape itself as an ideal destination and competitive hub for transnational flows of commerce, finance, tourism, expatriate labour and knowledge-based creative industries has served to colour contemporary discourses of homosexual law reform and queer social visibility and acceptance. And it also points to how state managers have regarded many of the outcomes of such globalising processes as conflicting with approved narratives of postcolonial Singaporean nationalism and state sovereignty.

The argument is that Singaporean queers – and those working for socio-legal change for their benefit – must be aware of how debates on these topics are coded not just nationally, but with reference to broader transnational processes and meanings. The chapter examines how this process informs the government's seemingly contradictory approach of permitting certain aspects of queer social, cultural and sexual life to be expressed within Singapore, while at the same time continuing to deny concrete steps towards socio-legal reform or queer political organisation (Au 2007b). In the conclusion some predictions about the likelihood and extent of future legal and political reform are offered.

Regulating homosexuality in Singapore: colonial legacies, modern forms

In 1997, Laurence Leong described Singapore as the 'last frontier in the Asian region for positive gay and lesbian developments' (p. 142), citing colonially-derived anti-sodomy laws, coercive governmental policies, police targeting, a lack of rights protections and biased media reporting as ingredients ensuring the ongoing relegation of homosexual Singaporeans to the fringes of national

life. A decade after Leong's words were published, and following extensive debates in the country's Parliament, the Singapore government chose to retain a colonial-era legal prohibition on 'gross indecency' between men as a symbolic statement of Singapore society's 'social norms and attitudes' (Lee 2007).

To understand this act of legal non-reform, it is necessary to first examine the colonial origins of Singapore's legislative proscriptions of homosexuality and examine the ways in which these laws are understood – by government and society alike – within post-independence Singapore. British colonial administrators' concern with controlling homosexuality was founded on widespread perceptions that homosexuality was prevalent in the tropical territories and societies they had conquered, and that it posed a risk to the social and moral order of both the colonised society and the male-dominated community of European soldiers and bureaucrats that administered it (Aldrich 2003). Thomas Babington Macaulay's Indian Penal Code, drafted in 1837, represented an early attempt to describe an appropriate framework of criminal and moral regulation within and for a British imperial possession (Wintemute 2011). Macaulay's Code included the now infamous Section 377 outlawing 'carnal intercourse against the order of nature'. This provision served to outlaw penetrative homosexual sex between men and to criminalise many other categories of sexual expression. This legal codification of the Anglo-Protestant morality of the time (L.J.K.S. Chua 2003, p. 214) was justified on the grounds of its contribution to the maintenance of good social order and a paternalistic concern for preventing 'injury … to the morals of the community' (Macaulay 1837, pp. 3990–1).

Section 377 became law in Singapore in 1871, when the Legislative Council of the Straits Settlements enacted a version of Macaulay's Code (Sanders 2009). Since the earliest days of British colonialism in Southeast Asia, the British had evinced concerns about what they perceived as a widespread acceptance of male homosexuality and effeminacy within the Straits. These misinterpretations (many of which overlooked the existing disapprobation of homosexuality within Malay Muslim and Chinese societies) formed a long-running subtext for relations between the British colonisers and local residents (Obendorf 2006b, pp. 180–3). Phillip Holden (2000) has written of how colonial governance in Singapore and the Straits Settlements sought to impose and maintain appropriate forms of sexual behaviour and social and personal morality. He explains how the British colonial project in the Straits was concerned with managing perceived 'disruptive' social forces (including homosexuality) within colonised populations and with constructing self-regulating forms of colonial subjectivity (Holden 2000, p. 68).

In 1885, the Criminal Law Amendment Act extended the British state's ability to regulate male homosexual sex by introducing the crime of gross indecency between men to British law (Smith 1976). This provision would make its way into Singapore law in 1938, when the colonial legislature voted

to insert the British amendment as Section 377A of the Singapore Penal Code (L.J.K.S. Chua 2003, pp. 216–17). Despite concerns over the wide-ranging and vaguely defined sexual acts the section sought to punish (and the fact that it had been used by criminals in Britain to extort payments from individuals), the colonial authorities in Singapore, convinced of a need to define and enforce moral norms, pressed on with what they saw as a desirable strengthening of the law (Human Rights Watch 2008, p. 20; Porter and Weeks 1991, p. 1).

Both of these legal provisions survived Singapore's complicated journey to postcolonial independence and statehood. This process involved the British loss of Singapore and its Japanese occupation during the World War II (1942–5); the resumption of British rule (1945–55); the grant of partial (1955–9) and then full (1959–63) internal self-governance by the British authorities; Singapore's brief membership of the Federation of Malaysia (1963–5) and finally its traumatic expulsion from the Federation and emergence as the sovereign Republic of Singapore on 9 August 1965. Singapore's leadership did not see the independence that had been thrust upon the nation as a cause for celebration (Lau 2000). Post-independence leaders found themselves faced with the responsibility of ensuring the future viability of Singapore as a city-state, occupying a tiny insular territory and without a national hinterland (Low 2002). Concerns grew over how to defend the sovereignty of a small, resource–poor and predominantly Chinese island nation surrounded by larger and more powerful Muslim states (Leifer 2000; Singh 1988). Such anxieties were given additional impetus by British Prime Minister Harold Wilson's 1968 announcement that the large British military base in Singapore was to close as part of the British policy of military withdrawal east of Suez – an economic and strategic blow to the fledgling nation's security (Pham 2010). Since this time, overcoming the nation's perceived existential vulnerabilities has been seen as the overriding challenge for independent Singapore, pursued through the nation's international relations and in its domestic policies.

It is in the light of this historical experience that evaluation of Singapore's post-independence history of regulating homosexuality should begin. Perhaps even more than has been the case in other Commonwealth states, Singaporean policy makers have prioritised the maintenance of domestic political and social stability as a necessary precondition for safeguarding Singapore's independence and ensuring national economic growth. Scholars have pointed to the emergence of a 'Singapore Model' of social and political regulation, in which national economic success and increased levels of individual wealth are presented to the citizenry – and explained in transnational forums – as being the result of efficient authoritarian modes of governance, high levels of official intervention into everyday life, and the careful delineation and protection of forms of communitarian social order. Under such scenarios, potential social or political liberalisation, assertive individualist rights claims and abrupt changes in social and political mores are presented as threatening to the very security

and survival of the nation, as well as to the population's continued enjoyment of the fruits of economic growth (Trocki 2006; Zolo 2001; Chua 1995).

This environment shapes Singaporean understandings of human rights. Singapore has ratified few of the major international human rights instruments, and has so far ruled out accession to the International Covenant on Civil and Political Rights. The government's privileging of concerns over security, economic efficiency and social stability underpins restrictions on freedom of speech and of the press and informs widespread censorship of content deemed by the authorities to be politically, racially or sexually sensitive (Rodan 2009). The criminal law, including provisions for mandatory capital and corporal punishment for certain offences, has been described by the country's Chief Justice as reflecting an 'efficiency model' of crime control that 'reflects conservative values and gives priority to the repression of crime as order is necessary' (Chan 2009, p. 33). Concerns over terrorism and state security are used to justify the ongoing existence of the indefinite 'detention without trial' provisions of the country's Internal Security Act. Defamation lawsuits brought by government figures have been argued to represent a strategy for deliberately silencing political opponents through punitive damages settlements and the barring of bankrupts from elected office (Lydgate 2003). Elsewhere, scholars have argued that the government's attempts to impose order and compel obedience have led to self-censorship on the part of citizens and the local press, and a diminished likelihood of civil society organising in the cause of social change (Gomez 2000; Khong 1995).

Such communitarian understandings of rights, prioritising economic and social rights (most obviously, the right to development) over civil and political rights, permeate government policies and work to shape public opinion regarding rights protections and provision (Thio 2009). They also help explain the decision of the Singaporean authorities to both defend and preserve the colonial prohibitions on homosexual sex. Michael Kirby has reasoned that to retain such colonially-derived laws is due in part to the Singaporean leadership positively regarding the contribution they – and the inherited legal framework of which they are a part – make to maintaining and defining certain kinds of social order (S. Tan 2011a; Vijayan 2011). This vision of social order takes the nuclear heterosexual family as its keystone. Addressing Parliament in 2007 to announce Singapore's decision to retain Section 377A as part of the Penal Code, Prime Minister Lee Hsien Loon stated that:

> Singapore is basically a conservative society. The family is the basic building block of our society. It has been so and, by policy, we have reinforced this and we want to keep it so. And by 'family' in Singapore, we mean one man one woman, marrying, having children and bringing up children within that framework of a stable family unit. (Lee 2007)

Invoking the centrality of the nuclear heterosexual family to Singaporean society forms a key part of government attempts to define and promote those

forms of citizenship and sexual subjectivity that it regards as most able to effectively contribute to national security, stability and survival (Tremewan 1994). Such thinking lies behind the many policies that seek to regulate the domestic sphere and to privilege procreative heterosexuality and the founding of a nuclear family unit over other forms of sexual subjectivity (Lyons 2004; Wong and Yeoh 2003). Queer identities – due to their largely non-procreative and non-normative nature – have come to be understood by post-colonial state managers as threatening national survival and viability (Leong 1995, p. 18; Alexander 1994, p. 6). The existence of such fears can be detected in the Singapore government's response to the issue of population growth – specifically the decline in the numbers of babies born to Singaporean families. Deploying the language of national crisis (Ortmann 2003; Heng and Devan 1992, pp. 343–4), any slump in the national birth rate is communicated to the Singaporean citizenry as menacing the very survival prospects of the country itself. The government has mounted a clear campaign that seeks to link declining birth rates to citizen-families with a future dilution of Singapore's national consciousness, a diminishment in the size and quality of the national work force, and as reducing the number of soldiers available for recruitment or conscription into the military and civil defence forces (Boey 2003; Goh 2000). Heterosexual couples are thus encouraged to assist the state in meeting such challenges through child rearing and to support policies privileging reproductive heterosexualities.

Heng and Devan (1992) have argued that such processes of compulsorising heterosexuality contribute to broader attempts at safeguarding national identity and security. They point to how the government seeks to guarantee the transmission of state-sanctioned gender and sexual roles, as well as cultural, national and moral values from citizen-mothers to children. It is possible to detect how this fusing together of issues of military and economic competitiveness, nationalist identity and cohesiveness, and reproductive heterosexuality have worked to negatively influence broader public debates over the social belonging and civil and political rights of homosexual Singaporeans. Discussions of homosexuality within the Singaporean media regularly feature accounts that position homosexuality, and greater official and legal tolerance of homosexuals, as potentially damaging to state security and social stability and as threatening to national identity, competitiveness and cohesion (Goh 2008; Leong 2005). The centrality that existing visions of social order (especially gender order) occupy in Singaporean culture also helps to explain the comparatively more progressive stance Singapore takes towards transsexual individuals. Sex-reassignment surgery is legal, post-operative transsexual people are able to change their legal gender on identity documents (but not birth certificates) and transsexuals are able to marry members of the opposite gender to the one they have reassigned to. Transsexuals who have transited permanently (via gender reassignment surgery) to their gender of choice, and thus who do not confound mainstream

expectations regarding appropriate gender roles and heterosexual identity, are given far greater legal recognition by the state than are gays, lesbians or those wishing to claim a visibly transgendered or genderqueered identity (Lo and Lee 2003; Lo 2003).

Singapore's international relations, most obviously its international political and economic strategies and its diplomatic relations with Western powers, also impact upon queer rights and social visibility. Berry (1994) was among the first to demonstrate how the Singapore government's attempts to distinguish itself from (and position itself as superior to) Western cultures and societies was at least in part informed by a strident assertion — to both domestic and international audiences — of Singapore's different approach to the regulation of homosexuality. He writes of the 'othering of homosexuality in the production of national identity', highlighting how postcolonial states such as Singapore have discursively deployed homosexuality as a boundary marker of identifiable difference between the non-West and the West (1994, p. 76). In the years since independence, the Singapore government has emerged as an outspoken critic of certain aspects of transnational liberal politics – most obviously internationally circulating discourses of human rights (including queer rights) – that it sees as potentially damaging to Singapore's social stability, cultural and political circumstances and economic growth potential. In these areas it has pursued a strong policy of differentiating Singapore from the institutional, cultural and social politics of the Western world (Thio 2006). Under such narratives, a communitarian, economically successful and cohesive postcolonial Singaporean nation is defined against a West marked by individualism, economic stagnation, social conflict and widespread immorality (Offord 1999; Berry 1994). Prime Minister Lee relied on such logic when he spoke on Singapore's decision to retain Section 377A:

> We were right to uphold the family unit when western countries went for experimental lifestyles in the 1960s – the hippies, free love, all the rage, we tried to keep it out … But I am glad we did that, because today if you look at Western Europe, the marriage [*sic*] as an institution is dead. Families have broken down, the majority of children are born out of wedlock and live in families where the father and the mother are not the husband and wife living together and bringing them up. And we have kept the way we are. (Lee 2007)

In an extraordinary speech during the same debates, Professor Thio Li-ann, a professor of law at the National University of Singapore and then a Nominated Member of Parliament, likened homosexual anal intercourse to 'shoving a straw up your nose to drink', urged Singaporeans not to 'ape the sexual libertine ethos of the wild wild West', and proclaimed that Singapore had 'no need of foreign or neo-colonial moral imperialism in matters of fundamental morality' (Thio 2007). In a less strident vein, then-Home Affairs minister Wong Kan Seng recently warned queer Singaporeans not to 'import

into Singapore the culture wars between the extreme liberals and conservatives that are going on in the United States'(2009).

The depictions of queer rights claims as being intrinsically Western in nature help reinforce official and popular understandings of queer identities themselves as being foreign in essence. Homosexual Singaporeans have been marked in popular discourses as of compromised national belonging, threatening to the order of the polity, and jeopardising their fellow citizens' continued enjoyment of the economic wealth and sovereign security provided by an economically successful, if illiberal, post-colonial state (C.K.K. Tan 2011; Obendorf 2006b, p. 190). A key challenge for Singaporean queer activists, therefore, is in articulating and defending a sense of belonging within contemporary Singaporean imaginings of nationalism and citizenship. The government has been quick to neutralise processes that it believes to represent foreign interference in domestic Singaporean politics. This is a tendency of which local Singaporean activists are critically aware. As in many other locations around the Commonwealth, assertive foreign-backed rights campaigns or public appeals to international rights standards could well prove counterproductive for Singapore queers and hinder the emergence of local activist politics (Obendorf 1998–9).

Queer Singaporeans are not just confronted with the state's impressive panoply of regulatory and policing powers, but also with the influence of Singaporean social opinion. As then-Prime Minister Goh Chok Tong averred in 2003, 'it's more than just the criminal code. It's actually the values of the people' (Goh 2003). Homosexuality is subject to religious proscriptions and regulation under the tenets of Islam, the faith of the Singaporean Malay-Muslim community (Norhazlina bte Md Yusop 2005) and open expressions of homosexuality are discouraged within the majority Chinese culture, in which heteropatriarchal obligations and familial responsibilities play a central role. It is important not to essentialise Singapore's ethnic community groups as necessarily antipathetic to gay interests, and to retain a key awareness of the government's ability to lead and shape public values and opinion on contentious issues (Chan 2008, pp. 308–10; Wee 2007). Nonetheless, a 2007 survey of Singaporean public opinion found that the majority (68.6 per cent) of Singaporeans held negative views of lesbians and gay men, and were uncomfortable with media portrayals of homosexuality (especially depictions of homosexuality within Asian societies) (Detenber et al. 2007). Importantly, levels of intolerance towards homosexuals, and their portrayal within the media, were found to be lower among more educated respondents and higher among older and more religious respondents.

The issue of religion is important. Since colonial times, Christianity has gained a powerful influence over Singapore's religious and cultural landscape (especially among the majority Chinese population), helping to shape social responses to the issue of homosexuality (Chan 2008, p. 309). Terence Chong

has argued that the government's need to appear secular and non-discriminatory has led to the emergence of a vocal, assertive, Christian movement mobilising around 'hot-button' issues such as homosexuality in the interests of defining a moral vision for the nation (Chan 2008).

Such politics are most clearly visible in the attempt, made in March 2009 by a group of Anglican Pentecostal Christians (led by the former Dean of Law at the National University of Singapore, Dr Thio Su Mien), to gain control of Singapore's most prominent women's rights advocacy group, the Association of Women for Action and Research (AWARE). At issue was AWARE's syllabus for sexual education, which it delivered in secondary schools. Dr Thio, presenting herself as a 'feminist mentor' and concerned citizen, spearheaded a group that took exception to AWARE's syllabus on the basis that it presented homosexuality, including lesbianism, in a non-judgemental rather than explicitly condemnatory fashion. A large group of Christians, concerned about AWARE's supposed promotion of homosexuality, strategically joined the organisation just prior to its Annual General Meeting. As new members, they then proceeded to vote their fellows to the majority of positions on the executive committee. Analysts of this event have suggested that those who had taken over the committee publicly promoted a series of dubious claims about homosexuality, including that it was incompatible with communitarian family values; that an organised homosexual agenda existed; and that positive or neutral mentions of homosexuality within school education would influence students to become homosexuals and to 'experiment' with homosexuality (Chua et al. 2011, p. 83). Public debate over this event, both in the press and online, turned on issues such as the appropriateness of including materials on homosexuality in schools' education programmes, the place of homosexuals within society, and the role that Christian organisations should play within broader Singaporean social debates. Matters culminated in a seven-hour extraordinary general meeting in May 2009 at which supporters of the previous committee – including large parts of Singapore's gay and lesbian community – turned out to pass an overwhelming motion of no-confidence in the new executive, who stepped down (T. Chong 2011).

The AWARE controversy can be read in a number of ways. The successful campaign, which unseated AWARE's existing committee, demonstrates both the organisation of the conservative Christian lobby and their determination to ensure homosexual issues remain marginalised and negatively characterised within mainstream debates over Singaporean public morality. Yet from a different stance, the victory of those who managed to unseat the new executive committee and retake the NGO represents a process whereby a liberal powerbase within Singapore society has been rendered visible and been able to achieve a degree of political success (Chua 2011). The AWARE saga shed light on the competing demands of sexual conservatism and political liberalism within Singapore public affairs, with homosexuality the rallying issue for each

side of the debate. The significance of these events for homosexual rights is more equivocal. While the saga did serve to spark public debate over issues of sexual education and gay and lesbian citizenship, the events provoked a government response that included a strong assertion of the government's belief that religion should remain separate from political debate and an unambiguous restatement of its policy of not permitting any promotion of homosexuality within Singapore schools. The government also halted the involvement of all external providers in its sexuality education programmes pending the introduction of new vetting procedures. The reappointed AWARE executive agreed that it would not seek to participate in future schools' sexual education programmes (Chua et al. 2011; Tan 2009c)

In Singapore today, then, a comprehensive range of legal strictures and forms of social regulation attempt to delimit the possibilities of homosexual life and queer social expression. While the state did abolish Section 377 of the Penal Code in 2007 (partly due to the concerns that its lack of specificity meant that it also outlawed certain forms of *heterosexual* sexual intercourse), a widespread public and parliamentary debate culminated in the government's decision to preserve section 377A, specifically due to its perceived ability to express government-led concerns over the inappropriateness of homosexuality within Singapore society (Lee 2008; Sanders 2009). Other legal provisions, such as laws dealing with public order, nuisance, outrage of modesty and obscene acts, also have the potential to punish homosexual sex and limit queer social visibility (Leong 2008). Significantly, it has been argued that many such legal restrictions apply equally to male and female homosexuals (Ng 2003, p. 17).

Many other regulations seek to render homosexuality marginal, if not invisible, within Singaporean society. Free-to-air television broadcasts in the city-state are not permitted to 'in any way promote, justify or glamorise' male homosexual, lesbian, bisexual or transgender lives or issues and must 'bear in mind the family as the basic unit of society in Singapore' (Media Development Authority 2004, 5.1, 5.2). Similarly, cable television operators are warned that the promotion of male homosexuality, lesbianism, bisexuality and transgenderism is not permitted and, where these issues are explored in any significant depth, a content rating limiting viewership to those 18 years and older should be applied (Media Development Authority 2010, 4.1, 4.2). Censorship of television programmes depicting gay and lesbian content is commonplace (People Like Us 2008). Media operators have been fined for not complying with official programme codes and broadcasting gay and lesbian content. In one recent case, a fine of $SG15,000 was levied on a TV station which broadcast an imported programme featuring a same-sex couple with an adopted infant (Media Development Authority 2008).

All films must be submitted to the Board of Film Censors for classification and censorship prior to being screened, with issues of morality and politics of

key concern for government censors. Where films with homosexual content are passed for screening (generally after cuts have been made), they are usually limited to viewers over the age of 21 and only permitted to be screened in downtown cinemas, away from the suburban heartlands. Similarly, the scripts of all theatrical performances must be submitted to the Media Development Authority for approval prior to their performance. One theatre company has claimed that its government funding was cut as a consequence of it having staged plays tackling political and sexual issues (Chia 2010). While internet access is largely unrestricted, authorities have in the past blocked access to gay websites (Chua 2005).

Many of Singapore's myriad of micromanagerial social policies impact sexual minorities in ways quite at odds with their effect on heterosexual citizens. Heterosexist policies limit eligibility for the subsidised public housing flats, in which approximately 85 per cent of the population resides, thereby denying homosexual men and women private non-commercial intimate and domestic space (Lyons 2004; Oswin 2010). The Singaporean education system renders queer issues and individuals largely invisible (Lim 2004, pp. 1773–5; Tan 2007) and openly homosexual servicemen are punitively regulated during their compulsory two-year stint in the military or civil defence forces (Lim 2002; Obendorf 2006a, pp. 41–66).

Significantly, the government seems to have taken a special interest in hindering the formation and emergence of organised gay and lesbian politics and queer civil society groups. It has twice blocked the formal registration, as a society of gay and lesbian advocacy group, People Like Us (in 1997 and in 2004), thereby denying the group the official recognition required in order to commence fundraising activities in Singapore (Chan 2008, p. 310). As the Home Affairs minister expressed it in the aftermath of the AWARE saga in 2009: 'The way for homosexuals to have space in our society is to accept the informal limits which reflect the point of balance that our society can accept, and not to assert themselves stridently as gay groups do in the west' (Wong 2009).

Gay and lesbian Singapore: between the nation and the world

In the light of the preceding survey of those social and governmental frameworks that seek to control the expression of queer culture, lifestyles and practices one could be forgiven for thinking that affairs for Singaporean queers are bleak indeed. Yet, without in any way downplaying the seriousness or extent of the government's interventions (actual and potential) into the possibilities and practise of Singaporean homosexual life, it is important to acknowledge that queer Singaporean lives, cultures, politics and passions *have* been able to find spaces and opportunities for expression.

As Singapore has reshaped itself as a global city, a key nodal point in processes of contemporary globalisation, gay and lesbian issues and communities have assumed a more prominent position within both Singaporean everyday life and the national socio-political consciousness. An early catalyst for such processes, as in many other Commonwealth nations, was the Human Immunodeficiency Virus (HIV) pandemic. Leong (1995) has argued that much of the early social and political development of Singaporean queer communities proceeded under the aegis of civil society attempts to manage HIV and Acquired Immune Deficiency Syndrome (AIDS). Working within transnational and national HIV prevention efforts, provided access to resources and funding in ways that circumvented governmental and societal opposition to homosexuals and homosexuality. However, this has not been without risks, with some scholars arguing that activists now need to struggle against the framing of HIV as a homosexual disease (Tan 2003, pp. 412, 416). Speaking in 2004, then Health Minister Dr Balaji Sadasivan characterised large gay and lesbian dance parties as 'seeding the infection in the local community', due to them allowing 'gays from high prevalence societies to fraternise with local gay men' (Tan 2005). The parties were subsequently banned, with authorities deeming them contrary to public interest.

Another key facilitator of gay and lesbian community consciousness, information sharing, social organisation and political awareness has been Singapore's enthusiastic adoption of modern information and communication technologies such as private computer ownership, mobile telecommunications and broadband internet access. Currently, over 80 per cent of Singaporean households have high-speed broadband internet access, with well over half of these possessing two or more computers. There is nearly 100 per cent individual internet usage among those under the age of 34 years (Infocomm Development Authority 2011a). Mobile phone penetration rates sit at around 145 per cent (Infocomm Development Authority 2011b). Ng (1999) has argued that the widespread nature of online communications services, such as chat rooms and websites, played a key role in fostering an early sense of gay and lesbian community, allowing (especially younger and middle-aged) homosexual Singaporeans to meet, organise, share information and arrange romantic or erotic encounters. He also writes of how online interactions helped reduce much of the social isolation experienced by Singaporean homosexuals, revealing to them some of the scope of the Singaporean homosexual community and providing them with tools of access and participation. The internet has also emerged as a key player in efforts to contain HIV and AIDS, with many online programmes and services targeting Singaporean sexual minorities (Yeo 2009). In more recent years, the ubiquity within Singapore of internet-enabled mobile telephones, with global positioning, social networking, blogging, video-calling and geotagging capabilities, has provided new ways for Singaporean gays and lesbians to meet, communicate, and build social and political awareness.

Online portals such as Trevvy (Trevvy.com 2011) and Fridae (Atkins 2005; Fridae 2011) explicitly cater to Singaporean gays and lesbians, offering dating profiles, film reviews, chat rooms, current affairs reporting and lifestyle advice. Both see themselves as playing a key role in promoting gay and lesbian interests and facilitating community development, with slogans such as 'building our community' (Trevvy) and 'empowering gay Asia' (Fridae). In the light of the legal restrictions preventing the formation, fundraising and operation of gay and lesbian groups and societies, computer-mediated communication and information dissemination – provided largely through servers and portals located outside of Singapore – is a key tool of gay and lesbian activism, debate and community organising (J. Chong 2011; George 2006). Local organisations, such as the equality advocacy group People Like Us, the queer women's group Sayoni, transgender group SgButterfly and community counselling service Oogachaga blend online activity and outreach with their activist projects beyond the internet.

Yet it would be wrong to characterise Singaporean gay and lesbian communities as being predominantly mediated through information and communications technologies, or finding their expression only within the medicalised discourses of public or sexual health. There is an emerging body of literary work – both prose and poetry – that documents the varied experiences of gay, lesbian and queer life in Singapore, available in bookshops across the island (for an overview, see Ng et al. 2010). Gay and lesbian issues have been explored extensively and sympathetically in the Singapore theatre, including on the stages of popular national arts venues (Lek and Obendorf 2004; Lim 2005; Peterson 2001). Gay and lesbian festivals, such as the annual IndigNation event, are an established part of Singapore's cultural calendar (IndigNation 2011) and a lesbian, gay, bisexual and transgender community centre hosts both monthly events and a library of queer resources (Pelangi Pride Centre 2011). A range of discotheques, bars and nightclubs provide gay and lesbian social space and boutiques, shops and professional services cater for gay and lesbian consumers. Seemingly flying in the face of legal prohibitions, sex-on–premises venues, designed to facilitate male homosexual encounters, have also become a feature (if a discreet one) of Singapore's urban environment. Even the government-linked English language broadsheet, the *Straits Times,* has conceded the economic benefit of queer tourism and local patterns of queer consumption (Li 2003). The extent to which the gay and lesbian community is now a visible and open part of contemporary Singaporean society was demonstrated in mid 2011 when over 10,000 people attended the third yearly 'Pink Dot' event in a central business district public park, gathering to raise awareness of the basic human need for love, regardless of sexual orientation (pinkdot.sg 2011).

How, then, might we explain the apparent disjuncture between governmental efforts at suppressing homosexuality and the existence of a vibrant, assertive

and sophisticated community of gay and lesbian Singaporeans? Despite the existence of certain forms of social antipathy towards gays and lesbians, strong regimes of internal control and policing, combined with a communitarian social order, help to ensure that levels of violent crime – whether targeted at homosexuals or more broadly – are among the lowest in the Commonwealth. While police entrapment and prosecutions have taken place in the recent past (Leong 1997, pp. 128–33), in contemporary Singapore arrests under Section 377A are rare. Criminal charges are usually pursued under alternative sections of the Penal Code, targeting behaviour such as sexual activity or obscenity in public, sex with juveniles or sexual assaults (Sanders 2009). There is some evidence that police have used Section 377A to intimidate and threaten queer Singaporeans and arrests for its breach have been made. At trial, however, prosecutors' strategy seems to be (perhaps with an awareness of the local attention and international condemnation Section 377A prosecutions might invoke) to amend the charges so as to prosecute accused persons for alternative crimes (Ng 2011).

Douglas Sanders has thus described Singapore as representing an 'example of a jurisdiction with the trinity of (a) criminal prohibition, (b) social disapproval but (c) little actual police enforcement of the law' (Sanders 2009, p. 43). He refers to the fact that while the government has made a point of retaining anti-homosexual legal provisions such as Section 377A, it has also demonstrated a tacit acceptance of certain homosexual behaviours, lifestyles and practices. The government's unique approach – blending legal prohibition with a degree of practical tolerance – can be best illustrated by the 2007 debates over the retention of Section 377A. While mounting a strong defence of the necessity of such laws to signal the durability of mainstream morality, the government simultaneously offered homosexual Singaporeans a promise that the criminal law would *not* be enforced to punish consenting private sexual acts between adults or to restrict existing spaces of queer expression. Speaking in Parliament to defend this 'not legally neat and tidy' approach, Prime Minister Lee stated:

> De facto, gays have a lot of space in Singapore. Gay groups hold public discussions. They publish websites … There are films and plays on gay themes … There are gay bars and clubs. They exist. We know where they are … We do not harass gays … And we do not proactively enforce section 377A on them (Lee 2007).

This paradoxical situation is paradigmatic of contemporary queer Singaporean life. Audrey Yue has described the Singapore government's distinctive approach to the regulation of homosexuality as an example of what she calls 'illiberal pragmatism' (2006; 2007, p. 24). The benefits flowing from the limited official tolerance on offer are real and tangible, including governmental acceptance of queer venues, increased acceptance of gays and lesbians in the workforce, and a reduction in police harassment. Yet they are not without limits. Prime Minister Lee, speaking on precisely this point, cited with approval the fact that

a gay teacher at an elite secondary school had, after a meeting with the school principal, chosen to withdraw a public blog entry he had made in which he disclosed his sexual orientation, but had not been fired from his position (the original blog entry is archived at Fong 2007). Lee asserted that this showed 'there is space, and there are limits' (Lee 2007). Such examples bear out Yue's analysis (2007), which posits that queer Singaporeans, in the knowledge of the state's power to intervene in the most intimate spaces of everyday life, are invited to accept a limited official tolerance of certain queer spaces, lifestyles and practices in return for their acceptance of the legal status quo and ongoing socio-political quiescence.

Yue goes on to explore how the spaces and opportunities created under these approaches have, together with Singapore's rapid economic growth and urban and cultural reforms, shaped the emergence and nature of local Singaporean queer cultures and creative practices (Yue 2007, p. 158). Following her analysis, one can see how many of the possibilities for gay and lesbian self-expression rely upon local queers' skills in negotiating repressive socio-legal codes and their ability to maximise the benefits deriving from government attempts to position the country as a creative, knowledge-based economy, as a city-space marked by sophisticated patterns of cosmopolitan consumption, and as a country able to maximise the benefits deriving from engagement with contemporary global flows of knowledge, labour, culture and commerce.

This latter point is important. Due to its small size and strategic location, Singapore has always seen itself both as needing to embrace an open, outward-looking, and mercantilist approach to the world and as ideally placed to do so (Chua 1998, p. 982). This thinking has inspired successive leaders' attempts to reshape and define the country as a world city: a leading global hub for transnational trade and commerce, with an urban environment designed to attract business, investment, tourism and knowledge workers (C.N. Tan 2009; Acharya 2008, pp. 126–34; Olds and Yeung 2004).

It is this process that Yue identifies as providing the context in which Singaporean queer cultures emerge. In the last decade, the government has launched a range of programmes designed to ensure that Singapore, and the lifestyle opportunities it provides, are thought of positively both by Singaporeans and by overseas commentators, potential expatriates, migrants and tourists. Under such programmes, Singapore has variously sought to remake itself into a 'renaissance city', a 'global city for the arts' (Chang 2000; Ministry of Information and the Arts 2000) and even as a 'global city of buzz' (Goh 2010). In doing so, it has accepted the logic, now commonplace within the literatures of urban planning and economic development, that the provision of attractive artistic, lifestyle and leisure opportunities to a territory's residents, migrants and visitors is positively correlated with that territory's ability to attract and retain highly-skilled workers, and with its global economic competitiveness (Ku and Tsui 2009; Kong 2007). Pursuant to such thinking, Singapore has

invested heavily in national arts institutions, recreational infrastructure, and educational, lifestyle and cultural precincts. Such processes have been accompanied by an understanding that this infrastructural development will also require a relaxation of pre-existing legal and regulatory structures (da Cunha 2010; Wong et al. 2006; Kwok and Low 2002).

It is largely in the wake of such policies of urban refashioning and official cosmopolitanism (and usually only within the outward-looking and internationally-configured locales that have been created under their terms) that Singaporean authorities have been prepared to tolerate queer cultural expression and visible queer communities. Indeed the conspicuousness of homosexual Singaporeans in such locations can be argued to be entirely consistent with governmental objectives and with official discourses of illiberal pragmatism. A flourishing gay and lesbian consumer culture, and the existence of literary, theatrical or artistic projects referencing homosexual themes, work to reinforce official narratives of Singaporean cosmopolitanism, diversity and sophistication.

More significantly, the existence, visibility and cultural contributions of homosexual communities within the city-space is perceived as contributing positively to broader national economic objectives. As Terrell Carver writes, Singapore has:

> embarked on a massive attempt to fulfil the hypothesis, articulated in the literature of business and management, that there is an important and imperative productive connection between regimes of sexual tolerance and the in-migration, development and retention of the 'creative class' in 'the city'. (Carver 2007)

Here, Carver references the work, in urban theory and developmental economics, of scholars such as Richard Florida and Richard Noland. Such accounts have had a strong influence on Singaporean elite understandings of homosexuality and arguably inform the ambiguous legal destination at which Singaporean leaders have arrived. Florida has famously argued that the presence of a large homosexual community in a city serves as a proxy for that city's overall level of tolerance for diversity. Those cities that are prepared to socially and legally tolerate diversity are more likely to attract a 'creative class' of workers – in research, design, science, finance, education and the arts – thereby gaining a competitive advantage in global knowledge-based and creative economies (Florida 2002; 2005). Similarly, Noland (2004) argues that social and political attitudes towards homosexuality can be linked statistically to broader 'economically relevant phenomena', such as levels of foreign investment and sovereign bond ratings.

Such economic arguments provide a potentially powerful impetus for change. The actor and activist Ian McKellen has presented pressures from transnational corporations (who might have difficulty persuading homosexual employees to relocate to Singapore), alongside diminished tourist arrivals and

widespread emigration of queer Singaporeans, as providing strong incentives for the government to change its approach (Tong 2007). There is evidence that such thinking has already taken hold within Singapore, even if it has yet to result in major legal reform. In 2003, the leading English language broadsheet, the *Straits Times* carried an opinion piece by a local political commentator, Chua Mui Hoong. She argued that '[i]f Singapore is serious about attracting smart, talented people, whether gay or not, many more bigger steps towards greater tolerance – and not just towards gays – must be made.' She concluded by stating, 'this is not about gay rights. This is about economic competitiveness' (M.H. Chua 2003). More recently, Lee Kuan Yew used the third volume of his memoirs, *Hard Truths to Keep Singapore Going*, to express his view that '[h]omosexuality will eventually be accepted … It's a matter of time before it's accepted here [in Singapore]' (Han et al. 2011, p. 247). Providing greater insights into his thinking, Lee had earlier offered the following justifications for his thinking on this matter:

> [I]f this is the way the world is going and Singapore is part of that interconnected world and I think it is, then I see no option for Singapore but to be part of it. They tell me and anyway it is probably half-true that homosexuals are creative writers, dancers, et cetera. If we want creative people, then we [have] got to put up with their idiosyncrasies. (Lee, cited in Au 2007a)

Future directions

Forces deriving from Singapore's history, its post-colonial national preoccupations, and from its deep engagement with flows of economic and social globalisation, have acted to configure a unique approach to the regulation of homosexuality in the city-state. Yet it is equally apparent that, like globalisation itself, this is a process marked by continual change and development. Two key questions emerge from the current situation regarding queer rights in Singapore: whether or not positive reform is indeed inevitable and, if so, from what sources and politics it will emerge.

Homosexuality is not presently an issue the Singapore parliament devotes much time to. The poor showing (by historical and Singapore standards) of the PAP at the 2011 Singapore general election (in which the ruling party suffered a swing against it of over six per cent) is likely to ensure that government will prefer queer issues to remain off the legislative agenda for the forthcoming five-year parliamentary term. The opposition Workers' Party specifically declined to state a policy on gay and lesbian rights prior to the election (People Like Us 2011) and the PAP may be loath to risk losing public goodwill, were it to be seen as initiating another round of public debate on the topic. Speaking on the likelihood of such an occurrence, Lee Kuan Yew has opined that he 'would hesitate to push it [gay and lesbian law reform] through against the prevailing

sentiment, against the prevailing values of society' (Han et al. 2011, p. 380). It is this logic that undergirds Lee's pragmatic and ambivalent approach to legal change and informs his belief that, while such change may well be inevitable, Singapore should be content to lag behind developments in the rest of the world. This thinking has also been expressed by Lee's son, Prime Minister Lee Hsien Loong who has stated that '[w]e will let others take the lead, we will stay one step behind the frontline of change; watch how things work out elsewhere before we make any irrevocable moves' (Lee 2007).

While senior members of the ruling party may regard legal change to benefit gay and lesbian Singaporeans as a necessary and inevitable reform, it seems clear that they will continue to approach any such future reforms in a gradual, pragmatic and cautious manner and are sanguine about deferring such changes into the distant, even indefinite, future. Yet phrases like 'following the world' and 'watching how things work out elsewhere', also indicate that the Singapore leadership is aware of developments elsewhere in the world and is aware that Singapore's lack of progress on these issues will not be without economic or reputational consequence. It is by reading the attempts to manage these consequences, and to deflect international criticism, that the flexibility of Singapore's current illiberal approach to regulating sexuality can be demonstrated. Chris Tan has explored how economic and pragmatic understandings lie behind the Singapore government's 2003 much-vaunted announcement of its willingness to hire openly homosexual civil servants. He argues that this announcement of apparent liberalisation was designed primarily to signal the nation's 'progressiveness' to overseas observers and was of little measurable benefit to Singaporean gays and lesbians (C.K.K. Tan 2009). Recently, similar scepticism has been expressed, following claims by Singaporean diplomats to United Nations bodies that the Singapore constitution guaranteed equality, regardless of sexual orientation, and that employment laws included provisions protecting those who had been dismissed from employment on the basis of their sexual orientation or gender identity (Au 2011a; Office of the High Commissioner for Human Rights 2011; S. Tan 2011b). Describing such characterisations of Singapore law as 'surreal', gay activist Alex Au described them as a case of Singapore 'preferring to say what it thinks the international community wants to hear rather than own up to its own failings' (Au 2011a).

The current delicate balance that has been struck between the claims of queer Singaporeans and the regulatory environment, constructed by an illiberal, pragmatic and economically rationalist government, seems likely to continue into the foreseeable future. Further, it seems apparent that discourses of official pragmatism, political survival and motivations derived from economic logics, are the most likely source of any future reforms. As Tan presents it, the 'illiberal social environment … deters global capital and labor flows, so it will only threaten economic growth and the [ruling] party's political legitimacy. If

nothing else, the PAP will decriminalise homosexuality out of self-preservation' (C.K.K. Tan 2011, p. 202).

Such an outcome, while to be anticipated and welcomed, is not without its downsides. Criticisms can be and have been made about how such logics reduce gay and lesbian rights to questions of state financial benefit and predicate citizenship rights on economic and nationalist contribution. As Alex Au has powerfully argued, 'we cannot shirk from the most fundamental reason for repeal of Section 377A and gay equality in general: Equality is a human right, and to impair equality for one group today would undermine the claim to equality for all other groups tomorrow' (Au 2011b). It is such thinking that lies behind two cases recently brought before the Singapore High Court[2]. In each of these, the continued existence of section 377A is being challenged on the grounds that it contravenes Singaporeans' constitutional right to equality before the law. At the time of writing, these cases were yet to be decided, and even those hopeful of their success conceded that they faced 'mighty odds' (Ng 2011)[3]. The legal approach does, however, represent a strand of Singapore queer activism that derives not from the assertion of queers' economic contribution to the nation but from their articulation of claims to pre-existing rights and equality as citizens of the nation.

The Singapore state possesses a highly developed capacity to oversee and manage its citizenry. Today, gay and lesbian Singaporeans remain subject to colonially derived laws, social regulation and official state discourses that seek to manage and respond to the competing demands of often-contradictory national concerns. These concerns posit queer lives and lifestyles as threatening to national cohesion, security and survival, yet simultaneously of potential benefit to the state in its processes of transnational enmeshment. It is therefore heartening that queer Singaporeans continue to articulate claims to national belonging and have shrewdly carved out and inhabited spaces for queer lives, cultures and passions in their negotiation of Singapore's regulatory and nationalist environments and its transnational economic and cultural relations. Whether justified on the grounds of fundamental human dignity, or (more likely) on the economically rationalist grounds of transnational competitiveness and financial contribution, Singaporean queers are challenging

2 The cases are *Gary Lim and Kenneth Chee vs The Attorney-General* and *Tan Eng Hong v. Attorney-General*. For prior litigation in the Tan Eng Hong case, see *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476. See also reporting at News Editor 2013a, 2013b, Ng 2013.

3 In defending the ongoing retention of Section 377A, the Attorney General's Chambers submitted written arguments in the Tan Eng Hong case that defended the existence of the law for its role in 'preventing the mainstreaming of gay lifestyles'. The written submission went on to warn of an 'incrementalist homosexual agenda' (Ng 2013).

their government's assumption that it can remain 'a few respectable steps behind' the world. Rather, – through their activism, their visibility and their civic participation – they are encouraging both government and society to hasten the process of catching up.

Bibliography

Acharya, A. (2008) *Singapore's Foreign Policy: The Search for Regional Order* (Hackensack: Institute of Policy Studies/World Scientific).

Aldrich, R. (2003) *Colonialism and Homosexuality* (London and New York: Routledge).

Alexander, M.J. (1994) 'Not just (any) body can be a citizen: the politics of law, sexuality and postcoloniality in Trinidad and Tobago and the Bahamas', *Feminist Review* 48, pp. 5–23.

Atkins, G.L. (2005) 'My man Fridae: re-producing Asian masculinity', *Seattle Journal for Social Justice* 4 (1), pp. 67–100.

Au, A.W. (2007a) '"Eventually" said Lee Kuan Yew', Yawning Bread, 24 Apr., available at www.yawningbread.org/apdx_2007/imp-347.htm (accessed 13 Dec. 2012).

— (2007b) 'Reading the tea leaves: MM Lee Kuan Yew on homosexuality in Singapore', *Fridae*, 24 Apr., available at www.fridae.com/newsfeatures/2007/04/24/1834.reading-the-tea-leaves-mm-lee-kuan-yew-on-homosexuality-in-singapore (accessed 13 Dec. 2012).

— (2011a) 'Constitution guarantees equality "regardless of … sexual orientation", says Singapore government. Really?', *Fridae*, 19 July, available at www.fridae.asia/newsfeatures/2011/07/19/11023.constitution-guarantees-equality-regardless-of-sexual-orientation-says-singapore-government-really? (accessed 13 Dec. 2012).

— (2011b) 'Gay equality helps fight HIV, but don't oversell it', *Fridae*, 3 June, available at www.fridae.asia/newsfeatures/2011/06/03/10920.gay-equality-helps-fight-hiv-but-dont-oversell-it?n=sec (accessed 13 Dec. 2012).

Berry, C. (1994) *A Bit on the Side: East-West Topographies of Desire* (Sydney, New South Wales: EMPress).

Boey, D. (2003) 'What fewer babies may mean for SAF planners', *The Straits Times*, 17 Dec.

Carver, T. (2007) 'Materializing the metaphors of global cities: Singapore and Silicon Valley', *School of Sociology, Politics and International Studies, University of Bristol – Working Papers* (01–07), available at www.bristol.ac.uk/spais/research/workingpapers/wpspaisfiles/carver0107.pdf (accessed 13 Dec. 2012).

Chan, K. (2008) 'Gay sexuality in Singaporean Chinese popular culture: where have all the boys gone?', *China Information* 22 (2), pp. 305–29.

Chan, S.S. (2009) *Keynote Address by Chief Justice Chan Sek Song at the New York State Bar Association Seasonal Meeting*. Supreme Court, Singapore, 27 Oct., available at http://app.supremecourt.gov.sg/data/doc/ManagePage/3021/CJ%20Keynote%20Address%20at%20NYSBA%20International%20Seasonal%20Meeting_27%20Oct%202009.pdf.

Chang, T.C. (2000) 'Renaissance revisited: Singapore as a "global city for the arts"', *International Journal of Urban and Regional Research* 24 (4), pp. 818–31.

Chia, A.(2010) 'Don't play play', *Straits Times*, 13 May.

Chong, J. (2011) 'The emergence of the lesbian community in Singapore', in W. S.W. Lim, S. Siddique and D. Feng Tan (eds.), *Singapore Shifting Boundaries: Social Change in the Early 21st Century* (Singapore: Asian Urban Lab), pp. 45–52.

Chong, T. (2011b) *The AWARE Saga: Civil Society and Public Morality in Singapore* (Singapore: NUS Press).

Chua, B.H. (1995) *Communitarian Ideology and Democracy in Singapore* (London: Routledge).

— (1998) 'World cities, globalisation and the spread of consumerism: a view from Singapore', *Urban Studies* 35 (5–6), pp. 981–1000.

— (2011) 'Making Singapore's liberal base visible', in T. Chong (ed.), *The AWARE Saga: Civil Society and Public Morality in Singapore* (Singapore: NUS Press), pp. 14–24.

Chua, B.H., D. Chua, J. Koh and J. Yong (2011) 'Blame it on the bogey: the Christian Right's construction of homosexuality and the AWARE CSE programme', in T. Chong (ed.), *The AWARE Saga: Civil Society and Public Morality in Singapore* (Singapore: NUS Press), pp. 74–95.

Chua, H.H. (2005) 'MDA bans gay website and fines another one', *Straits Times*, 28 Oct.

Chua, L.J.K.S. (2003) 'Saying no: Sections 377 and 377A of the Penal Code', *Singapore Journal of Legal Studies*, pp. 209–61.

Chua, M.H. (2003) 'It's not about gay rights – it's survival', *The Straits Times*, 9 July.

da Cunha, D. (2010) *Singapore Places its Bets: Casinos, Foreign Talent and Remaking a City-state* (Singapore: Straits Times Press).

Detenber, B., M. Cenite, M.K.Y. Ku, C.P.L. Ong, H.Y. Tong and M.L.H. Yeow (2007) 'Singaporeans' attitudes towards lesbians and gay men and their tolerance of media portrayals of homosexuality', *International Journal of Public Opinion Research* 9 (3), pp. 367–79.

Florida, R.L. (2002) *The Rise of the Creative Class: And how it's transforming work, leisure, community and everyday life* (New York: Basic Books).

— (2005) *Cities and the Creative Class* (New York: Routledge).

Fong, O. (2007) 'Otto Fong's open letter', Yawning Bread, 10 Sep., available at www.yawningbread.org/apdx_2007/imp-350.htm (accessed 18 Dec. 2012).

Fridae (2011) 'About Fridae: our mission', available at www.fridae.asia/about/ (accessed 18 Dec. 2012).

George, C. (2006) *Contentious Journalism and the Internet: toward democratic discourse in Malaysia and Singapore* (Seattle, WA: University of Washington Press).

Goh, C.T. (2000) *Transforming Singapore: Prime Minister Goh Chok Tong's National Day Rally 2000 speech in English*, Media Division, Ministry of Information and the Arts, Government of Singapore, available at www.gov.sg/nd/ND00.htm (accessed 2 Nov. 2004).

— (2003) Extract of PM Goh Chok Tong's interview with *Time* magazine, Yawning Bread, 5 Feb., available at www.yawningbread.org/apdx_2003/imp-116.htm (accessed 20 Dec. 2012).

— (2010) Speech by Mr Goh Chok Tong, Senior Minister, at NTU Students' Union Ministerial Forum, Nanyang Technological University – Singapore: Global City of Buzz, Home for Us, Ministry of Information, Communications and the Arts Communications Support Department, Singapore Government, 29 Oct., available at www.news.gov.sg/public/sgpc/en/media_releases/agencies/micacsd/speech/S-20101029–1.html (accessed 20 Dec. 2012).

Goh, D. (2008) 'It's the gays' fault: news and HIV as weapons against homosexuality in Singapore', *Journal of Communication Inquiry* 32 (4), pp. 338–99.

Gomez, J. (2000) *Self-censorship: Singapore's Shame* (Singapore: Think Centre).

Han, F.K., I. Zuraidah, M.H. Chua, L. Lim, I. Low, R. Lin and R. Chan (2011) *Lee Kuan Yew: Hard Truths to Keep Singapore Going* (Singapore: Straits Times Press).

Heng, G. and J. Devan (1992) 'State fatherhood: the politics of nationalism, sexuality and race in Singapore', in A. Parker, M. Russo, D. Sommer and P. Yaeger (eds.), *Nationalisms and Sexualities* (New York and London: Routledge), pp. 343–64.

Holden, P. (2000) *Modern Subjects/Colonial Texts: Hugh Clifford and the Discipline of English Literature in the Straits Settlements and Malaya 1895–1907* (Greensboro: ELT Press).

Human Rights Watch (2008) *This Alien Legacy: the Origins of 'Sodomy' Laws in British Colonialism* (New York: Human Rights Watch).

IndigNation (2011) 'About IndigNation', available at http://indignationsg.wordpress.com/about/ (accessed 20 Dec. 2012).

Infocomm Development Authority (2011a) 'Infocomm usage – households and individuals', available at www.ida.gov.sg/Publications/20070822125451.aspx.

— (2011b) 'Statistics on telecom services for 2011 (Jan–Jun)', available at www.ida.gov.sg/Publications/20110209152802.aspx.
Kampfner, J. (2008) 'How Disneyland with the death penalty came of age', *British GQ*, Oct., pp. 238–42 and 388.
Khong, C.-O. (1995) 'Singapore: political legitimacy through managing conformity', in M. Alagappa (ed.), *Political Legitimacy in Southeast Asia: the Quest for Moral Authority* (Stanford, CA: Stanford University Press), pp. 108–35.
Kong, L. (2007) 'Cultural icons and urban development in Asia: economic imperative, national identity, and global city status', *Political Geography* 26, pp. 383–404.
Ku, A.S.M. and C. Hong-chee Tsui (2009) 'The "global city" as a cultural project: the case of the West Kowloon Cultural District', in H. Siu and A. Ku (eds.), *Hong Kong Mobile: Making a Global Population* (Hong Kong: Hong Kong University Press).
Kwok, K.-W. and K.-H. Low (2002) 'Cultural policy and the city-state: Singapore and the "new Asian renaissance"', in D. Crane and N. Kawashima (eds.), *Global Culture: Media, Arts, Policy and Globalization* (New York: Routledge), pp. 149–68.
Lau, A. (2000) *A Moment of Anguish: Singapore in Malaysia and the Politics of Disengagement* (Singapore: Times Academic Press).
Lee, H.L. (2007) Speech during the second reading of the Penal Code (Amendment) Bill, Parliament of Singapore, 23 Oct., available at www.parliament.gov.sg/publications-singapore-parliament-reports (accessed 20 Dec. 2012).
Lee, K.Y. (2000) *From Third World to First, the Singapore Story: 1965–2000 – Memoirs of Lee Kuan Yew* (Singapore: Times Media Pte Ltd).
Lee, Y.C.L.)2008) '"Don't ever take a fence down until you know the reason it was put up": Singapore communitarianism and the case for conserving 377A', *Singapore Journal of Legal Studies*, pp. 347–94.
Leifer, M. (2000) *Singapore's Foreign Policy: Coping with Vulnerability* (London: Routledge).
Lek, A. and S. Obendorf (2004) 'Contentment or containment? consumption and the lesbian and gay community in Singapore', *James Gomez News*, available at http://eprints.lincoln.ac.uk/3539/ (accessed 20 Dec. 2012).
Leong, L.W.-T. (1995) 'Walking the tightrope: the role of Action for AIDS in the provision of social services in Singapore', *Journal of Gay and Lesbian Social Services* 3 (3), pp. 11–30.
— (1997) 'Singapore', in D.J. West and R. Green (eds.), *Socio-legal Control of Homosexuality* (New York: Plenum Press), pp. 124–44.

— (2005) 'The "Straight" Times: news and sexual citizenship in Singapore', in A. Romano and M. Bromley (eds.), *Journalism and Democracy in Asia* (London: Routledge), pp. 159–71.
— (2008) 'Decoding sexual policy in Singapore', in K.F. Lian and C.K. Tong (eds.), *Social Policy in Post-Industrial Singapore* (Boston: Brill), pp. 279–308.
Li Xueying (2003) 'Chasing the pink dollar', *Straits Times*, 17 Aug.
Lim, C.-S. (2002) 'Serving Singapore as a gay man: part 1 – a personal experience of disclosing homosexuality to the Singapore Armed Forces', Yawning Bread, Sep., available at www.yawningbread.org/guest_2002/guw-080.htm (accessed 20 Dec. 2012).
Lim, E.-B. (2005) 'Glocalqueering in new Asia: the politics of performing gay in Singapore', *Theatre Journal* 57, pp. 383–405.
Lim, K.F. (2004) 'Where love dares (not) speak its name: the expression of homosexuality in Singapore', *Urban Studies* 41 (9), pp. 1759–88.
Lo, J. and G. Huang (2004) *People Like Us: Sexual Minorities in Singapore* (Singapore: Select Publishing).
Lo, L. (2003) *Sisterhood* (Singapore: Select Books).
Lo, L. and L. Lee (2003) *My Sisters, Their Stories* (Singapore: Viscom).
Low, L. (2002) 'The limits of a city-state: or are there?', in D. da Cunha (ed.), *Singapore in the New Millennium: Challenges Facing the City-state* (Singapore: Institute of Southeast Asian Studies), pp. 221–42.
Lydgate, C. (2003) *Lee's Law: How Singapore Crushes Dissent* (Melbourne: Scribe).
Lyons, L. (2004) 'Sexing the nation: normative heterosexuality and the "good" Singaporean citizen', in A. Branach-Kallas and K. Wieckowska (eds.), *The Nation of the Other: Constructions of Nation in Contemporary Cultural and Literary Discourses* (Torun: Uniwersytet Mikolaja Kopernika), pp. 79–96.
Macaulay, T.B. (1837) *A Penal Code prepared by the Indian Law Commissioners* (Calcutta: Bengal Military Orphan Press).
Media Development Authority (2004) 'Free-to-air television programme guide', Media Development Authority, 23 Feb., available at www.mda.gov.sg/Documents/PDF/industry/Industry_TV_ContentGuidelines_FTATVProgCode.pdf (accessed 20 Dec. 2012).
— (2008) 'MediaCorp TV Channel 5 fined for breaching programme code', Media Development Authority, 24 Apr., available at www.mda.gov.sg/NewsAndEvents/PressRelease/2008/Pages/24042008.aspx (accessed 20 Dec. 2012).
— (2010) 'Subscription television programme guide', Media Development Authority, 10 Mar., available at www.mda.gov.sg/Documents/PDF/MDA_Subscription%20TV%20Programme%20Code%202010.pdf (accessed 20 Dec. 2012).

Ministry of Information and the Arts, Singapore (2000) *Renaissance City Report: Culture and the Arts in Renaissance Singapore* (Singapore: Ministry of Information and the Arts).

News Editor (2013a) 'Gary Lim and Kenneth Chee vs The Attorney-General (Summary of Submissions for the AG)', *Fridae*, 14 Feb., available at www.fridae.asia/newsfeatures/2013/02/14/12238.gary-lim-and-kenneth-chee-vs-the-attorney-general-summary-of-submissions-for-the-ag (accessed 9 Mar. 2013).

— (2013b) 'Tan Eng Hong's s377: A challenge to be heard in High Court on Wednesday', *Fridae*, 4 Mar., available at www.fridae.asia/newsfeatures/2013/03/04/12256.tan-eng-hongs-s377a-challenge-to-be-heard-in-high-court-on-wednesday (accessed 9 Mar. 2013).

Ng, K.K. (1999) *The Rainbow Connection: the Internet and the Singapore Gay Community* (Singapore: KangCuBine Publishing).

Ng, T. (2003) 'Law and homosexuals', in J. Lo and G. Huang (eds.), *People Like Us: Sexual Minorities in Singapore* (Singapore: Select Publishing), pp. 17–20.

Ng, Y.-S. (2011) 'One step closer to the abolition of s377A in Singapore?', *Fridae*, 27 Sep., available at www.fridae.asia/newsfeatures/printable.php?articleid=11214 (accessed 20 Dec. 2012).

— (2013) 'Singapore: AGC warns of "incrementalist homosexual agenda", High Court reserves judgment', *Fridae*, 6 Mar., available at www.fridae.asia/newsfeatures/2013/03/06/12259.singapore-agc-warns-of-incrementalist-homosexual-agenda-high-court-reserves-judgment (accessed 9 Mar. 2013).

Ng, Y.-S., D. Chua, I. Oh and J. Seah (2010) *GASPP: a Gay Anthology of Singapore Poetry and Prose* (Singapore: The Literary Centre).

Ng, Y.-S. and J. Wee (2006) *SQ21: Singapore Queers in the 21st Century* (Singapore: Oogachaga Counselling and Support).

Noland, M. (2004) 'Tolerance can help countries to achieve prosperity', *The Financial Times*, 19 Aug., p. 17.

N. bte Md Yusop (2005) *Same-Sex Sexuality and Islam in Singapore* [Master's dissertation, National University of Singapore], available at http://scholarbank.nus.edu.sg/handle/10635/14761 (accessed 20 Dec. 2012).

Obendorf, S. (1998–99) 'Homosexual rights and the non-Western world: a postcolonial reading of homosexual rights in international human rights law', *Third World Legal Studies*, pp. 179–204.

— (2006a) *Sexing up the International* [PhD dissertation, University of Melbourne), available at http://repository.unimelb.edu.au/10187/2099 (accessed 20 Dec. 2012).

— (2006b) 'Sodomy as metaphor', in P. Darby (ed.), *Postcolonizing the International: Working to Change the Way We Are* (Honolulu: University of Hawai'i Press), pp. 177–206.

Office of the High Commissioner for Human Rights (2011) *Universal Periodic Review: Singapore,* United Nations Human Rights Council, Working Group on the Universal Periodic Review, 6 May, available at www.ohchr.org/EN/HRBodies/UPR/PAGES/SGSession11.aspx (accessed 20 Dec. 2012).

Offord, B. (1999) 'The burden of (homo)sexual identity in Singapore', *Social Semiotics* 9 (3), pp. 310–16.

Olds, K. and H. Yeung (2004) 'Pathways to global city formation: a view from the developmental city-state of Singapore', *Review of International Political Economy* 11 (3), pp. 489–521.

Ortmann, S. (2003) *Legitimacy and the National Threat in Singapore (Legitimität und die nationale Gefahr in Singapur)* (Magisterarbeit, Political Science (Politische Wissenschaft in der philosophischen Fakultät 1), Friedrich-Alexander Universität Erlangen-Nürnberg, Erlangen).

Oswin, N. (2010) 'The modern model family at home in Singapore: a queer geography', *Transactions of the Institute of British Geographers* 35 (2), pp. 256–68.

Pelangi Pride Centre (2011) 'About us', Pelangi Pride Centre, available at www.pelangipridecentre.org/about/ (accessed 20 Dec. 2012).

People Like Us (2008) 'Mediacorp censors pro-gay speech, again', People Like Us, 29 Feb., available at www.plu.sg/society/?p=98 (accessed 20 Dec. 2012).

— (2011) 'Singapore political parties' positions on LGBT concerns: general election 2011', People Like Us, 27 Feb., available at www.plu.sg/society/?p=223 (accessed 20 Dec. 2012).

Peterson, W. (2001) *Theater and the Politics of Culture in Contemporary Singapore* (Middletown: Wesleyan University Press).

Pham, P.L. (2010) *'Ending East of Suez': the British Decision to Withdraw from Malaysia and Singapore, 1964–1968* (Oxford: Oxford University Press).

pinkdot.sg (2011) 'pinkdot.sg: supporting the freedom to love', available at http://pinkdot.sg (accessed 20 Dec. 2012).

Porter, K. and J. Weeks (1991) *Between the Acts: Lives of Homosexual Men 1885–1967* (London: Routledge).

Reuters (2007) 'Singapore considers legalizing homosexuality: Lee', *Reuters [Newswire]*, 24 April.

Rodan, G. (2009) 'Accountability and authoritarianism: human rights in Malaysia and Singapore', *Journal of Contemporary Asia* 39 (2), pp. 180–203.

Sanders, D.E. (2009) '377 and the unnatural afterlife of British colonialism in Asia', *Asian Journal of Comparative Law* 4 (1), pp. 1–51.

Singh, B. (1988) *Singapore: Foreign Policy Imperatives of a Small State* (Singapore: Centre for Advanced Studies, National University of Singapore).

Smith, F.B. (1976) 'Labouchere's amendment to the Criminal Law Amendment Bill', *Historical Studies* 17 (67), pp. 165–75.

Tan, C.N. (2009) 'Reinventing Singapore: Global City – from host to home', in T.W. Tan (ed.), *Singapore perspectives 2009: The heart of the matter* (Singapore: World Scientific Publishing).

Tan, C.K.K. (2009) '"But they are like you and me": gay civil servants and citizenship in a cosmopolitanizing Singapore', *City and Society* no. 21 (1), pp.133–54.

— (2011) *Stand up for Singapore? Gay Men and the Cultural Politics of National Belonging in the Lion City* (PhD dissertation, University of Illinois at Urbana Champaign), available at http://hdl.handle.net/2142/24017 (accessed 20 Dec. 2012).

Tan, K.P. (2003) 'Sexing up Singapore', *International Journal of Cultural Studies* 6 (4), pp. 403–23.

Tan, K.P. and G.J.J. Lee (2007) 'Imagining the gay community in Singapore', *Critical Asian Studies* 39 (2), pp. 179–204.

Tan, S. (2005) 'S'pore health minister's comments on HIV surge and gay parties draw criticism', *Fridae*, available at www.fridae.asia/newsfeatures/printable.php?articleid=1386.

— (2007) 'Singapore teacher removes coming out blog under ministry pressure', *Fridae*, 10 Sep., available at www.fridae.com/newsfeatures/2007/09/10/1972.singapore-teacher-removes-coming-out-blog-under-ministry-pressure (accessed 20 Dec. 2012).

— (2011a) 'Retired High Court judge: gays in Singapore keep it "quiet" due to gay sex law', *Fridae*, 2 June, available at www.fridae.asia/newsfeatures/2011/06/02/10919.retired-high-court-judge-gays-in-singapore-keep-it-quiet-due-to-gay-sex-law?n=sec (accessed 20 Dec. 2012).

— (2011b) 'Singapore UN delegate: "what is being criminalised is not gay Singaporeans but homosexual acts", *Fridae*, 11 May, available at www.fridae.asia/newsfeatures/2011/05/11/10867.singapore-un-delegate-what-is-being-criminalised-is-not-gay-singaporeans-but-homosexual-acts?n=sec (accessed 20 Dec. 2012).

Tan, Theresa (2009c) 'MOE tightens vetting of sexuality education', *Straits Times*, 22 May.

Thio, L. (2006) '"Pragmatism and realism do not mean abdication": a critical and empirical inquiry into Singapore's engagement with international human rights law', *Singapore Year Book of International Law* 8, pp. 41–91.

— (2007) 'Speech during the second reading of the Penal Code (Amendment) Bill', Singapore Parliament Reports, 22 Oct., available at www.parliament.gov.sg/publications-singapore-parliament-reports (accessed 20 Dec. 2012).

— (2009) 'Singapore human rights practice and legal policy: of pragmatism and principle, rights, rhetoric and realism', *Singapore Academy of Law Journal* 21, pp. 326–62.

Tong, S. (2007) 'Ian McKellen wades into Singapore gay rights debate', Reuters, 19 July, available at www.reuters.com/article/idUSSIN7694520070719 (accessed 20 Dec. 2012).

Tremewan, C. (1994) *The Political Economy of Social Control in Singapore* (Basingstoke: Macmillan, in association with St Antony's College, Oxford).

Trevvy.com (2007) 'Lee Kuan Yew: no option but to legalize homosexual sex', 25 April., available at www.trevvy.com/scoops/article.php?a_id=144.

— (2011) 'Trevvy is not about changing the world. It's about being who you are', available at www.trevvy.com/about/ (accessed 20 Dec. 2012).

Trocki, C.A. (2006) *Singapore: Wealth, Power and the Culture of Control* (Abingdon: Routledge).

Vijayan, K.C. (2011) 'An ex-judge's view of HIV and tolerance', *Straits Times*, 1 June.

Wee, C.J. W.-L. (2007) *The Asian Modern: Culture, Capitalist Development, Singapore* (Singapore: NUS Press).

Wintemute, R. (2011) 'Same-sex love and Indian Penal Code §377: an important human rights issue for India', *National University of Juridical Sciences Law Review* 4 (Jan.-Mar.), pp. 31–65.

Wong, C.Y.L., J.C. Chong and C.C.J.M. Millar (2006) 'The case of Singapore as a knowledge-based city', in F. Javier Carillo (ed.), *Knowledge Cities: Approaches, Experiences, and Perspectives* (Burlington: Butterworth-Heinemann), pp. 87–96.

Wong, K.S. (2009) 'Comments by DPM and Minister for Home Affairs Wong Kan Seng in response to media queries related to AWARE', Ministry of Home Affairs: press releases, 15 May, available at www.mha.gov.sg/news_details.aspx?nid=MTQ0MA%3d%3d-H1aIkdI4Ksw%3d (accessed 20 Dec. 2012).

Wong, T. and B.S.A. Yeoh (2003) 'Fertility and the family: an overview of pro-natalist population policies in Singapore', *Asian MetaCentre Research Paper Series* (Singapore: Asian MetaCentre for Population and Sustainable Development Analysis, Asia Research Institute, National University of Singapore).

Yeo, T.E.D. (2009) 'Cyber HIV/AIDS intervention in Singapore: collective promises and pitfalls', *International Journal of Communication* 3, pp. 1025–51.

Youngblood, R. (2007) 'Singapore sends mixed signals on homosexuality', *Deutsche Presse-Agentur [Newswire]*, 5 Oct.

Yue, A. (2006) 'Cultural governance and creative industries in Singapore', *International Journal of Cultural Policy* 12 (1), pp. 17–33.

— (2007) 'Creative queer Singapore: the illiberal pragmatics of cultural production', *Gay and Lesbian Issues and Psychology Review* 3 (3), pp. 149–60.

Zolo, D. (2001) 'The "Singapore model": democracy, communication, and globalization', in K. Nash and A. Scott (eds.), *The Blackwell Companion to Political Sociology* (Oxford: Blackwell), pp. 407–17.

Legal cases

Tan Eng Hong v Attorney-General [2012] 4 SLR 476.

9

The Malaysian dilemma: negotiating sexual diversity in a Muslim-majority Commonwealth state

Shanon Shah

1. Crises and competing legacies

In 1998, Malaysia became the first Asian country to host the Commonwealth Games, and was only the second developing country – after Jamaica in 1966 – to do so. This was remarkable, given prior developments when the then Prime Minister Mahathir Mohamad, demonstrably frustrated with the Commonwealth, had previously asked his advisers whether Malaysia should quit the organisation (Van der Westhuizen 2004, p. 1285). Nevertheless, once Malaysia won its bid to host the Games, the government pulled out all the stops despite the unanticipated global financial crisis of the late 1990s. This was Malaysia's chance to wrestle symbolic power back from 'Western' Commonwealth Member States (namely the UK, Canada, Australia and New Zealand), and announce to the world its arrival as a newly industrialising, sophisticated, Muslim-majority country.

But Malaysia was also to come under the international spotlight for other reasons. On the eve of the Games, then Deputy Prime Minister Anwar Ibrahim was sacked on corruption and sodomy charges. Controversy and public outcry followed. This was accompanied by increasingly lurid reports in the government-controlled media about Anwar's alleged sexual exploits with men and women (Spaeth 1998). These reports were meant to be all the more damaging because of Anwar's history as the charismatic leader of the Malaysian Muslim Youth Movement (ABIM), the nation's largest grassroots Muslim movement (Nagata 1980, p. 424). Amid further controversy, the courts found Anwar guilty of corruption and sodomy and he was jailed, only to be released in 2004 under the administration of Mahathir's successor, Abdullah Ahmad Badawi. The Federal Court overturned his sodomy conviction in a 2–1 decision; by this time, Anwar had already served his sentence for corruption (BBC News 2004).

The events of 1998 throw into sharp relief the challenges and complexities associated with discussing the criminalisation of 'same-sex sexualities' in Malaysia. Several issues became mutually entangled – authoritarianism, the politics of Islam, legacies of British colonialism, post-colonialism, gender and sexuality – and things have been messy ever since. It is important to recall the events of 1998, however, to remind ourselves of the bigger picture regarding the treatment of sexual minorities in Malaysia.

Taking into account this recent history, this chapter will reflect on the possibilities for decriminalisation of 'same-sex sexualities' in Malaysia. I will focus on how expressions of Islam in Malaysia impact on attitudes, discourses and policies towards sexual minorities. My analysis is based largely upon my experiences working on issues related to Islam, gender and sexuality, initially as an activist and subsequently as a journalist.

Moving forward to the year 2011, hardly lacking in news on gender and sexuality in Malaysia, major headline stories included panics about sexual minorities, threats against them, or both. In January, there was the intimidation – including death threats – by state and non-state actors against Azwan Ismail, a Malaysian Muslim man who came out as gay via a YouTube video (Shah 2011). The next target was Lady Gaga – in March, radio stations censored the explicitly gay-affirming sections of her hit single 'Born This Way' (Michaels 2011). In April, there was the public furore – including protest by the Women, Family and Community Development Minister – against a 'boot camp' purporting to toughen up 'soft' boys (Boo 2011). August was triply loaded. There was the outcry surrounding the High Court's rejection of transgender Muslim woman Aleesha Farhana's appeal to change her male name to a female one, and her death from health complications soon after the decision (Ibrahim 2011). Then, several Christian and Muslim leaders condemned Malaysian gay minister Rev Ou Yang Wen Feng's same-sex marriage to his African-American partner in New York (*The Star* 2011c). Finally, there was the resumption of Anwar's *new* sodomy trial (BBC News 2011), this time on charges that surfaced in 2008.

Given the cacophony of 1998, these headlines might appear to confirm an overall climate hostile towards diverse genders and sexualities. After all, it was when Anwar was first sacked that Section 377 of the Penal Code – Malaysia's sodomy laws – became embedded in popular discussion. To complicate matters, Anwar *could* have been charged under provisions in the *shariah* criminal laws because he is Muslim, but was not. The irony is that although Anwar was charged under a law inherited from the British colonial era, until now his opponents have reviled him as a 'traitor' to ethnic Malays, who are officially classified as Muslim (*The Malaysian Insider* 2009).

This does not mean, however, that Section 377 is the state's preferred method of prosecuting sexual minorities. The legal and political system is more complex than that (Brownell 2009). Regarding the enforcement of *shariah*

criminal laws around the time of Anwar's sacking, for example, 442 men were arrested between 1997 and 1999, based on public tip-offs that they had attempted to commit homosexual acts (*Time Magazine* 2000). This is why a deeper look at the discourses on Islam, especially those surrounding Anwar's trials (past and present), is needed. There seems to be an overarching political and cultural logic at work – 'same-sex sexualities' are an affront to Islam (and often other religions, too), and must be dealt with accordingly. Thus, whether 'secular' or 'Islamic' laws are applied becomes a matter of detail, depending on whether one is Muslim (and thus either the Penal Code or *shariah* laws are applicable) or not (in which case, only the Penal Code is applicable).

Between 1998 and 2011, there were numerous incidences where state and non-state actors targeted people perceived as sexual minorities. These attacks, however, were accompanied by increasingly vocal public outcry and dissent. For instance, in 2003, Malaysians of diverse ethnicities, religions and sexualities went to the Human Rights Commission (SUHAKAM), which came into existence in 1999, to protest the demonisation of 'soft' men and 'hard' women in the government-controlled Malay-language media. I, a Malaysian Muslim man, led this delegation and read out the memorandum to one of the Commissioners. While the memorandum did not succeed in repealing or halting the application of the sodomy laws, it managed to put sexual diversity explicitly on SUHAKAM's agenda.

It must be noted, however, that SUHAKAM has not taken significant steps forward. These might be related to the limits of its powers. Former vice-chairperson Simon Sipaun once lamented that SUHAKAM could only advise and make recommendations to the government and was powerless to enforce its decisions (Vengadesan 2009). Furthermore, sexual minority issues form only part of the landscape in a country where several categories of rights are infringed by state and non-state actors.

Nevertheless, there has been growing support for sexual diversity issues from established human rights and women's non-governmental organisations (NGOs). Many of these organisations, such as SUARAM (the Malaysian People's Voice) and the Women's Aid Organisation, were signatories to the 2003 memorandum to SUHAKAM. Concurrently, within the last ten years or so, there have been growing numbers of individuals identifying as lesbian, gay, bisexual or transsexual (LGBT) or those sympathetic to these issues, supporting and working with several rights-based organisations in Malaysia. Similarly, there is a post-1998 generation of artists and journalists who are from sexually diverse backgrounds, or who are supportive of sexual diversity. This has contributed to an informal and loose network of younger, post-1998 cultural and social actors sensitive to sexual diversity. Many of these individuals do not necessarily have contact with traditionally LGBT-focused groups whose work was pioneered, pre-1998, within the HIV/AIDS framework. Thus today, groups such as SUARAM and the Malaysian Bar Council are openly supportive

of initiatives to protect and defend the rights of sexual minorities, alongside traditionally HIV-focused LGBT groups.

Apart from this, several loose collectives have emerged *specifically* addressing sexual diversity, such as katagender (katagender 2009), The KL Word (KL Word 2011), and Tilted World (Tilted World 2011). In 2008, barely weeks after the new sodomy allegations against Anwar emerged, The Annexe Gallery in Kuala Lumpur hosted Seksualiti Merdeka, a public festival of discussions, art exhibitions and performances celebrating sexual diversity. It must be noted, though, that Seksualiti Merdeka did not emerge because of the allegations against Anwar. Nevertheless, it is still interesting to observe how a festival publicly defending sexual diversity materialised within such a politically-charged environment.

From its inception, Seksualiti Merdeka sought the inclusion and participation of a broad base of organisations and individuals – HIV/AIDS activists, human rights lawyers, feminist groups, artists, politicians and concerned members of the public (Seksualiti Merdeka 2011). This partnership-building strategy was relatively easy, given the sensitisation of most 'mainstream' rights-based organisations to sexual diversity issues by this time.

Initiatives such as Seksualiti Merdeka get space in the government-controlled media as well, albeit not on the front pages. The point is that public attitudes on sexual diversity do not go in one direction only. Rather, there seems to be a simultaneous closing down and opening up of spaces to discuss and express sexual diversity. On balance though, the power and authority held by a constellation of state and non-state actors favours those hostile towards sexual diversity. A discussion on the possibilities for decriminalisation of 'same-sex sexualities' in Malaysia must therefore take into account multiple, inter-related factors.

Why focus on the impacts of the politics of Islam on sexual diversity and what does it have to do with efforts to decriminalise 'same-sex sexualities'? Firstly, the Federal Constitution (2009, p. 11) establishes Islam as 'the religion of the Federation' of Malaysia, with the proviso that other religions may be practised 'in peace and harmony'. This is significant, given Malaysia's demographics – 60.4 per cent of Malaysians are Muslim, 19.2 per cent Buddhist, 9.1 per cent Christian, 6.3 per cent Hindu, and 2.6 per cent Confucian/Taoist/traditional Chinese religion (Department of Statistics Malaysia 2001). Thus, while the Federal Constitution is meant to uphold the fundamental liberties of all Malaysians, it has also enabled a set of *shariah* civil and criminal laws to regulate Malaysian Muslims. As this chapter will show, there are now several moves to intensify particular expressions (including legislation) of Islam, and these affect diverse genders and sexualities very significantly.

So is this going to be yet another 'clash of civilisations'-type argument that 'Islam' is incompatible with 'Western', 'secular' ideals of 'gay rights'? The short answer is no. There are enough damaging stereotypes about Islam and Muslims

that hinder the emergence of sounder insights on gender and sexual diversity. Besides, the intention of this chapter is not to unpick or analyse 'Islamic' theology or doctrines. Rather, it focuses on how social and political *expressions* of Islam – discourses, everyday practices, official policies and so on in all their nuances – bear upon diverse genders and sexualities.

1.1 Some notes on terminology

Is this chapter analysing 'Muslims' or 'Islam', then? It is necessary to alternate between the two terms, especially since so many state and non-state actors claim to speak on behalf of 'Islam' in the Malaysian context, whether they are advocates or critics. The specific aim in what follows is to assess the political, social and cultural specificities of Islam in the Malaysian experience.

Just as it is problematic to talk about 'Islam' in the Malaysian context, it is also difficult to talk about 'gender' and 'sexuality'. In fact, it is difficult to find Malay-language translations that accurately reflect Anglophone understandings of these terms. Similarly, sociologist Matthew Waites (2009, p. 152) points out the Western bias in applying terms such as 'gender identity' and 'sexual orientation' to non-Western contexts. In fact (as Waites (2009) also notes on p. 139), scholar of Thailand Peter A. Jackson points out that in Thai culture even the distinction between 'gender' and 'sexuality' – taken as a given in Western activist and academic circles – is blurred (Jackson 2000, p. 414).

This is also likely to be true in Malaysia, where certain things get lost in translation. For instance, the 2003 targeting of *lelaki lembut* ('soft men') and *wanita keras* ('hard women') was construed by many Malaysians – myself included – as an attack on gays and lesbians, resulting in the SUHAKAM memorandum. Nevertheless, while it is true that there is slippage between popular usage of the terms *lelaki lembut* and 'gay' – and in fact *lembut* is sometimes used as a euphemism for 'effeminate gay' – the Malay-language terminology is actually more ambiguous than that. *Lelaki lembut* could apply to gay men, male-to-female transsexuals, and even heterosexual men who are less 'macho' but in a non-pejorative sense. The point is that *lelaki lembut,* unlike 'gay', primarily describes an expression of gender which may or may not dictate particular sexual preferences, and this is what often gets lost in translation. This is but one example of how indigenous terms do not quite coincide with LGBT typologies.

At the same time, the nascent activism against decriminalisation of 'same-sex sexualities' is led by urban, middle-class, English speakers. Thus, on one hand, concepts such as 'gender identity' and 'sexual orientation' are difficult to translate across the spectrum of public imagination. On the other hand, a group such as Seksualiti Merdeka frames its approach very much within the concepts of 'gender identity' and 'sexual orientation' (Seksualiti Merdeka 2011). Meanwhile, Tilted World calls itself 'a Malaysian LGBT community project'

(Tilted World 2011), where LGBT terminology is similarly Eurocentric (Waites 2009, p. 138). This observation is not meant to discredit either collective, but rather to situate the subjective positions in their advocacy.

Given this dynamic, it is again difficult to coin unproblematic, consistent terminology. For now this chapter errs on the side of framing the discussion around 'diverse genders and sexualities' and 'sexual minorities', depending on the context.

2. Framing 'gender' and 'sexuality'

It is crucial to clarify that, as of 2009, only *seven* charges had been brought under Section 377 since 1938, and *four* of these were related to Anwar (Brownell 2009). In other words, the law is rarely invoked and its recent use is most likely politically motivated. The issue is therefore definitely not with Section 377 alone – a larger political and cultural climate makes it but one of many other laws and directives hostile towards diverse expressions of gender and sexuality. These include the Hudud legislation of Kelantan state, currently governed by the Malaysian Islamic Party, PAS, and formerly PAS-controlled Terengganu; the Syariah Criminal Offences Enactments of states controlled by the ruling party, the United Malays National Organisation (UMNO), or its federal coalition partners; the Syariah Criminal Offences Act of the federal territories; and several municipal laws (Mohamed Kasim 2004).

Therefore, as pointed out earlier, claims of state and non-state actors' targeting of sexual minorities are definitely not the stuff of urban myth. The colonial sodomy laws are still there, ready to be used, but there are provisions in the *shariah* criminal legislation (Shah 2009c) and municipal laws used to target sexual minorities. Thus, regardless of whether the charges against Anwar are politically motivated fabrications, they contribute in sum to a larger political environment hostile towards sexual diversity. After all, given Anwar's previous leadership of the morally and socially conservative ABIM, it is not hard to see why the charges have resulted in loud and often painful collisions of debates on 'Islam', 'gender' and 'sexuality'.

This begs the question of whether current state-sponsored or community-led hostility towards sexual diversity is a new phenomenon. How have attitudes towards sexual diversity changed since 1957, when Malaya (now West Malaysia) gained independence, or 1963, when Malaysia was formed? A paucity of historical research on sexuality prevents any certain conclusions being made. However, two things are clear. The first is that provisions in both the Penal Code and *shariah* laws criminalising non-normative sexualities are colonial (and in the case of *shariah*, some would argue *pre*-colonial) legacies. The second is that from the 1970s onwards, the rise of social movements related to Islam, such as ABIM, coincided with calls for stricter dress codes, gender segregation, moral values and so on. It would be safe to assume, therefore, that sexual diversity

has been a legal and political taboo since Independence. The events of 1998, however, intensified and politicised this taboo in unprecedented ways, justified primarily on 'Islamic' grounds. Cultural studies scholar Baden Offord (2011, p. 140) has also observed this intensification of 'state-sponsored homophobia', 'specifically tied to Islam' in Malaysia over the past two decades. This is why an understanding of the landscape of Islam in Malaysia is crucial for any effort seeking to decriminalise 'same-sex sexualities'.

It is also important here to understand how 'gender' and 'sexuality' are framed in relation to popular and legalist views of criminality. The targeting of sexual minorities by enforcement agencies – such as the police, Islamic Religious Affairs Departments – cannot be explained by 'homophobia' alone. Indeed apart from sexual minorities, unmarried heterosexuals – most visibly Muslim women – are also targeted by enforcement officers in what is popularly termed 'moral policing'. Again, while *shariah* laws enable Islamic Religious Affairs Department enforcers to carry out moral policing raids, based on public tip-offs, the 'secular' police force is also known to carry out such raids. And while *shariah* laws apply only to Muslims, non-Muslims have also been subjected to moral policing (Shah 2010d).

Furthermore, moral policing in Malaysia does not only target gender and sexual relations. In recent years, *shariah* legislation has been increasingly used to target Muslims who consume alcohol and non-Muslims accused of 'proselytising' Muslims (*The Star* 2011c). These phenomena have been concurrent with the emergence of several 'Islamic' NGOs calling for a return to what are perceived as 'authentic' Islamic doctrines – spanning religious belief, dietary requirements and expressions of gender and sexuality (Shah 2009a; 2009b). Subsuming the analysis under the framework of 'religious fundamentalism' or 'Islamism', however, would be inaccurate and unhelpful, because this would only ignore diverse shifts and nuances in society.

3. Framing 'Islam'

There are 12 Commonwealth Member States that are also members of the Organisation of Islamic Cooperation (OIC) – Bangladesh, Brunei Darussalam, Cameroon, Gambia, Guyana, Maldives, Mozambique, Nigeria, Pakistan, Sierra Leone, Uganda and, of course, Malaysia (Commonwealth Secretariat 2011; Organisation of Islamic Cooperation 2011). Why is this important, given the continuing buzz around 'globalisation'?

It is significant because while there is an increasing global exchange of people, capital, goods and ideas, these are still adapted and reformulated within local contexts. 'Globalisation' alone does not explain the processes through which symbolic and material relations are localised. If all things remained equal in a globalised world, for example, one might expect Malaysia to be proportionately committed to its major regional or transnational groupings

– namely in the United Nations, Commonwealth, OIC and Association of Southeast Asian Nations (ASEAN).

Why then does Malaysia not only vote alongside, but consistently *lead*, efforts to defeat United Nations resolutions or statements seeking to protect and affirm gender and sexual diversity (ARC International et al. 2011)? After all, there are several key Commonwealth Member States that are willing to sponsor such statements. Instead, Malaysia seems more comfortable standing alongside the majority of OIC members and other opposing states. This example is not meant to encapsulate this chapter's overall argument. Rather, it is meant to open up a space to discuss how the legacies of British colonialism and the politics of Islam intersect in unexpected ways in Malaysia regarding gender and sexual diversity.

For example, anthropologist Michael Peletz (2003, p. 3) observed the centrality of 'Asian values' in former premier Mahathir's political rhetoric. Mahathir repeatedly stressed that 'Asian' values were diametrically opposed to 'Western' or 'secular' values which embraced a litany of sins, including 'materialism', 'sensual gratification', 'homosexuality' and 'incest' (Peletz 2003, p. 3).

Yet, Mahathir did not coin his 'Asian values' rhetoric *ex nihilo*. Former Singapore Prime Minister Lee Kuan Yew also resorted to the 'Asian values' rhetoric to rebut public outcry when his government decided to flog American teenager Michael Fay for vandalism (Peletz 2003, p. 1). In turn, Lee's 'Asian values' rhetoric was not created out of thin air either – it was already a well-rehearsed explanation of the phenomenal economic success of several Asian economies prior to the financial meltdown of the 1990s (Peletz 2003, p. 2).

Furthermore, the strands in this rhetoric that are hostile to gender and sexual diversity are not unique to Malaysia. For instance, similar rhetoric is employed by Hindu nationalists in India who support traditional Indian values, and thus defend the country's sodomy laws (Waites 2010, p. 974). The irony is that, like Malaysia's, India's sodomy laws were introduced by British colonialists in 1860. A further irony is that Mahathir's 'Asian values' rhetoric is based on 19th-century Western colonial stereotypes of the 'Oriental' Other (Peletz 2003, p. 7). In other words, leaders such as Mahathir and Lee were resorting to *colonial* stereotypes of 'Asia' to promote *anti-colonial* political rhetoric.

It now appears, though, that Mahathir's 'Asian values' rhetoric has been fused or perhaps superseded by increasingly aggressive 'Islamic values' calls for more stringent application of *shariah* laws. But there is a further twist. The Malaysian *shariah* laws are also partly a legacy of British colonialism (Shah 2009c). To paraphrase the irony: the targeting of sexual minorities as a defence of 'authentic Islamic law' is based on 19th-century colonial legal constructions to regulate the 'Muslim' Other.

The point is that not all state hostility towards sexual minorities is alike. There might be a temptation to subsume the Malaysian experience under 'Islamic homophobia', in which countries such as Iran are targeted by Western LGBT activists (Long 2010, p. 120). However, there might be a temptation to assume that the contexts of other Commonwealth states with sodomy laws are neatly translatable to the Malaysian experience. The fact is that *both* Malaysia's legacies as a former British colony and a Muslim-majority state are important factors to take into account.

It is also important not to forget the continuing influence of Malaysia's culturally similar-but-different Southeast Asian neighbours. For example, anthropologist Mark Johnson (1998, p. 699) has shown how trans-border experiences between Sabah in East Malaysia and the southern Philippines redefine notions of 'gayness' among same-sex desiring Muslim men. Furthermore, while gender and sexuality are expressed in a variety of ways throughout 'Southeast Asia', scholars have noted 'recognisable patterns of ascribed and chosen social identities and status' (Johnson et al. 2000, p. 365).

Therefore on one level, this chapter aims to point out the specificities of the Malaysian experience. On another level, this analysis of Malaysia could provide vital analytical clues for the contexts of other Commonwealth countries that still criminalise 'same-sex sexualities'.

With these caveats in mind, a summary follows of some key positions held by spokespersons of 'Islam' in the social and political spectrum regarding the policing of sexual minorities. These positions are mostly sourced from media reports, and where possible from my own reporting and observations as a journalist. They are not meant to be exhaustive, but to sketch the spectrum of positions among different Muslim leaders. As previously mentioned, 'Islam' as a discourse and label is a powerful shaper of policies and public opinion in Malaysia. This is especially true in matters concerning sexual diversity. Thus, the purpose here is to put a finger on the different pulses of how discourses on Islam and sexual diversity are shaping up and what the possibilities for decriminalisation are.

3.1 The 'official' position

Malaysia is a federation consisting of 13 states and three federal territories. The administration of Islam is a state matter. It technically falls under the purview of each state's monarch or the Supreme Head of the federal state for the federal territories and non-monarchical states. An elaborate bureaucracy administers, legislates and enforces Islamic civil and criminal laws (Shah 2009d). The 'official' Islamic position is therefore that which is espoused by various state Islamic agencies and upheld by the UMNO-led ruling coalition.

Nevertheless, after the 2008 elections, an unprecedented five state governments were captured by the parties making up the federal opposition,

the Pakatan Rakyat (People's Alliance). The Malaysian Islamic Party, PAS, became the senior coalition partner in two of these state governments and a junior partner in another two coalition governments. In 2009, one of these states was wrestled back by UMNO via a series of defections in the legislature, and PAS now figures in three of the four remaining Pakatan Rakyat states. Thus, in recent years, PAS has also played an increasingly influential role in determining the 'official' Islamic position.

Having said this, it is important to note the complexities and ambiguities in the administration of Islam in all Malaysian states and territories. The monarch might be the ultimate 'head' of Islam, but does not really control the bulk of the application and legislation of Islamic laws. Also, while each state effectively has its own 'system', Islamic legislation for all states basically follows the template set by the Islamic laws of the federal territories.

On the whole, the 'official' position is hostile towards sexual diversity. For instance, in response to Azwan's coming out as a gay Muslim, de facto Minister of Religion Jamil Khir Baharom said his ministry would take 'appropriate action' to stem the promotion of 'homosexuality' in Malaysia (*The Star* 2010). The Mufti of Perak state, Dr Harussani Zakaria, echoed this sentiment and chided Azwan. So far, however, Azwan has not been subjected to legal action from any quarter. More recently, Jamil reiterated that 'LBGTs' [sic] had 'no rights' in Malaysia, given that their 'behaviour is against Islam' (Hassan 2011).

Regarding transsexual expressions, Harussani's position is that they are forbidden and he favours stricter 'Islamic' policing. In fact, according to one report, he was one of the architects of the 1983 official fatwa banning sex-reassignment surgery (*The Jakarta Globe* 2009). The former Mufti of Perlis state, Mohamad Asri Zainul Abidin, considered a 'moderate', also held that transsexuals should be fined or jailed if counselling was ineffective (Reuters 2007).

These articulations of the 'official' position are in line with the substance of Malaysian Islamic criminal laws, to which all Malaysian Muslims are subject. For instance, the Syariah Criminal Offences (Federal Territories) Act 1997, in Part IV: Offences Relating to Decency, criminalises *liwat* (loosely translated as sodomy) and *musahaqah* (loosely translated as lesbian sex). Both carry the same penalty: 'a fine not exceeding 5,000 ringgit [where GBP1 = MYR4.80 approx] or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof'. Also in Part IV is the criminalisation of a 'male person posing as a woman … for immoral purposes', which carries 'a fine not exceeding 1,000 ringgit or to imprisonment for a term not exceeding one year or to both' (Syariah Criminal Offences Act 1997).

It should be noted is that these *shariah*-designated crimes fall under the rubric of 'offences relating to decency'. Thus, punishments for same-sex behaviour carry penalties equivalent to those for heterosexual behaviours. 'Sexual intercourse out of wedlock', 'incest', 'prostitution' and pimping all

carry fines not exceeding MYR5,000, three years in prison and six strokes of the cane (Syariah Criminal Offences Act 1997).

Elsewhere, the Act lists offences 'relating to the sanctity of the religion of Islam' (such as 'failure to perform Friday prayers' and 'intoxicating drinks') and those 'relating to "aqidah" (loosely translated as "right doctrine")' (Syariah Criminal Offences Act 1997).

These provisions enable enforcers from Islamic Religious Affairs Departments to routinely police the behaviours of Malaysian Muslims. In relation to this, there has been just as much controversy over *shariah*-driven punishment of alcohol-drinking Muslims (Loh 2009) and heterosexual Muslim women who engage in sex out of wedlock (Shah 2010a). Nevertheless, there are legal limits to dissent, especially among Muslims, as the Act also criminalises 'insulting, or bringing into contempt, *etc.*, the religion of Islam', which carries 'a fine not exceeding 3,000 ringgit or to imprisonment for a term not exceeding two years or both' (Syariah Criminal Offences Act 1997).

That said, not all government and state-appointed Islamic officials are unshakeable in their positions. For instance, the Women, Family and Community Development Ministry is more conciliatory and engaging on issues affecting transsexuals. In the deceased Aleesha Farhana's case, Minister Shahrizat Abdul Jalil released statements calling for compassionate outreach and counselling (*The Star* 2011b). Nevertheless, her ministry continued to use the male pronoun to refer to Aleesha Farhana, perhaps indicating ambivalence on the matter with respect to the provisions of Malaysian *shariah* legislation.

3.2 The 'opposition' position

Political scientist Ahmad Fauzi Abdul Hamid (2009, p. 152) and other scholars have observed the competition between UMNO and the PAS – the country's two biggest political parties – to represent a more 'authentic' Islam. Since 2008, PAS has been in a coalition of three federal opposition parties, the others being the secular-left Democratic Action Party (DAP) and the centrist, mixed-ideology People's Justice Party (PKR). Anwar is PKR's designated advisor and is often referred to as its de facto leader, while the party is officially led by his wife, Dr Wan Azizah Wan Ismail. DAP and PKR have diverse memberships, although DAP is dominated by non-Muslim Chinese Malaysians. PKR has a more balanced membership and leadership composition, and also has an influential faction of leaders from various 'Islamic' movements.

The contest between Muslim leaders in federal government and Muslims in opposition (from PAS and to a lesser extent PKR) is overwhelmingly framed as a 'who-is-more-Islamic' battle. Thus, in response to the government's promise to take action against those promoting 'homosexuality' for example, PAS's youth wing called for increased policing of 'all forms of entertainment' promoting 'gay culture' (*The Star* 2010). In fact, in October 2010, PAS Youth

held a demonstration in protest at a concert by openly-gay entertainer Adam Lambert in Malaysia. PAS Youth also called on the government to take stern action against openly-gay Malaysian pastor Rev Ou Yang (Samsudeen 2011), seeing 'homosexuality' as not merely a Christian, but a Malaysian 'problem'.

Nevertheless, there are nuances to this view across the party. A senior PAS leader, Dzulkefly Ahmad, upholds moral policing but cautions against intruding on 'personal life' (Sta Maria 2011).

This is where the nuances within the Malaysian 'Islamic' opposition get interesting. One example is the 'Islamic' activism of former PKR MP Zulkifli Noordin, who was sacked from the party in early 2010 and is now an Independent. While he was in PKR, Zulkifli made several statements calling for a more stringent application of Islam in Malaysia. He stoked controversy when he disrupted a forum on religious freedom, organised by the Malaysian Bar Council, calling it an insult to Islam (Shah 2008a). Zulkifli also supports Section 377, saying it is consistent with Islamic values (Brownell 2009).

However, when I interviewed Zulkifli in 2008, like PAS's Dzulkefly, he was ambivalent about intruding on personal privacy in the name of moral policing (Shah 2008a). In fact, Zulkifli's response to a 2009 case involving a Malaysian Muslim transsexual woman was surprising. Several Malaysian Muslim leaders were calling for Fatine Min Baharin to be charged under Malaysian *shariah* law because she contracted a civil partnership with an English man in the UK. Zulkifli's was one of the few 'Islamic' voices that defended Fatine's personal security and said that she should not be victimised (mStar 2009).

Thus, the political opposition's discourse on Islam mirrors the official, government-sanctioned position. In both government and opposition, normative views on Islam are hostile towards sexual minorities. But voices exist in both camps that are more ambivalent about 'Islamic moral policing', including towards sexual minorities.

This said, the government and its supporting 'Islamic' advocates are now trying to discredit opposition-party Muslims by a series of discursive moves. Most importantly, the UMNO-led federal government has asked Muslims to reject the ethic of religious pluralism, which is defined as seeing other religions as 'equal' to Islam (Zalkapli 2011). Thus, UMNO and its supporters now attempt to discredit opposition-party Muslims as 'religious pluralists'. Similar discursive moves have been made with other terms such as 'liberal' and 'human rights', and there are frequent attempts to discredit Anwar in this way (Zalkapli 2010). In fact, the UMNO-owned Malay-language daily *Utusan Malaysia* (2011) claimed that Rev Ou Yang's same-sex marriage was 'proof' that 'pluralism' and 'liberalism' were undermining Malaysian nationhood.

However, such dynamics occur even *among* opposition Muslims. For instance, PKR's Zulkifli and PAS have tried to discredit Muslim feminist organisation Sisters in Islam several times for very similar reasons (Loh and Shah 2009).

3.3 The 'Islamic civil society' position

Attention also needs to be paid to numerous 'Islamic' NGOs and movements. These organisations act on a variety of issues, many of them exerting considerable pressure on public policies and directives (Shah 2009a, 2009b). It would be a mistake to subsume them under the label 'Islamist', however, as they hold distinct ideologies and goals and considerable intra-movement tensions exist among them.

Conventional 'liberal'/'fundamentalist' typologies can be divided up as follows: in terms of ideology, it is easy to pick out the more 'liberal' or 'reformist' groups, such as Sisters in Islam and the Islamic Renaissance Front (IRF), while their 'opposites' are the more morally and socially 'conservative' groups such as ABIM, the Malaysian Reform Movement (JIM) and the Muslim Organisations in Defence of Islam (PEMBELA).

Two immediate clarifications must be made, however. Firstly, while it may appear that the 'Islamic' NGO landscape is cleaved along 'liberal'/'fundamentalist' lines, the truth is that there is actually a constant (albeit small and unnoticed) flow of people and ideas between the two poles. Secondly, it should also be noted that even among the 'conservative Islamic' groups there are intra-movement tensions, which can get quite severe (Shah 2010b).

Given these clarifications, it is more helpful to abandon the 'liberal'/'fundamentalist' labels and map out how the discourse relating to sexual diversity is evolving among these Muslim groups, and how these in turn relate to shifts in public opinion.

In this sense, developments in the IRF deserve scrutiny. When I interviewed IRF founder and president Dr Ahmad Farouk Musa in 2010, he was clear about what he called his 'Islamist' origins. Dr Ahmad Farouk had initially co-founded the Muslim Professionals Forum but left because he disagreed with its position that the law should forbid Muslims from converting out of Islam (Shah 2010c). His defence of freedom of religion, however, is not based primarily on 'secular' human rights ideas – he locates the principle *within* the Islamic tradition. Under his leadership, the IRF promotes expressions of Islam that are opposed to the policing of people's moralities. Furthermore, Dr Ahmad Farouk says that the IRF is committed to building dialogue with different groups to 'revitalise intellectual dynamism in Muslim societies'.

The IRF, founded in 2009, is an interesting development as far as Malaysian 'Islamic' activism is concerned. Prior to the emergence of the IRF, many saw Sisters in Islam as the sole 'liberal/reformist' organisation, and it was marginalised, dismissed or even threatened with legal action by UMNO, PAS, and several Muslim NGOs (Ding 2009). Prior to the emergence of the IRF, it would have appeared that the Malaysian discourse on Islam was polarised and intolerant of non-conformist articulations. What the IRF and Dr Ahmad

Farouk's experiences prove, however, is that while the discourse is highly regulated, there are spaces for Malaysians to articulate Islam in fresh ways.

3.4 New indicators

In October and November 2010, the independent polling house Merdeka Center for Opinion Research carried out a survey of Muslim youth attitudes. 1,060 people aged 15 to 25 were polled in Malaysia, 1,496 in Indonesia. Such comprehensive surveys being rare in Malaysia, it was a historic initiative and crucially important, given that more than half the population of the two countries is under 30 years old (Chiam et al. 2011, p. 2).

One section of the survey asked, 'Do you agree or disagree with the following statements? ... It's ok to be gay or lesbian', to which 99.4 per cent disagreed, and 0.5 per cent agreed. The other statements were, 'it's ok to have sex before marriage' (98.4 per cent disagreed) and 'it's ok to watch pornographic movies' (97.6 per cent disagreed) (Chiam et al. 2011, p. 20).

The findings might alarm sexual diversity advocates. Nevertheless, deeper analysis is called for. For one thing, the survey question lacks nuance. It is framed as a 'yes' or 'no' question, which limits the articulation of potential responses. Thus, it must be borne in mind that these questions were answered by young Muslims in an environment where state and non-state actors exercise immense authority to interpret and implement 'Islam' on wide-ranging issues.

The survey questions are nevertheless valuable departure points for analysis. In other parts of the survey, there are similarly flawed but valuable questions, such as one asking respondents if they were concerned about human rights violations (81 per cent said yes) (Chiam et al. 2011, p. 24). Eighty-three per cent were concerned about 'Islamic radicalism in politics' and 78.4 per cent about lack of freedom of expression (Chiam et al. 2011, p. 23).

How should these different positions be interpreted? Hard conclusions cannot be drawn in the absence of qualitative follow-up studies. It could be that, when asked to clarify these apparent contradictions, some respondents might resort to creative hermeneutics. This is merely a suggestion, but one based on existing currents in global discourses on Islam.

For instance, the renowned European Muslim scholar Tariq Ramadan maintains that same-sex behaviour is not permissible within the Islamic tradition. He also says he does not support the 'promotion' of same-sex sexual expressions. However, he goes on to argue that it is not for the state to persecute and discriminate against sexual minorities (anas112 2010).

Ramadan's position might still offend secular liberal and/or Western advocates of LGBT human rights for not being affirming enough. It is, though, crucial to note the significance of his position. Firstly, he is a scholar respected by a wide cross-section of Muslims in the West and in Muslim-majority countries. Ramadan lectures regularly in Malaysia, appeals to many young

Malaysian Muslims and has close links with Dr Ahmad Farouk's IRF (Shah 2010c).

Secondly, Ramadan may start off from a 'conservative' position, but while his position remains at odds with Muslim scholars and leaders who affirm sexual diversity – such as openly gay American Muslim scholar Scott Siraj al-Haqq Kugle and openly gay imams Daayiee Abdullah from the US and Muhsin Hendricks from South Africa – he appears open to dialogue. It is also likely that this global circulation of ideas and experiences is yielding more nuanced positions on sexual diversity among Muslim scholars and lay believers. Although many positions appear to fall short of outright affirmation, they also do not seem to condone outright condemnation.

With reference to Malaysia, despite state and non-state actors controlling interpretations of Islam, it is not known to what extent young Muslims personally *mediate* these different interpretations. Going back to the survey, young Malaysian Muslims might not appear to be gay *affirming*, but there is a possibility that complementary interpretations of Islam and human rights could result in a minimum *acceptance* of sexual diversity. This might in turn entail fruitful discussion and action on decriminalisation of diverse expressions of gender and sexuality.

4. Further possibilities

This discussion suggests so far that the relatively new and weak movement to decriminalise diverse sexualities would benefit by building allies from *other* civil society or political movements. This section proposes some possibilities, given the current socio-political climate.

On 9 July 2011, an estimated 20,000 Malaysians of diverse ethnicities, religions and probably even gender and sexuality backgrounds took peacefully to the streets of Kuala Lumpur (Al Jazeera 2011). The movement, calling itself Bersih 2.0 (Malay for 'clean'), demanded free and fair elections, including a minimum campaigning period of 21 days, use of indelible ink, and free and fair access to the media for all political candidates (Bersih 2.0 Steering Committee 2011).

In the weeks leading up to the protest, the government and its mouthpieces tried to discredit the movement as the work of Communist infiltrators, foreign agents, Christian/Jewish plots to destroy Islam, and so on (Ding 2011). Bersih 2.0 chairperson Ambiga Sreenevasan even received a death threat (*The Star* 2011a). On the day of the protest, police fired tear gas and water cannons on protesters, and made nearly 2,000 arrests before and during the event (Welsh 2011).

A month after the protest, however, Prime Minister Najib Razak announced that his government would form a bipartisan parliamentary select committee on electoral reforms (theSun 2011). While Najib's proposal fell short of Bersih

2.0's demands – and even then he backtracked within days (*New Straits Times* 2011) – the movement's impact cannot be ignored. Meanwhile, a survey by Merdeka Center revealed that over two-thirds of Malaysians polled agreed with Bersih 2.0's demands. More significantly, 49 per cent disagreed with the government's handling of the 9 July protest (Yow 2011).

What does a mass protest demanding free and fair elections have to do with socio-political reforms regarding diverse genders and sexualities?

Firstly, the kind of government-led responses to demonise and discredit Bersih are disturbingly similar to the kind of rhetoric used to discredit any efforts to recognise sexual diversity. Thus, it is possible to analyse postcolonial, state-led hostilities towards sexual minorities as part of a larger anti-colonial rhetoric. Nevertheless, we must also note how this rhetoric is linked to authoritarianism. Many movements that question the Malaysian government's commitment to democracy and fundamental liberties (as enshrined in the Federal Constitution) are cast as 'foreign plots' and 'threats to Islam'. And these various movements are also dealt with using the same repertoire of repressive tactics – for example arrest and incarceration under draconian laws, disproportionate use of force, and demonisation in the media.

Secondly, the 9 July march is one indicator that the exact same repressive tactics might not be working anymore. In fact, political scientist Bridget Welsh (2011) says it is an example of how increasing numbers of Malaysians have 'broken down the barriers of fear'. Furthermore, as a mass movement of diverse Malaysians focused on electoral reforms, Bersih 2.0 is part of the larger reform drive that is concerned primarily with 'human rights and civil liberty' issues (Welsh 2011).

Thus, spill-over effects from movements such as Bersih 2.0 have the potential to transform the Malaysian socio-political landscape where sexual diversity is concerned. For one thing, the Bersih 2.0 Steering Committee has proportionate gender, ethnic and religious balance – the IRF's Dr Ahmad Farouk is a member. Others include advocates from the women's movement, human rights lawyers and the president of a mass Muslim movement (Bersih 2.0 Steering Committee 2011). These leaders have significant social and cultural capital in terms of ties with their grassroots constituents.

However, Bersih 2.0 also attracts leaders and supporters of opposition parties who are hostile towards the rights of sexual minorities. It would thus be a stretch to say that Bersih 2.0 supports sexual diversity, but it has the potential to attract a diverse group of Malaysians concerned about human rights and democracy, simultaneously challenging those among them who are hostile towards sexual diversity.

In addition to Bersih 2.0, other diverse collectives have also emerged, such as LoyarBurok (an interactive social justice blog); UndiMsia! (literally, 'VoteMalaysia!', a voter education campaign supported by LoyarBurok); and MyConstitution (a campaign to raise public awareness about the Federal

Constitution). Like Bersih 2.0, these movements are embedded within social media networks and encourage wide public participation especially among younger Malaysians. Furthermore, LoyarBurok and MyConstitution openly endorse sexual diversity initiatives such as Seksualiti Merdeka (Lord Bobo 2010).

This is significant because the diverse ethnic and religious makeup of these groups allows issues related to 'Islam' to be addressed meaningfully and transcended. In other words, growing interactions among politicised Malaysians – Muslims and non-Muslims – are redirecting articulations of Islam, and these could have an impact on the status of sexual minorities.

As far as institutional targets are concerned, SUHAKAM is still a viable option, notwithstanding criticisms about its lack of effectiveness – its decisions have symbolic power. In terms of sexual diversity, SUHAKAM says it is currently undertaking a consultation to understand 'the sensitivities of LGBT issue [sic] in Islam, at the same time to have an open discussion on the matter'. What is encouraging is that SUHAKAM 'maintains that human rights are for all and LGBT are not excluded. LGBT must be respected as human beings and their differences cannot be used as reasons to violate their rights' (Human Rights Commission of Malaysia 2010).

Apart from this, at the time of writing this chapter, transsexual women and their lawyers in Negeri Sembilan state are seeking judicial review to challenge the constitutionality of *shariah* provisions that outlaw 'cross-dressing' (Equal Rights Trust 2011). This legal challenge addresses the substance of Section 66 of Syariah Criminal (Negeri Sembilan) Enactment, widely used to target Muslim trans women. There are also, however, abuses at the procedural level of law enforcement. Muslim trans women from the state have testified that, after often violent and abusive detentions by state-appointed Islamic enforcers, they were made to appear in the *shariah* courts without adequate legal representation (Shah 2010e; 2010f). There has previously been an outcry about the heavy-handedness of state-appointed Islamic enforcers in several states, and similarly lawyers have tried previously to defend trans Muslim women in *shariah* courts. But such attempts to seek judicial review on the constitutionality of *shariah* criminal laws are rare although significant.

This strategy must, however, be assessed in the light of the larger legal and judicial system in Malaysia. There is no space here to discuss the complexities and complications of Malaysia's laws and courts, but a few points are necessary. Malaysia has had a succession of judicial crises since the 1960s which have hampered the courts' independence and left them vulnerable to interference from the executive. On top of this, there are also moves by state and non-state actors to elevate the status of 'Islamic' laws in Malaysia's legal and judicial system (Shad Saleem 2011). One way in which this is expressed is in the battle for jurisdiction between *shariah* and civil courts. For more information consult legal experts Mohammad Hashim Kamali and Shad Saleem Faruqi,

who have written extensively on conflicts in the Malaysian system with a focus on Islamic legislation. Suffice it to say here, at the risk of oversimplification, that the lack of independence, together with the growing 'Islamisation' of the Malaysian judiciary, are incredible obstacles for any legal strategy to challenge laws criminalising diverse genders and sexualities.

Besides these social movement and institutional openings, there are also bolder explorations of sexual diversity in the literary, arts and entertainment scene in Malaysia. It is beyond the scope of this chapter to run through a list of these recent works, but they exist, continue to proliferate and are produced and consumed by Malaysians of diverse ethnic and religious backgrounds. These include the 2005 film and 2006 television series *Gol and Gincu ('Goalpost and Lipstick')*, the 2011 film *Dalam Botol* (*'In a Bottle'*), and the 2008 play *Air Con*, significant because they presented sexual diversity issues to a mass audience in the Malay language and in a post-1998 environment. Also pioneering was the 2009 English-language anthology *Body2Body: A Malaysian Queer Anthology* (Kugan and Khee Teik 2009), and its 2010 Malay-language follow-up, *Orang Macam Kita* (*'People Like Us'*) (Ismail and Dirani 2010).

The question now is how to strategise *effective* advocacy for sexual diversity, including at the Commonwealth level. While the purpose of this chapter is not to recommend specifics, there are some frameworks that can provide a more useful basis for advocacy than others.

Most importantly, any attempt – either by governments or non-state advocates within the Commonwealth – to hold Malaysia accountable in its treatment of sexual minorities must consider cultural specificities, especially diverse expressions of Islam. Any transnational attempts to engage Malaysians in debates or discussions on sexual diversity will be seen as 'Western', neo-colonial impositions – and deservedly so – if local nuances are misunderstood or misrepresented.

Secondly, this does not mean that a human rights approach needs to be avoided. However, the approach needs to have multiple levels of critique. For example, interpretations of Islam and *shariah* that affirm the values of dialogue, freedom of expression and basic human dignity and rights should be respected *without* labelling other Muslims as 'fundamentalist', 'extremist' and so on. The use of such labels reinforces the view that 'human rights' discourses only marginalise Muslims or non-Western societies. As this chapter shows, Muslims in Malaysia are diverse and hold a spectrum of positions when it comes to Islam and civil liberties. Mapping 'liberal'/'fundamentalist' typologies on to Malaysian experiences of Islam is thus more inaccurate, even damaging, than helpful.

What does help is engaging Muslim leaders and scholars in the everyday experiences of sexual minorities. For example, through constructive engagement via its own community spokespersons and HIV/AIDS organisations, the Muslim trans women community in Kuala Lumpur now receives non-

judgemental religious instruction from the Federal Territories Islamic Affairs Department on matters related to HIV. I have observed good rapport between some religious instructors from the Department and marginalised communities, such as trans women, drug users and people with HIV. Efforts like these often hit brick walls within the Islamic bureaucracy. Nevertheless, these personal, non-threatening encounters between sexual minorities and the rank-and-file in Islamic departments are an opportunity, albeit a very slender one, for greater dialogue on sexual diversity.

Thirdly, regional and international support is necessary to ensure that reforms in Malaysia are visible and have every chance of success. For instance, the international spotlight on the government's violent handling of the Bersih 2.0 assembly has been crucial in moderating the government's subsequent actions. Take premier Najib's 'explanation' to Malaysians that he told his UK counterpart David Cameron there is room for dissent in the country but that public order had to be maintained (*The Malaysian Insider* 2011). While this is an unsatisfactory answer, it highlights the fact that the Malaysian government is still forced to respond to its Commonwealth counterparts when issues are made visible. Thus, non-interventionist, supportive but simultaneously critical gestures in favour of Malaysian social movements are key ingredients for reform.

5. Concluding thoughts

Offord has observed that the influence of sexual diversity movements on the Malaysian state 'has been negligible' (2011, p. 143). I am tempted to agree to a certain extent. However, that is why this chapter is less a recipe for advocacy on sexual diversity in Malaysia than it is a map of the terrain, choosing to lay out how complex and diverse expressions of Malaysian Islam bear upon efforts to uphold and defend sexual diversity. The chapter also uses this map to navigate through broader developments among Malaysian social movements and to identify further opportunities for advocacy and social transformation. I hope that it will help sexual diversity and human rights advocates in Malaysia and across the Commonwealth to gain helpful insights to inform their specific strategies and tactics. After all, it is by taking note of the landscape's details that new paths, or many mutually supportive paths, can be pioneered.

Bibliography

Abdul Hamid, A.F. (2009) 'Transnational Islam in Malaysia', in Peter Mandaville et al. (eds.), *Transnational Islam in South and Southeast Asia: Movements, Networks and Conflict Dynamics* (Seattle: The National Bureau of Asian Research), pp. 141–65.

anas112 (2010) Tariq Ramadan about homosexuality, available at www.youtube.com/watch?v=wsaWjxkZB3w&feature=related (accessed 4 Jan. 2013).

ARC International et al. (2011) 'Historic decision at the United Nations: Human Rights Council passes first-ever resolution on sexual orientation and gender identity' [press release] 17 June, available at: www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1417.html (accessed 4 Jan. 2013).

BBC News (2004) 'Malaysia's Anwar Ibrahim set free', 2 Sep., available at http://news.bbc.co.uk/2/hi/asia-pacific/3619790.stm (accessed 4 Jan. 2013).

— (2011) 'Malaysia's Anwar Ibrahim defiant at sodomy trial', 22 Aug., available at: www.bbc.co.uk/news/world-asia-pacific-14611879 (accessed 4 Jan. 2013).

Bersih 2.0 Steering Committee (2011) 'Bersih 2.0', available at http://bersih.org (accessed 4 Jan. 2013).

Boo, S.-L.(2011) '"Sissy boot camp" violates law, says Shahrizat', *The Malaysian Insider*, 19 Apr, available at www.themalaysianinsider.com/malaysia/article/sissy-boot-camps-violates-law-says-shahrizat/ (accessed 4 Jan. 2013).

Brownell, C. (2009) 'Rethinking Malaysia's sodomy laws', *The Nut Graph*, 24 July, available at www.thenutgraph.com/rethinking-malaysia-sodomy-laws/ (accessed 4 Jan. 2013).

Chiam, H.K. et al. (2011) *Values, Dreams, Ideals: Muslim Youth in Southeast Asia. Surveys in Malaysia and Indonesia* (Kuala Lumpur: Merdeka Center for Opinion Research), available at www.merdeka.org/pages/02_research.html (accessed 4 Jan. 2013).

Commonwealth Secretariat (2011) *Member States*, available at www.thecommonwealth.org/Internal/142227/members/ (accessed 4 Jan. 2013).

Department of Statistics Malaysia (2001) 'Population and housing census 2000: press statement' (Putrajaya: Department of Statistics Malaysia), available at http://web.archive.org/web/20070323094806/http:/www.statistics.gov.my/english/census/pressdemo.htm (accessed 4 Jan. 2013).

Ding, J.-A. (2009) 'SIS critics using police', *The Nut Graph*, 5 Nov., available at www.thenutgraph.com/sis-critics-using-police/ (accessed 4 Jan. 2013).

— (2011) 'Theories of Bersih 2.0', *The Nut Graph*, 25 July, available at www.thenutgraph.com/theories-of-bersih-2–0/ (accessed 4 Jan. 2013).

Equal Rights Trust (2011)'The *Mak Nyahs* of Malaysia: testimony of four transgender women', *The Equal Rights Review* 7, available at www.equalrightstrust.org/ertdocumentbank/ERR7_testimony.pdf (accessed 4 Jan. 2013).

Federal Constitution 2009 (2009) (Kuala Lumpur: Lawnet).

Hassan, M.S. (2011) 'Tiada hak bagi LBGT [sic]' ('No rights for LGBTs'), *Harian Metro*, 11 Oct., available at www.hmetro.com.my/articles/20111011005652201111011005652/Article (accessed 4 Jan. 2013).

Human Rights Commission of Malaysia (2010) (SUHAKAM) 'Study on the rights of LGBT in Malaysia' [press release], available at www.suhakam.org.my/c/document_library/get_file?p_l_id=10408&folderId=32357&name=DLFE-8904.pdf (accessed 4 Jan. 2013).

— (2011) 'SUHAKAM official portal – functions and power', available at www.suhakam.org.my/info/jawatan;jsessionid=D424EA90774EB36729AEFDC437491FAB (accessed 4 Jan. 2013).

Ibrahim, Z. (2011) 'Tribute to Aleesha (alias Ashraf)', *Free Malaysia Today*, 2 Aug., available at www.freemalaysiatoday.com/2011/08/02/tribute-to-aleesha-alias-ashraf/ (accessed 4 Jan. 2013).

Ismail, A. and D. Dirani (eds.) (2010) *Orang Macam Kita* (Petaling Jaya: Matahari Books).

Jackson, P.A. (2000) 'An explosion of Thai identities: global queering and re-imagining queer theory', *Culture, Health and Sexuality* 2 (4), pp. 405–24.

Jakarta Globe (2009) 'Transsexual in Malaysia: a life without identity', 6 Sep., available at www.thejakartaglobe.com/culture/transsexual-in-malaysia-a-life-without-identity/328296 (accessed 4 Jan. 2013).

Johnson, M. et al. (2000) 'Critical regionalities and the study of gender and sexual diversity in South East and East Asia', *Culture, Health and Sexuality* 2 (4), pp. 361–75.

Johnson, M. (1998) 'Global desirings and translocal loves: transgendering and same-sex sexualities in the southern Philippines', *American Ethnologist* 25 (4), pp. 695–711.

katagender (2009) *katagender*, available at http://katagender.blogspot.com (accessed 4 Jan. 2013).

KL Word (2011) *The KL Word: Putting the 'L' in KL*, available at www.theklword.com/about-2/ (accessed 5 Sep. 2011).

Kollman, K. and M. Waites (2009) 'The global politics of lesbian, gay, bisexual and transgender human rights: an introduction', *Contemporary Politics* 15 (1), pp. 1–17.

Kugan, J. and Pang Khee Teik (eds.) (2009) *Body 2 Body: A Malaysian Queer Anthology* (Petaling Jaya: Matahari Books).

Liau, Y.-S. (2007) 'Malaysia's Muslim transsexuals battle sex change woes', *Reuters*, 3 Sep., available at http://in.reuters.com/article/2007/09/03/idINIndia-29301520070903 (accessed 4 Jan. 2013).

Loh, D. and S. Shah (2009) 'PAS wants Sisters in Islam investigated' *The Nut Graph*, 7 June, available at www.thenutgraph.com/pas-wants-sisters-in-islam-investigated/ (accessed 4 Jan. 2013).

Loh, D. (2009) 'Whipping Kartika', *The Nut Graph*, 1 Sep., available at www.thenutgraph.com/whipping-kartika/ (accessed 4 Jan. 2013).

Long, S. (2009) 'Unbearable witness: how Western activists (mis)recognize sexuality in Iran', *Contemporary Politics* 15 (1), pp. 119–36.

Lord Bobo (2010) 'Seksualiti Merdeka 2010: we are family!' *LoyarBurok*, 5 Oct., available at www.loyarburok.com/2010/10/05/seksualiti-merdeka-2010–we-are-family/ (accessed 4 Jan. 2013).

LoyarBurok (2011) 'LoyarBurok', available at www.loyarburok.com (accessed 4 Jan. 2013).

Malaysian Centre for Constitutionalism and Human Rights (2011) 'JUICE: UndiMsia! Democracy made hip', 26 Aug., available at www.loyarburok.com/2011/08/26/juice-undimsia-democracy-hip/ (accessed 4 Jan. 2013).

The Malaysian Insider (2011) 'Najib says briefed Britain's PM on Bersih's real intentions', 22 July, available at www.themalaysianinsider.com/malaysia/article/najib-says-briefed-britains-pm-on-bersihs-real-intentions (accessed 4 Jan. 2013).

Michaels, S. (2011) 'Lady Gaga "gay anthem" censored in Malaysia', *The Guardian*, 18 Mar., available at www.guardian.co.uk/music/2011/mar/18/lady-gaga-born-this-way-malaysia (accessed 4 Jan. 2013).

Mohamed Kasim, Z. (2004) 'Sexuality under attack: the political discourse on sexuality in Malaysia', *Queering: Social Movements and Feminist Theories, Women in Action (WIA)* 1, 14 Sep., available at www.isiswomen.org/index.php?option=com_content&task=view&id=270&Itemid=135 (accessed 4 Jan. 2013).

mStar (2009) 'Zulkifli Noordin kata Fatine Min Baharin patut dibantu bukan dihukum' (Zulkifli Noordin says Fatine Min Baharin should be helped not punished)', 4 Dec., available at http://mstar.com.my/berita/cerita.asp?file=/2009/12/4/mstar_berita/20091203204827&sec=mstar_berita (accessed 4 Jan. 2013).

Nagata, J. (1980) 'Religious ideology and social change: the Islamic revival in Malaysia', *Pacific Affairs* 53 (3), pp. 405–39.

NECF Executive Secretary (2007) 'Gay church: a response', *National Evangelical Christian Fellowship Malaysia*, Nov.–Dec., available at www.necf.org.my/newsmaster.cfm?&menuid=2&action=view&retrieveid=930 (accessed 4 Jan. 2013).

New Straits Times (2011) 'General election can be held anytime: Najib', 19 Aug., available at www.nst.com.my/nst/articles/Generalelectioncanbeheldanytime_Najib/Article/ (accessed 5 Sep. 2011)

Offord, B. (2011) 'Singapore, Indonesia and Malaysia: arrested development!', in M. Tremblay et al. (eds.), *The Lesbian and Gay Movement and the State* (Surrey: Ashgate), pp. 135–51.

Organisation of Islamic Cooperation (2011) *Member States*, available at www.oicun.org/3/28/ (accessed 4 Jan. 2013).

Peletz, M.G. (2003) *Reinscribing 'Asian (Family) Values': Nation Building, Subject Making, and Judicial Process in Malaysia's Islamic Courts* (Erasmus Institute).

PerlembagaanKu/MyConstitution (2011) *PerlembagaanKu/MyConstitution*, available at www.perlembagaanku.com (accessed 5 Sep. 2011).
Samsudeen, H. (2010) 'Paderi homoseksual: Pemuda PAS Wilayah desak kerajaan nyatakan pendirian' ('Homosexual priest: Federal Territories PAS Youth urge government to state position'), *Merdeka Review*, 3 Sep., available at www.merdekareview.com/bm/news.php?n=11066 (accessed 4 Jan. 2013).
Seksualiti Merdeka (2011) *Seksualiti Merdeka*, available at www.seksualitimerdeka.org (accessed 4 Jan. 2013).
Shah, S. (2008a) '"It's God's will"', *The Nut Graph*, 11 Nov., available at www.thenutgraph.com/its-gods-will/ (accessed 4 Jan. 2013).
— (2008b) 'PAS can't govern alone', *The Nut Graph*, 4 Dec., available at www.thenutgraph.com/pas-cant-govern-alone/ (accessed 4 Jan. 2013).
— (2009a) 'Agitating Malay Muslims', *The Nut Graph*, 3 Mar., available at www.thenutgraph.com/agitating-malay-muslims/ (accessed 4 Jan. 2013).
— (2009b) 'The rise of Muslim NGOs', *The Nut Graph*, 5 May, available at www.thenutgraph.com/rise-of-muslim-ngos/ (accessed 4 Jan. 2013).
— (2009c) 'Sodomy laws: a British import', *The Nut Graph*, 21 Aug., available at www.thenutgraph.com/sodomy-laws-a-british-import/ (accessed 4 Jan. 2013).
— (2009d) 'Syariah law galore', *The Nut Graph*, 14 Dec., available at www.thenutgraph.com/syariah-law-galore/ (accessed 4 Jan. 2013).
— (2010a) 'The Islamic state we deserve?', *The Nut Graph*, 19 Feb., available at www.thenutgraph.com/islamic-state-we-deserve/ (accessed 4 Jan. 2013).
— (2010b) 'Confusion over ISA banner', *The Nut Graph*, 26 Mar., available at www.thenutgraph.com/confusion-over-isa-banner/ (accessed 4 Jan. 2013).
— (2010c) 'A front for Islamic renaissance', *The Nut Graph*, 8 April., available at www.thenutgraph.com/front-for-islamic-renaissance/ (accessed 4 Jan. 2013).
— (2010d) '"Is Chinese penis really that good?"', *The Nut Graph*, 14 June, available at www.thenutgraph.com/"is-chinese-penis-really-that-good"/ (accessed 4 Jan. 2013).
— (2010e) '"Diam, pondan!" ("Shut up, tranny!")', *The Nut Graph*, 15 June, available at www.thenutgraph.com/%E2%80%9Cdiam-pondan%E2%80%9D/ (accessed 4 Jan. 2013).
— (2010f) 'The arbitrariness of moral policing', *The Nut Graph*, 18 June, available at www.thenutgraph.com/the-arbitrariness-of-moral-policing/ (accessed 4 Jan. 2013).
— (2011) 'Malaysia's gay threat', *The Nut Graph*, 10 Jan., available at www.thenutgraph.com/malaysias-gay-threat/ (accessed 4 Jan. 2013).

Spaeth, A. (1998) 'Whose trial?' *TIME World*, 16 Nov., available at www.time.com/time/world/article/0,8599,2053873,00.html (accessed 4 Jan. 2013).

Sta Maria, S. (2011) 'An academician in politician's clothing', *Free Malaysia Today*, 11 Mar., available at www.freemalaysiatoday.com/2011/03/11/an-academician-in-politicians-clothing/ (accessed 4 Jan. 2013).

The Star (2010) 'Gay man fears for his life after exposing his sexuality on Net', 23 Dec., available at http://thestar.com.my/news/story.asp?file=/2010/12/23/nation/7670758&sec=nation (accessed 4 Jan. 2013).

— (2011a) 'Ambiga gets death threat', 24 June, available at http://thestar.com.my/news/story.asp?sec=nation&file=/2011/6/24/nation/8967215 (accessed 4 Jan. 2013).

— (2011b) 'Transgender Aleesha dies; candlelight vigil planned for Saturday night', 30 July, available at http://thestar.com.my/news/story.asp?sec=nation&file=/2011/7/30/nation/20110730130619 (accessed 4 Jan. 2013).

— (2011c) 'Jais submits initial report on church issue', 15 Aug., available at http://thestar.com.my/news/story.asp?file=/2011/8/15/nation/9300466&sec=nation (accessed 5 Sep. 2011).

Surin, J.A. (2003) 'Lesbians, gays can turn to Suhakam', *The Star*, 29 Aug., available at http://thestar.com.my/news/story.asp?file=/2003/8/29/nation/6163308&sec=nati (accessed 4 Jan. 2013).

— (2010) 'The importance of Bersih', *The Nut Graph*, 8 Nov., available at www.thenutgraph.com/the-importance-of-bersih/ (accessed 4 Jan. 2013).

Syariah Criminal Offences (Federal Territories) Act 1997 (Kuala Lumpur: The Commissioner of Law Revision, Malaysia).

theSundaily (2011) 'Some hail proposed electoral reform panel, others to wait and see', 16 Aug., available at www.thesundaily.my/news/113826 (accessed 5 Sep. 2011).

Tilted World (2011) 'Tilted World: a Malaysian LGBT community project', available at http://tiltedworld.org (accessed 4 Jan. 2013).

Time Magazine (2000) 'Homosexuality is a crime worse than murder', 26 Sep., available at www.time.com/time/world/article/0,8599,2040451,00.html (accessed 4 Jan. 2013).

Utusan Malaysia (2011) 'Paderi kahwin sejenis bukti fahaman liberal semakin menular. (Same-sex marriage priest proof liberal ideology is spreading)', 16 Aug., available at http://utusan.com.my/utusan/info.asp?y=2011&dt=0816&pub=utusan_malaysia&sec=Dalam_Negeri&pg=dn_15.htm&arc=hive (accessed 4 Jan. 2013).

Van der Westhuizen, J. (2004) 'Marketing Malaysia as a model modern Muslim state: the significance of the 16th Commonwealth Games', *Third World Quarterly* 25 (7), pp. 1277–91.

Vengadesan, M. (2009) 'Leashed from the start', *The Star*, 6 Sep., available at http://thestar.com.my/lifestyle/story.asp?file=/2009/9/6/lifefocus/4655074&sec=lifefocus (accessed 4 Jan. 2013).

Waites, M. (2009) 'Critique of "sexual orientation" and "gender identity" in human rights discourse: global queer politics beyond the Yogyakarta Principles', *Contemporary Politics* 15 (1), pp. 137–56.

— (2010) 'Human rights, sexual orientation and the generation of childhoods: analysing the partial decriminalisation of "unnatural offences" in India', *The International Journal of Human Rights* 14 (6), pp. 971–93.

Welsh, B. (2011) 'People power in Malaysia: Bersih rally and its aftermath', *Asia Pacific Bulletin* 128, 10 Aug., pp. 1–2.

Yow, H.C. (2011) 'Most Malaysians agree with Bersih demands, poll finds', *The Malaysian Insider*, 29 Aug., available at www.themalaysianinsider.com/malaysia/article/most-malaysians-agree-with-bersih-demands-poll-finds/ (accessed 4 Jan. 2013).

Zalkapli, A. (2010) 'Ikim backs scholars against Anwar', *The Malaysian Insider*, 15 Dec., available at www.themalaysianinsider.com/malaysia/article/ikim-backs-scholars-against-anwar/ (accessed 4 Jan. 2013).

— (2011) 'Najib warns Muslims against religious pluralism', *The Malaysian Insider*, 18 Feb., available at www.themalaysianinsider.com/malaysia/article/najib-warns-muslims-against-religious-pluralism (accessed 4 Jan. 2013).

10

Decriminalisation of consensual same-sex sexual acts in the South Asian Commonwealth: struggles in contexts

Sumit Baudh

Introduction

Many countries the world over have laws that criminalise consensual sexual acts among persons of the same sex. These laws are differently worded as 'gross indecency', 'buggery', 'debauchery' or 'carnal intercourse against the order of nature'. More commonly, they are known as 'sodomy laws'. Sodomy laws affect almost everybody, if not in the practice of being charged, then in the societal attitudes that follow. No doubt they bear serious implications for same-sex desiring persons, including those who identify as *hijra*, *kinnar*, *kothi*, *aravani*, *zanaanaa*, *khusra*, *khwajasara,* queer*,* third gender*,* lesbian, gay, bisexual, and transgender (hereinafter referred to collectively as LGBT). The laws present a serious threat to HIV prevention initiatives aimed at, for example, men who have sex with men (MSM). These laws also have an impact on attitudes towards certain sexual acts like oral and anal sex, regardless of who is committing them, heterosexual or homosexual.

A global review of these laws is entirely worthwhile. This chapter focuses on the Commonwealth countries of South Asia. In this category, Bangladesh, India, the Maldives, Pakistan and Sri Lanka are subject to this criminalisation. Although Bhutan and Nepal (also Afghanistan and Iran according to some definitions) are considered part of South Asia, they are not included here because they are not Commonwealth countries.

Kirby (2011), Sanders (2009) and Human Rights Watch (2008) have pointed to criminalisation as a direct reflection of Victorian period law-making in what was then the British Empire. The British buggery law was reformulated as 'unnatural' offences in the Indian Penal Code of 1860. In this revised form it travelled the world. Ironically, though the penalisation has long ceased to exist in its place of origin (the present United Kingdom), it continues to flourish elsewhere.

In this chapter criminalisation in the South Asian Commonwealth is explored, drawing upon application of human rights, paying close attention to issues beyond the law and exploring the potential of decriminalisation. Part 1 describes the nature and abuse of criminalisation; part 2 gives an account of the application of human rights; part 3 goes beyond legal issues, building upon perspectives of affected individuals and activists; and part 4 explores the potential of decriminalisation.

Methods

This survey moves on from my working paper of five years ago (Baudh 2008). Having taken more of a legal-research approach then, it became clear the region studied was too large and there was insufficient legal material on the subject. The scope of this chapter is limited to South Asia and research methods were expanded to include interviews.

It relies on interviews with Joya Sikder, founder of the *Badhan Hijra Sangha* and the president of Sex Workers Network of Bangladesh; Tinku Ishtiaq, a gay activist in Bangladesh; Rahmat Ullah Bhuiyan, deputy manager – Program, Bandhu Social Welfare Society, Bangladesh; Rosanna Flamer-Caldera, executive director, EQUAL GROUND, Sri Lanka; and two members of the Organization for the Protection and Propagation of Rights of Sexual Minorities, or simply O, in Pakistan (who requested anonymity).

All interviewees gave informed consent to be quoted in this chapter and were given the opportunity to be anonymous. Names were changed and data anonymised where requested.

The criteria for inclusion in the group of interviewees was geographical location and practical experience. I interviewed those located in South Asia who have practical experience of criminalisation – either through having been directly subjected to it or of having engaged with it as an activist. My long-time involvement with this subject includes voluntary involvement with the Voices Against 377 (2004 onwards), my association with the South and Southeast Asia Resource Centre on Sexuality (2006–9) and membership of the Task Force for setting up South Asia Human Rights Association for Marginalised Sexualities and Genders (2008 onwards). My prior acquaintance with some of the activists in the region was very useful.

The interviews, based on a checklist of questions, took place between April and September 2011, three in person, two via email and one on Skype. Copies of all written correspondence, audio recordings and transcriptions were kept and quotes selected from them which form significant portions of this essay.

Perspectives from the Maldives are missing since I am unaware of anyone who may have insights into the subject, or of any literature on criminalisation in that country – though I would welcome it.

No financial support was provided for this research. It relies on random opportunities, for example my visit to Dhaka in April 2011,[1] where I conducted some of the interviews.

My thanks to Matthew Waites and another reviewer (unknown to me) for comments and inputs on a previous draft. All responsibility for errors and omissions is mine. I have not received any remuneration, nor given any. The work is independent, its biases my own. I dedicate it to my mother, Vidyawati. True to her name, she has always been my teacher.

1. Criminalisation

Covering the nature and abuse of criminalisation, this section begins with an overview that branches into four subparts – one each on Bangladesh, Sri Lanka, Pakistan and India.

There are sodomy laws across the world and their wording varies from country to country. The most common version in South Asia is called 'Unnatural Offences'; it reads as follows:

> Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
>
> Explanation – *Penetration* is sufficient to constitute the carnal intercourse necessary to the offence described in this section. (*The Penal Code 1860*)

Table 10.1: Overview of criminalisation

Country	Terms of Penalisation	Penalty	Subjects
Bangladesh	|=|	|+|	FN
India	|=|	|+|	FN
Pakistan	|=|	Minimum imprisonment up to two years, maximum ten years, also liable to fine.	FN

1 Task force meeting, South Asian Human Rights Association for Marginalised Sexualities and Genders (SAHRA), Dhaka, 6–9 April 2011; supported by a Norwegian organisation, LLH. I stayed on a few extra days at my own cost to conduct interviews for this chapter.

Sri Lanka	(1) 365: |=|	(1) Maximum ten years	FN
	(2) 365A (1995): gross indecency in public or in private	(2) Maximum two years imprisonment or fine or both; higher penalty for offence with minor (<18)	
Maldives*	(1) Sharia Law penalises sexual acts between men and between women.	(1) For men: banishment for nine months to one year or a whipping of ten to 30 strokes; for women: house arrest for nine months to one year.	(1) Only same sex sexual acts (male & female).
	(2) |=|	(2) |+|	(2) FN

Sources: ILGA (2011), Human Rights Watch (HRW 2008), Kirby (2007), Narrain and Dutta (2006).

Notes:
|=| Terms of the law identical to the most common version (as cited above).
|+| Imprisonment up to ten years, may extend to life, also liable to fine.
FN Facially neutral, that is, the criminalisation applies equally to heterosexual and same-sex sexual acts.
* Two contradictory accounts. ILGA (2011) states that 'the Penal Code of Maldives does not regulate sexual conduct.' But a schedule in Kirby (2007) states that the Maldives Penal Code of 1960 has Sections 377 C, 377 D. Also Human Rights Watch (HRW 2008, p. 6) states, 'In Asia and the Pacific, colonies and countries that inherited versions of that British law [377] were: Australia, Bangladesh, Bhutan, Brunei, Fiji, Hong Kong, India, Kiribati, Malaysia, Maldives …' Narrain and Dutta (2006) are also of the view that the Maldives inherited the same Section 377 as the rest of the region.

Notwithstanding the commonality of the numeral 377, practice and impact of this criminalisation has varied. In India for example, in the absence of any other law, Section 377 has been used for prosecuting child sexual abuse. It has also been used as an instrument of human rights violations. More about its abusive practice follows.

1.1 Bangladesh

According to a newspaper report (*The Daily Star* 2008), law enforcement agencies in Bangladesh use Section 377 to harass the MSM. However, in one of my interviews a local gay activist, Tinku Ishtiaq, offered a contradictory account (Ishtiaq 2011):

> Even though 377 exists in the books, it has never been used and I have not heard of it being used as a threat either. However, there are anti-vagrancy and some anti-prostitution laws which are used against hijras [in South Asia, hijras are neither man, nor woman; for brevity

> and for present purposes, they can be understood as 'transgender']. Law enforcers in Bangladesh rarely prosecute people for violating laws, but use them as threats to coerce money.

In another interview, Joya (Sikder 2011) who self-identifies as *hijra*, shared her personal experiences – of arrest, custodial violence and abuse. Interestingly, they have nothing directly to do with Section 377:

> I still have this swelling on my right hand. I won't be able to explain how much they beat us! They use their batons and sticks to full force, especially on us who are *hijras* in women's clothes. They accuse us of all sorts of things, thievery, pickpocketing, etc.
>
> I was arrested in 1999. There is this park near the Shahjalal international airport. There I was with all my make-up. I was having *chaat* and *paani puri* [street food], just like other people. Suddenly this policeman grabbed me by my hair and dragged me to the police van. They couldn't decide what to do with me. So they just drove me around – for two hours. Then they took me to the police station.
>
> Obviously by then I was pleading them, 'let me go.'
>
> They said 'no, you bastard, if we let you go you will be back in the park again, and you will spread your disease.'
>
> At the police station they took me to the cabin of second officer.
>
> He didn't know what to do with me. He yelled at the constable, 'what have you brought ... why have you brought this *Thing* into my room? What are we going to do with this – *Thing*?'
>
> 'She goes around the city selling her body.'
>
> 'Okay, okay. Just throw her in the jail for a night.'
>
> The next day I was sent to the court. While entering the court, I saw a huge queue of lawyers. One of them came to me.
>
> 'If you accept you're guilty, it will be a fine of 500 taka. Another 500 for me to do the work, so a total of 1000 taka', he said.
>
> That's when I got to know about this Section 54.

Section 54 of the Criminal Procedure Code in Bangladesh is another colonial law that came into force in 1898. It is used as an instrument of violation against anyone, not just *hijras* or transgender persons. According to the US Department of State, 'Section 54 of the Criminal Procedure Code and Section 86 of the DMP Ordinance provide for the detention of persons on the suspicion of criminal activity without an order from a magistrate or a warrant, and the government regularly arrest persons without formal charges or specific complaints' (US Department of State 2005). The Bangladesh Legal Aid and Services Trust (BLAST) challenged Section 54 in the Supreme Court of Bangladesh High Court Division in 1998. They relied on several instances

of abusive exercise of power and violation of fundamental rights. The court judgment stated that 'a good number of people died in the police custody after their arrest under Section 54'. It continued, 'such tragic deaths are resulted [sic] due to sweeping and unhindered power given to a police officer under section 54 of the Code' (*BLAST v. Bangladesh* 2003, p. 9). The court recommended that the Government revise Section 54.

1.2 Sri Lanka

Criminalisation in Sri Lanka exists in the form of Sections 365A of the Penal Code. A local NGO, the Women's Support Group (WSG) states:

> Section 365A of the Penal Code (enacted in 1883) criminalises sexual activity between two adults of the same sex. In 1995 the government amended the word 'males' in the original text to 'persons', thereby criminalising sexual activity between women as well … To date although there have been no convictions under this provision of the Penal Code, complaints have been received by police stations citing this provision. (WSG 2011, pp. 2–3).

Resonating with the account on Bangladesh (by Tinku Ishtiaq), Rosanna, executive director of EQUAL GROUND (an NGO in Sri Lanka), confirmed that Section 365A is not used (Flamer-Caldera 2011):

> I mean legally there have been no cases, but they do pick up on the vagrancy law and other laws that they use to intimidate and harass. 365A allows the police for example to just grab you off the street and intimidate you into giving them sexual favours or money to keep it out of the courts.

She narrates an incident that illustrates the influence of criminalisation:

> When we tried to advertise for the International Day Against Homophobia, the newspaper group we were advertising with – who had been very supportive the last three years, had even been giving us a thirty per cent discount – suddenly decided no. That they are not going to put our advertisement because it says homophobia and homosexual on it. Apparently their legal team said that it is illegal to 'promote homosexuality'. Without actually knowing the meaning of 365A, they are using it to further marginalise and suppress LGBT voices.

However, Rosanna challenged the association of this law with homosexuals.

> Where does it say in this law that homosexuals are criminals? It does not. It just says 'carnal intercourse against the order of nature' – and that goes for heterosexual people too. So why is it that we [LGBT persons] are targeted? Is it because we ourselves have said, 'yes we are being criminalised according to this law' and making a big deal out of it?

According to Rosanna, the barriers to LGBT persons are more cultural and social, for example forced heterosexual marriages and the marginalisation that occurs in schools, health services and the workplace.

1.3 Pakistan

Summer (name changed on request) is Muslim, Pakistani and queer. She is a Lahore-based activist (on women's and queer issues), mixes in the queer scene and is a member of the Organization for Protection and Propagation of Rights of Sexual Minorities (or simply 'O'). Commenting on criminalisation in Pakistan, Summer said:

> It is my understanding that occasionally 377 is used as a threat against traditional communities of trans women, particularly sex workers. And also it is felt as a threat by gay men. (Anon. (a) 2011)

Farhan (name changed on request) is a young activist in Lahore and a member of 'O'. According to Farhan, Section 377 is not used but there are cases of extreme sexual violence, particularly against *hijras* (Anon. (b) 2011):

> I have heard accounts of hijras who were gang raped and then offered to the police as thieves who then gang rape them again. The law is used to demean them and justify their rape. I do not know of any LGBT person having been convicted or sent to jail under Section 377, but the Section is in use in rape and child molestation cases.

Speaking of an actual attempt to apply Section 377 to consenting adults, Summer recalled the case of Shahzina and Shumail:

> The Lahore High Court in bringing down the judgment for Shumail Raj and Shahzina Tariq attempted initially to use 377. Upon realising that it requires penetration, and there was no implement of penetration, which is to say there was no penis, since the court had declared they were both women, they could no longer employ 377. That is when they charged them with perjury. (Anon. (a) 2011)

The case of Shahzina and Shumail is described in greater detail in an interview elsewhere (Khan 2007). The brief facts of the case are: Shumail, biologically a female, preferred to dress as a man. Shumail and Shahzina, both adults, got married of their own free will, albeit as a man and as a woman. Unhappy with their wedding, Shahzina's father started harassing them. To stop this Shahzina-Shumail sought an intervention from the court and showed their marriage certificate. The judge told the father to stop harassing Shahzina-Shumail as they were legally married. This did not stop him. Still hopeful of pursuing their legal remedy, Shahzina-Shumail approached a higher court. The father told this court that his daughter had in fact married a woman. Medical reports confirmed Shumail's sex as female. The court wanted to know why Shumail should not be prosecuted under Section 377 – and for perjury. Section 377 was found not to apply, as pointed out by Summer. They were prosecuted and convicted for perjury.

Another case surfaced more recently. According to a newspaper report (BBC News 2010), the police disrupted the wedding ceremony of two adults: Rani who is a *khusra* (local term in Pakistan for transgender person) and a

man, Malik Iqbal. The police arrested them along with their 45 guests. The First Instance Report (FIR) cited a number of provisions including Section 377 (Suhail 2010).

1.4 India

In India, Section 377 has been more visible, especially during the last two decades. And this was even more the case following the Delhi High Court's 'reading it down' in 2009 – to decriminalise consensual sex between adults in private (*Naz Foundation v. NCT Delhi* 2009; hereafter *Naz* 2009) (Lennox and Waites, 'Introduction', this volume). Prior to decriminalisation, though, Section 377 was understood very differently. An earlier study of Indian judgments (Narrain 2004, p. 55) considered a total of 46 reported cases. Of these, 30 cases (65 per cent) dealt with child sexual abuse (by men), of which 20 involve boys and ten involve girls. The remaining 16 cases (involving adults) do not lend themselves easily to an analysis of LGBT lives. The recorded facts are not only scarce, but couched in the same vagueness as the language of Section 377.

More contemporary readings of the case law have thrown light on the lives and struggles of individuals who were subjects of Section 377 – in a time when it was untouched by more modern understanding of gender and sexuality. For example, a recent analysis of the court decision of 1934, with the convict, Nowshirwan Irani, as protagonist. According to the author, Nowshirwan stands for a 'subaltern Oscar Wilde' (Narrain 2011). Readings such as these are not only novel, they are crucial for restoring segments of lost history. Nowshirwan is even more relevant to this chapter because of his geographical location in Sind, which at the time was part of pre-partition India (it is located in present-day Pakistan). Such cases are crucial for collating a legal history which will apply equally to present-day Pakistan and Bangladesh.

There are more contemporary accounts of human rights violations in India that demonstrate in greater detail the villainy of Section 377. A few are particularly well known, for example the police raid on an NGO in 2001 (Human Rights Watch 2002). Many other instances are now part of the Delhi High Court ruling (*Naz* 2009). There are also documentations elsewhere (PUCL 2001; 2003), hence not repeated here for the sake of brevity.

2. Human rights application

2.1 International human rights, an overview

Criminalisation has been subject to judicial scrutiny in different jurisdictions. Out of the entire body of case law, the bare bones are outlined here. The European Court of Human Rights and the United Nations Human Rights

Committee (UNHRC) have both held, in different cases, that criminalisation is a violation of the right to privacy (*Dudgeon v. United Kingdom* (1981); *Norris v. Ireland* (1988); *Modinos v. Cyprus* (1993); *Toonen v. Australia* (1994)). The US Supreme Court held criminalisation to be in breach of personal liberty (*Lawrence v. Texas* 2003). The Constitutional Court of South Africa ruled that such laws are in violation of the rights to privacy, equality, and human dignity (*National Coalition for Gay and Lesbian Equality v. The Minister of Justice* 1999). The High Court of Fiji held the criminalisation to be unconstitutional (*McCoskar v. The State* 2005). The most recent addition to this listing of judicial decriminalisations is the Delhi High Court ruling (*Naz* 2009) to be outlined later in the chapter.

The judicial scrutiny has not always yielded similar outcomes. In contrast to the list above, some cases have rejected the idea of decriminalisation. The Supreme Court of Zimbabwe, for example, rejected an application of the right to equality and chose to retain criminalisation (*Banana v. The State* 2000, cited in Quansah 2004, pp. 213–14). Also, the Court of Appeals in Botswana chose to retain criminalisation on the grounds of public morality (*Utjiwa Kanane v. The State*, 2003, cited in Quansah 2004 pp. 202–6). Judicial application of human rights on the subject is thus scattered and varied.

More recently, a number of international initiatives have sought to apply human rights to this criminalisation. In response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, Indonesia in 2006, resulting in the Yogyakarta Principles: a guide to human rights and their application to sexual orientation and gender identity. Principle 6, the right to privacy, calls for the repeal of 'all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent' (Yogyakarta Principles 2006). There are also state initiatives with international bearings. The British Foreign Office Minister Ian McCartney affirmed 'Britain's commitment to the universal decriminalisation of homosexuality' (*Morning Star* 2007). Foreign and Commonwealth Office (FCO) of the UK has since had an 'LGBT programme' and an 'LGBT toolkit' (FCO n.d.). In 2008, a Core Group of States (Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway) presented a statement on behalf of 66 States in the UN General Assembly calling for an end to discrimination based on sexual orientation and gender identity (ARC International 2009). In 2010, the United Nations Committee on the Elimination of Discrimination Against Women adopted a General Recommendation that referred to sexual orientation (UN CEDAW 2010, para. 18, p. 4). In 2011, the UN Human Rights Council passed a historic resolution on sexual orientation and gender identity and discriminatory laws and practices and acts of violence (UN OHCHR 2011). Application of human rights in this area internationally has thus widened and continues to grow.

2.2 Sri Lanka

Sri Lanka experienced the application of human rights differently. According to a study by the United Nations Development Programme (UNDP), during a conflict in the 1990s 'it was pointed out that the wording of the existing "anti-homosexual" provision referred only to "man", and that this was discriminatory. Therefore, the word "person" was used to replace "man", resulting in legislation that now criminalises both men and women. In this way, the introduction of a bill – that aimed at decriminalising homosexual conduct between men – ultimately resulted in a widening of the scope of the original law' (UNDP n.d.).

There is much to learn from this experience, but a lack of comprehensive documentation or analysis of it. In her interview, Rosanna (of EQUAL GROUND) shed some light, that it was an initiative by the Centre for Policy Alternatives (CPA), an NGO working on research and advocacy. Another NGO, Companions On a Journey (COJ) was also involved. Together they sought law reform from the Ministry of Justice, challenging Section 365A on the grounds of human rights, said Rosanna. She was not involved herself and at the time was not taking part in any LGBT activism at all. Asked how she felt about women being included in the criminality fold, she said, 'It's ironic because the Government has never been conscious of gender balance in any shape or form – to say that law was gender-biased was rather strange' (Flamer-Caldera 2011).

Rosanna viewed this more as a Government action. It can also be seen as a reaction – to the process initiated by the CPA. Asked if the CPA consulted anyone, she said, 'Only with COJ, and even COJ was very new at the time. This whole "gay community" was a new concept. The process came and went, nobody even noticed. When we started working in the area of gay rights we learnt about what had happened.' Does she feel any resentment? 'No', she replied (Flamer-Caldera 2011).

Many questions remained unanswered. On what grounds exactly was Section 365A challenged? Was there any prior documentation of human rights violations? At whose behest was this process initiated? Was it affected persons themselves, for example LGBT individuals? Should a civil society organisation or an NGO or a group of lawyers initiate such a process – without consulting those who are directly affected?

Some of these questions also emerged in the process that took place in India. Without referring to them directly, that process is briefly described in the following section.

2.3 India

Much joy and hope is pinned on recent decriminalisation measures. In a historic moment on 2 July 2009, the Delhi High Court 'read down' Section

377 to decriminalise consensual sex between adults in private (*Naz* 2009).

That historic moment does not stand in isolation. It rests in part on constitutional guarantees and Indian case law. It rests in part on its preceding judicial applications in Europe, North America, South Africa and the UNHRC. It rests in part on the personal courage and belief of community, organisations, groups and individuals in India, who began agitating over the issue two decades ago. More immediately, it rests upon the eight years of litigation that began in 2001.

The Naz Foundation India, an NGO working on HIV/AIDS in Delhi, found that Section 377 was a hindrance to carrying out HIV/AIDS interventions – amidst MSM. Under the professional advice and supervision of another NGO, the Lawyers Collective, the Naz Foundation filed a Public Interest Litigation (PIL) in the Delhi High Court, challenging the constitutional validity of Section 377. The challenge was mounted on the grounds that: i) the law is arbitrary in its classification of natural and unnatural sex; and ii) it causes a serious setback to HIV/AIDS outreach work amidst MSM, thus violating their right to life. The Government, through the Ministry of Home Affairs, took an adversarial position to defend Section 377 on the grounds of 'public morality'.

In its journey from 2001 to 2009, when Naz PIL roamed the judicial corridors, its fate was unpredictable. A disheartening note was struck in 2004 when it was dismissed on the ground that there was no real 'cause of action', that Naz had no *locus standi*, that the entire petition was an academic exercise. In an appeal (on the limited question of *locus standi*), the Supreme Court of India set aside this dismissal. The PIL was thus given a new lease of life in 2006 and sent back to the Delhi High Court for 'consideration on merits'.

It faced opposition from the Government and also from some private organisations and individuals. Newly revived but still vulnerable, it was clear that if it was to stand ground it had to garner greater support. Voices Against 377, a Delhi-based coalition of different organisations and groups filed a supporting intervention. This bolstered the argument for decriminalisation beyond the necessity of tackling HIV/AIDS. It demonstrated the investment of women's rights groups, child rights groups and groups working on human rights, sexuality and education.

Opposition from Government was divided and diluted when the National AIDS Control Organisation (NACO), under the Ministry of Health, filed an affidavit to the effect that Section 377 was indeed a hindrance to HIV/AIDS interventions. It proved to be the most decisive disintegration of the opposition to decriminalisation. This will be expanded upon later in the chapter (see also Narrain 2004; 2011).

Meanwhile, the application of human rights in Pakistan and in Bangladesh needs to be understood in the context shared by activists in those countries.

3. Beyond legality

3.1 Society, family and religion

Tinku Ishtiaq, a gay activist, shared his understanding of the situation in Bangladesh:

> The only recognition of LGBT people is the existence of the small but visible *hijra* community. Consequently the majority of Bangladeshis associate homosexuality with *hijras* and reserve their scorn for this community. Very few people have come out in Bangladesh and the reaction to their coming out has been mixed. Some, like myself, have been grudgingly accepted by some relatives and straight friends while ignored by others. There has been no visible hostility from anyone. Some other people who have come out have been ostracised by their families and many have been driven to marrying the opposite sex through the general societal and familial approbation. Once married, they are rehabilitated, even though most married gay men continue to have clandestine sexual liaisons with other men/boys. I have rarely heard about violence against gay men who had come out in some way. Since the major barrier is societal, not legal, the process to tackle it would be to address the issues socially (Ishtiaq 2011).

Summer, a Lahore-based activist, shared her understanding of the situation in Pakistan:

> People are scared of the families more than anything else. Family pressure and duress is there for many many things. It is there for men, it is there for women, it is there for trans-women. Religion is a big issue, and a sort of self hatred as a result of that. So there is family duress and there is religion, the two of them also intertwine and do a little dance of evil on your head – because the family invokes religion and then once God is invoked you cannot go anywhere (Anon. (a) 2011).

Tinku Ishtiaq and Summer point to the role of society, family and religion. According to them it bears greater influence than the law.

3.2 Rule of law, a grounded perspective

An obscure piece of legislation, like Section 377, may be lying unnoticed. People who would have been affected by it may be blissfully unaware. A process or an initiative that draws attention to it would then be like waking up sleeping dogs or bringing home the 'absent drunkard father'. Again quoting Summer:

> I don't think that in Pakistan changing the law has a great deal of effect. There is no rule of law. Law is academic most of the time. It doesn't do anything for us – one way or the other. It is the absent drunkard father who comes home once in a while, smacks us around and then off to drink again. Right now what the kids want is 'daddy don't come home'.

> We get criticised even for having an organization [O], for even having any kind of public events – because what we are told is, 'let sleeping dogs lie, everybody is living their lives quietly. What is your problem?' (Anon. (a) 2011)

The invocation of absent drunken father and sleeping dogs is not a measure of Summer's personal fears or an overly fertile imagination. It is not far-fetched to imagine erratic outcomes of legal interventions. Consider what happened in Sri Lanka, for example. As already discussed, a legal process aimed at decriminalisation ultimately resulted in widening its scope (UNDP n.d., p. 9). More recently, the Parliament in Malawi carried out a similar exercise that brought women within the folds of criminalisation. According to the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA),

> In December 2010, the Parliament passed a bill amending the Penal Code of Malawi. In late January 2011, President Bingu Wa Mutharika assented to the bill, thus completing its enactment into law. The new Section 137A, captioned 'Indecent practices between females', provides that any female person who, whether in public or private, commits 'any act of gross indecency with another female' shall be guilty of an offence and liable to a prison term of five years (ILGA 2011, p 26).

3.3 Legal intervention, what if

If an attempt is made to address this criminalisation through a legal intervention, what would be its impact? This was one of the questions I posed to interviewees from Pakistan and Bangladesh.

Summer rejected the idea of any legal intervention in Pakistan, fearing for those who are or will be directly affected:

> Queer people who could, would flee. Those who couldn't, would come under scrutiny in ways that they were not before. If an attempt was made to decriminalise, it means an attempt would be made to remove or make ineffective a law that nobody uses. It would only have a detrimental effect because the problem isn't that the law doesn't accept, the problem is that the society overwhelmingly rejects any and all homosexuality (Anon. (a) 2011).

Farhan, another Lahore-based activist, feared a violent backlash. According to him:

> There will be a huge backlash and it will be violent particularly to the people who are working to decriminalise 377 and the people who wear their sexuality on their sleeves. *Hijras*, *Zenannas*, *Khwajasara*, MSM and others such will be an unfair target (Anon. (b) 2011).

Summer also feared that it will end up informing the law-enforcement authorities of ways in which harassment can be meted out legally:

> A law that is there, but does not get employed often, will be remembered suddenly, to fight any kind of queer activism. The way in which it was attempted to be used in the Shazina-Shumail case. (Anon. (a) 2011)

Pointing to political volatility in Pakistan – which witnessed frequent and extreme forms of violence – Farhan spoke of the killing of Salman Taseer, a champion of minority rights:

> [With] the current turmoil that Pakistan is going through it is very difficult to even raise a voice or hint on such issues. The recent barriers faced by Christians and other religious minorities (on Section 153A and the shooting of ex-governor of Punjab Salman Taseer) gave me a huge reality check of not just the situation but also the mind-set of the people around me. (Anon. (b) 2011)

The killing sent strong signals to all sections of society, not just those supporting religious minorities. It reinforced the sense of fear and vulnerability felt by all those who are at odds with the dominant religious view.

Tinku Ishtiaq, a gay activist, echoed similar fears – of a backlash in Bangladesh:

> If there are attempts at decriminalisation now, there is likely to be a backlash. There could be violence against the gay community particularly against *hijras* and those who are perceived as effeminate men or masculine women. The violence or other overt forms of discrimination could be used against other people who are openly out. (Ishtiaq 2011)

Like Summer in Pakistan, Tinku rejected the idea of any legal intervention:

> Personally, I would oppose decriminalisation attempts at present as it has the potential of bringing great danger to the LGBT community, which lacks recourse to any support systems. (Ishtiaq 2011)

Activists in both Pakistan and Bangladesh thus rejected the idea of legal intervention. According to them the problem is social, not legal and such an intervention is neither necessary nor desirable.

What then could be the way forward, if any? Drawing on lessons from a campaign in another sphere, Summer attempted a response:

> I can imagine an engagement of Islamic discourse that will lead to some kind of Islamic decriminalisation, or in reducing of the thing. That is what happened with the rape law. I do not know the details, basically it used to be that if rape is not proved, the woman was automatically liable for fornication. There was a campaign as a run up to the Women's Protection Bill, which aimed to separate rape from fornication. There was a television programme called 'Zara Sochiye' – which means 'just think about it'. It put the question about legality of the rape law requiring four witnesses, in Islamic terms: Is it Islamically legal to do this? The programme lasted several weeks, that did a lot for generating public opinion. People were interested, people would watch and talk about it. Following the logic of the Quran – that they knew and they

> understood – it was apparent that this is a nonsensical and utterly unjust law. The law has now been changed: rape is rape, fornication is fornication. If rape is not proved, the woman is no longer charged with fornication.
>
> Now I can see a campaign that works like that may have some effect. *Except* that while there was widespread agreement within large sections of society that rape law is cruel, against human rights, and against Islam; there is a very narrow sliver of the same society that believes that homosexuality *may* not be a sin. And that is because of a very clear verse in the Quran which says: 'you lie with men when you should lie with women, you commit an abomination'. It has a context, there's a whole story behind it, but Quran is not read comprehensively. It is read often as a series of discrete sentences. If one sentence says something, it is very uncommon to look at the sentence before and the sentence after. (Anon. (a) 2011)

4. Decriminalisation

Is a legal intervention for decriminalisation right now unnecessary and undesirable?

Both Tinku Ishtiaq (from Bangladesh) and Farhan (from Pakistan) brought out in particular the vulnerability of *hijras* as a set of people who will bear the brunt of any backlash. Interestingly, Joya Sikder, herself a *hijra*, did not express the same fears, but an unequivocal support:

> It [the criminalisation] is quite invisible, it poses minimum risk, but I would do anything to get rid of it. No arrests have been made so far, but the sheer existence of this law poses a risk for us. Sex should be a matter of one's own discretion. I am an adult, I can make my own decisions. Who is proposing to me, and I am proposing to whom; boys proposing to me, or girls proposing to me; that is not the main thing. I can love anyone. Whether I am having anal sex or oral sex, it is not about that. Why should others, someone from outside, even look into it? It is a private matter.

On this ground alone, so aptly articulated by Joya, criminalisation must be tackled.

Also, the impact of criminalisation is not limited to the number of prosecutions and convictions that follow (Goodman 2001). There may well be none. The impact of criminalisation can be assessed in so many other areas. For example, the attempt to use it in cases of consensual relationships (such as Shahzina-Shumail), or in FIRs (as in the case of Rani and Malik Iqbal), or the threat to use it for extracting money or to force sex, or the mere perception of criminality, as in the case of a newspaper refusing to publish EQUAL GROUND's advertisement.

Cases from other jurisdictions have challenged criminalisation successfully, even when it was not being used. For example, Norris complained to the

European Court of Human Rights about a law that criminalised male homosexual activity (*Norris v. Ireland* 1988). According to him, since he was liable under the law for his homosexual conduct, he suffered, and continued to suffer, unjustified interference with his right to respect in his private life. The court held that the law indeed interfered with Norris's right under Article 8 of the European Convention on Human Rights. The decision of the court effectively expanded the definition of 'victim' – Norris had not been subjected to a police investigation and yet his case was admitted.

Another case that challenged criminalisation in the European Court followed a few years later (*Modinos v. Cyprus* 1993). As in South Asia, criminalisation in Cyprus was framed during the country's colonial occupation and hence predated the Constitution of Cyprus. Modinos complained that 'the prohibition on male homosexual activity constituted a continuing interference with his right to respect for private life'. Like Norris, Modinos was never subjected to any police investigation and, further, the Attorney General of Cyprus had declared an explicit policy *not* to initiate prosecution. The Court held that the policy of non-prosecution provided no guarantee that action would not be taken by a future attorney general. Therefore, criminalisation continuously and directly affected the private life of Modinos.

4.1 India

Criminalisation was successfully challenged in India (*Naz* 2009), expanding the contours of human rights beyond *Norris* (1988) and *Modinos* (1993). The Delhi High Court decision did not rely on privacy alone. It brought into the spotlight privacy in the context of the right to human dignity. Sex is not a dirty thing that people ought to be simply left alone with: it is something that people derive their personhood from; the core of their being is vested in their sexuality. A violation of that zone of privacy is therefore also a violation of human dignity. The rights to human dignity and privacy were read together and combined under Article 21 of the Constitution (the right to life and personal liberty).

As part of the argument under Article 21, the decision tackled the area of 'public morality'. The question was: is there a 'compelling state interest' in retaining criminalisation for the sake of public morality? In response, the decision invoked the idea of 'constitutional morality':

> [P]opular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of 'morality' that can pass the test of compelling state interest, it must be 'constitutional' morality and not public morality. (*Naz* 2009, para. 79)

Ruling also on the right to equality, the High Court declared Section 377 as arbitrary and hence violating Article 14. It held that the discrimination caused

to MSM and the gay community was unfair and unreasonable (*Naz* 2009, para. 82). Although neutral on the face of it, the criminalisation discriminated indirectly. The High Court decision made a new and useful interpretation of Article 15 (on prohibition of discrimination) – for the first time in India, sexual orientation was considered a ground analogous to sex (*Naz* 2009, para. 85).

In arriving at its decision the court relied on a range of material: case law, both Indian and foreign; international conventions and understandings on human rights; UN declarations and conferences on HIV/AIDS; and prior statements of validation from the Government of India. The decision is located primarily in the Constitution and a number of precedents from the Supreme Court of India.[2] It also borrowed from cases worldwide[3] and referred to the Universal Declaration of Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR), the International Convention on Economic Social and Cultural Rights (ICESCR) and the European Convention on Human Rights (ECHR). It also referred to the Yogyakarta Principles, from which it borrowed the definitions of sexual orientation and gender identity (*Naz* 2009, para. 43, p. 36). The decision also acknowledged the statement presented in the UN General Assembly (*Naz* 2009, para. 59, p. 49), referred to the written works of Edwin Cameron, Michael Kirby, Ryan Goodman and Dilip D'Souza, and relied on the Constituent Assembly debates, while quoting Dr B.R. Ambedkar on 'constitutional morality'. Politically astute, the decision also cited prior statements of validation by the Prime Minister of India, Manmohan Singh, and the health minister Ramadoss. And finally, in its conclusion, the decision invoked the first Prime Minister of independent India, Pandit Jawaharlal Nehru:

> If there is one constitutional tenet that can be said to be an underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that

2 Landmark decisions such as *Maneka Gandhi v. Union of India* (1978), *Kharak Singh v. State of U.P.* (1964), *Gobind v. State of Madhya Pradesh* (1975), *Raj Gopal v. State of Tamil Nadu* (1994), *District Registrar, Hydrabad v. Canara Bank* (2005), *PUCL v. Union of India* (1997), *Budhan Choudhary v. State of Bihar* (1955), *Indra Sawhney* (1992), *Francis Mullin v. Union of India* (2006) and *Khet Mazdoor Samity v. State of West Bengal* (1996).

3 Landmark decisions such as *Egan v. Canada* (1995), *Law v. Canada* (1999), *Olmstead v. United States* (1928), *Griswold v. State of Connecticut* (1965), *Eisentadt v. Baired* (1972), *Jane Roe v. Wade* (1973), *Bowers v. Hardwick* (dissent, 1986), *National Coalition for Gay and Lesbian Equality v. The Minister of Justice* (1998), *Dudgeon v. United Kingdom* (1981), *Norris v. Republic of Ireland* (1988), *Modinos v. Cyprus* (1993), *Toonen v. Australia* (1994), *Lawrence v. Texas* (2003), *Romer v. Evans* (US 1996), *Vriend v. Alberta* (Canada 1998), *Leung T.C. William Roy v. Secy for Justice* (2006), *Dhirendra Nandan and Another v. State* (2005) and the Nepali Supreme Court decision of 2007.

> Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracised. (*Naz* 2009, para. 130, p. 104)

4.2 Bangladesh

The reverberations of the Delhi High Court decision were heard far and wide. Reflecting on the impact in Bangladesh, Joya Sikder said:

> The day when 377 was decriminalised in India, that very day we called an urgent meeting here [in Bangladesh]. Immediately we got down to serious talks. We were very happy and at the same time we were amazed that, 'look our strong neighbour has done this. What should we do?' (Sikder 2011)

Joya's eagerness called for closer examination. Finding it intriguing that someone who has never been directly affected by criminalisation should be so eager to get rid of it, I asked Joya when and how she first found out about Section 377. She said:

> This was much later, much after 1999. When I had joined the NGO sector for work. There was this funny song [in Bangla] that grew popular in the *hijra* community. Its lyrics [in English] are something to this effect: 'here here, look at us, look at us, we are the beauties, we are the beauties, men in women's clothes, this is what we enjoy, but 377 is our destroyer.' I listened to this song and I grew curious about 377. That's when I found out. Someone from Bandhu had written the song. It was carried on by this organisation called Shilpi Sangha, they made it very popular – in tune and all that. (Sikder 2011)

The trail from Joya pointed in the direction of Bandhu, an NGO working on HIV/AIDS in Bangladesh. Bandhu had produced not just the song that caught the attention of Joya, it had a number of in-house publications that refer to Section 377. The annual report of 2009 gave details about a meeting that followed soon after decriminalisation in India. It stated:

> [I]n less than a week after the Delhi High Court decision, there was a meeting in Bangladesh, on 7 July 2009, presided over by the head of a Delhi-based NGO, Partners in Law and Development (PLD). Another meeting followed a few months after, on 24 November 2009, where a staff member from the Lawyers Collective presented on 377, describing the process of decriminalisation and explaining the decision. (Bandhu Social Welfare Society 2009a, pp. 18–20)

The trail that began with Joya offered a snapshot view of the ongoing decriminalisation process in Bangladesh. It showed that HIV/AIDS NGOs like Bandhu have invested in decriminalisation for more than a decade now (see also Bandhu Social Welfare Society 2009b). It illustrated the reverberations of the Delhi High Court decision and also showed the involvement of Indian NGOs, namely the Lawyers Collective and the PLD.

4.3 Sri Lanka

NGOs are at the forefront of decriminalisation processes in the region. In Sri Lanka, for example, a mix of decriminalisation initiatives are led by NGOs working on human rights, HIV/AIDS, LGBT and women's rights.

The role of the Centre for Policy Alternatives (CPA) in Sri Lanka has already been mentioned and more information is available on its website. A section on 'past projects and programmes' includes a document entitled, 'A case for decriminalisation of homosexuality in Sri Lanka'. Compiled in 1999 with the assistance of Companions on a Journey, it attempted to make a case for the repeal of Section 365A (Centre for Policy Alternatives n.d.). Another document linked criminalisation with HIV/AIDS:

> There are several discriminatory laws not specific to HIV/AIDS that undermine efforts to control the spread of the virus. The Penal Code of Sri Lanka (Amendment Act No. 29 of 1998, Section 365A) continues the 'criminalisation of homosexuality, carnal intercourse against the order of nature and acts of gross indecency'. Penal sanctions against such acts when committed by consenting adults in private cannot be considered reasonable or just in a liberal society. These laws also undermine programs aimed at the prevention of HIV/AIDS and other STIs since they drive marginalised people further underground. (Centre for Policy Alternatives 2007, p. 9)

The Women's Support Group (WSG) called for the repeal of Section 365A (WSG 2011, p. 10). The CEDAW Committee's concluding observations on Sri Lanka, dated 4 February 2011, urged the Government to 'decriminalize sexual relationships between consenting adults of same sex' (UN CEDAW 2011, para. 25, p. 5).

Rosanna, executive director of EQUALGROUND, considered challenging criminalisation at the UNHRC – as happened in the case of *Toonen v. Australia* (1994). 'But who is there to actually take on that challenge?' she said. 'We are looking for that bright young person to come and give us a boost' (Flamer-Caldera 2011).

Rosanna expanded on her organisational strategy in broad terms:

> Our organisational strategy is to gain the understanding and the support of the masses. Even if 365A changes today, even if it is overturned today and put aside, the attitudes and the perceptions of the people in general about homosexuality, that is not going to change overnight. In order for us to live a life that is equal and [one] with freedom and dignity, we need to have a lot of people thinking 'this is okay' (Flamer-Caldera 2011).

Indeed a decriminalisation initiative involves more than a legal intervention. It must keep a close eye on socio-political circumstances and take a multipronged approach. This is echoed in the case of Pakistan, outlined in the following section.

4.4 Pakistan

Within my set of interviewees the strongest opposition to the idea of decriminalisation came from Pakistanis. Some of these arguments are presented in Part 3. During the interviews I found the interviewees sometimes shifted their stance. This was not a measure of their inconsistency, rather, it demonstrated their self-reflection and reasoning. Summer for example, initially rejected decriminalisation but became more open to the idea as the interview progressed. She said:

> Any strategy to empower and free queer people has to have law as only one – and only one prong – and one of many prongs. So it cannot be the central thing. I am not against decriminalisation, I am against decriminalisation as campaign now. Decriminalisation in ten years, you want to have a ten years strategy, okay. You want to have a two years strategy, no.

This multi-pronged and long-term approach envisaged by Summer must address family, community, religion and patriarchy. She said:

> I cannot imagine bringing any kind of decriminalisation campaign without first laying a whole lot of ground work that builds support within family structures, and community structures – when I say community I mean kinship communities and networks. A thorough and multifaceted engagement with Islam and a thorough and multifaceted engagement with patriarchal institution of the family, without doing those two things decriminalisation is – it would mean bringing about crisis. (Anon. (a) 2011)

Summer pitched the tackling of patriarchy and Islam as necessary pre-conditions for a decriminalisation initiative. Her brief moment of approval appeared to have passed – she placed rather tough conditions on a venture that had not even begun.

Summer showed a glimmer of hope at another point in the interview – when she spoke of the Delhi High Court decision (*Naz* 2009) and its influence in Pakistan. She said:

> I think it has brought queerness to the fore in way that it was never before. It is brown people saying that gay people are okay. And you know, the newspapers – in English and Urdu – published photos in which I recognized my friends! (Anon. (a) 2011)

The Delhi High Court decision appeared to have sparked a rivalry only too familiar between the two countries, a rare instance where the rivalry played out in a good way: the judiciary in Pakistan appeared keen to outdo its Indian counterpart. This might have been speculation or wishful thinking on Summer's part (and my own), but it was worth considering. In an unprecedented move, the Supreme Court in Islamabad ordered that trans people should receive equal protection and support from the government (*PinkNews* 2009). Connecting this to the Delhi High Court decision, Summer said, 'I think the timing of

that was very much because of the Delhi decision, it was just within a month' (Anon. (a) 2011).

No decriminalisation initiative is currently on the horizon for Pakistan.

5. Conclusion

For this chapter I narrowed the scope of my earlier research and expanded my methods to include interviews. Even so, the scope proved too vast and it was only possible to scratch the surface of decriminalisation in South Asia. However, the expansion of research methods proved useful, since it allowed crucial insights into socio-political aspects to be introduced. These findings should not be regarded as secondary to legal material, however – I found them essential. It would have been preferable to offer more analysis but time and the word-limit ran out. My concluding thoughts are therefore preliminary and provisional.

While Section 377 is said to be of no direct impact in Bangladesh, Joya is eager to heckle this 'sleeping dog'. As a *hijra* she is more visible than her LGBT associates, and hence more susceptible and more likely to bear the brunt of a backlash. In Pakistan, Summer likened the law to an 'absent drunkard father', a statement both comic and worrying at the same time. It summed up her fear of legal intervention, in the near future, or ever, without simultaneous tackling of society, family and religion. Thus, perched precariously between an absent drunkard father and the proverbial sleeping dogs, decriminalisation in India has unwittingly nudged its neighbours on either side.

South Asia is passing through a unique moment in the history of criminalisation. An understanding of the law and related socio-political aspects can make the most of it.

Bibliography

Anon. (a) (2011) Interviewed by S. Baudh, Dhaka, Bangladesh, 8 April.

Anon. (b) (2011) Interviewed by S. Baudh, [Email] Lahore, Pakistan/New Delhi, India, 10 May.

ARC International (2009) 'World Congress on Human Rights, Sexual Orientation, and Gender Identity' [Note circulated at the congress] Paris, 15 May.

Bandhu Social Welfare Society (2009a) *Annual Report 2009* (Dhaka: Bandhu).

— (2009b) *The Fourth Consultation Meeting on Policy and Advocacy – A right to live in dignity, social justice and wellbeing: MSM in Bangladesh*. Rajendrapur, Gazipur, Bangladesh, 8–10 Nov. 2008 (Dhaka: Bandhu).

Baudh, S. (2008) *Working Paper: Human Rights and the Criminalisation of Consensual Same-Sex Sexual Acts in the Commonwealth, New Delhi: South and Southeast Asia*, The South and Southeast Asia Resource Center on

Sexuality, available at http://tarshi.net/downloads/Working_ Paper_ Sbaudh_16M08.pdf (accessed 14 Jan. 2013).
BBC News (2010) 'Pakistan "eunuch wedding" is stopped by police', 26 May, available at www.bbc.co.uk/news/10166519 (accessed 14 Jan. 2013).
Bhuiyan, R. (2011) Interviewed by Baudh S. Dhaka, Bangladesh, 11 April.
Centre for Policy Alternatives (CPA) (n.d.) *Governance*, available at http://cpalanka.org/governance/ (accessed 14 Jan. 2013).
Centre for Policy Alternatives (CPA) (2007) *HIV/AIDS in Sri Lanka: A Profile on Policy and Practice*, available at www.hivpolicy.org/Library/HPP001560.pdf (accessed 14 Jan. 2013).
Dave, N. (2011) 'Ordering justice, fixing dreams', in A. Narrain and A. Gupta (eds.), *Law Like Love* (New Delhi: Yoda Press), pp. 25–42.
Fernando, M. (2008) 'Vagrant voices', *Himal Southasian* 21 (3), p. 37, available at www.himalmag.com/component/content/article/1010–vagrant-voices.html (accessed 14 Jan. 2013).
Flamer-Caldera, R. (2011) Interviewed by S. Baudh, [Skype] Colombo, Sri Lanka/New Delhi, India, 28 Sep.
Foreign and Commonwealth Office (FCO) (n.d.) *Global Issues, Human Rights, Equality and Non-discrimination, LGBT Rights*, available at www.fco.gov.uk/en/global-issues/human-rights/equality/lgbt-rights/ (accessed 14 Jan. 2013).
Goodman, R. (2001) 'Beyond the enforcement principle: sodomy laws, social norms, and social panoptics', *California Law Review*, 89 (3), pp. 643–737.
Human Rights Watch (2008) *This Alien Legacy*, available at www.hrw.org/sites/default/files/reports/lgbt1208webwcover.pdf (accessed 14 Jan. 2013).
— (2002) *Epidemic of Abuse – Police Harassment of HIV/AIDS Outreach Workers in India*, available at www.unhcr.org/refworld/docid/3d4fc51f4.html (accessed 14 Jan. 2013).
International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) (2011) *State-sponsored Homophobia – A World Survey of Laws Prohibiting Same-sex Activity Between Consenting Adults*, available at http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2011.pdf (accessed 6 Dec. 2011).
Ishtiaq, T. (2011) Interviewed by S. Baudh, [email] Dhaka, Bangladesh/New Delhi, India, 24 April.
International HIV/AIDS Alliance and the Commonwealth HIV and AIDS Action Group (CHAAG) (2010) *Enabling Legal Environments for Effective HIV Responses – a leadership challenge for the Commonwealth*, available at www.aidsalliance.org/publicationsdetails.aspx?id=496 (accessed 14 Jan. 2013).
Khan, N.S. (2007) Interview, 'In plainspeak', available at www.tarshi.net/asiasrc/plspk/2007_3/interview.asp (accessed 14 Jan. 2013).

Khanna, A. (2011) 'The social lives of 377', in A. Narrain and A. Gupta (eds.), *Law Like Love* (New Delhi: Yoda Press), pp. 174–202.

Kirby, M. (2011) 'The sodomy offence: England's least lovely criminal law export?', *Journal of Commonwealth Criminal Law*, available at www.acclawyers.org/wp-content/uploads/2011/05/2–Kirby-The-Sodomy-Offence-2011–JCCL-22.pdf (accessed 14 Jan. 2013), also in this volume (chapter 2).

— (2007) 'Discrimination on the ground of sexual orientation – a new initiative for the Commonwealth of Nations?', *The Commonwealth Lawyer* 16.

Kugle, S.S. (2010) *Homosexuality in Islam: Critical Reflection on Gay, Lesbian, and Transgender Muslims* (Oxford: Oneworld Publications).

Morning Star (2007) 'Minister states commitment to LGBT rights', 17 May, available at www.morningstaronline.co.uk/news/content/view/full/45429 (accessed 14 Jan. 2013).

Narrain, A. (2004) *Queer: Despised Sexuality, Law and Social Change* (Bangalore: Books for Change).

— (2011) 'A new language of morality', in A. Narrain and A. Gupta (eds.), *Law Like Love* (New Delhi: Yoda Press), pp. 253–77.

Narrain, A. and B. Dutta (2006) 'Male-to-male sex, and sexuality minorities in South Asia: an analysis of the politico-legal framework', in Naz Foundation International, *Risks and Responsibilities: International Consultation on Male Sexual Health and HIV in Asia and the Pacific*. New Delhi, 23–26 September, available at http://nfi.net/downloads/Risks_Responsibilities/background%20papers/Political%20and%20legal%20framework%20regarding%20MSM%20in%20South%20Asia.pdf (accessed 14 Jan. 2013).

PinkNews (2009) 'Pakistan court orders equal benefits for trans people', 16 July, available at www.pinknews.co.uk/news/articles/2005–13279.html (accessed 14 Jan. 2013).

PUCL-K (2003) *Police Violence Against Transgender Community* (Bangalore: People's Union for Civil Liberties (Karnataka)), available at www.pucl.org/Topics/Gender/2004/transgender.htm (accessed 14 Jan. 2013).

— (2001) *Human Rights Violations Against Sexual Minorities in India*, (Bangalore: People's Union for Civil Liberties (Karnataka)), available at www.pucl.org/Topics/Gender/2003/sexual-minorities.pdf (accessed 14 Jan. 2013).

Quansah, E.K. (2004) 'Same-sex relationships in Botswana: current perspectives and future prospects', *African Human Rights Law Journal*, pp. 201–17, available at www.chr.up.ac.za/test/images/files/publications/ahrlj/ahrlj_vol04_no2_2004.pdf (accessed 5 Dec. 2011).

Sanders, D. (2009) '377 – and the unnatural afterlife of British colonialism', *Asian Journal of Comparative Law* 4, pp. 165–206.

Sikder, J. (2011) Interviewed by Baudh S. [translation by Haque E.] Dhaka, Bangladesh, 11 April.

Suhail, S. (2010) 'Hijras, marriage and the law', *CHAY Magazine*, available at http://chaymagazine.org/2010–queer-jun/254–hijras-marriage-and-the-law (accessed 14 Jan. 2013).

The Daily Star (2008) 'Change mindset to ensure rights of MSM people in society', 28 Feb, available at www.thedailystar.net/newDesign/news-details.php?nid=25318 (accessed 14 Jan. 2013).

UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) (2011) 'Concluding observations/Sri Lanka', UN Doc. CEDAW/C/LKA/CO/7 (4 Feb. 2011), available at www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-LKA-CO-7.pdf (accessed 14 Jan. 2013).

— (2010) 'General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women', UN Doc. CEDAW/C/GC/28 (16 Dec. 2010), available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=CEDAW/C/GC/28&Lang=E (accessed 9 Dec. 2011).

UN Office of the High Commissioner for Human Rights (OHCHR) (2011) 'Council establishes mandate on Côte d'Ivoire, adopts protocol to child rights treaty, requests study on discrimination and sexual orientation', 17 June, available at www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11167&LangID=E (accessed 14 Jan. 2013).

UNDP (n.d.) *Law, Ethics and HIV/AIDS in South Asia: a study of the legal and social environment of the epidemic in Bangladesh, India, Nepal and Sri Lanka*, available at www.undp.org/hiv/docs/alldocs/Asia%20–%20Law,%20Ethics%20and%20HIV-AIDS%20–%20Study%20of%20the%20Legal,%20Social%20Environment%20of%20Epidemic%20in%20Bangladesh,%20India,%20Nepal%20and%20Sri%20Lanka.pdf (accessed 14 Jan. 2013).

US Department of State (2005) 'County reports on human rights practices', Bureau of Democracy, Human Rights, and Labor, available at www.state.gov/g/drl/rls/hrrpt/2005/61705.htm (accessed 14 Jan. 2013).

Women's Support Group (WSG) (2011) *NGO Shadow Report to the UN Committee on the Elimination of All Forms of Discrimination Against Women: The Status of Lesbians, Bisexual Women and Transgendered Persons in Sri Lanka*, available at www2.ohchr.org/english/bodies/cedaw/docs/ngos/WSG_SriLanka48.pdf (accessed 14 Jan. 2013).

Yogyakarta Principles (2006) *The Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, available at www.yogyakartaprinciples.org/principles_en.htm (accessed 14 Jan. 2013).

Legal cases

[BLAST] Bangladesh Legal Aid and Services and Trust and Others v. Bangladesh and Others 55 DLR (HCD) (2003) 363, available at www.blast.org.bd/content/judgement/55–DLR-363.pdf (accessed 14 Jan. 2013).

Dudgeon v. United Kingdom (1981) Ser. A, No. 45.

McCoskar v. The State (2005) FJHC 500, available at www.paclii.org/fj/cases/FJHC/2005/500.html (accessed 14 Jan. 2013).

Modinos v. Cyprus (1993) Ser. A No. 259.

National Coalition for Gay and Lesbian Equality v. The Minister of Justice 1999 (1) SA 6, available at www.saflii.org/za/cases/ZACC/1998/15.html (accessed 14 Jan. 2013).

Naz Foundation v. NCT Delhi 2009, available at http://lobis.nic.in/dhc/APS/judgement/02–07–2009/APS02072009CW74552001.pdf (accessed 14 Jan. 2013), also published in the *Delhi Law Times* 160 (2009), p. 277.

Norris v. Ireland (1988) Ser. A, No. 142.

The Penal Code, 1860. Act XLV of 1860 Bangladesh. Section 377, available at http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=11 (accessed 14 Jan. 2013).

Toonen v. Australia 1994 (Communication No. 488/1992) U.N. Doc CCPR/C/50/488/1992.

Utjiwa Kanane v. The State, Criminal Appeal No 9 of 2003 (30 July 2003) unreported. Cited in Quansah 2004, pp. 202–6.

11

Decriminalising homosexuality in Africa: lessons from the South African experience

Gustavo Gomes da Costa Santos

The lesbian and gay sexual rights issue has become increasingly visible in the international context, including in South Africa. Recent recognition of lesbian and gay rights and approval of equality laws in several countries confirms the relevance of this issue at the beginning of the 21st century. Reaction from conservative groups in different national contexts has also brought gay and lesbian rights to the forefront in both national and international political agendas. The demands of lesbian and gay people for equality first emerged in 'developed' countries and nowadays are present throughout 'developing' countries. Many activists have demanded equality and in several cases, they have been winning legal battles. Such is the case in South Africa, where an equality clause was included in the Bill of Rights within the new post-apartheid Interim Constitution of 1993, which came into force in 1994, and was also included in the final Constitution (Constitution of the Republic of South Africa 1993; 1996). The equality clause prohibits unfair discrimination on grounds including 'sexual orientation' (Kennedy 2001). This was the first case in the world where a constitution text included lesbian and gay rights among the rights protected by law, and this contributed to dramatic changes including the decriminalisation of sex between men in 1998 and the creation of same-sex marriage in 2006.

After being under Dutch colonisation for almost 200 years, South Africa was occupied by British troops in 1795. It was only in 1806 that the British Empire finally gained South Africa as part of its territories scattered around the world. The British expansion in southern Africa ignited several conflicts with Dutch colonisers known as the Boers, and with the native people. Those conflicts, which were fuelled by discoveries of gold and diamond natural deposits, ended in the Anglo-Boer War in 1899. The British Empire won the war in 1902 and, as part of the peace agreement, the Boer Republics joined the Cape Colony and Natal in the Union of South Africa in 1910 (Guiliomee and Mbenga 2007). The creation of the Union of South Africa consolidated

British power in southern Africa. South Africa became a Dominion in the British Commonwealth and, like Canada, Australia and New Zealand, gained self-government and great independence in foreign affairs. This situation ended in 1961, when the increasing opposition from newly independent African and Asian states precipitated the expulsion of apartheid South Africa from the Commonwealth due to its racist policies. The country only became part of the organisation again in 1994, after its very first multi-racial elections (Chhiba 2011).

South Africa is an exception in the African continent when it comes to sexual rights. The majority of the nations in Africa consider same-sex relationships as a crime, and in former British Empire states this is maintained largely via laws known as the sodomy laws which can make 'offenders' face years in prison or a life sentence. According to the recent International Lesbian and Gay Association (ILGA) report on *State-sponsored Homophobia*, discussed in the introductory chapter of this volume, 36 African countries penalise consensual same-sex intercourse between adults with incarceration and three of them with the death penalty (Sudan, Mauritania and the northern states of Nigeria: Bruce-Jones and Itaborahy 2011, pp. 10, 18–19). Besides that, many leaders in the continent have spoken in clear homophobic tones, making it clear they consider that homosexuality is not part of African culture. African leaders, such as the Zimbabwean president Robert Mugabe and former Namibian president Sam Nujoma, have largely identified homosexuality as having been brought into Africa by former Western colonial powers (Phillips 1997), contrary to historical research evidence (Epprecht 1998) and accounts from black lesbian and gay people (Gevisser and Cameron 1995). In the views of such leaders, homosexuality is 'unAfrican' and represents a major danger to the cultural integrity of their countries. In a context where the AIDS pandemic is spreading all over the continent and the African governments are not responding effectively to it, homosexuality has turned into an easy 'scapegoat' for all the ills afflicting the population (Long 2003). Lesbian and gay activists have been 'outed' by newspapers and face increasing harassment by their governments. Ugandan MPs have recently elaborated a bill which if approved would reinforce the penalisation of same-sex practices; drafts have sought to punish consensual same-sex intercourse between adults with life imprisonment or with the death penalty in cases where the perpetrator is HIV-positive (BBC News 2009; Jjuuko, this volume; Ward, this volume).

In such a context of disseminated state-sponsored discrimination and oppression against lesbian and gay people, how was it possible for South Africa to enact some of the most progressive legislation on sexual rights? This chapter seeks to understand the main reasons for South Africa's uniqueness by analysing the development of sexual rights in the country, from campaigning which began in the apartheid period through the transition to majority rule until the decriminalisation of sodomy in 1999, and also noting more recent

developments including the creation of same-sex marriage. To understand South Africa's path to the decriminalisation of homosexuality, one must look back to the struggle against apartheid and the negotiated transition to democracy which culminated in the approval of the final version of the Constitution in 1996. The aim of this chapter is to draw some lessons for other countries in Africa and the Commonwealth on how to advocate lesbian and gay rights, particularly in the legal and institutional arenas.

1. Apartheid and the politics of sexuality in South Africa

South Africa is known around the globe for having hosted one of the most systematic and cruel racial segregation regimes in history: apartheid. This system of segregation emerged from the oppression of indigenous black African peoples and non-white minorities by two white ethnic groups descended from colonising populations: South Africans of British descent, speaking English, and Afrikaners descended from Dutch, French and German settlers, speaking Afrikaans. The Afrikaans word 'apartheid' means 'separateness' and was used to name the racial segregation policy implemented after the victory of the National Party (NP) in 1948. Differently from the racial segregation system present in the period prior to 1948, apartheid promoted a deliberate politics of fixation and institutionalisation of ethnic/racial groups. The early predecessors of apartheid promoted the 'separate development' idea, which stated that each racially defined group could 'develop' based on their own characteristics and specificities. It was established by apartheid policies that each racially defined group should live in specific areas and that inter-racial marriage was absolutely forbidden. In real terms, the white minority secured privileges based on the systematic exclusion of non-white social groups (Welsh 2010).

The subjacent objective of the apartheid was to block the urbanisation of African groups. Strict mobility controls were established as an attempt to monitor black African people in white areas. All black Africans were required to have a pass that allowed them to enter white areas and they were supposed to leave such areas before a pre-established time every day (Posel 1991). The restrictions established by the NP related to the mobility of non-white people, aiming to control the supply of workers for both farms and newly established industries around big cities.

Besides mobility controls, apartheid had two different approaches to social intervention: the 'petty' apartheid, which established public areas separated by 'race' (restaurants, hospitals, toilets, beaches, train and bus stations and public buildings had separated areas for white and non-white people), and the 'grand' apartheid that established specific 'homelands' for each specific ethnic group in such a way that all South African black people should be considered as citizens of those 'nations' and therefore treated as foreigners in the white areas. The 'grand apartheid' led to a massive forced migration. More than three million

people were sent from white areas to the 'homelands', which were artificially created nations for different ethnic groups (Guiliomee and Mbenga 2007).

The origin of apartheid is linked to the Afrikaner nationalism that emerged decades before in the Anglo-Boer war (1899–1902). From the arrival of British settlers at the beginning of the 19th century, Afrikaners found themselves in a situation of economic disadvantage relative to white people with a British background. British descendants had privileged access to commerce and merchant capital. Afrikaners were mainly engaged in subsistence farming and had low levels of education compared to the white British. As the urban Afrikaner population started to grow after the war, the Afrikaner intelligentsia's groups were increasingly alarmed by what they perceived as growing poverty in the Afrikaner communities. This was recurrently used by Afrikaner leaders as a catalyst for the promotion of Afrikaner nationalism, which proposed the union of the *volk* [people] against both English colonialism and non-white people (Guiliomee 2003).

Organisations like Afrikaner Broedebond [the Afrikaner Fraternity] had an important role in spreading the Afrikaans language, declared as the official language in 1925 alongside English, and in promoting the bonding between entrepreneurs and the working class. Besides the language, another important characteristic of the Afrikaner culture was Calvinism. The Dutch Reformed Church [Nederduits Gereformeerde Kerk – NGK] had an important role in the foundation of the apartheid ideology. The myth of the Babel Tower was the theological basis used to justify apartheid. In the book of Genesis, the Bible tells the story of the Babylonian people, who wanted to build up a tower high enough to reach the skies. The Tower is a representation of human pride and arrogance, as the Babylonians wanted to be as grand as God himself. As a way to punish people, God separated them in different languages and cultures. According to J.D. Du Toit, minister of the NGK, the lesson from the Tower of Babel was twofold: 'those whom God has joined together had to remain united; those whom God had separated had to remain apart (…)' (Guiliomee 2003, p. 462). It was based on that interpretation of the Bible that the architects of apartheid founded their ideas on theological grounds.

Another pillar of the 'separate development' idea was the prohibition of inter-racial relationships, apparent in the Immorality Act 1927 which criminalised extramarital male/female sexual intercourse between 'European' and 'native' people. The prohibition aimed to prevent any racial mixture as a way to crystallise borders among racially defined groups. The leaders of Afrikaner nationalism lectured about the need to forbid sexual intercourse between white and non-white people in order to keep the *volk* unit intact. The prohibition of those relationships meant an approach to avoid supposed racial degeneration and save the *volk* Afrikaner. In the electoral campaign of 1948, the NP emphasised the necessity to keep the Afrikaner nature pure via racial segregation. This idea became a social policy with the approval of the

Prohibition of Mixed Marriages Act 1949. The racial segregation was reinforced by the Immorality Amendment Act 1950, which criminalised all forms of heterosexual extra-marital sexual relations between people from different racial groups.

It was in the efforts to regulate relationships among different racial groups that homosexuality gained visibility in South Africa. From the beginning of the NP government, racist policies had always been associated with sexual policing (Retief 1995). The obsessive interest of the authors of apartheid in controlling sexuality in South Africa was based on interpretations of Christianity, and more specifically Calvinism, ideologies that underpinned the 'separate development' idea. It was necessary to keep the white nation sexually and morally pure as a way to fight against the 'black danger' (*swart gevaar*).

The emergence of a growing gay sub-culture in big South-African cities, associated with the increasing visibility of places frequented by homosexuals, blew the whistle and caught the attention of the NP, whose high command saw homosexuality as a threat to South African civilisation. To make sure the country would not have the same destiny as Rome or Esparta, the falls of which were intimately associated with the dissemination of homosexuality in the eyes of the NP, in 1968 the party imposed a major repression of homosexuality by proposing an act amending the Immorality Act 1957.

The Immorality Amendment Act 1969 increased the regulation of sex between men in several ways, while also adjusting sexual offences by men with girls, via amendments to the Immorality Act 1957 (later renamed by the Immorality Amendment Act 1988 to become known as the Sexual Offences Act 1957). The most important amendment relating to sex between men became Section 20A of the 1957 Act, stating:

> 1. A male person who commits with another male person at a party an act which is calculated to stimulate sexual passion or to give sexual gratification shall be guilty of an offence.
>
> 2. For the purposes of subsection (1) 'a party' means any occasion where more than two persons are present. […]

The law now stated that individuals involved in same-sex relationships could face punishment by being locked up for two years in prison. Thanks to the lobby promoted by the Homosexual Law Reform Fund (known as the Law Reform), the approved amendment did not have draconian measures for punishing homosexuality in general, as initially proposed in the first considered amendment; rather, it encompassed only male homosexual acts in situations with more than two persons present. However, this enabled certain intrusions into private life, as well as forbidding gay parties, and was accompanied by other new restrictions. Further amendments made by the 1969 *Act* ended up raising the legal age for consensual sex between homosexuals from 16 to 19 years old via the revised section 14 of the 1957 Act, and prohibiting the use of

dildos via a new section 18A of the 1957 Act. After that, the police could arrest any homosexual who was participating in a 'party', defined as any occasion with more than two people present (Retief 1995, p. 103). The amendment raised police control over places where gays socialised, which reinforced the idea of homosexuality as crime. Although it may be seen as the initial movement of the homosexual mobilisation, the Law Reform did not establish a homosexual movement in South Africa due to its single and short-term demand.

It is only possible to find an emerging homosexual movement in South Africa during the 1980s. During the reforms promoted by President P.W. Botha (Thompson 2001), the Gay Association of South Africa (GASA) was created in 1982, supposedly aiming to unite homosexuals by providing spaces for socialisation and support services. Most of the members of that Association were white; they were conservative and had no political objectives. Moreover, the group decided not to have its activities linked to the black movement whatsoever. It is possible to find testimonies from black people who were part of the GASA that demonstrate the racial prejudice within that group (Head et al. 2005). For some white members, the presence of black people was not accepted and the only intention was to show, mainly abroad, that the group was not racist. The arrest of the black activist and member of the group Simon Nkoli for anti-apartheid protests in 1986 exposed the internal contradictions of GASA. The ILGA banished GASA as the group did not make public its opposition and indignation about the arrest of Nkoli (Gevisser 1995, p. 56).

Some progressive members of the international anti-apartheid movement saw in the arrest of Nkoli an opportunity to insert lesbian and gay rights issues into the African National Congress (ANC)(Gevisser 1995; Cock 2005). Ruth Mompati, a member of the ANC in the United Kingdom, told the British gay press in 1987 that the ANC did not have an agenda for gay and lesbian people because that would shift the focus of the ANC from the most important issue for the party: the fight to end apartheid (Tatchell 2005). For Mompati, homosexual people were not normal people and they did not need any rights as they were well-off people. Besides that, homosexuality was just another fashionable item from the Western world. These statements generated many protests from the international anti-apartheid movement. Many letters were sent to the ANC leadership condemning the homophobia presented in Mompati's declarations and pressed the ANC to publicly make its position on gay and lesbian rights clear in the liberation struggle. In November 1987, the ANC's information director, Thabo Mbeki, made public the commitment of the ANC to fight for gay and lesbian rights in South Africa (Tatchell 2005). After that, some ANC high-profile members (such as Albie Sachs, Frene Ginwala and Kader Asmal) had meetings with lesbian and gay activists inside and outside South Africa. According to Tatchell (2005), these early contacts were fundamental for bringing gay and lesbian rights to the Bill of Rights elaborated by the organisation, which was later integrated in the interim

Constitution. The commitment shown by people in the ANC leadership did not mean that the issue of gay and lesbian rights was the subject of consensus in the ANC's ranks. On the contrary, many ANC members are still reluctant to promote policies for gay and lesbian people. This topic will be revisted in the last section of this chapter.

After the collapse of GASA in 1986, two different kinds of activism emerged in South Africa. The one represented by the National Law Reform Fund (NLRF) tried to apply the conservative mobilisation model used by both Law Reform and GASA. They focused their efforts on changing laws that criminalised homosexuality without engaging in the struggle against apartheid. Created in the same year, the NLRF supported a candidate from NP, whose political ideas were pro-homosexual rights. The second kind of activism associated the fight for homosexual rights with democratic demands and the battle to extinguish the apartheid regime. This was apparent in the creation of both the Gay and Lesbian Organisation of the Witwatersrand (GLOW) in 1988, in which most members were black activists under the leadership of Simon Nkoli; and the Organisation of Lesbian and Gays Activists (OLGA) in 1987, that represented a number of white activists and middle-class intellectual people engaged in the anti-apartheid battle. These latter two organisations presented evidence that the characteristics of the homosexual mobilisation in South Africa had changed. Although still mainly organised along racial lines, GLOW and OLGA represented the commitment of the recently born gay and lesbian movement to ally with the struggle to end apartheid. At that time there were several popular demonstrations on the streets against racial segregation and consequently repression was escalating against liberation movement groups (Thompson 2001). Both GLOW and OLGA became members of the United Democratic Front (UDF), a broad-based political entity that congregated many anti-apartheid organisations. The UDF was in line with the ANC's ideas, in a context where the ANC had been banished in 1960 by the NP government. In 1990, as the ANC was legalised and subsequently Nelson Mandela was set free, South Africa's democratisation process was just beginning. In the same year, GLOW launched in Johannesburg the first Lesbian and Gay Pride Parade in South Africa, which had 800 participants (Gevisser 1995). Grasping slogans such as 'united in the community' and 'lesbian and gay against apartheid', lesbian and gay activists claimed the liberation movement, to include the struggle for sexual liberation, as part of its commitment to a society free of all kinds of oppressions.

In this democratisation process, lesbian and gay groups started to demand the inclusion of lesbian and gay rights in the battle for human rights. From that moment on, groups thus aligned worked together with ANC leaders to make sure the prohibition of discrimination on the grounds of sexual orientation should be included in the Bill of Rights proposed as necessary by that party from 1986 (Christiansen 2000, p. 1012). That Bill of Rights would be used

as the basis of such a bill in the new Constitution (Croucher 2002). Although many leaders and members of ANC considered homosexuality abnormal and not part of the African culture, as with the homophobic declarations of Ruth Mompati previously discussed (Gevisser 1995), the contact of several ANC leaders living abroad with both pro-gay rights activists and gay and lesbian anti-apartheid activists was a catalyst to include gay and lesbian rights into a broader perspective oriented towards human rights. All those efforts made the ANC, in 1992, the first South African party to formally recognise the rights of gays and lesbians (Fine and Nicol 1995; Croucher 2002).

2. Homosexuality in the constitutional assembly: guaranteeing sexual rights for lesbian and gay people in the new South Africa

The ANC played a key role in initiating open public debate over the content of the new Constitution. From 1990 the ANC's Constitutional Committee initiated a series of seminars and conferences over its *Constitutional Guidelines* published in 1989, as detailed by Klug (1996). This enabled participation by various NGOs and community groups, and helped set an inclusive tone for discussions.

Gay and lesbian activists met with members of the ANC Constitutional Committee and many groups supported a written submission by OLGA (Fine and Nicol 1995). Christiansen reports this to have influenced an ANC Women's Section meeting, in March 1990, to adopt a position opposing 'sexual orientation' discrimination. This helped enable individuals such as Kader Asmal and Albie Sachs to argue for the express prohibition of discrimination related to 'sexual orientation' when the Bill of Rights was drafted (Christiansen 2000, pp. 1026–7). The draft bill was then published in November 1990 with a note acknowledging OLGA (ibid., p. 1026), and circulated internationally for consultation in 1991, stating 'Discrimination on the grounds of … sexual orientation shall be unlawful' (African National Congress Constitutional Committee 1991).

In order to pave the way for the transition to the new order, major political actors decided to organise the Convention for a Democratic South Africa (CODESA) in December 1991. Nevertheless, the most important organisations (NP and ANC) diverged in their objectives. NP delegates aimed that CODESA should be responsible for elaborating the new Constitution. In their view, only CODESA would guarantee the rights of the white minority in the new South Africa. On the contrary, ANC delegates urged CODESA to deal only with issues regarding the political transition itself. The elaboration of the new Constitution should have been the task of the new and probably ANC-dominated Parliament, elected at the first multi-racial election (Guiliomee and Mbenga 2007).

The solution to this impasse only emerged with the organisation of the Multiparty Negotiating Forum (MPNF) in April 1993. Both parties

compromised that the new constitution should be elaborated in a two-phased process. In the first phase, an interim constitution would be elaborated, defining the arrangements for the first multi-racial elections and the constitutional principles known as the '34 Principles', agreed by all parties. In the second phase, the newly-elected Parliament would have two years to discuss the new constitution. Once approved, it should be sent to the Constitutional Court to be confirmed. The Court would have the prerogative to certify that the new constitution complied with the Principles previously agreed by all parties in the MPNF (Christiansen 2000).

Organised in different Thematic Committees, the Forum rallied between April and November 1993 in Kempton Park and had the task of drafting the interim constitution. Many lesbian and gay activists were directly involved in the anti-apartheid struggle and had worked together with high-profile leadership figures inside the ANC. In 1993, gay lawyers established the Equality Foundation[1] and prepared a submission to the Technical Committee on Fundamental Rights. In this submission, the group demanded that the Committee include the concept 'sexual orientation' in the interim constitution. On the occasion, there was an intense debate on how to write down the equality clause. Some defended a more generalist approach, in which the equality clause would only mention that 'everyone is equal before law' (South African Law Commission 1991; South Africa Government 1993). Others, including ANC delegates, defended an equality clause in which social conditions such as race, gender, age and sexual orientation would be enumerated, as a way to remove any possible doubt about their legal protection under the new constitutional text (African National Congress 1993). For the Equality Foundation, an equality clause expressly defining the social characteristics protected by law was especially important to protect the rights of sexual minorities. A constitution which explicitly included 'sexual orientation' would avoid any uncertainty concerning the applicability of the equality principle for lesbian and gay people.

In an addendum to the First Submission sent on June 1993 to the Committee, the Equality Foundation based its claim to include 'sexual orientation' in the interim constitution on a consensus among the main political groups that gay rights had to be protected in the new political order. The ANC, the Inkhata Freedom Party (IFP) and the Democratic Party (DP) had included the concept 'sexual orientation' in their own proposals for the new Bill of Rights. According to the submission, there was an increasing understanding in courts and public opinion that 'sexual orientation is simply one of the varied experiences of the

1 The Equality Foundation was established using funds raised previously by NLRF to facilitate submission to the President's Council review of existing laws on homosexuality. As the review never took place, the funds were transferred to the Equality Foundation to lobby for the inclusion of sexual orientation in the equality clause (Hoad et al. 2005).

human condition, is not pathological and is immutable' (Equality Foundation 1993a, p. 1).

In the Equality Foundation's view, to expressly include 'sexual orientation' as one of the grounds for non-discrimination would be essential to protect the rights of lesbian and gay people since: i) discrimination on sexual orientation often occurs indirectly, based on misconceptions with no empirical validity; ii) in spite of increasingly progressive approaches to the issue, the South African courts had mainly disapproved of homosexuality; and iii) only by enumerating the social conditions protected by the Bill of Rights could the Technical Committee fulfil its aim to inspire the confidence and hope of all communities and individuals in the new South Africa (Equality Foundation 1993a, p. 4).

At the end of the negotiations, an agreement was reached by the major parties. It was decided that the equality clause would specifically enumerate the social characteristics protected by the Bill of Rights. OLGA, the Equality Foundation and their allies thus succeeded in achieving the inclusion of the expression 'sexual orientation' in the interim Constitution, including the rights of lesbians and gays in the principles agreed in the transition's first phase (Christiansen 2000). According to a document produced by the Equality Foundation (1993b), an individual's sexual orientation is not simply an indication of his or her preferred sexual activities. Sexual orientation is related to the identity of an individual, encompassing his or her deep personality and individuality.

> Sexual orientation is a matter of identity. This embodies both personality and individuality. Identity is not synonymous with gender. Gender differentiates the male and the female physiological attributes. These are generally inherited. Identity, on the other hand, relates to gender only in so far as the male or male physiology is incorporated into the psycho-social structure of the individual. The term sexual orientation embraces both gender and identity. (Equality Foundation 1993b)

Although sexual orientation has been used mostly to refer to all sexual expressions deviant from the heterosexual norm, the term can be defined to refer to not only homosexuality but also heterosexuality and bisexuality. According to the document, in the constitutional perspective, sexual orientation excludes the so-called paraphilias, which are considered pathological in psychiatry. Non-pathological sexual practices are those performed by consenting human adults. All other erotic activities, such as paedophilia and zoophilia, are excluded from legal protection. The prohibition of discrimination regarding sexual orientation only encompasses homo-, hetero- and bisexuality. The intention of the Equality Foundation to narrow the constitutional protection to those sexual expressions was to avoid losing allies from the political elite and a backlash from conservative groups.

The triumph of including sexual orientation in the interim Constitution motivated many South African lesbian and gay activists to create in 1994 the

National Coalition for Gay and Lesbian Equality (NCGLE). Formed by 78 groups, the NCGLE based its tactics on the successful examples of single-issue mobilisations such as the End Conscription Campaign (ECC)[2] in the 1980s and the first pro-gay lobby of Law Reform in the 1960s. The main aim was to concentrate all efforts in one single demand: to maintain the concept 'sexual orientation' in the final version of the Constitution.

The work of the gay professor and lawyer Edwin Cameron was fundamental in delineating the strategies put in place by NCGLE. In a workshop organised in 1991 by GLOW,[3] and in his inaugural lecture in Wits University in 1992 entitled 'Sexual orientation and the constitution: a test case for human rights' (Cameron 1992; 1993), Cameron elaborated the importance of protecting the rights of lesbian and gay people in the new constitution. Based on both works, lesbian and gays activists drafted the strategy to advocate equality in the political and legal arenas. The strategy would later become known as the 'shopping list' (Berger 2008). It consisted of the main demands of lesbian and gay people, ranked from the more consensual and easier to accomplish ones (equal consenting ages for homosexual and heterosexuals, abolishing anti-sodomy laws), followed by the more controversial ones (adoption and marriage by same-sex couples).

The role of the NCGLE was to coordinate the lobby for equality in the Constitutional Assembly, to such an extent that it would strengthen the political action of the poorly organised and fragmented lesbian and gay community. The idea was to collect the support of as many allies as possible and avoid any backlash from conservative groups. In a report published in 1995 entitled 'We must claim our citizenship!', there was a tension between the need to mobilise the grassroots of gay and lesbian communities, on one side, and on the other, the recognition of the hostile environment for lesbians and gays in South Africa (NCGLE Executive Committee 1995). Before the document was elaborated, NCGLE commissioned a national survey to find out about the acceptability of homosexuality in South Africa. The results, which were never released, showed the deep and widespread rejection of homosexuality among South Africans (Hoad et al. 2005). This confirmed some NCGLE members' suspicions that the organisation was not going to resist a backlash from conservative groups. Thus, instead of demanding public hearings to discuss the inclusion of sexual

2 The ECC was a group formed in 1983 in protest against the conscription of all white South African men into military service in the South African Defence Force (SADF). The group rose against South African intervention in Angola and the enforcement of apartheid policies in black townships. ECC members refused to join the security forces based in the 'conscientious objection' clause set in the military legislation. The group joined the UDF in the struggle against apartheid in 1985 and was therefore banned by the NP government in 1988 (Hoad et al. 2005).

3 Cameron, E. 'Presentation to GLOW and Society for Homosexual on Campus (SHOC) workshop', 16 March 1991 (Hoad et al. 2005).

orientation in the constitution and consequently raising the topic in public opinion, NCGLE opted for a low-profile action. Without attracting too much attention from the public, the organisation collected many support letters from different organisations and high-profile individuals involved in the struggle against apartheid, such as Cape Town's Archbishop Desmond Tutu. Additionally, NCGLE members elaborated a submission to the Constitutional Assembly close to its deadline,[4] in order to avoid exposition of the issue in the media.

Presented to the Assembly in February 1995, the NCGLE's submission raised many reasons for keeping the expression 'sexual orientation' in the final version of the constitution (NCGLE 1995). It is important to point out that in many passages in the submission, NCGLE members stressed the commonalities between discrimination based on sexual orientation and discrimination based on 'race' or gender. Overcoming the past of discrimination and oppression was one of the main objectives of the new South Africa. Only by promotion of equality and human rights for all would this objective be attained. In this context, hopes for ending discrimination and oppression were vested in the Constitution, especially in the Equality clause within its Bill of Rights, to fulfil the aspirations of all South Africans for a fairer life. The 14 grounds of non-discrimination enlisted in the clause eight, paragraph two of the Constitution were interconnected – namely race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Excluding one of them would endanger the nation's commitment to reconciliation and national unity.

To understand the relative success of the lesbian and gay movement in constructing a clear parallel between prejudices of 'race', gender and sexual orientation, one must analyse how South African activists have presented and elaborated the issue of homosexuality. The NCGLE's submission emphasised sexual orientation as an inherent part of the identity of all human beings. Were sexual orientation excluded from the Constitution, the other social conditions enumerated would be in a vulnerable situation.

> 2.1 The fourteen conditions specified in section 8(2) of the interim constitution contain a common thread: they are all human characteristics, some immutable, others inherent features of human identity. They do not form a closed number of protected conditions. But they constitute a recognisable complex of related and analogous conditions intrinsic to human individuality, personality or identity.

4 The deadline for the Constitutional Assembly to present the final version of the Constitution was 6 May 1996. After that, it was required to be certificated by the Constitution Court before coming into effect (Constitutional Court of South Africa 2013).

> 2.2 An individual's sexual orientation – hetero or homosexual – is intrinsic to his or her identity. Unfair discrimination demeans individuals on the basis of characteristics intrinsic to identity. Accordingly, omitting any of these grounds from the enumerated formulation would make each of the remaining conditions vulnerable to prejudice or political whim. (NCGLE 1995, p. 6)

NCGLE's submission reaffirmed the reasons presented by Equality Foundation's submission in 1993, especially the one which presented sexual orientation as an essential feature of people's personality and identity. According to both submissions, sexual orientation is a neutral difference among the individuals, not a disease or a sin, and therefore should not be a fair ground for discrimination. The need to constitutionally protect lesbians and gays rested in their condition as a minority group. The inclusion of sexual orientation in social conditions enumerated in the equality clause would testify the commitment of South Africa to the principle of equity and non-discrimination.

NCGLE's members also criticised the main arguments presented by African Christian Democratic Party (ACDP), which opposed legal protection of homosexuals. Founded in 1993, the ACDP has defined itself as a party committed to biblical values of reconciliation, justice, compassion, tolerance and peace. It also stands for the sanctity of life, the individual and the community. The party focuses its action on moral issues such as abortion, homosexuality and pornography.

Advocating a Christian point of view, the submission presented by ACDP to the Constitutional Assembly argued for the exclusion of sexual orientation from the final version of the Constitution (African Christian Democratic Party 1995). This exclusion was to be based in the biblical condemnation of homosexuality. The concept of human dignity defended by ACDP members assumed the spiritual union between humankind and God. In ACDP's concept of human dignity, humans must strictly respect God's laws, so the issue of homosexuality is automatically excluded from any legal protection, as they claim that, according to the Bible, homosexuality is morally wrong and against 'the natural order of things'.

In response to the ACDP submission, NCGLE has argued that the purported 'Christian perspective on human rights' promoted by ACDP members was totally incompatible with the inclusive project of citizenship incorporated in the interim Constitution in 1993. According to NCGLE, South Africa was to be seen as a diversity society. To implement a Bill of Rights based in Christian principles would be to impose one belief on people with others. This would constitute unfair discrimination against other religions and creeds. Besides, when ACDP promoted its 'Christian perspective on human rights', it was only worried about the exclusion of the expression 'sexual orientation' from the Constitution. In this regard, ACDP was using Christian principles to disguise its prejudices against lesbians and gays (NCGLE 1995, p. 13).

NCGLE, continuing with its reasoning, argued that religion's liberties and autonomy were not in danger, should the term sexual orientation be included in the Constitution. As said above, the social conditions enlisted in the equality clause were argued to be inherently connected. Thus, guaranteeing the principle of non-discrimination on sexual orientation was a pre-condition to protect the freedom and autonomy of different religions and beliefs. By relegating homosexuality to a mere 'lifestyle', ACDP was denying its status as an intrinsic feature of human personality. In NCGLE's view, in doing so, party members were clashing with the democratic values enshrined in the interim constitution (NCGLE 1995, p. 15).

During the South African political transition, support was thus built around the importance of protecting the rights of lesbians and gays. This support in the Constitutional Assembly was significant in the approval, by a large majority, of the new Constitution in 1996, with an equality clause expressly prohibiting discrimination based on sexual orientation. Despite ACDP opposition, South Africa became the first country in the world to textually protecting sexual orientation rights in its constitution.

3. Ruling down sodomy laws: *NCGLE v. Minister of Justice* and the role of the Constitutional Court in guaranteeing sexual rights

The lesbian and gay activists' efforts to make political leaders from the ANC and elsewhere sympathetic to lesbian and gay rights, and the efficient lobby to promote free sexual expression, led to the inclusion of the concept 'sexual orientation' in the grounds of non-discrimination listed in the equality clause (in Section 9.3). That meant the recognition of the rights of lesbian and gay people as part of wider understandings of human rights and citizen rights. The enactment of the Constitution can be considered the first step towards abolition of the judicial engine that criminalised several aspects of sexuality.

When the Constitution was approved in 1996, South Africa had much legislation which criminalised male homosexuality. The offence of sodomy had been introduced by early Dutch settlers in the Cape Colony in the 17th century. According to the Roman-Dutch common law, it encompassed all forms of aberrant sexual behaviour, including bestiality, self-masturbation and anal intercourse as committed by both same-sex and male/female couples. With the increasing introduction of English common law in the 19th and 20th centuries, sodomy gradually became restricted to unlawful sexual intercourse *per anum* (anal intercourse) between two human males; hence sexual acts between women were not criminalised (Long 2003).

Later changes, already mentioned, were made in 1969 with the approval of amendments to the Immorality Act 1957 (later renamed as the Sexual Offences Act 1957) by the Immorality Amendment Act 1969. The new text of section 20A, created in the 1957 Act (previously quoted), prohibited any sex between

men at a 'party', defined as meaning with more than two persons present. As discussed, the 1969 Act also outlawed the manufacturing, sales or supplying of any product for unnatural sexual acts, and created an age of consent of 19 for sex between men (Retief 1995).

Although from its inception in 1994 the NCGLE had already identified section 20 of the Sexual Offences Act 1957 as an important barrier to the establishment of sexual rights set in the Constitution, it was the legal case *S v. Kampher* (1997), about a prisoner in the province of Western Cape, that first brought the issue of criminalising homosexuality to the courts. After having sexual relationships *per anum* with another male prisoner, the accused was charged with the crime of sodomy and was sentenced to 12 months in prison. The verdict opened space for appeal on the grounds that the crime of sodomy was inconsistent with the interim constitution approved in 1993. According to the decision of the High Court of South Africa, section 20A of the Sexual Offences Act 1957 was unconstitutional because it breached Sections 8 (1) and 13 of the interim Constitution, which prohibited discrimination on the grounds of sexual orientation. Besides that, the sentences for sodomy were a clear example of sexual discrimination against homosexuals, since consensual sexual acts by male/female couples in private locations were not considered a crime.

The decision stated that the legislators clearly intended, when the term 'sexual orientation' was included in the Constitution, to expand the basis of tolerance and consideration in a way such that consensual sex between adult males should not be criminalised. The judges' understanding was that to recognise sexual orientation as an 'inadmissible ground for discrimination' would be to confirm lesbian and gay people as having the same rights as heterosexual people. The new Constitution should consider sexual orientation as a moral rather than criminal question and irrelevant, as indicated by the equality clause. The court set aside the conviction and sentence of Kampher, without striking down the sodomy laws in general, in a context where a decision on a similar case by the Constitutional Court was forthcoming.

In 1998, a case brought by the NCGLE, which had started in the High Court, arrived at the Constitutional Court and yielded a landmark decision. In *NCGLE v. Minister of Justice* (1998), the organisation requested the Court to rule down section 20A of the Sexual Offences Act 1957 and to invalidate the crime of sodomy presented in the common law. NCGLE's aim was to suspend the legal consequences of the criminalisation of sodomy in the South African legal system.[5] Justice Ackermann authored a historic majority judgement in

5 According to section 49 (2) of the Criminal Procedure Act 1977, an authorised person (such as a police officer) was entitled to kill a person suspected of committing sodomy had that suspect tried to avoid prison. In addition, a person convicted for the crime of sodomy would not be eligible for benefits set in sections 1 (8) e (9) of the Special Pensions Act 1996.

favour of NCGLE which achieved the decriminalisation of sex between men in South Africa.

Ackerman based the ruling on several arguments that had already been presented in the previous decision of the High Court and used the case to broaden the understanding of sexual rights. One of the first points developed by the Constitutional Court was the equality concept. For the Court, the equality concept in the South African Constitution could not be considered as a passive or a negative concept. Section 8 of the Constitution recognised that discrimination towards individuals from vulnerable social groups would generate vulnerability standards and injustice that would widen inequality in the country. The Court's understanding was that the legislator should not only prohibit discrimination but also allow positive measures to repair the damages discrimination may cause. Moreover, the fight for equality did not mean the suppression of all existent differences. In a democratic and free society, it would be necessary that an individual should place himself or herself in the position of 'the other' to understand how difficult it is to live under subordination and exclusion, as experienced by people from minority groups.

For Justice Ackermann the crime of sodomy was an example of unfair discrimination[6] against homosexuals because it had the clear objective of criminalising an act based only on moral and religious values. It was also his understanding that to criminalise same-sex practices would reinforce existent prejudice and would deepen its negative effects in the everyday life of lesbian and gay people. The cruellest of those effects was the psychological damage that would affect the confidence and self-esteem of gays and lesbians. That vulnerability could be exacerbated by the fact that gay and lesbian people were a minority, not politically empowered to guarantee a legislation that could embrace their interests (*NCGLE and Another v. Minister of Justice and Others* 1998, para. 23). In this sense, gays and lesbians would depend on the Constitution and judicial courts to protect their rights.

As well as representing discrimination against homosexuals, the crime of sodomy breached gay men's right to dignity. To criminalise sexual intercourse *per anum* between male adults, the crime of sodomy punished a sexual behaviour that is identified by society as a practice related to homosexuals. So the crime of sodomy stigmatised all homosexuals who, in judicial terms, were sex offenders. That put all homosexuals in a vulnerable situation, based only on the fact that they have a sexual behaviour.

Justice Ackermann traced a clear analogy between contemporary

6 The South African Constitution establishes that in certain cases and situations discrimination could be considered fair, such as in the case of a presidential pardon benefiting specific groups only, namely young and disabled people and mothers with toddlers. In this situation, the Presidential Act aimed to benefit particularly vulnerable individuals in society as a means of achieving a worthy and important society goal. *NCGLE and Another v. Minister of Justice and Others* (1998) para. [19].

homosexuals and interracial couples at the time of apartheid. In both situations, individuals had been punished for not conforming to the sexual relationships prescribed by law. The comparison between discrimination by 'race' and by sexual orientation would be used once again in a decision to emphasise gay men's right to privacy. For Ackermann, the right to privacy was a basic right all individuals should have in terms of intimacy and autonomy free from external interference, where individuals can express their sexuality and build relationships free of any constraints. The anti-sodomy law and the prohibition of interracial sexual relationships would be clear examples of breaches to the right of privacy in South Africa. In this sense, it would be necessary to extinguish the anti-sodomy law, as had been done with the Prohibition of Mixed Marriages Act in 1985, to comply with the current South African Constitution.

In a separate concurring judgement on the same case, Justice Sachs – mentioned earlier for his contribution to establishing sexual orientation in an initial draft Bill of Rights – agreed with Justice Ackermann's decision and reinforced its importance. Sachs emphasised not only the practical and symbolic power of the decision to guarantee citizenship for a vulnerable social group but also its importance to reaffirm the idea of a democratic and plural society, as described in the Constitution. For Sachs, the objective of the crime of sodomy was to punish anyone who would dare to practice it. The crime of sodomy was a clear discrimination against homosexuals, as they were seen to be deviants from the hegemonic heterosexuality norm (*NCGLE and Another v. Minister of Justice and Others* 1998, paras. 108–9).

Justice Sachs confirmed the importance of the right to privacy as a foundation for this decision, despite the reticence of the petitioners including the NCGLE. They saw the right to privacy as a limited way to promote the rights of lesbian and gay people as homosexuality would be protected only in private locations, which would reinforce the idea that homosexuality is something people should be embarrassed about. Sachs objected to such arguments and reinforced the connection between the rights to equality and privacy. For him, human rights should be taken as a whole, centred on people and analysed taking context into account. Discrimination by sexual orientation should be analysed to identify its different causes, which could lead to the breach of the rights to equality, privacy and dignity. The differentiation and subsequent discrimination could hurt gay people's self-esteem. That did not mean removing differences among different groups but, rather, that difference should not be the foundation of discrimination. His understanding was that equality and uniformity are not the same thing. Equality means equal respect and concern to all, despite their differences. In this sense, equality does not mean the suppression of differences; it is the affirmation of the self, and the recognition of difference makes a democratic society alive. This is relevant in South Africa's case, where socially produced differences formed the basis of white minority privileges. In Sachs's words:

> The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people as they are. The concept of sexual deviance needs to be reviewed. A heterosexual norm was established, gays were labelled deviant from norm and difference was located in them. What the constitution requires is that the law and public institution acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal ceases to be the basis for establishing what is legally normative. More broadly speaking, the scope of what is constitutionally normal is expanded to include the widest range of perspectives and to acknowledge, accommodate and accept the largest spread of difference. What becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour. (NCGLE and Another v. Minister of Justice and others 1998, para. 134)

This argument shows the anti-sodomy case's importance in materialising the Constitutional Court's understanding about the liberty, equality, dignity and difference concepts. The decision that made the anti-sodomy law unconstitutional became a reference for the formulation of lesbian and gay sexual rights. The decision made clear the constitutional right for non-discrimination on sexual orientation grounds and recognised lesbian and gay people as citizens.

4. The South African experience and lessons for lesbian and gay rights advocates

The path to forging legal protection for lesbian and gay people in South Africa was characterised by a virtuous confluence of many factors. A two-phased negotiated political transition, allied with the commitment of the main political leaders to human rights protection, helped the fragmented and poorly organised lesbian and gay movement to achieve inclusion of sexual rights as part of the democratic project for the new South Africa. Within a favourable political context, lesbian and gay activists elaborated a detailed advocacy strategy known as the 'shopping list' (Berger 2008). The strategy consisted of identifying the main political demands of the lesbian and gay community and ranking these according to their viability. As previously mentioned, easier demands would initially be brought to the courts, such as for an equal age consent and the ruling down of anti-sodomy laws, and would be followed by demands on more controversial and polemical issues, such as adoption and same-sex marriage. The idea was to use an incremental approach to litigation. Favourable decisions to lesbian and gay petitioners would form the basis for other decisions dealing with sexual rights. In this sense, the judiciary in general and the Constitutional Court in particular were to play a fundamental role in forging lesbian and gay rights.

Another important aspect of the strategy was an accurate analysis of the political context, which pointed to the weakness of lesbian and gay activism in the country and identified possible support from high-profile figures in South African politics. The main aim of the 'shopping list strategy' was to overcome the fragility, in terms of grass-roots mobilisation, of the gay and lesbian movement by lobbying high-profile people and organisations. Using largely academic and technical arguments and previous judicial precedents as the basis of its submission to the MPNF and the Constitutional Assembly, NCGLE succeeded in constructing a parallel between homophobia and racism. Homosexuality was defined as an intrinsic and immutable characteristic of personal identity. Prejudices against homosexuals were argued to originate in misconceptions and religion-based views of homosexuality as immoral. According to NCGLE's submission, anthropological and psychological works had shown that homosexuality was neither a sin nor an unnatural act. Together with heterosexuality and bisexuality, it was a legitimate expression of human sexuality. In its commitment to promote human rights, the Constitution had to recognise and protect homosexuals as a minority group from oppression and discrimination in society. Framing gay and lesbian rights in the language of 'identity politics' (Heyes 2009), which claims that one's identity as a lesbian or gay man makes one peculiarly vulnerable to violence and marginalisation, was fundamental to connecting the fight against discrimination, based on sexual orientation with the broader struggle for human rights. As the last section of this chapter shows, the Constitutional Court's decisions portrayed lesbian and gay people as particularly susceptible individuals, who now needed law's protection to repair years of prejudice and legal discrimination.

The success in constructing a clear parallel between racism and homophobia is probably the main lesson that equality advocate groups in Africa can draw from the South African case. The issue of racism is a very sensitive one in Africa, but also in other countries of the Commonwealth. An approach that stresses the commonalities between discrimination based in sexual orientation and race and gender can be a way to gather support from other groups in civil society, such as anti-racist, human rights and feminist groups. The success of this approach will depend heavily on the degree of mobilisation and organisation of conservative groups and whether they are inside the ruling party. Even after the wave of democratisation in the 1990s, politics in many African countries are still dominated by single-party regimes (Kuenzi and Lambright 2001; Meredith 2006). As the Zimbabwean and Ugandan cases clearly show, ruling-party leaders have been using an anti-gay rhetoric to clash with opposition groups. In those cases, the actions of gay and lesbian activists are severely restricted as their demands can be seen as 'foreign' or 'unAfrican'.

Even in the successful case of South Africa, the inclusion of sexual orientation in the Constitution has not stopped religious and traditional groups from blaming homosexuality as 'alien' to African culture. This became particularly

apparent in 2006, when South Africa took another huge step forward by becoming the first state in Africa, and only the second in the Commonwealth after Canada in 2005, to legalise same-sex marriage (see introductory essay by Lennox and Waites, this volume). In debates on this issue, opposing groups largely stated that gay rights are 'unAfrican' and defended an amendment to the Constitution to ban same-sex marriages (de Vos 2007; Judge et al. 2008). Recent attacks on gays in townships and the disseminated practice of 'correctional rape' against lesbians also show the obstacles in implementing progressive legislation on sexual rights.

Even for some ranks of the ANC, the issue of gay and lesbian rights is still not consensual. Although many ANC leaders support the idea that homosexuality is an important part of the 'rainbow nation' project proposed by the ANC, some members of the party are against that idea. Despite the fact that the ANC has been in power since 1994 and the fact that the Constitution of 1996 clearly states that South African society should be free of discrimination based on sexual orientation, several government departments have been neglectful when it comes to policies promoting the rights of gay and lesbian people.

In 2006, some ANC members made public their rejection of the legalisation of same-sex unions. Members like the general secretary of the Congress of Traditional Leaders of South Africa (CONTRALESA), Mwelo Nkonyana, and the organisation's president, Patekile Homomisa, stepped forward to demand that the ANC leadership should let MPs vote in accordance to their own consciences. However, the ANC National Executive Committee reaffirmed its commitment to lesbian and gay rights and demanded that its members vote 'yes' on the proposed bill (*IOL News* 2006). The law was approved on 30 November 2006, making South Africa the first country in the southern hemisphere to nationally legalise same-sex unions. It is also significant that, since 2004, South Africa has become the only state in Africa to grant legal gender recognition after gender reassignment treatment, perhaps suggesting some similarity of approach to gender identity issues (for discussion of transgender issues see Morgan et al. 2009; Klein 2009; Gender Dynamix 2011).

Nevertheless, the changing political situation in South Africa, particularly since Jacob Zuma became President in 2009, makes the future uncertain. Zuma is reported to have described, in 2006, same-sex marriage as 'a disgrace to the nation' and to have rallied conservative groups opposed to same-sex marriage in his campaigning (Croucher 2011, p. 163). As Sheila Croucher's discussion indicates, this suggests that the future of human rights related to sexual orientation will depend not only on the law, but also on wider socio-political contexts and changes.

Lesbian and gay activists in other Commonwealth countries can also draw some further lessons from the South African case. The British legacy of common law can be useful in pushing for sexual rights in the judiciary. South African activists with their 'shopping list' strategy have largely used the principle of

Stare decisis to forge sexual rights in courts. According to this principle, judges are obliged to respect precedents of prior decisions, especially the ones ruled by higher courts. In *Lesbian and Gay Equality and others v. Minister of Home Affairs and others* (2005) the South African Constitutional Court based its ruling in favour of the recognition of same-sex unions on a large jurisprudence created on sexual rights for lesbian and gay people (see *NCGLE and Others v. Minister of Home Affairs and Others* (1999); *Satchwell v. President of the Republic of South Africa and Another* (2001); *J and Another v. Director General, Department of Home Affairs and Others* (2002); *Fourie and Another v. Minister of Home Affairs and Another* (2003)). This can be partly explained by the NCGLE incremental litigation strategy of forging sexual rights, in which previous favourable decisions would lay the foundations for further decisions on lesbian and gay rights (Berger 2008). In this sense, the Court has played a significant role in ruling down legislation against homosexuality, despite the prejudices spread in public opinion, sending a message of tolerance and respect for human rights.

Another lesson is the importance of the equality clause as a starting point for a strategy to promote lesbian and gay rights in the legal arena. The fight for equality principles, non-discrimination and privacy was essential in order for the South African Constitutional Court to declare the unconstitutionality of the prohibition of the consensual intercourse between adult males. The absence of 'sexual orientation' as category expressly named in a Bill of Rights does not necessarily make that strategy unfeasible in other Commonwealth countries. The constitutions of several Commonwealth countries establish generic principles of equality that can and should be used by gay and lesbian rights advocates as a weapon to decriminalise homosexuality.

Additionally, the laws that prohibit same-sex intercourse are a common legacy of British colonisation. These, as other chapters in this book show, are still present in several penal codes and in the common law of many Commonwealth nations. In this sense, the South African Constitutional Court's decisions can be useful to support litigation to repeal anti-sodomy laws in those nations. Besides, the colonial legacy of criminalisation of homosexuality must be used against arguments, such as the one used by the Zimbabwean president, Mr Mugabe, and the former Namibian president, Mr Nujoma, that homosexuality was a practice brought in by white colonisers in the 19th and 20th centuries, and is alien to local culture. Academic studies have already shown that there were homosexual practices in the African continent before the white colonisers arrived (Phillips 1997; Epprecht 1998). In fact, instead of bringing homosexuality to the continent, what white colonisers brought was the very idea that homosexuality should be treated as a criminal offence. Efforts must be made to expose this legacy in order to achieve decriminalisation and to prove wrong allegations that gay and lesbian rights represent a threat to the local culture and to the 'integrity of the nation'.

Bibliography

African Christian Democratic Party (1995) *Submission regarding Constitutional Principles II (Fundamental Rights and Freedoms)*, Constitutional Assembly Theme Committee 4, vol. 2, available at NCGLE Archives, GALA, University of the Witswatersrand.

African National Congress, Constitutional Committee (1991) 'A Bill of Rights for a Democratic South Africa – Working Draft for Consultation', *Social Justice* 18 (1/2), pp. 49–64.

African National Congress (1993) *Draft Bill of Rights*, preliminary version, February 1993 (South Africa: Community Law Centre, University of the Western Cape).

BBC News (2009). 'Uganda MP urges death for gay sex', BBC News, 15 Sep., available at http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/africa/8308912.stm (accessed 17 Jan. 2013).

Berger, J. (2008) 'Getting to the Constitutional Court on time: a litigation history of same-sex marriage', in M. Judge, A. Manion and S. De Waal (eds.), *To Have and to Hold: The Making of Same-sex Marriage in South Africa* (Johannesburg: Fanele, Jacana Media).

Bruce-Jones, E. and L.P. Itaborahy (2011) *State-sponsored Homophobia: A world survey of laws criminalising same-sex sexual acts between consenting adults* (ILGA), available at http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2011.pdf (accessed 15 Nov. 2011).

Cameron, E. (1992) 'Sexual orientation and the constitution: a test case for human rights', inaugural lecture, Centre for Applied Legal Studies, University of the Witswatersrand, 27 Oct. (available at NCGLE Archives, GALA, University of the Witswatersrand).

— (1993) 'Sexual Orientation and the Constitution: A Test Case for Human Rights', *South African Law Journal* 110, p. 450–472.

Chhiba, P. (2011) 'South Africa and the Commonwealth: A historical allegiance or catalyst for change?', *Polity*, 17 Jan., available at www.consultancyafrica.com/index.php?option=com_content&view=article&id=638:south-africa-and-the-commonwealth-a-historical-allegiance-or-catalyst-for-change&catid=57:africa-watch-discussion-papers&Itemid=263 (accessed 20 Mar. 2013).

Christiansen, E.C. (2000) 'Ending the apartheid of the closet: sexual orientation in the South African constitutional process', *New York University Journal of International Law and Politics* 32 (4), pp. 997–1058.

Cock, J. (2005) 'Engendering gay and lesbian rights: the equality clause in the South African Constitution', in N. Hoad, K. Martin and G. Reid (eds.), *Sex and Politics in South Africa* (Cape Town: Double Storey Books).

Constitution of the Republic of South Africa (1993) South Africa: South African Government Information, available at www.info.gov.za/documents/constitution/93cons.htm (accessed 17 Jan. 2013).

Constitutional Court of South Africa (2013) 'The Constitution: The History of the Constitution', available at www.constitutionalcourt.org.za/site/theconstitution/history.htm (accessed 22 Mar. 2013).
— (1996) South Africa: South African Government Information, available at www.info.gov.za/documents/constitution/1996/ (accessed 17 Jan. 2013).
Croucher, S. (2002) 'South Africa's democratisation and the politics of gay liberation', *Journal of Southern African Studies* 28 (2), pp. 315–30.
— (2011) 'South Africa: opportunities seized in the post-apartheid era', in M. Tremblay, D. Paternotte and C. Johnson (eds.), *The Lesbian and Gay Movement and the State: Comparative Insights into a Transformed Relationship* (Farnham: Ashgate), pp. 153–66.
de Vos, P. (2007) 'The "inevitability" of same-sex marriage in South Africa's post-apartheid state', *South African Journal on Human Rights* 23 (3), pp. 432–65.
Epprecht, M. (1998) '"Good God Almighty, what's this!": homosexual "crime" in early colonial Zimbabwe', in S.O. Murray and W. Roscoe (eds.), *Boy-Wives and Female Husbands: Studies in African Homosexualities* (New York: Palgrave), pp. 197–220.
Equality Foundation (1993a) Addendum to Submission to the Technical Committee on Fundamental Rights during the transition, June 1993, available at National Coalition for Gay and Lesbian Equality Archives, Gay and Lesbian Memory in Action, University of the Witswatersrand.
— (1993b) 'Meaning and scope of the term sexual orientation in section 8(2) of the Constitution, Act 200 of 1993', NCGLE, available at NCGLE Archives, GALA, University of the Witswatersrand.
Fine, D. and J. Nicol (1995) 'The Lavender lobby: working for lesbian and gay rights within the liberation movement', in E. Cameron and M. Gevisser (eds.), *Defiant Desire: Gay and Lesbian Lives in South Africa* (New York, Routledge), pp. 269–77.
Gender Dynamix (2011), available at www.genderdynamix.co.za (accessed 17 Jan. 2013).
Gevisser, M. (1995) 'A different fight for freedom: a history of South African lesbian and gay organisation from the 1950s to the 1990s', in M. Gevisser and E. Cameron (eds.), *Defiant Desire: Gay and Lesbian Lives in South Africa* (New York, Routledge), pp. 14–87.
Guiliomee, H. (2003) *The Afrikaners: Biography of a People* (Cape Town: Tafelberg).
Guiliomee, H. And B. Mbenga (2007) *New History of South Africa* (Cape Town: Tafelberg).
Heyes, C. (2009) 'Identity politics', *Stanford Encyclopedia of Philosophy,* available at http://plato.stanford.edu/entries/identity-politics/ (accessed 17 Jan. 2013).

Hoad, N., K. Martin and G. Reid (eds.) (2005) *Sex and Politics in South Africa* (Cape Town: Double Storey Books).

IOL News (2006) 'ANC MPs must vote "yes"', 14 Nov., available at www.iol.co.za/news/politics/civil-union-bill-anc-mps-must-vote-yes-1.303068 (accessed 17 Jan. 2013)

Judge, M., A. Manion and S. De Waal (eds.) (2008) *To Have and to Hold*: *The Making of Same-Sex Marriage in South Africa* (Johannesburg: Fanele, Jacana Media).

Kennedy, B. (2001) 'Homosexuals in the periphery: gay and lesbian rights in developing Africa', *Nebraska Anthropologist*, Paper 21.

Klein, T. (2009) 'Intersex and transgender activism in South Africa', *Liminalis* 3, pp. 15–41, available at www.liminalis.de/2009_03/Artikel_Essay/Liminalis-2009–Klein.pdf (accessed 17 Jan. 2013).

Klug, H. (1996) 'Participating in the design: Constitution-making in South Africa', *Review of Constitutional Studies* 3 (1), pp. 18–59.

Kuenzi, M. and G. Lambright (2001) 'Party system institutionalization in 30 African countries', *Party Politics* 7 (4), pp. 437–68.

Long, S. (2003) *More Than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa* (New York: Human Rights Watch and The International Gay and Lesbian Human Rights Commission).

Meredith, M. (2006) *The State of Africa: A History of Fifty Years of Independence* (London: the Free Press).

Morgan, R., C. Marais and J. Wellbeloved (2009) *TRANS: Transgender Life Stories from South Africa* (Johannesburg: Fanele, Jacana Media).

NCGLE (1995) Submission to the Theme Committee on Fundamental Rights. Constitutional Assembly, 20 Feb., available at NCGLE Archives, GALA, University of the Witswatersrand.

NCGLE Executive Committee (1995) 'We must claim our citizenship! A report of the interim Executive Committee of NCGLE, December 1994–1995', available at NCGLE Archives, GALA, University of the Witswatersrand.

Phillips, O. (1997) 'Zimbabwean law and the production of a white man's disease', *Social and Legal Studies* 6 (4), pp. 471–91.

Posel, D. (1991) *The Making of Apartheid, 1948–1961: Conflict and Compromise* (New York: Oxford University Press).

Retief, G. (1995) 'Keeping Sodom Out of the Laager: state repression of homosexuality in apartheid South Africa', in M. Gevisser and E. Cameron (eds.) *Defiant Desire*: *Gay and Lesbian Lives in South Africa* (New York, Routledge), pp. 99–113.

South African Law Commission (1991) *Project 58: Group and Human Rights – Interim Report* (Pretoria: South African Law Commission).

South Africa Government (1993) *Government's Proposals on a Charter of Fundamental Rights* (South Africa: Republic of South Africa).
Tatchell, P. (2005) 'The moment the ANC embraced gay rights', in N. Hoad, K. Martin and G. Reid (eds.), *Sex and Politics in South Africa* (Cape Town: Double Storey Books), pp. 140–7.
Thompson, L. (2001) *A History of South Africa*, 3rd edn. (New Haven, CT: Yale University Press).
Welsh, D. (2010) *The Rise and Fall of Apartheid: From Racial Domination to Majority Rule* (Johannesburg: Jonathan Ball Publishers).

Legal cases

Fourie and Another v. Minister of Home Affairs and Another, 2003, Supreme Court of Appeal, Case No. 232/2003.
J and Another v. Director General, Department of Home Affairs and Others, 2002, CCT Case No. 46/2002.
Lesbian and Gay Equality Project and Others v. Minister of Home Affairs and Others, 2005, CCT Case 10/05.
NCGLE and Another v. Minister of Justice and Others, 1998, CCT Case No. 11/98.
NCGLE and Others v. Minister of Home Affairs and Others, 1999, CCT Case No. 10/99.
Satchwell v. President of the Republic of South Africa and Another, 2001, CCT Case No. 45/2001.
S v. Kampher, 1997, High Court of South Africa (Cape of Good Hope Provincial Division), No.001377/97, Case No. 232/97.

12

The development of sexual rights and the LGBT movement in Botswana

Monica Tabengwa with Nancy Nicol

Introduction

Botswana operates a system of dual law comprising the customary laws and practices of the different ethnic tribes and the common law. The customary law is largely unwritten and differs from tribe to tribe and community to community. The common law is constituted by a combination of old English and Roman Dutch law and the statutory enactments passed by Parliament over time. Upon attaining independence from British rule in 1966, Botswana adopted a Constitution which remains in place today with a few changes. The Constitution is the supreme law of the land; all other laws and practices that do not comply can and have been declared unconstitutional.

The Constitution of Botswana provides for the protection of 'all persons' within Botswana; in particular, Section 3 focuses on the protection of all fundamental rights and freedoms without discrimination. The definition of what is considered 'discriminatory' is found under Section 15(3). This clause has been held up by the Courts of Botswana as allowing them to interpret the law very liberally in order to protect the rights of the most vulnerable groups of our society, such as women, children and all others whose fundamental human rights are being violated, which could include sexual minorities. In fact in the famous case of *Attorney General v. Unity Dow*[1] the Court of Appeal held that the Constitution is supreme and where there is conflict with another law or culture the Constitution must trump them. In this case the court agreed with the suggestion that, although the words sex or gender were not included in the definition of discrimination, the interpretation has to be broad allowing for a read in of the words rather than an exclusion of a right. The list was therefore held to be generic and not exhaustive.

1 *Attorney General v. Unity Dow* 2003 BLR XXX (CA).

However, Botswana society is highly conservative with many practices and stereotypes which privilege some and exclude or deny other groups, such as lesbians, gays, bisexuals, trans-gender, intersex and sex workers, the right to exist. The relevant sections dealing with discrimination under the Constitution as aforementioned are Sections 3 and 15 respectively. The former provides that 'every person in Botswana is entitled to fundamental rights and freedoms of the individual, that is to say the right whatever his race, place of origin, political opinions, colour, creed or sex but subject to respect for the rights and freedoms of others and for public interest'.

Section 15(3) defines discrimination as

> affording different treatment to different people attributable wholly or mainly to their respective description by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

The Constitution makes no specific mention of either sexual orientation or gender identity as a possible ground upon which an allegation of discrimination can be made.

The Botswana Penal Code regulates most criminal conduct and not unlike the Constitution it is also a legacy of British colonial rule which remains in effect today, also with few amendments. The offending provisions with regard to same-sex conduct are found under Sections 164 and 167 of the Penal Code, and provide as follows: 'any person who has carnal knowledge of any person against the order of nature, has carnal knowledge of an animal or permits carnal knowledge of him/her against the order of nature, is guilty of an offence and is liable for imprisonment' and 'any person who … commits any act of gross indecency with another person'. This provision on same-sex conduct has been subject to much debate as it does not provide a definition of 'carnal knowledge', but the courts of Botswana interpret it as referring to sexual intercourse. The offence applies generally without any limitations to age, gender, or the location where the acts occur, effectively meaning that even sexual acts between consenting adults in the privacy of their homes can be prosecuted. In November 1998, a local human rights lawyer, Duma Boko,[2] speaking at the DITSHWANELO Conference on Human Rights and Democracy, held in Botswana, argued that the provision was vague and embarrassing and should accordingly be declared null and void by the courts. Mr Boko made the following observations:

2 Mr Boko, a lawyer with profound interest in human rights, has recently carried out research on the issue and decriminalisation of homosexuality.

> the Penal Code does not provide any definition of '**the order of nature**' ... The sections are extremely vague and embarrassing in law. The conduct they seek to proscribe is so unclearly defined, if at all, that the ordinary citizen and society must keep guessing at their meaning and differ as to application.[3]

Although, strictly interpreted, this provision could include sex between heterosexuals, the application of the law has clearly shown that gay men are its primary targets. In other jurisdictions it is clear that sodomy is the punishable act.[4] The crime carries a penalty of seven years' imprisonment.

In 1998 the government undertook a review of all laws affecting the status of women was undertaken by the government and this process momentarily raised expectations among the LGBT (lesbian, gay, bisexual and transgender) community and members of Lesbians, Gays and Bisexuals of Botswana (LeGaBiBo) that the discriminatory laws might be repealed. However, the ruling Botswana Democratic Party (BDP), facing an election the following year, opposed any suggestions to change the law. The BDP Executive Secretary told the media that the party 'could not even debate the issue of homosexuality' because it 'would shock the Botswana nation' (Long 2003). The then vice-president of Botswana, Seretse Ian Khama, stated that 'human rights are not a license to commit unnatural acts which offend the social norms of behaviour ... The law is abundantly clear that homosexuality, performed either by males or females, in public or private is an offence punishable by law' (*Midweek Sun* 1998). Kgosi Seepapitso IV[5] of the Bangwaketse told the *Midweek Sun* that people who are gay should be whipped or sent to jail. The Evangelical Fellowship of Botswana, a coalition of evangelical churches, launched what they called a crusade against homosexuality. Its National Secretary, Pastor Biki Butale, called on 'all Christians and all morally upright persons within the four corners of Botswana to reject, resist, denounce, expose, demolish and totally frustrate any effort by whoever to infiltrate such foreign cultures of moral decay and shame into our respectable, blessed, and peaceful country' (Mokome 1998).

The 1998 review looked at all laws that discriminated against women, repealing or amending many of them. The move was to make all laws gender neutral, especially those relating to sexual offences[6] and violence, but implementing them remains problematic because the socio-political environment continues to be largely patriarchal and characterised by unequal power relations, with men wielding most of the power.

3 Duma Boko, DITSHWANELO Conference on Human Rights and Democracy, Gaborone 1998.

4 Sodomy is defined as unlawful and intentional sexual intercourse *per anum* between two males.

5 Chief of the Ngwaketse tribe of Botswana.

6 This amendment modified all sexual offences, increased penalties and criminalised the spread of HIV infection.

This meant that provision which originally afforded different treatment according to differences in gender was repealed and replaced with a more gender-neutral provision covering males and females equally. For instance, within the review of sexual offences, that of rape,[7] which originally did not recognise females as possible perpetrators, was amended to include women, thus making the offence of rape gender neutral. Similarly, the provisions for same-sex conduct, which had originally criminalised sexual conduct between 'male persons', were subsequently replaced with gender-neutral provisions to include sexual conduct between women. The argument for the amendment was that the provisions were originally discriminatory on the basis of gender and therefore unconstitutional. Instead of repealing the offending law, Parliament saw fit to extend it to sexual acts between women ostensibly to comply with demand to eliminate the discriminatory effect of the law. As a result, Botswana not only retained the criminalisation of same-sex sexual acts between men in 1998, but also expanded its laws to criminalise sexual conduct between women.

Although the offence had been expanded in this way, the general provisions remained the same and no more insight was provided to assist with what was meant by 'against the order of nature'. Due to the private nature of the acts being criminalised, this law was hardly ever enforced and so the Courts had little opportunity to attempt an interpretation of it. However, an opportunity to refer the issue for judicial review arose through the Kanane[8] case. Sometime during the night the police, acting on a tip-off, raided Robert Norrie's residence and caught him in the act of engaging in sexual intercourse with Utjiwa Kanane. The two men were charged with committing an act of gross indecency and engaging in unnatural sexual acts contrary to the Penal Code.[9] Mr Norrie, an American citizen, pleaded guilty and was convicted and subsequently deported. The Centre for Human Rights (DITSHWANELO) intervened to establish this as a test case for the decriminalisation of same-sex sexual conduct. They instituted a constitutional challenge in the High Court, alleging that the Penal Code provisions violated rights conferred to him by the Constitution of Botswana, namely, the right to non-discrimination; specifically, that it discriminated against male persons on the grounds of gender, the right to privacy and the right to freedom of association, assembly and expression conferred under sections 9, 15 and 13 respectively. Moreover, the acts on which the charges against Mr Kanane were based had taken place between consenting male adults within the privacy of their residence.

The High Court dismissed the case, placing much emphasis on religious doctrine and accusing Westerners for being the source of many evils such as HIV/AIDS and homosexuality in Botswana. The High Court (Judge

7 Section 141 Penal Code Amendment No 5 of 1998.
8 *Kanane v. the State* 2003 (2) BLR 67 (ca).
9 CAP [08:01] Laws of Botswana.

Mwaikasu) upheld the constitutionality of Sections 164 and 167 of the Penal Code. It held that the provisions of the Botswana Constitution that protect rights to privacy, association and freedom of expression could be curtailed by legislation enacted to support public morality. The Court further found that the law prevented harm to public morality due to carnal knowledge against the order of nature. Additionally, it found that although lesbian intercourse was not considered to be any sort of carnal knowledge (that is, neither natural nor unnatural), there was no gender discrimination in the Penal Code.

In 2003, DITSHWANELO applied to the Court of Appeal alleging that the High Court had misinterpreted the constitutional provisions referring to non-discrimination. The same arguments were presented before the appeal court, which also dismissed the case on the basis that Botswana society was not yet ready to decriminalise homosexuality. The Court of Appeal did not consider the issue of gender discrimination since it considered that the amendment of the Penal Code in 1998, which made this same offence gender neutral, had rendered such challenge redundant (*Kanane v. The State* BLR 2003). After reviewing all the evidence and the legal arguments, the Court held that there was nothing to suggest a change in societal perception against homosexuality and that in fact all indications were that attitudes were hardening to maintain the status quo. The Court held as follows:

> The Court can take judicial notice of the incidence of AIDS both worldwide and in Botswana, and in my opinion the legislature in enacting the provisions it did was reflecting a public concern. I conclude therefore that so far from moving towards the liberalisation of sexual conduct by regarding homosexual practices as acceptable conduct, such indications as there are show a hardening of a contrary attitude. Gay men and women did not represent a group or class which at this stage had been shown to require protection under the Constitution (*Kanane v. The State* 2003 BLR).

The clear implication is that the Court considered that AIDS is caused in part by homosexual conduct and therefore society, by amending the law to broaden penalties against same-sex sexual conduct, was hardening its heart against gays and lesbians. The Court argued that homosexual practices should not be decriminalised because gay and lesbians are not a group protected by the Constitution. Moreover, the judges shifted interpretation of the scope of the law from behaviour ((homo) sexual conduct) to identifying 'gay men and women'. The main inference of this judgement is that the legal position, as expounded by the Court in this decision, reflects the opinion of the public towards homosexuality. In fact, the Court was of the view that there was no evidence to suggest public opinion in Botswana had changed and developed sufficiently to warrant decriminalisation. The Court felt that Botswana, being a liberal democracy, had expressed through the elected legislators their disapproval of homosexuality by means of the 1998 Penal Code amendment extending the

offence to cover sexual acts between female persons. It was also the Court's view that the law did not prevent gays and lesbians from associating so long as it was within the confines and subject of the law. This is debatable, however, as it works on the premise that people understand that what is criminalised is the conduct and not the personal status of being gay, lesbian, transgender or otherwise. In Botswana, as in many other communities with similar provisions criminalising same-sex conduct, people have been stigmatised and/or subjected to discriminatory conduct on the basis of their actual or perceived sexual orientation and gender identity.

International human rights discourse in Botswana

The issues of sexual orientation and gender identity have been receiving a lot of attention lately in local, regional and international arenas. On 17 June 2011, for the first time at the UN, a resolution seeking to address ongoing persecution and discrimination of persons on the basis of sexual orientation and gender identity (SOGI) was tabled and approved. This resolution was introduced by South Africa, the one African country that has made constitutional provisions to guarantee non-discrimination based on sexual orientation. It was met with some disapproval, not surprisingly, from many of the other African countries, led by Nigeria, Egypt, Uganda and others who were opposed to any discussion on SOGI at the UN. It was no surprise that Botswana abstained from voting on this resolution as it has always sided with African countries that choose to selectively apply tradition and public morality to deny the existence of communities such as gay, lesbian, bisexual and transgender people and sex workers.

The Coalition of African Lesbians has repeatedly appeared before the African Commission on Human and Peoples' Rights to apply for accreditation, which has resulted in many fierce debates – both formal and informal. At their heart are the issues of traditional values and public morality, with the majority feeling that traditional and religious cultures should be upheld. The Commission itself is divided on this issue but the prevailing official position is that sexual orientation and gender identity have no place in the African human rights mechanisms, especially as there is no specific mention of sexual orientation in the African Charter.

The international treaties, which Botswana has ratified, do not automatically apply because Botswana is a dualist legal system. For such treaties to be enforceable and applicable domestically, they must be specifically incorporated through legislative enactments into domestic law. This does not mean, however, that international treaties bear no significance when laws are applied in Botswana. Although they are not justiciable without specific incorporation they can be persuasive within the Courts. The status of international law in Botswana has been perfectly summed up in the case of *Attorney General v.*

Unity Dow[10] judgment where Justice Amissah stated that international law must be used in the interpretation of the law. In his words:

> Botswana is a member of the community of civilised states which has undertaken to abide by certain standards of conduct and, unless it is impossible to do otherwise, it would be wrong for its Courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken.

Justice Aguda, JA added the following observations:

> The Courts must interpret domestic laws in a way that is compatible with the State's responsibility not to be in breach of international law as laid down by law creating treaties, conventions, agreements and protocols within the United Nations and the Organisation of African Unity.

The Courts have used this same judgment and international treaties, such as the International Covenant on Civil and Political Rights (ICCPR) and the ILO Convention,[11] to protect people from discrimination on the basis of HIV status. In *Lemo v. Northern Air Maintenance (Pty) Ltd*,[12] Lemo, an employee of Northern Air Maintenance, was dismissed the day after he disclosed his HIV status to his employer. During the final four years of his employment, Lemo's health deteriorated and he had taken all of his annual and sick leave, and was repeatedly on unpaid leave. There was a factual dispute as to whether Lemo was terminated due to his HIV status or his frequent absence from work. Where an employee is HIV positive, employers should refrain from any discriminatory practices towards an HIV/AIDS-positive employee, and should treat the employee the same as any other employee suffering from a life-threatening illness. It is therefore clear that the Courts are willing to exercise some judicial activism in applying international human rights standards, notwithstanding that the many treaties ratified to date are yet to be domesticated.

The government's refusal to register LeGaBiBo presents an opportunity to test the judicial activism that was shown in the case of Unity Dow and the other cases discussed above. The denial of registration of LeGaBiBo is a violation under the ICCPR Article 22 of the freedom of association. Another violation of LGBT rights in Botswana is the state's criminalisation of same-sex sexual activity.

Despite instances of discrimination against LGBT individuals in Botswana and the fact that the ICCPR prohibits such conduct, Botswana's reports to the Human Rights Committee failed to mention the existence (or lack thereof) of specific efforts to eliminate discrimination against LGBT persons

10 *Attorney General v. Unity Dow* (1992) BLR 119 CA.

11 The International Labour Organisation Declaration on Fundamental Principles and Rights at Work, adopted in June 1998.

12 *Lemo v. Northern Air Maintenance (Pty)* Ltd No 166 Industrial Court 2004.

(BONELA and LeGaBiBo with Global Rights and International Gay and Lesbian Human Rights Commission, 2008). LeGaBiBo, with the assistance of Global Rights,[13] presented a shadow report in March 2008, whose goal was to provide information to aid the Human Rights Committee in its evaluation of Botswana's adherence to the rights set forth in the ICCPR, and eventually to lead to a genuine attempt to protect and provide civil and political rights to LGBT persons in Botswana.

The Human Rights Committee recommended, in 2009,[14] that Botswana decriminalise homosexual relationships and practices/consensual same-sex activities between adults, and that it forbid discrimination on the basis of sexual orientation which would be in violation of the right to privacy guaranteed by the ICCPR. Although Botswana has committed to upholding the ICCPR principles, it has failed to bring its criminal code into compliance with international principles regarding discriminatory practises against minority groups, such as LGBT and sex workers. Such laws violate international protections of the right to privacy and protections against discrimination and threaten basic freedoms of association, assembly and expression. These laws violate Articles 2, 26 (non-discrimination) and 17 (right to privacy) of the ICCPR.

Why criminalise? Whose morality?

> When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.
> *Lawrence v. Texas*, US Supreme Court 2003

In Botswana, LGBT people are opposed for a variety of personal, moral, political and religious reasons. Some would say that it is unnatural and encourages unhealthy behaviour; others believe it undermines the traditional family, choosing to believe that children should be brought up in a home with both a mother and father and that children should not be exposed to sexualities other than the accepted heterosexuality. Many Christian people consider same-sex sexual acts a sin and un-Christian, often referring to the biblical notions of the 'sin of Gomorrah and Sodom'. This kind of opposition is deeply embedded in people's attitudes and behaviour. Many acts of discrimination against LGBT communities come from people who view the act of homosexuality as 'immoral'. However, most people who are opposed to LGBT rights have little or no personal contact with openly gay people. As a result of the criminalisation of same-sex sexual relationships by the Botswana government and the religious dogma and hate-mongering that is preached by religious groups, many

13 International human rights organisation based in Washington DC, USA.

14 Human Rights Committee, Concluding Observations of the Human Rights Committee: Botswana, UN Doc. CCPR/C/BWA/CO/1 (24 April 2008): para 22.

individuals are loath to accept LGBT people as deserving of equal respect and protection (Mutua 2011).

Since the Kanane case, there have been no further prosecutions for engaging in same-sex sexual activity, so in general people are left alone. The government of Botswana has in fact used this as an excuse not to be criticised for discriminatory practices against LGBT people. In March 2010, the ex-president of Botswana, Festus Mogae, who is now a champion of decriminalisation, said in the course of a BBC debate that during his term in office he instructed the police and law enforcement officers to 'leave homosexuals alone'. Upon being asked why it would not have been more prudent to decriminalise when he had the power and opportunity as President, he said 'he could not risk losing an election because of gays', this referring to the fact that the majority of people in Botswana were so homophobic that they would lose faith in him as a leader were he to openly support the cause to decriminalise same-sex sexual conduct.

Effects of criminalisation of same-sex conduct

Criminalisation affects the lives of many people across the country because the laws uphold societal attitudes of intolerance and homophobia. It has been demonstrated in other jurisdictions that, even where laws criminalising homosexuality are not enforced, the mere presence of the law is insidious and can create the conditions for discrimination in employment, stigmatisation, disparagement, threats of physical violence and other human rights abuses. Moreover, criminalisation deters the reporting of human rights abuses, perpetrated against individuals on the basis of actual or imputed sexual orientation or gender identity, since survivors of abuse may face criminal prosecution when they report these crimes to the police. As a consequence, homosexual liaisons are conducted furtively and there is no 'out' community of any note apart from a few isolated individuals who are also employees of LeGaBiBo.

There is a general misunderstanding of the intent of the law, as most people believe the law criminalises both the sexual orientation status as well as the conduct. Accordingly, homophobic individuals may interpret these provisions as permission to target LGBT people, their organisations and their events. Members of LeGaBiBo have reported that they have been denied access to entertainment places by nightclub owners because of their sexual orientation and gender expression. One such incident involved an individual who was ejected from a local nightclub on the grounds that she was 'a lesbian'. She was simply standing in line for a drink, when a man who identified himself as the owner of the club approached her. He proceeded to push her into the kitchen, where he touched her chest, frisked her and demanded, 'Identify yourself. Are you a man or a woman? We don't allow lesbians here'. (LeGaBiBo 2006). She was then escorted off the premises by a security guard. LeGaBiBo responded by

issuing a press release condemning this act as being discriminatory. However, this incident had no recourse because there is no law in Botswana that recognises the rights of non-heterosexual people. Therefore, reporting such an incident to authorities or the police is to no avail, as there is no legal instrument in Botswana that recognises discrimination based on sexual orientation or gender expression with the exception of Employment Act Amendment No.10 of 2010 that prohibits dismissal on the basis of sexual orientation, but which only applies to workplace discrimination and has little effect on general life outside of work. The effects of the Penal Code provisions will remain the same.

The mere existence of these laws allows officials to invade the private spaces of individuals alleged to be engaging in same-sex activity and can result in arbitrary arrests and detention. The high-profile case of *Kanane v. The State* is an example of this kind of invasion of privacy. Intolerance by society further drives homosexuals underground, a situation further aggravated by the homophobic statements of national leaders and politicians of neighbouring countries such as Zimbabwe, Namibia, Uganda and Kenya.

Homophobia in Botswana – popular opinion or the few voices of overzealous politicians?

Is the majority of Botswana society really homophobic or are the views of a few overzealous politicians pre-empting and influencing public opinion? Does the criminalisation of same-sex sexual relations sustain prevailing public attitude or is the reverse true? Is it the laws that influence public attitude or the public attitude that influences the law? Should public attitude be allowed to triumph over constitutionally-protected human rights?

The presence of criminal laws which proscribe same-sex sexual conduct gives legitimacy to political leaders to make undisguised anti-homosexuality statements. In fact, the Court in the case of *Kanane v. The State* (2003) made little attempt to establish what the public opinion actually was. With no research evidence available, it seems difficult to really know what societal attitudes are towards homosexuality.

Historically, colonialism introduced laws against homosexuality (Baudh 2008; Gupta 2002; Saunders 2009; Human Rights Watch, this volume). However, post-colonial states have not, in the main, kept pace with legislative reform in the colonising countries; nor have they kept up with changing societal norms. It is very common for homosexuality to be dismissed as a 'Western' disease and as 'un-African', and politicians in Botswana describe the decriminalisation of same-sex acts as the antithesis of Botswana culture and as a reflection of Western influence. Changes in the content of the law should follow changes in society. Yet Botswana has clung doggedly to criminal provisions which are now at odds with the vision of creating a tolerant and transparent

nation as per the national vision.[15] Although it has been argued that the laws of Botswana represent the views of the majority because they are enacted by an elected legislature, the same is not true for the Penal Code which dates from colonial rule. Politicians have been known to take advantage of their positions to influence public opinion and in this case their anti-homosexuality opinions take legitimacy from the presence of the criminal code, while purporting to act as protectors of 'good' public morals. In fact, it is difficult at this point to find clear indications as to what societal attitudes towards same-sex sexual conduct actually are or to define a standard moral code.

In 2006, the Assistant Minister of Labour and Home Affairs, Olifant Mfa, was quoted in the press as saying that homosexuality is 'barbaric, whether you argue it from the perspective of religion or culture', and that such individuals should 'go for counselling and serious therapy so that they can be brought back to normality' (Lute 2006). Mr Mfa continued that the reason homosexuality is not part of Botswana culture is because 'even people who claim to be homosexual are afraid to come out in the open' (Lute 2006). Certainly, fear of being exposed to negative and discriminatory treatment by political and religious forces keeps these individuals from coming out into the open. It will continue to be difficult for the LGBT community to be open about their sexual orientation so long as it is constituted as a criminal offence.

BONELA (The Botswana Network on Ethics, Law and HIV/AIDS) and LeGaBiBo responded to the published interview with an open letter to the newspaper's letters editor stating,

> we continue to advocate for the rights of the lesbians, gays, bisexuals, transgender and intersex community because they have long been here, contribute to the fabric of this country and will long be here to stay. Homosexuality is found all around Botswana, including in rural areas … Homosexuality cannot be cured simply because it is not a disease. (BONELA and LeGaBiBo 2006)

Kgosi Sediegeng Kgamane, a tribal authority, admitted that he was aware of such behaviour in society, but added that Tswana custom does not approve of homosexuality and considers it to be a kind of mental illness (Lute 2006). Kgosi Lotlaamoreng II, the paramount chief of Barolong, claimed that there are no elements of homosexuality in Botswana or other African societies and that homosexuality is 'alien behaviour that comes with foreigners' (Lute 2006).

However, the issue remains a divisive one, even among human rights organisations. The Botswana Council of NGOs[16] has, to date, failed to come up with a clear position because their members have been unable to agree to

15 Botswana National Vision Council, Botswana Long Term Vision 2016, 2009, available at www.vision2016.co.bw.

16 This is a network of all human rights NGOs in Botswana; LeGaBiBo is not a member due to lack of registration status.

accept and acknowledge LGBT rights as human rights deserving full promotion and protection like all other rights. Many people still opt to adopt subjective interpretations of culture and morality over protecting rights of LGBT people.

Public health, HIV and decriminalisation

Another consequence of the prohibitive criminal code is that it hinders the government from providing adequate appropriate services to these marginalised populations. For instance, the social intolerance of same-sex sexual conduct has contributed to the inability of the government to provide condoms to prisoners. The prison population represents a unique group of men who have sex with men (MSM) who do not necessarily identify as gay, transgendered or otherwise, and who often go back to their usual interrelations with the rest of the community as soon as they are released from prison.

HIV/AIDS has contributed to many governments and aid organisations shifting their attitude towards same-sex relationships. The government of Botswana is presently debating the same issues with many organisations and leaning towards a human rights-based approach, having come to the realisation that from a public health perspective they cannot continue to deny full access to health services to sexual minorities. For instance, in 2000, the then-President Festus Mogae launched the Botswana Human Development Report 2000, in which he urged the nation 'not to be judgmental' towards groups vulnerable to HIV, including LGBTs, prisoners and commercial sex workers.

These remarks may have been prompted by the need to address HIV/AIDS and the factors that contribute to the high infection and prevalence rates in Botswana holistically. The same Human Development Report determined that laws criminalising same-sex sexual conduct have been detrimental to Botswana's efforts at HIV/AIDS education, prevention and care because they excluded a whole community of people from participating in HIV prevention programmes. In *Toonen v. Australia* the Human Rights Committee noted that the criminalisation of same-sex sexual practices 'could not be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS'.[17] In fact it was generally observed that statutes criminalising homosexual activity tend to impede public health programmes by driving underground many of the people at the risk of infection. The Human Rights Committee also concluded that the 'criminalisation of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention'.[18]

Civil society organisations (CSOs) in Botswana such as BONELA, LeGaBiBo and DITSHWANELO have attempted to engage with the government,

17 *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), para. 8.5.

18 Toonen communication (supra).

emphasising the fact that the government has a moral and legal obligation to prevent the spread of HIV among prisoners and among communities. Prisoners are part of the community. They come from the community and return to it after completing their sentences. Protection of prisoners is therefore protection of and prevention of potential harm to communities. The emphasis on HIV has brought for sexual minorities new spaces for the discussion of sexual rights and thus has created possibilities of alliances between LGBT groups with other mainstream human rights organisations. The Botswana government has also had to realign its development strategies to ensure that marginalised populations – including sex workers, gay and other men who have sex with men, people living with HIV and other marginalised populations – must be meaningfully engaged and represented at all levels of the national and regional response to HIV and AIDS. Botswana has been most affected by HIV but, with leadership from the Office of the President, the country has managed to mobilise a strong response to the epidemic resulting in the scaling up of a more harmonised and holistic response. However, one significant gap has been the meaningful engagement of key populations in the planning, delivery, and monitoring of programmes, and in high-level decision-making. HIV is both a global health and human rights issue, and a development issue that threatens social and economic stability. Since Botswana has accepted Millennium Development Goal 6 – the halting and reversal of the spread of HIV and AIDS and the achievement of universal access to treatment for HIV for all those needing it – the best possible way to achieve this is to adopt a human rights-based approach holding that all people have equal rights and dignity. Sex workers, gay and other men who have sex with men, substance users and other marginalised groups share equal human rights to healthcare, security, gender equality, freedom from discrimination, and to self-determination. In principle, the Botswana government has shown its willingness to engage with these marginalised communities but the decriminalisation of same-sex conduct, sex work and HIV is still outstanding.

Botswana – time to decriminalise?

The government has so far been slow to recognise LeGaBiBo, the only organisation representing lesbian, gay, bisexual, transgender and intersex (LGBTI) peoples in Botswana. As a result LeGaBiBo operates in an unfriendly environment. There are no social or legal protections available for LGBT people who are subjected to prejudice or discrimination. The issue of gender expression in the form of cross-dressing, although not explicitly prohibited in any of the statutes, is frowned upon. The system recognises only two genders and the existence of other genders is shrouded in taboo and silence. LeGaBiBo members have their hands full working around the clock with limited resources to ensure that their constituents are not subjected to human rights violations.

Despite working under immense difficulty in a hostile and non-conducive environment, LeGaBiBo has had tremendous support through the years. CSOs have spoken out against prejudice, and one mainstream human rights group, DITSHWANELO, the Botswana Centre for Human Rights, urged the decriminalisation of homosexual conduct as early as 1990 when the group LeGaBiBo was first initiated. The Centre used to coordinate LeGaBiBo as a project run on behalf of an informal group of lesbians, gays and bisexuals. This group mainly comprises persons aged between 18 and 40. In 1998, DITSHWANELO hosted a conference on human rights and democracy where a LeGaBiBo representative made a presentation on lesbian and gay rights. The workshop resulted in a Human Rights Charter for Lesbians, Gays and Bisexuals in Botswana. In 2001, DITSHWANELO held a workshop on safer sex for this group in relation to HIV/AIDS prevention. Government policy makers and representatives from the United Nations Development Programme attended and a report was prepared and widely circulated. DITSHWANELO continues to advocate and lobby for the decriminalisation of same-sex relations by providing information to students, researchers, members of the public and the media on this issue.

Due to financial constraints, DITSHWANELO was unable to sustain its support of the project. As a result, LeGaBiBo was not in operation until 2004, when LeGaBiBo resumed its work under the auspices of BONELA to address the human rights issues which affect them. Since then BONELA has provided LeGaBiBo with office space, guidance and mentoring. Through this collaboration, LeGaBiBo has been able to provide services such as workshops on healthy relationships, substance and alcohol abuse, partner abuse, safe and safer sex. In addition to service provision, LeGaBiBo has engaged with local media in order to advocate and influence reporting with regard to the human dignity of LGBT people. LeGaBiBo has also been able to extend its network abroad through membership in regional networks, such as the Coalition of African Lesbians (CAL), and international ones, such as the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), which has improved its ability to fulfil its objectives. In 2005, LeGaBiBo submitted a constitution to the Registrar of Societies in order to get officially registered. Although the organisation anticipated that the registration would be refused, this was intended to force the government to make a determination on the issue of registration of an LGBT organisation and, should they decline, a test case on the basis of the constitutionality of the Penal Code provisions would again be brought before the courts.

It took more than two years of repeated demands from LeGaBiBo members but finally the application was rejected by letter, dated 10 September 2007 on the grounds that:

> the country's constitution does not recognise LGBTs, and ... Section 7(2)(a) of the Societies Act which says any of the objects of the society

> is, or is likely to be used for an unlawful purpose or any purpose prejudicial to or incompatible with peace, welfare or good order in Botswana.

The rejection of the application came as no surprise. The letter raised some issues: *inter alia* that the director and his office interpreted the Penal Code provisions to mean that the very fact of being 'homosexual' is what the law prohibits. The import of this misguided interpretation is that organising and registering an entity, whose objective is to work with LGBT communities, is seen as aiding the commission of an unlawful act. This interpretation of the law has hindered the free association of the LGBT community, most of whom remain closeted, fearing ridicule, stigma and discrimination. This strict interpretation of the Penal Code provisions prohibits sexual acts between people of the same sex, rather than on the basis of one's sexual orientation, although there appears to be a thin line. The Societies Act itself would be hard put to deny registration of LeGaBiBo but, read together with the Penal Code, gives new meaning to what might be considered as 'prejudicial to or incompatible with peace, welfare and good order'.[19]

The members of LeGaBiBo have since served notice on the Attorney General's office to sue the state on the following grounds:

> 1. That by denying registration the State is violating them the right as individuals and as a collective to freedom of association and free assembly as guaranteed by the Constitution of Botswana under Section 13. The Constitution guarantees for all persons fundamental human rights and freedoms without discrimination, however sexual orientation is not amongst the list for which discrimination is prohibited. The case of *Attorney General v. Unity Dow* (1992) laid to rest fears that the list was exhaustive but rather laid down an enabling interpretation that it was a generic list and that the intention of parliament was not to exclude but rather was broad based such that other words like 'sex' could be read into it. In a similar fashion it would therefore follow naturally that the word 'sexual orientation' be read into the list so that discrimination on the basis of one's orientation is prohibited by the Constitution of Botswana.
>
> 2. The provisions violate the right to privacy which is conferred by Section 9 of the Constitution in so far as they purport to regulate sexual conduct that takes place between two consenting adults that does not result in harm to any of the participants.
>
> 3. The provisions violate the right to freedom of association as conferred by the Constitution in so far as they seek to dictate to persons what intimate relations they should form or refrain from constituting.

19 Societies Act Sec 7(2)(a) CAP 18:01 Laws of Botswana.

4. The provisions violate the freedom not to be subjected to cruel and/or degrading treatment, as conferred by Section 7, in so far as they prescribe criminal sanction for conduct that does not result in harm to anyone.

5. The provisions violate the right to free speech, which is entrenched by Section 12 of the Constitution, in so far as it criminalises the expression of affection between LGBT people. The provisions violate the right to non-discrimination, in so far as they penalise the only means available to LGBT people of expressing intimacy, yet do not criminalise that available to heterosexuals.

6. The provisions violate the right to movement conferred by Section 14 of the Constitution, to the extent that the provisions in question compel individuals to constantly cross the border in search of a place where they can freely form intimate associations without the fear of societal stigmatisation and where they can express their affection for fellow LGBTs without fear of criminal sanctions.

7. It is contrary to Section 86 of the Constitution as it advances no legitimate legislative objective.

The members of LeGaBiBo are fully aware that the Court of Appeal declared the said provision constitutional as it arrived at the finding that Botswana is not ready for homosexuality. However, the Court of Appeal also indicated in the case of *Kanane v. The State* (2003) that the courts in Botswana should be open to arriving at a different conclusion, should it be shown that the attitudes of Botswana towards homosexuality have softened.

The Constitution of Botswana contains a bill of rights and such rights are universal in application to all persons without discrimination. The right to privacy is found under Section 9 of the Constitution and has been defined as the right to be left alone by the High Court of Botswana.[20] Further, the South African case of the *National Coalition of Gays and Lesbians Equality v. Minister of Home Affairs*[21] described the right to privacy as recognising that all individuals have the right to a sphere of private intimacy which allows individuals to establish relationships without interference from the community and states that it is not the business of the state to dictate the nature nor extent of such intimacy. In the case of Botswana, the Court failed to conclusively deal with whether or not the Penal Code infringes on the constitutional right to privacy of LGBT men and women. Such issues of whether or not one is heterosexual, homosexual, or whatever the case may be, become paramount as they are central to one's personal identity and therefore are private. The right

20 *Diau v. Botswana Building Society* (2003) 2 BLR 409, IC.

21 *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others* 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999).

to privacy rightfully embodies the actual enjoyment of one's personal identity and liberty and should not be denied by anybody beyond what is reasonably justifiable.

Sections 3 and 9 of the Constitution create situations where limitations may be imposed on the enjoyment of the right to privacy by private individuals. Some of these derogations are to serve the public defence, safety, health, order, morality, development, or any other purpose beneficial to public interest. Section 9 provides, most importantly, that any derogation for whatever reason must be reasonably justifiable in a democratic society. It is noteworthy that the Penal Code does not proscribe homosexuality as a way of life but only the act of intercourse between two people of the same sex. Furthermore, these provisions fail to define what acts would be considered to be either against the order of nature or grossly indecent. Accordingly, they are by their own nature vague and embarrassing as they fail to define exactly the acts which they seek to criminalise. Because of this vagueness they are subject to arbitrary interpretations, and subject to the whims of individual prejudices, as was demonstrated by the limitless application of religious doctrine by the judge in the case of *Kanane v. The State* (2003) and by others who have had the opportunity to adjudicate on LGBT issues.

Thus the question remains as to whether the state is justified in invoking Section 9 to legislate for the criminalisation of homosexual acts between consenting adults under the guise of preserving public morality. Such blanket derogation cannot be reasonably justified, as the act it purports to prohibit does no harm to society. More importantly the judges in the case of *Attorney General v. Unity Dow* (1992) made a very important statement in saying that Botswana has chosen to be a member of the United Nations, a body of states that respects the dignity and inviolability of universal human rights.

Conclusion

Attitudes towards same-sex sexual relationships have changed over time: whereas in many societies it was initially regarded as a sin and immoral, then as deviant and an illness that needed treatment, the 21st century brought about new attitudes towards gay men and women. Although same-sex sexual intercourse remains a crime in many jurisdictions of the world, the discussion has now shifted to whether same-sex relationships should be formally acknowledged and accepted, and whether fundamental rights to privacy, personal liberty and protection of the law should be realised equally without discrimination on the basis of sexual orientation, and gender identity and expression.

Given that it has been accepted that communities such as men who have sex with men (MSM) are highly vulnerable to HIV, it becomes imperative for governments to re-examine the impact of maintaining prohibitive criminal provisions against same-sex sexual conduct. As alluded to by the *Kanane v. The*

State (2003) decision, the prevailing position against same-sex sexual conduct exists because of public opinion. Accordingly, the Botswana community must also re-examine itself and decide whether to maintain the criminal law that sustains homophobia at the cost of public health and human rights. Although there is limited data or research, the little that has been done recently suggests that HIV/AIDS is having a disproportionate effect on LGBT communities in Botswana. A pilot study on MSM (Baral et al. 2009) found that 17 per cent of the respondents (out of 151 men who have sex with men who participated in the study) were infected, clearly suggesting that there is a raging epidemic, one that needs to be addressed using a human rights-based approach. Another report from the Botswana National Aids Agency (2003) declared the need to take critical measures in order to curtail the spread of the disease:

> to halt and eventually reverse the destructive tide of the HIV/AIDS epidemic requires a more dynamic, determined and radical response. To do anything less may spell disaster.

LeGaBiBo has been encouraged by this declaration and is hopeful that the radical response will include the elimination of all barriers, legal and social, which contribute to the country's inability to effectively control and manage HIV/AIDS.

One positive principle is that of *botho*, captured in Botswana's Long Term Strategic Vision document (Presidential Task Group 1997). *Botho* is a word derived from Setswana, the national language in Botswana that refers to a well-rounded character, with good manners, discipline and the realisation of full potential, individually and within communities.

The principle of *botho* in the Botswana's Vision 2016 is committed as much to providing lifelong learning opportunities and to educating tomorrow's leaders as it is to national development. Botswana's Economic and Social Development Agenda is based upon five national principles: democracy, development, self-reliance, unity and *botho*. Botswana's Vision 2016 acknowledges *botho* as one of the tenets of African culture. It encourages people to applaud rather than resent those who succeed. It disapproves of anti-social, disgraceful, inhuman and criminal behaviour, and encourages social justice for all. *Botho* as a concept must stretch to its utmost limits the largeness of spirit of all Botswana. The five principles are derived from Botswana's cultural heritage and are designed to promote social harmony. They set the broader context for national development objectives, which are: sustained development, rapid economic growth, economic independence and social justice. *Botho* must be central to education, to home and community life, to the workplace and to national policy.

Adherence to the Botswana Vision 2016, the Millennium Development Goals, the Constitution and domestication of all other treaties providing for non-discrimination of all persons should ensure that decriminalisation is indeed a likely possibility for Botswana.

Bibliography

Anon. (1998) 'Vice President Khama harshly denounced homosexuality', *Midweek Sun*, undated clipping.

Baral, S., G. Trapence, F. Motimedi, E. Umar, S. Iipinge, F. Dausab and C. Beyrer (2009) 'HIV prevalence, risks for HIV infection, and human rights among men who have sex with men (MSM) in Malawi', *PLOS One* 4 (3), e4997, available at www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0004997 (accessed 20 Mar. 2013).

Baudh, S. (2008) *Human Rights and the Criminalisation of Consensual Same-sex Sexual Acts in the Commonwealth, South and Southeast Asia* (New Delhi: The South and Southeast Asia Resource Centre on Sexuality).

BBC World Debate (2011), 'Is Homosexuality unAfrican?', Johannesburg, 12 Mar.

Boko, G. D. (1998) 'The case for decriminalisation of voluntary homosexual conduct in Botswana', DITSHWANELO (Botswana Centre for Human Rights), Conference on Human Rights and Democracy in Botswana, Gaborone, Botswana, 17–19 Nov.

BONELA and LeGaBiBo (2006) 'Letter to the Editor', *The Botswana Gazette*, 29 May.

BONELA, LeGaBiBo with Global Rights and International Gay and Lesbian Human Rights Commission (2008) 'The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Botswana: A Shadow Report, March 2008', available at www.globalrights.org/site/DocServer/Shadow_Report_Botswana.pdf?docID=9723 (accessed 26 Mar. 2013).

Bruce-Jones, E. and L.P. Itaborahy (2010) *State-sponsored Homophobia: A World Survey of Laws Criminalising Same-sex Activity Between Consenting Adults* (Brussels, International Lesbian, Gay, Bisexual, Trans and Intersex Association), available at http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2011.pdf (accessed 23 July 2011).

Gupta, A. (2002) 'The history and trends in the application of the anti-sodomy law in the Indian Courts', *The Lawyer's Collective* 16 (7), p. 9.

LeGaBiBo (2006) 'Group condemns act of discrimination at local nightclub', press release, 7 Nov.

Long, S., A. Widney Brown and G. Cooper (2003) *More Than a Name: State-sponsored Homophobia and its Consequences in Southern Africa* (New York: Human Rights Watch), available at www.unhcr.org/refworld/docid/3f4f59710.html (accessed 18 Jan. 2013).

Lute, A. (2006) 'Homosexuality is rubbish', *The Botswana Gazette*, 24 May.

Mokone, O. (1998) 'Evangelical backlash on gays', *The Botswana Gazette*, 27 May.

Mutua, M. (2011) 'Sexual orientation and human rights: putting homophobia on trial', in S. Tamale (ed.), *African Sexualities: A Reader* (Cape Town: Pambazuka Press), ch. 47.

National AIDS Coordination Agency (2003) *Botswana National Strategic Framework For HIV/AIDS 2003–2009* (Gaborone: Pyramid Publishing).

Ntuane, B. (1998) 'The people say no to homosexuality: and the government abides by their will', *Midweek Sun*, 3 June.

Presidential Task Group for a Long Term Vision for Botswana (1997) *Botswana: Towards Prosperity for All, a Comprehensive Development Framework Profile* (The World Bank), available at http://web.worldbank.org/archive/website01013/WEB/IMAGES/WEBBOTSW.PDF (accessed 18 Jan. 2013).

Sanders, D. E. (2009) '377 and the unnatural afterlife of British colonialism in Asia', *Asian Journal of Comparative Law* 4 (1), p. 1176.

Tamale, S. (ed.) (2011) *African Sexualities: A Reader* (Cape Town: Pambazuka Press).

UN Commission on Human Rights (1996) 'HIV/AIDS in prison; Statement by the Joint UN Programme on HIV/AIDS', 52nd Session.

UNICEF (2005) *Analysis of Child-focused Indicators: Based on the 2001 Botswana Population and Housing Census* (Gaborone: United Nations Children Fund).

Legal cases and statutes

Attorney General v. Unity Dow [1992] 6 BLR 1 (AC).

Diau v. Botswana Building Society (BBS) [2003] BLR 409.

Kanane v. The State [2003] 2 BLR 64 (CA).

Lemo v. Northern Air Maintenance Pty Ltd.

National Coalition of Gays and Lesbians Equality and Others v. Minister of Home Affairs and Others [1999] ZACC 17, CCT/99.

Toonen v. Australia [1992] U.N. Doc CCPR/C/50/D/488/1992 (1994). U.N. Doc CCPR/C/BWA/1 of 2 May 2007, Initial Report Submitted by Botswana to the Human Rights Committee.

13

The LGBT situation in Malawi: an activist perspective

Undule Mwakasungula

Malawians, sad to say, remain steadfast in their resistance to homosexuality. The perception that same-sex practices are deviant and alien to the social and cultural fabric of Africa (Muula 2007) is still deeply ingrained in the minds of most Malawians, which makes the fight for lesbian, gay, bisexual and transgender (LGBT) rights much harder. Some authors have argued that much of the homophobia being witnessed in Africa today is not 'home-grown' (Mutua 2009). I share the same view. In the case of Malawi, much of the revulsion to homosexuality can be traced to its colonial past.

This chapter begins with the historical background so as to place homophobia in context. It then presents an overview of recent developments in Malawi in relation to LGBT issues, and the various ways in which these issues are resurfacing and being debated in the country. It concludes with a call for recognition and widespread acceptance of LGBT rights as human rights.

Historical background

Malawi, like most of Southern Africa, experienced British colonialism, which fundamentally altered and even destroyed many positive values. Tolerance and respect for the otherness of the other, the hallmark of the *ubuntu* concept, was replaced by hatred and extreme fanaticism. There were no laws criminalising consensual same-sex acts before colonialism – these were introduced by the colonialists. When the country finally gained independence in 1964, it adopted all the laws that were in force during colonialism, including those regarding 'unnatural acts'.

After independence, it was expected that the country would speedily embrace democracy and guarantee rights and freedoms previously denied to Malawians. Unfortunately, this did not happen. Instead, the country endured three more decades of a brutal dictatorship under a native regime remembered as much for widespread human rights violations as for strictly enforcing its 'four cornerstones', namely unity, loyalty, obedience and discipline. Failure to

observe these cornerstones invited heavy-handed responses from the ruling party's notorious youth wing and the police force. It was during this time of dictatorship that most homosexuals went underground for fear of repression. The regime's insistence on the 'four cornerstones', coupled with the late former-President Ngwazi Dr Hastings Kamuzu Banda's puritanical beliefs, made it impossible to talk openly about sexuality, as sex education was generally banned or censored.

When I was growing up in the 1970s, homosexuality was strictly taboo, but this did not mean that homosexuals were non-existent. They have always existed in Malawi. There were lots of stories back then of homosexual activities taking place in boarding schools, prisons and so on. But people could not openly discuss these issues for fear of Banda's high discipline.

In 1994, following protests and international condemnation, Banda agreed to relinquish power and Malawi became a multiparty democratic state. That was when the human rights situation in Malawi began to improve. Freedom of speech and other freedoms were re-established, creating a more liberal climate in which people could claim their rights without fear of persecution. While some rights claims were successful, others faced stubborn resistance; in some cases, even outright rejection. Up to now, most people in Malawi have not accepted that LGBT rights are actually human rights, and this is where the problem is.

Human rights in the Malawian Constitution

The biggest achievement of the transition period was the adoption of a Constitution, with a fully-fledged Bill of Rights. This was a great achievement considering that previous constitutions – those of 1964 and 1966 – did not have a Bill of Rights. The present Constitution, adopted in 1994, contains various rights provisions, including rights to life, equality, dignity, access to justice and fair trial, and freedom from torture and other cruel and inhumane treatment.

Of particular relevance to this discussion is the provision in Section 20(1) of the Constitution, which provides that 'Discrimination of persons in any form is prohibited' and that 'all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property or other status'. The Constitution does not explicitly recognise sexual orientation as a prohibited ground for discrimination. However, the inclusion of 'other status' provides room to advocate for LGBT rights.

The recognition in Section 21 that every person has the right to privacy is another relevant provision. The scope of this right is much broader and includes the right not to be subjected to: i) searches of his or her person, home or

property; ii) the seizure of private possessions; or iii) interference with private communications, including mail and all forms of telecommunications.

Constitution *versus* Penal Code

The supremacy of the Malawi Constitution is beyond doubt. Section 5 states clearly that: 'any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to extent of such inconsistency, be invalid'. The supremacy of the Constitution is clearly repeated and emphasised under Sections 199 and 200. Section 199 states that 'this Constitution shall have the status as supreme law and there shall be no legal or political authority, save as is provided by or under this Constitution'.

The biggest embarrassment of the legal system in Malawi is the obvious contradiction between the Constitution and the country's Penal Code. While the Constitution guarantees rights, the Penal Code seems to take them away.

Homosexuality is a criminal offence in Malawi. This is clearly reflected in Sections 153 and 156 of the Penal Code. Section 153, which criminalises 'Unnatural offences', states that anyone who:

> (a) has carnal knowledge of any person against the order of nature; (b) has carnal knowledge of any animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature; shall be guilty of a felony and shall be liable to imprisonment for fourteen years, with or without corporal punishment.

Section 156, which criminalises 'Indecent practices between males', on the other hand, provides that:

> Any male who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, shall be guilty of a felony and shall be liable to imprisonment for five years, with or without corporal punishment'.

The criminalisation of same-sex acts between consenting adults flies in the face of constitutional provisions of the rights to privacy, freedom of association and the principle of non-discrimination. There is overwhelming evidence to suggest that the existence of such laws in the Penal Code fuels stigma and the violation of rights. It becomes a legitimisation of police harassment and blackmail of those who wish to keep their sexual orientation a secret as well as discrimination of those who come out.

On the subject of discrimination, a bone of contention over the years has been the exclusion from criminalisation of 'indecent practices' between females. This debate was, however, rested in 2010 when Parliament passed a new law criminalising consensual same-sex activity between women. The new

law, Section 137A, captioned 'Indecent practices between females', provides that any female person who, whether in public or private, commits 'any act of gross indecency with another female shall be guilty of an offence and liable to a prison term of five years'. Reasons for introducing this new law were made clear. The then Justice and Constitutional Affairs Minister, Dr George Chaponda, did not mince words when defending this new law. Addressing a press conference soon after the law was passed, Chaponda described the new law as 'gender sensitive', saying government wanted to include women 'to ensure that homosexuality is criminalised without discrimination' (Sonani 2011a).

What the minister or government perhaps ignored is the fact that, as noted earlier, the existence of laws criminalising homosexual behaviour between consenting adults also constitutes discrimination (see, for example, the Opinion adopted by the UN Working Group on Arbitrary Detention on a case in Cameroon (2007)). It perpetuates stigma and discrimination and contributes to a climate of homophobia, intolerance and violence and fuels the violation of rights enshrined in the Constitution. For the laws of Malawi to be meaningful, there is a need to address all the inconsistencies. It does not otherwise make any sense to give people rights with one hand and take them away with the other.

Constitutional review process

Under the new Constitution, a Law Commission was established, mandated with the task of reviewing all laws, including Penal Code laws, to ensure that they are consistent with the Constitution. As part of the constitutional review process that followed the May 2004 Parliamentary and Presidential Elections (PPE), the issue of homosexuality was raised by various human rights non-governmental organisations (NGOs), including the Malawi Human Rights Resource Centre (MHRRC). The NGOs suggested that homosexuals' rights should be incorporated into the Republic Constitution as a first step towards decriminalisation. However, the suggestion was brushed aside because the majority of the people were against it (Muula 2007).

The constitutional review is an ongoing process; however, decriminalisation of homosexuality looks unlikely in the short-term. Responding to questions raised by Denmark, the Czech Republic, Norway, the Netherlands and the United Kingdom during the Universal Periodic Review (UPR) in November 2010, Malawi indicated that it had no plans to legalise homosexuality and stated that the wishes of the people of Malawi in this regard should be respected (UN Human Rights Council 2011).

The rejection of LGBT rights on the basis that the majority of Malawians are against homosexuality does not add up. In a democracy it is a fallacy to suggest that nothing should be done about an issue that concerns a minority. Moreover,

as discussed earlier, the Constitution of Malawi prohibits discrimination in any form, clearly demonstrating that the argument of the majority of Malawian people being against homosexuality is only used as an excuse to deny LGBT persons their rights.

Republic v. Steven Monjeza and Tiwonge Chimbalanga

One case that best illustrates the struggles of LGBT individuals in Malawi is that of Steven Monjeza and Tiwonge Chimbalanga. On 26 December 2009, Monjeza and Chimbalanga were arrested by police after holding the first same-sex traditional engagement ceremony (*chinkhoswe*) ever in Malawi (Malawi, Criminal Case Number 359 of 2009, *Republic v. Steve Monjeza Soko and Tiwonge Chimbalanga Kachepa*). The arrest triggered a spate of homophobia that swept across the country (Kasunda 2010). On 4 January 2010, for example, police arrested Dunker Kamba, an officer from the Centre for the Development of People (CEDEP), for possessing what police alleged to be 'pornographic gay material'. In February the same year, police arrested a 60–year-old man, Davis Mpanda, for sodomy. He was sentenced to ten years' imprisonment by the South Lunzu Magistrate's Court. During the trial, Mpanda told the court that he was 'born to sexually desire males only' (Namangale 2011).

Out of all the cases, it was the trial of Monjeza and Chimbalanga that drew the most public attention, probably because this was the first gay couple ever to defy the law of Malawi by openly seeking marriage. The 'gay couple', as they soon became known, were charged with two alternative counts, namely, buggery contrary to Section 153(A) of the Penal Code for the first accused (Steve) and permitting buggery, contrary to Section 153(C) of the Penal Code for the second accused (Tiwonge) and, in the alternative, the offence of indecent practices between males, contrary to Section 156 of the Penal Code for both of them.

The case triggered a nationwide debate, which is still ongoing, on whether or not homosexuals have rights, and whether or not they should be tolerated in Malawi. One argument that has been continually raised is that homosexuality is a foreign culture, and against the dominant Christian and Islamic religions. Ironically, Monjeza and Chimbalanga were locals, who had probably never travelled outside Malawi – they were also Christian church-goers. Tiwonge was locally known as 'Aunt Tiwo' and his community had long accepted him as a biological male who acted and behaved like a woman.

The case also raised a number of rights issues. There were reports that the two suspects were repeatedly beaten by police while in custody, and forcefully examined to establish whether they practised anal intercourse (Amnesty International 2010). In Malawi, according to Section 42 (2) of the Constitution, any accused person has a right to be given bail unless the courts prove beyond reasonable doubt that doing so would jeopardise investigations

or create insecurity on the part of the accused or the general public. However, the presiding magistrate, Nyakwawa Usiwa-Usiwa, told the court that no bail could be granted to the accused for their own security 'since the case had attracted public interest locally and internationally' (Somanje 2010a).

On that basis, the refusal to grant them bail was unjustified. There was no evidence whatsoever that the accused posed any danger to the public or that they would have influenced investigations of their crime. The claim that the accused persons' security was at risk was also baseless. If the public had witnessed their engagement ceremony and no one had harmed them, it was hard to imagine how their security would be jeopardised. The trial lasted five months, December 2009 to May 2010, during which time the couple were held in detention under terrible living conditions that amounted to cruel, inhumane and degrading treatment.

During the trial, state prosecutor, Barbara Mchenga, argued that the 'gay couple' had left a 'scar on morality' in the country and deserved to be punished heavily, as they seemed to be proud of being gay (Ngozo 2010). Defence lawyers, on the other hand, argued that the charges raised by the magistrate court were contrary to the constitutional provisions, especially sections 5, 199 and 200 which guarantee freedom of conscience, privacy and bail application (Bottoman 2010). However, efforts to have the case certified as a constitutional matter were rejected by the Chief Justice, Lovemore Munlo, on the basis that the charges raised by the magistrate court did not border on constitutional matters, but criminal charges, which meant that the case could only be heard in the lower courts (Somanje 2010b).

On 20 May 2010, the couple was sentenced to the maximum sentence of 14 years in prison with hard labour, with the judge, resident magistrate Nyakwawa Usiwa-Usiwa, telling the couple: 'I will give you a scaring sentence so that the public be protected from people like you so that we are not tempted to emulate this horrendous example', and 'Malawi is not ready to see its sons getting married to its sons' (Tenthani 2010).

His opinion reflected the view of most Malawians on homosexuality, which clearly stems from deep religious beliefs and cultural convictions. A majority of Malawians hold such religious beliefs and are convinced that homosexuality is evil (Muula 2007b). Fortunately for the LGBT rights campaign, not everyone in Malawi thinks like that; and certainly not every judge considers homosexuality as the most heinous crime requiring 'a scaring sentence'. One High Court judge who has stated his opinion clearly on the matter is Judge MacLean Kamwembe. This was during the review of the 'sodomy case' involving Davis Mpanda and a young man whose identity was not revealed to the public.

When that case was brought before the High Court for appeal, Kamwambe, presiding, reduced the ten-year sentence given by a lower court to three years. Delivering his ruling, Kamwambe decried what he described as a tendency

by lower-court judges to view homosexuality as the most 'heinous' crime and to impose tougher sentences than the case deserves (Namangale 2011). The judge also questioned the 14-year jail sentence, which the Blantyre Magistrate's Court had imposed on Tiwonge and Steve. It is significant that the judge's opinion came at the height of an intense advocacy and lobbying campaign for LGBT rights by some rights activists, including myself. To us, this was a big victory. It came second to the pardon given to Chimbalanga and Monjeza following their conviction. The judge's opinion showed that positive change is possible in Malawi.

International pressure and its impact

As indicated earlier, the arrest and subsequent conviction of the 'gay couple' sparked condemnation, locally and internationally. On the international scene, the conviction was condemned by the likes of Amnesty International (AI), AIDS and Rights Alliance for Southern Africa (Arasa) and the International Gay and Lesbian Human Rights Commission (IGLHRC). Individuals and international icons, such as Peter Tatchell, Madonna and Sir Elton John, also reacted with condemnation, as did donor entities and governments such as the UK, Germany, the European Union and the World Bank. In March 2010, the Common Approach to Budgetary Support (CABS), a grouping comprising the African Development Bank, Norway, UK, Germany, EU and the World Bank, also added their voice to the orchestra of voices condemning the gay couple's arrest (Mzale 2010).

Such was the international outcry that, within days of the sentencing, Malawi's President Bingu Wa Mutharika pardoned the couple on 29 May 2010, during a visit by UN Secretary General, Ban Ki-moon. The pardon was welcomed by the gay community and rights activists, both within Malawi and abroad. However, the celebration was short-lived as authorities quickly followed it up with a series of retrogressive steps putting further restrictions on the rights of gay and lesbian people. Speaking to reporters on arrival from the France-Africa summit, President Mutharika warned government officials not to comment further on the issue. He also warned that the law remains valid and anyone caught engaging in homosexual acts would be punished. The president argued that homosexuality is alien to Malawi's culture and will never be legalised during his presidency. In November 2010, during the Universal Periodic Review (UPR) review at the UN Human Rights Council, Malawi rejected all recommendations, including those merely requesting the state to ensure adherence to its twin constitutional obligations of non-discrimination and equality, in terms of treatment of the LGBTI community. The then Attorney General, Dr Jane Ansah, argued that Malawi could not implement the recommendations because a majority of the country's population is against homosexuality (UN Human Rights Council 2011).

Barely a month after the UPR session, in December 2010, the Malawi Parliament passed a bill criminalising consensual sex between women. Coming so soon after the presidential pardon, this was the biggest setback to the LGBT rights campaign. Several questions have been raised as to why Malawi has taken such retrogressive steps. The President said he had granted the pardon on humanitarian grounds. However, it was clear it had been motivated by something else – possibly fear of economic sanctions or, worse still, fear of a public backlash, considering that many people had expressed support for the gay couple's conviction. Malawians, including politicians, need to be made aware in order to understand why discrimination against LGBT persons is unacceptable; otherwise, it will be impossible to effect real change any time soon. As things stand, it is impossible for any politician, or MP, to vote in favour of homosexuality in Parliament. He or she risks the wrath of their constituency or church.

Without awareness, nothing – not even aid cuts – will change people's negative attitudes towards homosexuality. In recent years, we have seen how some donors, such as the British, have been threatening aid cuts if countries like Malawi do not decriminalise homosexuality. Unfortunately, such approaches are counterproductive as they evoke memories of imperial control. Africans generally are rebellious, especially against attempts to impose 'foreign' strategies to fix African problems. There are complex issues underpinning African homophobia that ultimata, sanctions and international condemnations will not address. Information and communication are, in my opinion, powerful tools in the fight against homophobia.

It is also best to tackle the underlying causes of homophobia. Decades of experience and research demonstrate that seeking to influence behaviour alone is insufficient and unsustainable if the underlying factors influencing behaviours such as religion and culture are not addressed. A major lesson from the 'gay couple' trial is that to effect real change in Malawi, it is necessary never to lose sight of the community, for it is from the community that many homophobic beliefs and attitudes emanate. It is impossible to change religious beliefs, but at least positive cultural attitudes can be influenced. The best that can be done is to encourage dialogue within communities and the recognition and identification of cultural attitudes and practices that violate human rights and put other people's lives at risk.

Role of culture and religion

Religion and culture run so deep in Malawi that one sometimes wonders why the country chose to be guided by a secular and not a religious constitution. Most people who opposed homosexuality during the constitutional review process argued on the basis of religion and culture, saying homosexuality is against Malawi's cultural values and norms and against the 'creation of man and woman as God designed them to be' (Muula 2007).

In 2009, some parliamentarians attempted to amend the Constitution so as to include a clause stipulating that Malawi is a 'God-fearing nation'. The attempt was, however, foiled thanks to some parliamentarians who argued that including such a clause would practically be the same as legislating religion.

A majority of Malawians hold religious beliefs and are deeply conservative, particularly on issues of sex and marriage. The perception that sex is for procreation only is a dominant belief running in almost all ethnic groups, reinforced by religious scriptures which define sex as a preserve of married couples in a family unit. The family itself is a closely guarded institution, recognised in Section 22 (1) of the Constitution as the 'natural and fundamental unit of society'. However, the Constitution does not define what a family is, which is then left to individual interpretation.

Also worth noting is the fact that marriages and children are highly valued in traditional Malawian society (Muula 2007). A number of cultural practices attest to this: firstly, little – if anything – is known about cultural practices intended to prevent pregnancy (traditional contraceptives). On the contrary, there are several traditional herbs that people are encouraged to use to improve the chances of pregnancy. Second, cultural practices such as *kupimbira* (early or forced marriage) are still widely practised in order to increase *mbumba* (offspring); third, in many parts of Malawi, particularly in rural areas, the traditional custom of *fisi* (hyena) is still widely practised. With this custom, when a married or cohabiting couple are unable to have a child, an arrangement is made with another man (an outsider) to sleep with the woman to make her pregnant. With such beliefs and values, it is hardly surprising that many people hold negative attitudes towards people with different sexualities.

However, these beliefs are no excuse to perpetuate discrimination of people on the basis of sexual orientation and gender identity. People also need to understand that there is no basis for the continued marginalisation of LGBT persons in Malawi. Same-sex practices are part of Malawian culture. Local names such as *mathanyula* (anal sex) confirm that homosexuality is indeed traditional and indigenous, contrary to popular assertions that the practice comes from the west. It is clear from studies across Africa that homosexuals have existed on the continent for centuries (Roscoe and O'Murry 1998). In Malawi, homosexuality was particularly common among migrant Malawian workers in South Africa and Rhodesia. It was not encouraged, but those who practised it were not persecuted either. It is only recently that intolerance and negative attitudes towards homosexuals have emerged. There is a need to encourage people to reflect on why such is the case now.

In Malawi today intolerance of homosexuals is so widespread that Malawians do not even want to see or associate with someone who supports or sympathises with LGBT people. Why is that? To illustrate this point, the Anglican Church sent a pro-gay rights Bishop, Nick Henderson, to Malawi in 2007, to head the Anglican diocese of Lake Malawi. However, the congregation

did not accept him and protests led to the death of a church member (*The Nation* 2007). Such violence is unheard of. I have discovered no documented evidence showing that homosexuals were persecuted in Malawi in the past. Yet hatred and violence against people of different sexualities is tolerated today and nobody gets punished for it. To make matters even worse, such homophobia is legitimised by the country's laws, the very same statutes intended to limit and contain harm to others. To me, the laws of a secular state are there in the first place to protect individuals from each other and to ensure that no one harms anyone else. The question is: when two adults of the same sex agree to love each other, do they harm anyone? They do not. So what is the point of maintaining laws criminalising homosexuality? These are the questions people should be made to consider.

Linking HIV/AIDS and homophobia: a missed opportunity

A good starting point for any meaningful community dialogue is to highlight the link between homophobia and HIV and the consequences of excluding homosexuals from HIV programming. In this regard, important lessons could be drawn from early responses to HIV and AIDS.

The first HIV/AIDS case in Malawi was reported in 1985. At that time the Malawian people's response was not helpful. It was characterised by scorn, blame, denial and witch-hunting. This was basically due to lack of accurate information about the disease – for example, how HIV was transmitted, and what kind of condition AIDS was. Malawi was then under the autocratic rule of Kamuzu Banda. His style of leadership and religious beliefs did not help matters. During his reign, public discussion of sexual matters was generally banned or censored, and HIV and AIDS were considered taboo, making it very difficult for HIV/AIDS education and prevention schemes to be carried out.

This culture of stigma, denial and blame continued until the mid 1990s when President Bakili Muluzi took office. In his early years in the role, Muluzi made a speech publicly acknowledging that the country was undergoing a severe AIDS epidemic and emphasising the need for a unified response to the crisis. Muluzi later announced that his own brother had died as a result of AIDS. These public announcements were significant in the sense that Malawians could now discuss HIV/AIDS more openly than before. However, this openness came a little too late as the epidemic had already reached crisis levels.

Today, Malawians are repeating the same mistake. Despite evidence of increased risks of HIV infection among men who have sex with men (MSM) the response is still the same – stigma, denial and blame. As a result, many homosexuals operate underground, which poses serious challenges in terms of reaching them with HIV and AIDS interventions.

The rates of HIV among MSM in Malawi are quite alarming; a study conducted in 2008 among 200 MSM who were sampled using a 'snowball' method found 21.4 per cent to be HIV infected, almost double the national prevalence, which now stands at around 12 per cent (Baral et al. 2009). There is also staggering evidence that some MSM have sexual relationships with women, to hide their homosexuality, thereby contributing significantly to the wider epidemic. The National HIV/AIDS Strategy recognises MSM as a high-risk group and recommends action to stem the epidemic within it. Yet in practice, MSM are ignored, a situation that leaves them particularly vulnerable to HIV infection.

Nowhere in Malawi is the problem more pronounced than in the country's prisons. In 1999, a study on HIV and AIDS in Malawi's prisons by Penal Reform International revealed rampant unprotected homosexual acts among inmates. The report highlighted cases of prisoners with sexually transmitted infections and 'peri-anal abscesses', which they could only have contracted through anal sexual intercourse (Jolofani and DeGrabriele 1999). Interestingly, the report distinguished two types of homosexual activity that take place in prisons – that is, habitual and circumstantial:

> Some prisoners are said to be 'that way inclined' and were homosexuals even outside the prison. This group is said to be in the minority, with estimates ranging from 10% to 20% of all those involved in homosexual activity ... There is another group who 'because of the lack of women become confused', but they are not really homosexuals (Penal Reform International 1999).

A decade since that research was done, reports of unprotected sex in prison cells keep coming out. In April 2011, two inmates, Stanley Kanthunkako, 19, and Stephano Kalimbakatha, 22, were arrested after prison authorities intercepted 'a chain of love letters'. Local media reported that prison authorities found Stanley 'with sperms on his anus' (Muwamba 2011). Yet, despite this overwhelming evidence of sex in prisons, programmes to distribute condoms in prisons have hit a snag with those advocating for inclusion being castigated. The position of government on the matter is that condoms would encourage homosexuality, which is illegal in Malawi. However, the intention is not to encourage homosexuality, which is a reality and does not need encouragement, but to prevent the spread of HIV among people who practice homosexuality. As the situation stands, people of different sexualities have no means of protecting themselves from HIV.

In Malawi, as in many African countries, prevention messages and products (condoms, lubricants) are not tailored to the needs of homosexuals. What this suggests is that by ignoring these people, HIV programmes are ignoring important dynamics in the epidemic, making it unlikely that the country will be able to achieve its goal of turning off the tap of new infections by 2015.

Civil society response

The issue of homosexuality has received a mixed reaction among local civil society. Mindful of the legal challenges, most civil society organisations (CSOs) have circumvented the issue, focusing instead on governance and other human rights issues. A few of us, however, have grabbed the bull by its horns and are speaking out, warning fellow Malawians that as long as we continue to confine gays and lesbians in dark corners because of our inflexibility to accommodate them, the battle against HIV/AIDS will never be won.

In April 2010, my organisation, the Centre for Human Rights and Rehabilitation (CHRR) and the Centre for the Development of People (CEDEP) organised a two-day national conference with the aim of initiating and promoting dialogue on homosexuality in relation to human rights and HIV/AIDS. The conference brought together a diverse range of stakeholders including human rights lawyers, journalists, representatives of government institutions, such as the Malawi Law Commission and the Malawi Human Rights Commission (MHRC), academia, the private sector, the donor community, civil society and the faith community.

The conference, the first open forum on homosexuality to be held in Malawi, provided an opportunity for different stakeholders to discuss honestly, openly and objectively matters around LGBT and map the way forward in improving lives of LGBT persons in view of statistics showing high HIV prevalence among this very marginalised group. It was held at the height of the highly publicised case of the gay couple. There was drama as police attempted to stop the conference from proceeding. On the first day, they arrived and demanded a copy of the programme and list of participants. When they could not obtain it, they picked up one of the organisers for a brief period of questioning.

However, the conference continued as planned. Delegates were provided with opportunities to learn, not only about the socio-historical context within which HIV thrives in southern Africa, but also about the influences of culture and homophobia. Delegates also discussed strategies to address HIV among Most-at-Risk-Populations (MARPs) – a group that includes MSM.

Robust discussions took place as delegates shared their views on homosexuality. While the religious leaders insisted that homosexuality was evil and should remain criminalised in Malawi, human rights activists, academicians, lawyers and others argued for the repeal of the penal code for the sake of progress in HIV. One of the presenters, Dr Charles Chilimampunga, a social scientist from the University of Malawi, Chancellor College, said culture is dynamic: it is thus possible to challenge and shift negative aspects of cultures that increase people's vulnerability to HIV and which put others at risk.

Through such open discussions, it was later acknowledged by the conference that Malawian society's homophobia and criminalisation of homosexuality is driving the spread of HIV among LGBT persons and fuelling human rights

abuses against them. There was much discussion on how this could be addressed and one suggestion was to advocate and lobby for legal reform at all levels to ensure that the country's laws are consistent with the country's constitutional provisions.

One of the conference's key recommendations was the establishment of a taskforce that would meet regularly to further dialogue on LGBT issues and lead advocacy efforts. Acting on this recommendation, CHRR and CEDEP organised a follow-up workshop where a Technical Working Group on Most at Risk Populations (MARPs) was formed. MARP is a broader group that besides including MSM and women who have sex with men also encompasses sex workers and other marginalised groups. The multi-stakeholder working group comprises religious leaders, human rights lawyers, human rights activists, journalists, researchers and HIV specialists. Government actors, however, were reluctant to get involved. The MHRC said it was still deliberating its position on the matter (Kasunda 2011a). The working group has the following objectives:

- Advocate for the Malawi government to implement a comprehensive package of services for the MARPs based on its commitment in the HIV Prevention Strategy (2009–13) as advanced in the Section Policy Points to implement the Strategy;
- Promote available research to build understanding about HIV-related needs and human rights issues for MARPs, identify gaps in research and advocate for further research needed to understanding HIV prevalence, HIV risk behaviours and human rights context for MARPs to inform policy and evidence-based programming;
- Advocate for reform of laws and practices that act as impediments to effective HIV programming for MARPS;
- Strengthen capacity among MARPs to understand and be actively involved in claiming their rights;
- Build understanding among state and non-state actors about HIV-related needs and human rights issues for MARPs and foster leadership to address them.

CHRR and CEDEP followed this up with the launch of a three-year awareness and advocacy project on LGBT and human rights, designed to promote LGBT issues in the context of human rights and HIV/AIDS. During the LGBT conference, it was evident that the lack of adequate public knowledge or misconceptions about LGBT was fuelling stigma and discrimination in Malawi. Thus the project fights discrimination and moves public opinion on LGBT issues through civic education, capacity building, lobbying and advocacy. The civil education component is aimed at increasing awareness of the general population on legal, policy, cultural and religious issues affecting LGBT people in Malawi. The project recognises the fact that education is a powerful tool in the fight against homophobia.

The capacity-building component, on the other hand, is aimed at providing support to state and non-state actors to deal with LGBT issues. It was acknowledged during the conference that one of the reasons organisations – including civil society – are reluctant to get involved in the fight for LGBT rights is lack of awareness. Staff members of these organisations are poorly informed on LGBT issues. As a result, many hold the misconceptions and prejudices which exist in their society.

Despite the hostile environment, the project has made remarkable progress, creating visibility of LGBT issues and facilitating open discussion on an issue that remains sensitive in Malawi. A number of successful activities have also been undertaken, including engagement with key stakeholders such as the media. A workshop was conducted in April 2011, where journalists from all media houses, including those funded by the government, were briefed on LGBT issues by experts and activists.

The impact of that media workshop was clearly seen in the subsequent days, when at least eight articles on various aspects of homosexuality were published in the country's leading newspapers. The content of these articles ranged from in-depth analysis to one-on-one interviews with LGBT rights campaigners. For example, in their 26 April 2011 edition, the *Daily Times*, one of the leading dailies in Malawi, ran a comment urging Malawians to debate homosexuality seriously. The comment was an improvement on a previous one published in the 13 February 2011 edition, entitled 'Govt should act on "negative trends"' in which the paper appeared to trash LGBT rights by claiming that 'there is consensus in Malawi that homosexuality is not in line with the country's culture'. In one interview, CEDEP executive director Gift Trapence was given ample space to explain matters around LGBT and debunk the myth that homosexuality is unnatural (Kasunda 2011b). The newspapers also carried comments from readers about homosexuality. Although some readers defended criminalisation, others defended homosexuals' right to exist and spoke about the need to embrace them and include them in HIV programming.

Another positive outcome of the conference was networking among journalists. A media technical working group was formed by journalists themselves, which promises to help both in getting across to a wider audience the message of the importance of recognising minority rights, and in facilitating debate. While this is an ongoing process in a challenging environment, it is pleasing to note that an initial platform now exists upon which further advocacy can build and grow.

Impact of the LGBT debate

Despite the hostile environment, the CHRR/CEDEP project has made remarkable progress, creating visibility of LGBT issues in Malawi and a climate of open discussion on an issue that remains sensitive in the country. There has,

for instance, been improvement in the media portrayal of LGBT issues. This is manifested mainly in news articles, analyses and comments as well as radio-panel discussion programmes and theatre performances. A popular vernacular drama group, Kwathu, has come up with a play entitled *Titolerane* (tolerance), which tackles the issue of homosexuality, highlighting the need for widespread acceptance of people who are 'different'. The play has been performed in various places in the country's rural and urban areas, attracting huge audiences and positive press reviews. There have of course been some challenges.

Church leaders' reaction

The advocacy has in some cases attracted extremities of thought and passion, with some senior government officials, and traditional and religious leaders openly expressing disgust at attempts to promote gay rights. Those opposed to the campaign have done so on the basis of culture, morality and religion. Arguing from the Bible, one leader and founder of a Pentecostal church has called for the death penalty to be imposed on those who practise and promote homosexuality 'as the Bible says' (Mmana 2011). Quoting biblical verses, Apostle Samuel Chilenje argued that God punished Sodom and Gomorrah 'because of gays and lesbians'; 'The Bible says that everybody indulging in same sex acts must be put to death by stoning. Even those promoting it deserve the same'.

Other church leaders have, however, disagreed with these views and called for tolerance and inclusion of homosexuals. One such is the Anglican Bishop, Brighton Malasa, who has called for acceptance of marginalised groups such as homosexuals and sex workers (Munthali 2011). The Church of Central Africa Presbyterian (CCAP), the second-largest Christian denomination in Malawi, after the Catholic Church, has also spoken out in favour of inclusion. Speaking during the celebration of 120 years of the church's St Michaels and All Angels Church, in May 2011, officiating clergy called for tolerance of homosexuals (Mussa 2011). The position of the CCAP Church on the matter is that homosexuals are sinners, just like everyone else, and should therefore be embraced and ministered to with love. One of its senior pastors was quoted in the local media as saying: 'Our Lord Jesus Christ hates sin but He does not hate the sinner. The problem with the way people are debating the gay issue is that they are failing to differentiate between homosexuality as an orientation and homosexuality as a practice' (*Malawi News* 2011).

Government reaction

The reaction of government officials to the debate has, however, been immensely negative. In May 2011, Malawi's President Mutharika publicly condemned those practising and promoting homosexuality, describing them as being worse than dogs. Mutharika made the remarks in front of his supporters at Kamuzu

Institute for Sports in Lilongwe on 15 May 2011. The *Daily Times* of 17 May 2011 quoted the president as saying: 'If, as human beings created in the image of God, we are failing to appreciate the differences between males and females and start marrying man-to-man or women-to-woman are we not worse than dogs that appreciate nature's arrangement?'

The President's remarks came hot on the heels of an excruciating campaign by the Ministry of Information and Civic Education, which has seen the ministry bringing conservative religious and traditional leaders on national television to condemn homosexuality and reprimand CHRR and CEDEP for promoting acceptance and recognition of homosexuals. Towards the end of April 2011, the Ministry of Information and Civic Education held a string of press conferences to 'expose' a funding proposal for gay rights it had 'unearthed', jointly submitted by CHRR and CEDEP to the Royal Norwegian Embassy. To embarrass the NGOs, and possibly incite hatred against them, the Ministry paraded the traditional leaders and religious leaders on national TV to condemn the NGOs for promoting 'a foreign culture' and 'evil acts', which could 'cause God to punish Malawi as He did with Sodom and Gomorrah'.

Impact on HIV advocacy

As a result of all this campaigning and the president's vitriolic speeches against homosexuality, public officers, who were previously supportive of inclusion for the sake of HIV, have made a U-turn on the issue of MSM and HIV. For example, in April 2011, senior public officer responsible for nutrition and HIV/AIDS, Dr Mary Shawa – who in 2009 argued that Malawi must recognise the rights of its gay population to be able to step up its fight against HIV/AIDS – dismissed the activists' campaign, saying the numbers of homosexuals in Malawi were too small to be a priority. Shawa and other government officials accused the activists of using HIV as an excuse to homosexualise Malawi (Chikoko 2011).

There are many reasons why government has waxed and waned on this issue. However, a major one is that NGOs advancing gay rights are in the government's bad books as these are the same NGOs that have been fiercely attacking the government's poor governance and human rights record. In self-defence, and in order to discredit these NGOs, the government has picked on the gay rights issue in an attempt to gain public sympathy, knowing that this is an issue that most Malawians are not happy about. In this circumstance, it is difficult for any public officer to talk positively about homosexuality; he or she risks the wrath of the government or even dismissal.

Threats against human rights defenders and attempts to divide civil society

Another negative outcome of the debate on homosexuality is the government's use of threats against human rights defenders, particularly those that are critical of the Mutharika administration. In a televised speech on 6 March 2011, Malawi's President Mutharika encouraged his supporters to bring discipline into the country (Somanje 2011). This heightened the risk of attacks against the leadership of CHRR and CEDEP, who have criticised the government for its stand on LGBT issues and various governance and human rights issues facing the country. On 3 March 2011, CHRR offices were attacked (Sonani 2011). This was followed by threats – including death threats – made against the CHRR executive director, making increased security of CHRR and CEDEP premises a matter of necessity.

Worse still, the government has been using the LGBT issue to divide civil society and isolate CSOs promoting LGBT rights. What is even more surprising is that some civil society leaders are using the same issue to attack their friends, tactfully avoiding other matters raised by the CSOs. They have resigned themselves to the government employing the usual tactic of using the gay issue to win the hearts and minds of Malawi's conservatives and to divide civil society. In May 2011, President Mutharika held a secret meeting with board members of the NGOs' umbrella body, the Council for Non Government Organisations in Malawi (CONGOMA), to discuss several issues affecting the NGO/government relationship. Media sources revealed that one of the issues on the table was that of minority rights. A few days after the meeting, a delegation from CONGOMA approached CHRR and CEDEP executive directors to ask them to 'slow down on advocating for minority rights', a request the two flatly refused. Shortly afterwards, on 5 May, some CONGOMA board members, led by chairperson, Victor Mhone, held a press conference in Lilongwe, during which they distanced themselves from the campaign for minority rights. Mhone argued:

> The issue of sexual minority rights is diverting the nation from important issues of governance and economic problems.' […] 'Gay rights are not the priority of the coalition and we know government is blowing this issue out of proportion just to attack civil society. [...] Bearing in mind that law reform should adopt a bottom-up approach, let ordinary Malawians, through an open, transparent and democratic process demand gay rights as and when they need them. […] As CONGOMA, we have taken a position and it is disassociating the NGO community from such unlawful acts (Khunga 2011).

Conclusion: what next?

The situation of LGBT persons in Malawi is still perilous and demands more concerted action from civil society and activists. There is a need to intensify efforts to combat homophobia. However, this is easier said than done. Winning this fight is a challenge that will require resources, effective strategies and critical reflections on the role of donors and international partners. This chapter mentioned earlier that Malawi does not need a 'shock and awe' approach to change its stance on homosexuality. The issue needs to be approached tactfully and with more understanding. Threats of aid cuts if the country does not decriminalise homosexuality will not yield anything. The best approach, in my view, is to convince people to accept these issues through dialogue with respect for their opinions. Understanding, respect and dialogue are required here. We need to dialogue with the community. We also need to start talking with government.

It may be that the approach of LGBT activists is one of the reasons the government has waxed and waned on this issue. As noted earlier, we have, in the recent past, relentlessly attacked government on its governance failures and weaknesses. But in self-defence, government has picked on the gay rights issue and tried to gain public sympathy, knowing that most Malawians are not happy about it. We can change that! – not by turning a blind eye to government's failures and weaknesses but doing so in a way that does not make actors feel inferior or useless. Experience has shown that the current administration in Malawi does not respond well to public criticism. A closed-door approach would perhaps be necessary to draw government's attention to the fact that political rhetoric is contradicting policy or expert opinion on homosexuality, and that this will have serious implications in the consolidation of human rights and the national goal of turning off the tap of new HIV infections by 2015.

While talking to government, LGBT people will also need to start up a conversation with fellow members of civil society. Civil society is an important ally in this fight for LGBT rights. Speaking with one voice on this issue makes it easier to convince the public to see the issue our way. There are many reasons why a majority of CSOs are reluctant to get involved. First, several staff members from local CSOs are poorly informed on LGBT issues. The culture and education system in Malawi does not provide a good context for understanding diversity and different sexualities. Due to lack of awareness, many CSO staff members hold many of the misconceptions and prejudices existing in their society.

Of course there are other issues besides lack of awareness. Many CSOs view the LGBT issue as too hot to handle. CSOs would rather concentrate on issues that are popular with the majority of the population, such as children's rights, rather than issues that may attract a public backlash. For faith-based CSOs, LGBT issues are particularly tricky. Many are already struggling to promote

and provide condoms for heterosexuals; little wonder they have not included LGBT issues in their work. Still, it is necessary to talk and convince them that LGBT rights are human rights, urging them to join hands with us in ensuring that all people are treated the same, regardless of sexual orientation. A training workshop for CSOs on LGBT rights would be a good starting point to start up this conversation.

All in all, the debate on LGBT issues has been fruitful. Not only has it helped to profile LGBT issues and increased their visibility in the public eye, but it has also opened debate on an issue that, a few years ago, was strictly taboo. Sustaining this open discussion is vital as it will undoubtedly lead to greater understanding and tolerance of LGBT persons and their choices and identities.

Bibliography

AFP, (2010) 'Mutharika: stop calling gays satanic', *News24*, 2 June, available at www.news24.com/Africa/News/Stop-talking-about-satanic-gays-Mutharika-20100602 (accessed 22 Jan. 2013).

Amnesty International (AI) (2010) 'Malawian couple convicted of 'unnatural offences,' *Priority Action May 2010*, available at www.amnesty.org.uk/actions_details.asp?ActionID=682 (accessed 6 Nov. 2011).

Baral, S., G. Trapence, F. Motimedi, E. Umar, S. Iipinge, F. Dausab and C. Beyrer (2009) 'HIV prevalence, risks for HIV infection, and human rights among men who have sex with men (MSM) in Malawi', *PLOS One* 4 (3), e4997, available at www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0004997 (accessed 20 Mar. 2013).

Bottoman, L. (2010) 'Gays arrest unconstitutional – lawyer', *Daily Times*, 4 Jan.

Chikoko, R. (2011) 'Homosexuality not big issue in Malawi – Shawa', *The Nation*, April.

Jolofani, D. and J. DeGrabriele (1999) 'HIV in Malawi Prisons: A Study of HIV Transmission and the Care of Prisoners with HIV/AIDS in Zomba, Blantyre and Lilongwe Prisons', Penal Reform International, available at www.penalreform.org/publications/hivaids-malawi-prisons-0 (accessed 20 Mar. 2013).

Kasunda, A. (2010) 'Police hunt for prominent gays', *The Nation on Sunday*, 28 Feb.

— (2011a) 'MHRC deliberating on minority rights', *The Nation*, 15 Apr., available at www.mwnation.com/index.php?option=com_content&view=article&id=17795:mhrc-deliberating-on-minority-rights&catid=76:guest-spot&Itemid=70 (accessed 16 Nov. 2011).

— (2011b) 'Homosexuality is natural', *The Nation*, 8 Apr., available at www.mwnation.com/index.php?option=com_content&view=article&id=17411:homosexuality-is-natural&catid=76:guest-spot&Itemid=70 (accessed 16 Nov. 2011).

Khunga, S. (2011) 'NGOs divided … Govt capitalizing on gay rights – Mhone', *Daily Times*, 6 May, available at www.msmgf.org/files/msmgf//SubSaharanAfrica/NGOs_Divided_1.pdf (accessed 20 Mar. 2013).

Malawi News (2011) 'Homosexuals are not beyond redemption – Rev. Chingota', 21–27 May.

Mmana, D. (2011) 'Homosexuals deserve to die – Apostle', *The Weekend Nation*, 30 April.

Munthali, K. (2011) 'Accept prostitutes, gays, urges Bishop', *The Nation*, Feb.

Musa, M. (2011) 'Accommodate gays – CCAP clergy', *The Daily Times*, 17 May.

Mutua, M. (2011) 'Sexual orientation and human rights: putting homophobia on trial', in S. Tamale (ed.), *African Sexualities: A Reader* (Cape Town: Pambazuka Press).

Muula, A. (2007) 'Perceptions about men having sex with men in Southern African country: case study of print media in Malawi', *Croatian Medical Journal*.

Muwamba, E. (2011) 'Two Malawian male prison lovers arrested', *The Nation*, 16 April.

Mzale, D. (2010) 'Donors caution Malawi on gays', *The Nation*, 17 Mar.

Namangale, F. (2011) 'Judge faults tough sentences against gays', *The Nation*, 7 June.

Ngozo, C. (2010) 'Malawi gays had no chance', IPS, 21 May, available at http://ipsnews.net/africa/nota.asp?idnews=51525 (accessed 22 Jan. 2013).

Roscoe, W. and S. O'Murray (1998) *Boy-wives and Female Husbands: Studies on African Homosexualities* (New York: St. Martin's Press).

Somanje, C. (2011) 'Deal with my critics, Bingu tells DPP rally', *The Nation*, 7 Mar.

— (2010) 'Gay couple trial begins today', *The Nation*, 11 Jan.

— (2010) 'Munlo throws gays application', *The Nation*, 23 Feb.

Sonani, B. (2011) 'Malawi tells off donors', *The Nation*, 10 Feb.

– (2011) 'Thugs attack CHRR offices amidst death threats', *The Nation*, 7 Mar., available at www.nationmw.net/index.php?option=com_content&view=article&id=15440:thugs-attack-undules-offices&catid=1:national-news&Itemid=3 (accessed 4 Nov. 2011).

Tenthani, R. (2010) 'Malawi gay couple get maximum sentence of 14 years', BBC News, 20 May, available at www.bbc.co.uk/news/10130240 (accessed 22 Jan. 2013).

Umar. E. et al. (2008) 'A cross-sectional evaluation of the HIV prevalence and HIV-related risk factors of men who have sex with men (MSM) in

Malawi', AIDS 2008 – XVII International AIDS Conference: Abstract no. MOPEO412.

UN Human Rights Council (2011) *Report of the Working Group on the Universal Periodic Review: Malawi*, UN Doc. A/HRC/16/4 (4 Jan. 2011), available at www.unhcr.org/refworld/docid/4d7deb592.html (accessed 22 Jan. 2013).

UN Working Group on Arbitrary Detention (2007) 'Opinion No. 22/2006 (Cameroon)', UN doc. A/HRC/4/40/Add.1 (2 Feb. 2007), pp. 93–4, paras. 18–19.

14

The incremental approach: Uganda's struggle for the decriminalisation of homosexuality

Adrian Jjuuko

Introduction

The struggle for decriminalisation of homosexuality in Uganda began long before the now-renowned Anti-Homosexuality Bill 2009. This was in fact a reaction to the ever-increasing agitations and demands for equal rights for homosexuals in Uganda, where homosexuality was and still is a very controversial subject. During the decade leading to the tabling of the Anti-Homosexuality Bill, voices demanding equal rights and recognition for homosexuals were steadily becoming louder at the same time as voices calling for the further curtailing of homosexuality were also getting much louder. The pro-gay rights side was led by youthful human rights activists, while the anti-gay side was led by right-wing Pentecostal pastors and conservative government officials (Tamale 2007). By October 2009, the battle lines were drawn and the Anti-Homosexuality Bill was thrown in as the trump card for the anti-gay group. One of the major issues that has underpinned this debate is criminalisation. Homosexuality is perceived to be criminalised under the Penal Code, which in fact only criminalises carnal knowledge against 'the order of nature'. The pro-gay rights group has always argued that the presence of this law discriminates against homosexuals and makes them second-rate citizens. The anti-gay rights group views the law as necessary and in fact too weak to fight the 'Western' evil of homosexuality that they feel is threatening to tear apart the very fabric of Ugandan society.

No reliable statistics exist as to the number or percentage of homosexuals in Uganda. Gay rights groups have estimated the number of homosexuals to be approximately 500,000 in a population of approximately 33,000,000 people. However, very few of them have openly come out as homosexual. This is because, perhaps more than any other subject in Uganda, homosexuality is largely taboo.

Uganda has more than 56 different ethnic groups (Uganda Bureau of Statistics 2005, p. 12).[1] The majority of the population is Christian albeit in different denominations (ibid. 2005, p. 11).[2] Uganda is 68.1 per cent rural (ibid. 2005, p. 11) with most of the population engaged in subsistence agriculture. Traditional cultures and customs still play an important role in the day-to-day life of most Ugandans and are recognised as a source of law subject to the repugnancy test.[3] The welfare of the community tends to override individual interest in most Ugandan communities and communal ownership of land is legally protected.[4]

Legally, the Constitution of the Republic of Uganda prohibits same-sex marriages. This was originally not part of the Constitution but was added during the 2005 amendment denoting the increasing demands and agitations of gay rights activists. Uganda criminalises homosexuality using the infamous early-English-language term of unnatural offences – too abominable to be named.[5] This criminalisation has led to arrests, blackmail, mob justice and the 'othering' of homosexuals in Uganda. Perhaps the best known, but certainly not the only case, is the murder of prominent gay activist David Kato in January 2011.[6] Homosexuals in Uganda live in a state of fear, and very few

1 The 1995 Constitution of Uganda lists 56 different ethnic groups; see Third Schedule of the Constitution of the Republic of Uganda, 1995. The 2002 Housing and Population Census found that only nine of the ethnic groups consisted of more than one million people. See Uganda Bureau of Statistics 2002 (2005), Uganda Population and Housing Census Main Report, Kampala, Uganda, p. 12. Available from www.ubos.org.

2 According to the 2002 census, Christians comprised 85.2% of the population with 41.9% Catholic, 35.9% Anglican, 4.6% Pentecostal, 1.5% Seventh Day Adventists, 0.1% Orthodox Christians and 1.2% other Christians. Muslims make up 12.1% of the population, traditionalists 1%, no religion 0.9%, other non-Christian 0.7% and Bahai 0.1% (Uganda Bureau of Statistics 2005, p. 11).

3 Section 15(1) of the Judicature Act Cap 13 provides that 'Nothing in this Act shall deprive the High Court of the right to observe or enforce the observance of, or shall deprive any person of the benefit of, any existing custom, which is not repugnant to natural justice, equity and good conscience and not incompatible either directly or by necessary implication with any written law'.

4 Article 237(3) of the 1995 Constitution provides for customary land tenure in Uganda, as does Section 2 of the Land Act Cap 223.

5 For example, in 1669, Sir Edward Coke, Lord Chief Justice of England and Wales, referred to buggery as 'a detestable and abominable sin, among Christians not to be named, committed by carnal knowledge against the ordinance of the Creator and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast', p. 58.

6 David Kato, the Litigation Officer for Sexual Minorities Uganda and a renowned LGBTI activist the world over, was found murdered in his home in Mukono district in January 2011. Sydney Nsubuga was arrested and charged with his murder. He was found guilty and sentenced to 30 years in prison (Mayamba 2011).

'out' gays would walk on the streets of Kampala without looking over their shoulder, or thinking twice. The general population relies on religion and culture to promote a culture of hatred against homosexuals. Ignorance, on the other hand, fuels homophobia. For example, in a study carried out by the author in 2009 at Makerere University, it was found that most of those supporting criminalisation could not correctly define homosexuality, and that the reasons given for opposition to it were based on religion and culture (Jjuuko 2008).

Despite all these challenges, the LGBTI (lesbian, gay, bisexual, transgender, intersex) movement in Uganda continues to struggle for equality and non-discrimination and aims for decriminalisation as a key initial step towards achieving its objectives. The movement is becoming increasingly visible and its impact is widely felt. Ironically, one factor that has ensured this is the presentation before Parliament of the Anti-Homosexuality Bill 2009[7] (hereinafter referred to as the Bahati Bill). This seeks to introduce, among others, the offences of homosexuality and aggravated homosexuality, and proposes the death penalty for the latter. The authors of the Bahati Bill argue that pro-homosexuality campaigns have increased and because of this homosexuality is a serious threat in Uganda today.[8] There is thus a need for a stronger law to protect the 'traditional family' as it appears the present laws have not been effective.[9]

The presentation of the Bahati Bill galvanised the hitherto nascent and rather disorganised LGBTI rights movement to focus on the Bill as a key target. It also brought international attention to Uganda. The movement reorganised and restrategised. Suddenly the tussle for decriminalisation turned into a struggle to prevent further criminalisation in the short run but without losing focus on the ultimate goal: decriminalisation.

In the light of the overwhelming homophobia and hate, activists in Uganda have come up with innovative ways of moving towards decriminalisation. They are using the judiciary, the legislature, the executive, coalition building,

7 Gazetted on 25 September 2009, as Bills Supplement No. 13 to the Uganda Gazette No. 45 Volume CII. It was tabled by Ndorwa South MP, David Bahati, as a private member's bill.

8 The Bill's memorandum states clearly that one of its aims is to provide 'a comprehensive and enhanced legislation to protect the cherished culture of the people of Uganda, legal, religious, and traditional family values of the people of Uganda against the attempts of sexual rights activists seeking to impose their values of sexual promiscuity on the people of Uganda'.

9 The memorandum states the Bill's objectives as being 'to establish a comprehensive consolidated legislation to protect the traditional family by prohibiting (i) any form of sexual relations between persons of the same sex; and (ii) the promotion or recognition of such sexual relations in public institutions and other places through or with the support of any Government entity in Uganda or any non-governmental organisation inside or outside the country'.

international advocacy and awareness campaigns to slowly inch towards decriminalisation. Lessons can thus be drawn from this experience.

This chapter highlights the different incremental approaches that have been, and continue to be, adopted by activists in Uganda to achieve decriminalisation of same-sex conduct. This is presented from the perspective of the activities and experiences of the Civil Society Coalition on Human Rights and Constitutional Law[10] (hereinafter the Coalition), where the author worked as Coordinator (at the time of writing in December 2011).

Historical antecedents of the law on homosexuality in Uganda

In the beginning: homosexuality in pre-colonial Uganda

During the pre-colonial period there was no Uganda, for the country or state called Uganda is a creature of colonialism. What existed then in the geographical area forming present-day Uganda were a number of independent, centralised kingdoms and a number of decentralised non-kingdom communities. Most of the history is not written down, except in very general terms, to describe key political events and remarkable incidents. These too have been deciphered from oral history.

Despite this, it is clear that homosexuality was not criminalised by the state or by the communities. Sylvia Tamale explains that historically in the areas now known as Uganda, homosexual practices were neither fully condoned nor totally suppressed (Tamale 2003, p. 29).

Laws in pre-colonial Uganda were also not written down, though they were still positive laws. Codes governing conduct existed, albeit backed by myths and transgressions punishable by the community or by the state. Of course diversity did exist as not all groups were the same. What should be noted, however, is that other sexual transgressions had a well-developed punishment system. For example, among the Bakiga of what is now Western Uganda, 'if a girl should be caught in a sexual misdemeanour, treatment will depend in part on the gravity of the offence, its publicity and the identity of the man' (Edel 1996, p. 65). No such systems are shown to exist in the case of homosexuality. In fact Human Rights

10 The Civil Society Coalition on Human Rights and Constitutional Law was formed in October 2009 shortly after the presentation of the Anti-Homosexuality Bill 2009 before Parliament. It is a coalition of over 40 civil society organisations (CSOs) working to oppose the Bill as well as promote sexual rights in Uganda. The Coalition currently brings together organisations for LGBTI people, sex workers, women's rights, refugee rights, those with HIV/AIDS, plus mainstream bodies. It is a common platform for advocacy and the key strategies are the use of the Ugandan Constitution, the law and human rights principles to promote equality and justice for all regardless of their sexual orientation. For more information visit www.ugandans4rights.org (accessed 24 Jan. 2013).

Watch points out that 'They [the colonialists] brought in the legislation, in fact, because they thought "native" cultures did not punish "perverse" sex enough. The colonized needed compulsory re-education in sexual mores' (Human Rights Watch 2008, p. 5; see Human Rights Watch, this volume).

Studies show that practices which correspond to today's homosexual practices were institutionalised and accepted in some pre-colonial African communities. In Buganda, Faupel's allegation that homosexuality was practised without any criminal punishments at the king's court should be noted (Faupel 1984, p. 9). Faupel documents an apparently established practice at the king's court, where the king himself was involved in homosexuality with his pages. He states that the Uganda Martyrs were killed by Kabaka Mwanga primarily because, having been introduced to Christianity, they found the king's homosexual tendencies towards them to be suddenly unacceptable under the new religion. Apparently, these same boys had not had any ill feelings about the practice before Christianity.[11] However, Kaggwa (1971), in *Basekabaka ba Buganda*, blames the importation of homosexuality into Buganda upon the Arabs. He argues that, 'these Arabs introduced into our country along with numerous disorders an abomination which we had never practiced and which we had never heard spoken of' (quoted in Faupel 1984, p. 9).

As I have argued elsewhere (Jjuuko 2008), linguistics show otherwise. In Buganda the word *bisiyaga* (meaning sodomy) was in use long before colonialism and even the Arabs to refer to the same-sex practice among males (Nanyonga-Tamusuza 2005, p. 214).[12] According to Southwold (1993), this word has been part of Buganda's vocabulary for a very long time.

Amory argues that, 'the fact of the matter is that there is a long history of diverse African peoples engaging in same sex relations' (Armory 1997, p. 5; see also Ahlberg 1994). Homosexuality was also acknowledged among the Iteso (Lawrance 1957), the Bahima (Mushanga 1973), the Banyoro (Needham 1973) and the Langi (Driberg 1923). Murray and Roscoe argue with evidence that 'the colonialist did not introduce homosexuality to Africa but rather intolerance to it – and systems of surveillance and regulation for suppressing it' (Murray and Roscoe 1998, p. xvi).

The beginning of trouble: the introduction of Victorian morality to Uganda

One of the long-lasting legacies of British colonialism in most of the Commonwealth is the introduction of laws on 'unnatural offences'. Uganda

11 However, Faupel's assertions have to be taken with a pinch of salt for the whole publication seems bent on demonising Mwanga and glorifying the Uganda martyrs.

12 Sylvia Nanyonga- Tamusuza, however, quotes sources who argue that the root word for 'siyaga' is the Arab term 'siag', which in common parlance means 'forming', but whose hidden meaning can refer to homosexuality.

did not escape these Victorian morality laws, which were brought in with the declaration of the British protectorate over Uganda in 1894, and formalised under the 1902 Order in Council. Section 15(2) enabled the application to the Uganda protectorate of laws in the United Kingdom and its other colonies as they existed on or before 11 August 1902.

It is important to note that the introduction of the imported law occurred just a few years after the moral panic that occurred in Britain in 1885 after W.T. Stead's 'exposure' of trafficking of girls in London's vice emporiums (Walkowitz 1992, p. 81). The uproar following that publication led to the Criminal Law Amendment of 1885 which made indecent acts between consenting male adults illegal.[13] This law criminalising conduct 'too awful to be named' became applicable to Uganda by virtue of the Order in Council.

The 1950 Penal Code (adopted 15 June 1950), which was developed based on both the Indian Penal Code of 1860 and the Australian Penal Code (Read 1963), introduced the unnatural offences provision as it is today[14].

Post-independence period: the law and homosexuality

Uganda became an independent state on 9 October 1962. Independent Uganda now had a chance to make its own laws and thus bring to an end the legacy of the 1902 Order in Council. However, the new government did not do much more than simply rename ordinances as Acts. The Penal Code Act 1950 became the Penal Code Act Cap 106. It went through a number of amendments in 1966;[15] 1967;[16] 1970;[17] 1971;[18] 1972;[19] 1973;[20] 1974;[21]

13 This Act was repealed for England and Wales by section 51 of, and the fourth schedule to, the Sexual Offences Act 1956; and for Scotland by section 21(2) of, and Schedule 2 to, the Sexual Offences (Scotland) Act 1976.

14 The Penal Code Ordinance, No. 7 of 1930, later Cap 128 of the Laws of Uganda Protectorate, Revised Edition 1935. It was modelled on the Griffith Code named after Sir Samuel Hawker Griffith (1845–1920), first Chief Justice of the High Court of Australia and earlier Premier and Chief Justice of Queensland, whose Penal Code had been adopted in Queensland in 1901.

15 Act 1/1966.

16 Act 7/1967.

17 Act 29/1970.

18 Decree 11/1971.

19 Penal Code Act (Amendment) Decree, Decree 9/72.

20 Penal Code Act (Amendment) Decree, Decree 4/73.

21 Penal Code Act (Amendment) Decree, 1974, Decree 4/94.

1976;[22] 1980;[23] 1984;[24] 1987;[25] 1988;[26] 1990;[27] 1991;[28] 1996;[29] and 1998.[30]

The laws of Uganda were compiled and revised five times before 2000 – four times during the colonial period and once after independence in 1964.[31] In 2003, the Laws of Uganda Revised Edition 2000 was inaugurated. The Penal Code became Cap 120, and this is the most recent version. Apart from increasing the punishment of carnal knowledge against the order of nature to life imprisonment, the wording is exactly as it was in 1950. The current relevant provisions are Sections 145, 146 and 147 respectively.

The current position of the law on homosexuality

Ugandan activists not only have to deal with the unnatural offences provisions of the Penal Code but also with the Constitution and a myriad of other laws. Article 31(2) (a) of the Constitution of Uganda provides that 'Marriage between persons of the same sex is prohibited'. It is interesting that at this point the Constitution takes on the nature of a penal statute and imposes a prohibition, a provision that was not originally part of the Constitution, but 'sneaked in' during the 2005 amendment of the Constitution which saw an omnibus amendment Bill, with many and varying provisions being introduced at once. What most people focused on was the proposal to remove presidential term limits and thus this provision passed without much public or even parliamentary debate.[32]

Under section 145 of the Penal Code Act, unnatural offences are criminalised. To avoid any confusion, the provision is reproduced here:

> **145. Unnatural offences.**
>
> Any person who –
>
> (a) has carnal knowledge of any person against the order of nature;
>
> (b) has carnal knowledge of an animal; or
>
> (c) permits a male person to have carnal knowledge of him or her against

22 Penal Code Act (Amendment) Decree, Decree 14/76.
23 Statute 3/1980.
24 Penal Code (Amendment) Act 1984.
25 Statute 5/1987.
26 Penal Code Act (Amendment) Statute 1988.
27 Penal Code (Amendment) Statute 1990.
28 L.N. 4/1991.
29 Statute 6/1996.
30 Act 3/1998.
31 The earlier ones were in 1910, 1923, 1935 and 1951.
32 The so-called 'kisanja' (presidential third term) bill was so contested that it only passed after ruling party MPs were bribed with five million Ugandan shillings (about US$2,500). What kept on surfacing, however, was the 'kisanja' provision while many others were largely forgotten.

> the order of nature, commits an offence and is liable to imprisonment for life.
>
> **146. Attempt to commit unnatural offences.**
>
> Any person who attempts to commit any of the offences specified in section 145 commits a felony and is liable to imprisonment for seven years.

Flowing from this, Section 15(6) (d) of the Equal Opportunities Commission Act 2007 prevents the Equal Opportunities Commission from investigating matters which are regarded as immoral or unacceptable by the majority of the social and cultural groupings in Uganda. This Commission is established by statute to 'eliminate discrimination and inequalities against any individual or group of persons on the ground of sex, age, race, colour, ethnic origin, tribe, birth, creed, opinion or disability, and take affirmative action in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom for the purpose of redressing imbalances which exist against them'.[33]

The parliamentary Hansards show that this provision was inserted because 'the homosexuals and the like have managed to forge their way through in other countries by identifying with minorities. If it is not properly put in the clause, they can easily find their way through fighting discrimination. They can claim that since they are part of the minority, they can fight against marginalisation'.[34]

To summarise the current legal situation, one cannot contract a legal gay marriage under Ugandan law. It is criminal to engage in same-sex sexual acts and homosexuals cannot seek remedies from the Equal Opportunities Commission, a commission set up to promote equality for all. The law as it now stands does not draw a distinction between consensual same-sex relations and non-consensual same-sex relations. However, it does not criminalise being homosexual, although many of those that have suffered under these laws have been arrested merely on suspicion of being homosexual.

Evidently the struggle for decriminalisation requires different approaches from those employed elsewhere as perhaps more than any other country Uganda is legally and socially hostile to homosexuality.

Proposals for the future: Bills in parliament

As if the current legal regime is not restrictive enough, two bills concerning homosexuality are currently before Uganda's parliament: the Anti-Homosexuality Bill 2009 and the Sexual Offences Bill 2011.

The Anti-Homosexuality Bill 2009 is the most infamous of the two. It seeks to create an offence called homosexuality (Clause 2). Homosexuality is broadly defined in the Bill to include any penetration of the anus or mouth with a penis

33 Quoted from the long title to the Equal Opportunities Commission Act 2007.
34 Parliamentary *Hansard,* 12 Dec. 2006.

or any other sexual contraption (Clause 2(1) (a)); or the use of any object or sexual contraption to penetrate or stimulate a sexual organ of a person of the same sex (Clause 2(1)(b)); or the touching of another person with the intention of committing the act of homosexuality (Clause 2(1)(c)). The punishment is life imprisonment (Clause 2(2)).

The Bill also creates the offence of aggravated homosexuality for cases of homosexuality with a minor (Clause 3(1)(a)); or where the offender is a person living with HIV (Clause 3(1)(b)); or where the offender is a parent or guardian of the person against whom the offence is committed (Clause 3(1)(c)); or where the offender is a person in authority over the person against whom the offence is committed (Clause 3(1)(d)); or where the victim of the offence is a person with disability (Clause 3(1)(e)); or where the offender is a serial offender (Clause 3(1)(f)); or where the offender uses drugs or other substances to stupefy or overpower the victim so as to have same- sex intercourse with them (Clause 3(1)(g)). The punishment for this is the death penalty (Clause 3(2)). An HIV test is mandatory (Clause 3(3)).

The Bill further provides for attempts to commit homosexuality and aggravated homosexuality,[35] aiding and abetting of homosexuality,[36] conspiracy to commit homosexuality,[37] procuring homosexuality by threats,[38] detention with intent to commit homosexuality,[39] keeping of brothels,[40] same-sex marriages,[41] promotion of homosexuality,[42] and failure to disclose the

35 Punishable with up to seven years' imprisonment and life imprisonment for attempts to commit aggravated homosexuality (Clause 4).

36 Punishable with up to seven years' imprisonment (Clause 7).

37 Punishable with up to seven years' imprisonment (Clause 8).

38 Clause 9.

39 Punishable with up to seven years' imprisonment (Clause 10).

40 Punishable with up to seven years' imprisonment (Clause 11).

41 Purporting to contract a same-sex marriage will be punishable by imprisonment for life (Clause 12).

42 Clause 13 criminalised the procuring, production, reproduction of pornographic materials, funding or sponsoring activities to promote homosexuality, offering premises, uses of technological devices or acting as an accomplice to promote or abet. On conviction, the punishment is a fine of 5,000 currency points (Ushs. 100,000,000 or US$40,000) or a minimum of five years in prison, and in the case of a body corporate the directors are liable to seven years' imprisonment and the cancellation of the certificate of registration. This clause would effectively mean the end of sexual rights advocacy in Uganda as an act could easily be regarded as promotion and also funding for such work could be effectively cut.

offence.[43] It also provides for extra territorial jurisdiction,[44] and extradition of offenders.[45] It also seeks to nullify all international instruments that 'promote' homosexuality.[46]

The Sexual Offences Bill 2011 was gazetted on 14 January 2011. The Bill is intended to update and repeal Chapter XIV of the Penal Code Act – 'Offences Against Morality'. It thus maintains the unnatural offences provision. In Section 19, under unnatural offences, it provides that (1) 'A person who performs a sexual act with another person against the order of nature with the consent of the other person commits an offence, and is liable to on conviction to imprisonment for life'. This is the same level of penalty as in the Penal Code.

Under Section 20 the Sexual Offences Bill states 'A person who attempts to commit any of the offences specified in Section 19 above commits an offence and is liable on conviction to imprisonment not exceeding six months'. The penalty here is significantly lower than that in the Penal Code Act and even in the Anti-Homosexuality Bill, where the maximum imprisonment is seven years. Rather than amending the Penal Code, its provisions are almost exactly reproduced in this consolidating bill.

On the road to decriminalisation – the development of a gay rights movement in Uganda

For a long time, homosexuality has largely been invisible in Uganda. Homosexuals operated underground and did not dare stand out to be counted. Very few people came out openly as gay. For those, however, who were suspected of being gay and also those who suffered internal crises because of their sexuality, only a few had access to higher education. Some have been

43 Clause 14 requires persons in authority to report within 24 hours of obtaining information about an offence under the Bill being committed. Authority is defined to mean having power and control over other people because of your knowledge and official position; and shall include a person who exercises religious, political, economic or social power. This clause would thus cover lawyers, doctors, parents, teachers, local leaders and priests among many others.

44 Clause 16 would affect even the commission of the homosexuality and other offences outside Uganda by a Ugandan citizen or permanent resident, or where the offence was committed partly in and partly outside Uganda.

45 Clause 17 makes the offences under the bill extraditable. This thus elevates them to the same status as other extraditable offences like treason and misprision of treason.

46 Clause 18 nullifies any 'international legal instrument' whose provisions are contradictory to the spirit and provisions of the Bill. This implies that the Universal Declaration of Human Rights, the International Covenant on Civil and Political rights, the International Covenant on Social, Economic and Cultural Rights, the Convention on Elimination of all forms of Discrimination Against Women and a host of other important human rights treaties that provide for equality for all would no longer be applicable in Uganda.

dismissed from their jobs when their homosexuality was discovered, while yet others have suffered depression or committed suicide. Some have managed to escape the country, while others have remained closeted.[47] A few have accepted their homosexuality, while others think it is an unfortunate destiny.

A small group has gone beyond mere acceptance, however, coming to terms with their homosexuality and taking it for what it is – a sexual orientation that they cannot change. They have therefore decided to stand up and advocate for equality, bringing an end to discrimination and hate.

Those who prefer remaining secretive and who think advocacy only worsens an already bad situation have made objections. There exists a school of thought among Uganda's LGBTI community which prefers the status quo, rather than going into uncharted territory. This group, largely made up of still-closeted individuals, also thinks that advocacy and activism draw too much attention to the LGBTI community, thus inviting responses from society.

Despite this position, other advocates for equal rights have moved on. For a long time, the name Victor Mukasa was synonymous with the LGBTI movement in Uganda.[48] Today, many other activists have come forward and the LGBTI movement boasts a group of courageous individuals who are willing to defend and demand their rights without fear, and at great risk to their lives and livelihoods. Uganda now has many LGBTI activists, three of whom have won prestigious international human rights awards within a year of each other.[49] These awards show that the work of LGBTI activists in Uganda is extremely visible, inspiring many other people to stand up and be counted, as well as ensuring that the struggle the Ugandan activists are engaged in is a struggle for human rights in general.

Uganda boasts close to ten organisations, founded and manned by LGBTI persons working on different aspects such as HIV/AIDS, policy advocacy, healthy living and creating safe spaces for LGBTI persons. One of the most visible is the umbrella organisation Sexual Minorities Uganda (SMUG).[50]

Another remarkable development is the formation of the Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL), known simply as the Coalition. It is composed of over 40 LGBTI, sex work and mainstream organisations working together to oppose the Anti-Homosexuality

47 On options available to gay persons and asylum see Jjuuko (2011).

48 Victor was for a long time the most outspoken LGBTI person in Uganda, who almost single-handedly challenged homophobia in society, raised awareness in mass media, and was therefore harassed and threatened on numerous occasions.

49 Julius Kagwa won the Human Rights First Award 2010, Jacqueline Kasha Nabagesera won the Martin Ennals Award for Human Rights Defenders 2011, and most recently Frank Mugisha won both the Rafto Prize for Human Rights and the Robert F. Kennedy Award for Human Rights 2011.

50 SMUG won the Rafto Prize for Human Rights 2011, represented by Frank Mugisha.

Bill 2009 and to advocate for sexual rights in Uganda. The Coalition was created in October 2009 shortly after Hon. David Bahati had tabled the Anti-Homosexuality Bill in Uganda's parliament. It successfully prevented the Bill from becoming law, despite popular support for it within the eighth parliament. However the Bill has not yet been withdrawn from parliament and still hangs over the heads of the human rights community in Uganda like the legendary sword of Damocles. The Coalition is thus still working to ensure the ninth parliament does not pass the bill, and is also getting ready to take recourse to the law in case the Bill is passed.

The Coalition is opposed to the Bahati Bill on purely human rights and constitutional law grounds. In statements issued in the Ugandan media since the Coalition was formed, it is clear that it regards the Bill as unconstitutional, anti-human rights and affecting all categories of persons in society. The Coalition has thus been the key Ugandan voice against the Bahati Bill, and has coordinated both local and international efforts against the Bill and also around a broader goal of respecting human rights and the Ugandan Constitution. Whereas challenges exist as to how to reconcile the various interests of the various members of the Coalition, a common goal has been identified and for more than two years, it has been steadily moving to achieve it.

As the LGBTI movement in Uganda grows, so does the anti-gay movement – opposition has grown rapidly over recent years. This opposition is championed by religious groups, especially the Pentecostal movement supported by the American religious right. The visit of noted anti-gay activist Scott Lively[51] to Uganda in 2009 marked the height of anti-gay propaganda. During a meeting of parents, convened by Stephen Langa of Family Life Network, Scott Lively and his team[52] blamed homosexuality for all evils and rallied Ugandans to stand firm against it. They stated that homosexuality was curable and they had a 'cured' homosexual to 'prove' this assertion.[53] Lively and his team even met with MPs such as David Bahati, who a few months later introduced the Anti-Homosexuality Bill.[54]

51 He is the president of Abiding Truth Ministries, a conservative Christian organisation located in Temecula, California and co-author of the Pink Swastika, a book linking homosexuals to the Holocaust. See Abrams and Lively (1995).

52 The meeting included Exodus International's board member Don Schmierer and Caleb Lee Brundidge of Extreme Prophetic Ministries, who defines himself as an 'ex gay'.

53 Caleb Lee Brundidge claimed that he was an 'ex gay' who was saved from being a homosexual.

54 Lively himself had this to say about his role in the Bill: 'In March of this year I had the privilege of addressing members of the Ugandan parliament in their national assembly hall when the anti-homosexuality law was just being considered. I urged them to pattern their bill on some American laws regarding alcoholism and drug abuse' (Lively 2010).

Pastor Martin Sempa of Makerere Community Church and Pastor Solomon Male, executive director of Arising for Christ, spearheaded an Anti-Homosexuality Coalition[55] and at one point even Muslim religious leaders joined them.[56] A two-million-signature petition supporting the Bill was reportedly submitted to Parliament.[57]

The anti-gay movement continues its fight against homosexuality in Uganda, diametrically opposed to the work of LGBTI activists. All indications show that these two forces are still pitted against each other. The anti-gay movement has the upper hand, for it can access the wider media denied to the gay rights movement and they also use gay panic propaganda, such as 'recruitment of our children' and Uganda being besieged by foreigners promoting homosexuality. The war continues with the gay rights movement making headway inch by inch. One area where considerable progress has been made is the law.

Decriminalisation through courts of law: an audit of progress

The legal battles so far won: an incremental approach to decriminalisation

Despite the difficulties involved in getting legal recognition for LGBTI organisations, they continue to operate in the country and influence policy and legal process.[58] No case has been brought to Uganda's courts of law challenging Section 145 of the Penal Code Act yet, but progress is being made slowly towards that goal. The approach taken is to use the courts to enforce the rights of LGBTI persons. Two resolved High Court cases stand out: *Victor Juliet Mukasa and Yvonne Oyo v. Attorney General* and *Kasha Jacqueline, David Kato and Onziema Patience v. Rollingstone Publications Limited and Giles Muhame.*

The case of *Victor Juliet Mukasa and Yvonne Oyo v. The Attorney General of Uganda, Misc. Cause No. 247 of 2006* was filed in the High Court of Uganda by two 'out of the closet' lesbians. It was filed against the attorney general whose servants the two accused of having violated their rights to privacy,

55 The ironically named Inter Faith Rainbow Coalition against Homosexuality.

56 Notably the leader of the Muslim Tabliqs, Sheikh Sulaiman Kakeeto.

57 On 7 April 2011, it was reported in the local media that a petition allegedly bearing two million signatures supporting Bahati's Bill was presented by a group led by Pastor Martin Sempa.

58 In Uganda, the requirements to register a Non Governmental Centre are simply prohibitive under the Non Governmental Organisations Registration (Amendment) Act 2006. They require approval from government officials from the lowest level up to the politically appointed District Internal Security Officer (DISO) and Resident District Commissioner (RDC). This is followed by the requirement to renew the NGO licence every year with the NGO Board which is a largely political body. Again the name of the NGO must be reserved with the Registrar General who has powers to reject a name which he/she regards as undesirable, and certainly many names of LGBTI NGOs fall under this category.

property and freedom from torture, inhuman and degrading punishment. These violations arose from the police and Local Council 1 chairman's forced entry and abduction of the second applicant and the ransacking of the first applicant's house, undressing of the second applicant at the police station and denying her the use of toilet facilities.

The case was heard by Justice Stella Arach Amoko who treated the case as no different from any other. She found that the applicant's rights had been violated including the right to privacy. She referred to international human rights instruments and found that these rights applied to all Ugandans without discrimination. This case was regarded as a victory by the sexual minorities fighting for recognition in Uganda for it recognised them as persons no different from any other group.

Kasha Jacqueline, David Kato and Onziema Patience v. Rollingstone Publications Limited and Giles Muhame, Miscellaneous Application No. 163 of 2010 was an application for an injunction, filed under the auspices of the Civil Society Coalition on Human Rights and Constitutional Law in Uganda through its members, Kasha Jacqueline, David Kato and Patience Onziema. The *Rolling Stone* tabloid (not related to the US magazine bearing the same name) had carried, on the front page of its 2 October 2010 edition, the headline '100 pictures of Uganda's top homos leak' which included the words 'Hang Them!' Bullet points under the headline read, 'We shall recruit 100,000 innocent kids by 2012: homos' and 'Parents now face heart-breaks [sic] as homos raid schools'.

The publication contained the names and in some cases the pictures and description of where certain activists and human rights defenders live. A later edition of the newspaper, published on 31 October, contained a further 17 photos of alleged LGBTI people, with personal details of those identified, including where they lived.

The Court initially issued an interim order restraining the editors of the newspaper from any further publication of information about anyone alleged to be gay, lesbian, bisexual or transgender until the case could be finally determined. In final determination of the application, the Court in considering whether the *Rolling Stone*'s publication of alleged homosexuals' names, addresses and preferred social hang-outs constituted a violation of the applicant's constitutional rights, ruled that:

> 1) The motion is not about homosexuality per se, but '... it is about fundamental rights and freedoms,' in particular about whether 'the publication infringed the rights of the applicants or threatened to do so'.
>
> 2) The jurisdiction of Article 50 (1) of the constitution is dual in nature, in that it extends not just to any person 'whose fundamental rights or other rights or freedoms have been infringed in the first place,' but also to 'persons whose fundamental rights or other rights or freedoms are threatened to be infringed.'

> 3) Inciting people to hang homosexuals is an attack on the right to dignity of those thus threatened: 'the call to hang gays in dozens tends to tremendously threaten their right to human dignity'.
>
> 4) Homosexuals are as entitled to the right to privacy as any other citizens. Against the 'objective test', 'the exposure of the identities of the persons and homes of the applicants for the purposes of fighting gayism [sic] and the activities of gays ... threaten the rights of the applicants to privacy of the person and their homes'.
>
> 5) Section 145 of the Penal Code Act cannot be used to punish persons who themselves acknowledge being, or who are perceived by others to be homosexual. Court ruled that 'One has to commit an act prohibited under section 145 in order to be regarded as a criminal'. Clearly this applies only to a person who has been found guilty by a court of law.

The court issued a permanent injunction preventing the *Rolling Stone* and its managing editor, Giles Muhame, from 'any further publications of the identities of the persons and homes of the applicants and homosexuals generally'. The court further awarded UGX. 1,500,000 to each of the applicants, as well as ordering that the applicant would recover their costs from the respondents.

This court ruling was also regarded as a great step in the move towards decriminalisation, in that it built on the earlier Victor Mukasa case, the Court affirmed that homosexuals are entitled to the same rights like everyone else and that their sexuality cannot be a basis for discrimination against them. The injunction provides broad protection to other Ugandans who are, or who are perceived to be homosexual, and the ruling provides an important precedent should any other media attempt to publish similar information.

These two cases were all brought under Article 50 (1) of the Constitution, which provides that: 'Any person who claims that a fundamental or other right or freedom guaranteed under this constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation'. In both cases cited above the plaintiffs' rights were infringed upon. The difference between the two is that one was against the state and the other against non-state actors.

The two cases set precedents that neither the state nor non-state actors can treat LGBTI persons as lesser beings. They are entitled to the same rights as everyone else. The reasons provided by both judges of the High Court for their decision are indicia that the judiciary is at the present ready to uphold individual rights without discrimination. These cases undoubtedly play an important role in the move towards decriminalisation. They are not nullifying laws, but they are certainly moving in the right direction – the incremental approach to decriminalisation.

Opportunities not yet taken and legal battles still ongoing

Another enabling provision of the Constitution is Article 50(2), which gives any person locus to bring an action to enforce the violations of another's rights. It reads: 'Any person or organisation may bring an action against the violation of another person's or group's human rights'. This provision is one of the two bedrocks of public interest litigation in Uganda (Karugaba 2005). In interpreting the potential of this provision, Karugaba notes:

> By using the expression 'any person' instead of say 'an aggrieved person' it allows any individual or organisation to protect the rights of another even though that individual is not suffering the injury complained of. It effectively abolishes locus standi as we know it in the Common Law tradition. Whenever there is an injury caused by any act/omission contrary to the Constitution, any member of the public acting bona fide can bring an action for redress of such wrong. (ibid. 2005, p. 4)

So far Article 50(2) has not been used to enforce rights of LGBTI persons in Uganda but its potential is enormous in a country where LGBTI persons have been downtrodden and only a few (individuals or organisations) can stand up to claim their rights.

The other bedrock of public interest litigation is Article 137(3) of the Constitution. It states:

> A person who alleges that –
>
> (a) an Act of Parliament or any other law or anything in or done under the authority of any law; or
>
> (b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.

This provision gives the Constitutional Court powers of judicial review to examine actions of the legislature, the executive and even non-state actors using the Constitution as the benchmark; thus, laws and actions can be reviewed. In *Ismail Serugo v. Attorney General,*[59] Mulenga JSC emphasised that the right to present a constitutional petition was not vested only in the person who suffered the injury but also in any other person. It applies just like Article 50(2) except that it only applies to cases requiring constitutional interpretation.[60]

59 Constitutional Appeal No. 2 of 1998.

60 In *Attorney General v. Maj. Gen. David Tinyefuza*, Constitutional Appeal No. 1 of 1997, Wambuzi CJ (as he then was) stated 'In my view, jurisdiction of the Constitutional Court is limited in Article 137(1) of the Constitution. Put in a different way no other jurisdiction apart from interpretation of the Constitution is given. In these circumstances I would hold that unless the question before the Constitutional Court depends for its determination on the interpretation or construction of a provision of the Constitution, the Constitutional court has no jurisdiction'.

An Article 137(3) action affecting rights of LGBTI persons is pending in the Constitutional Court. The case of *Jjuuko Adrian v. Attorney General*[61] challenges the constitutionality of Section 15(6)(d) of the Equal Opportunities Commission Act. The provision restricts the commission from investigating 'any matter involving behaviour which is considered to be immoral and socially harmful, or unacceptable by the majority of the cultural and social communities in Uganda'.

The petitioner argues that Section 15(6)(d) contravenes Articles 20(1) (fundamental human rights are inherent and not given by the state); 21(1) (equality before the law); 21(2) (non-discrimination on the grounds of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability); 28(1) (right to a fair trial) and 36 (minorities have a right to participate in decision-making processes, and their views and interests shall be taken into account in the making of national plans and programmes) of the Ugandan Constitution. It prevents sexual and other minorities from accessing a commission which is supposed to promote equal opportunities for all, and is thus unconstitutional.

This case is still pending before the Constitutional Court and is thus subject to the *sub judice* rule.

At the same time, about three criminal cases against homosexual or perceived homosexual persons are pending in the Ugandan courts at the time (at the end of July 2011). These individuals have been charged under the unnatural offences provisions of the Penal Code. It is interesting to note that a constitutional petition action can develop out of a criminal case when a matter requiring constitutional interpretation appears.[62] Thus these cases if strategically studied can give rise to constitutional petitions challenging Section 145.

Activists are also still strategising on how to legally approach decriminalisation through courts of law. When the time is right, a case may be brought challenging the unnatural offences provisions of the Penal Code Act.

Opportunities and challenges in decriminalisation through courts of law in Uganda

The language in Article 21(1) of the Constitution, which recognises equal rights for all before and under the law, and in Article 21(2), which includes sex as one

61 Constitutional Petition No.1 of 2009.

62 Article 173(5) states that 'Where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a field court martial,' the court:

(a) may, if it is of the opinion that the question involves a substantial question of law; and

(b) shall, if any party to the proceedings requests it to do so, refer the question to the constitutional court for decision in accordance with clause (1) of this article.

of the grounds upon which discrimination is prohibited in Uganda, shows that homosexuals cannot be treated differently. All rights apply to them like the two cases cited above show. The right to privacy is so far an established right in this respect. This, added to the two precedents above, shows that a case can be successfully pursued challenging Section 145 using the non-discrimination and privacy approaches.

However, a number of other considerations and thus challenges as per the legal and social environment exist today. One of the key challenges standing in the way of such a case was the recent addition to the Constitution of a prohibition on same-sex marriages. Though limited to marriages, it is used by anti-gay activists to defend the constitutionality of Section 145 of the Penal Code Act. Article 21(5) of the Ugandan Constitution provides that nothing shall be taken as inconsistent with Article 21 which is allowed under any provision of the Constitution. Since Article 31(2) (a) allows discrimination against same-sex couples in marriages, it may be cited as an example of discrimination against homosexuals being allowed under the Constitution.

The Constitutional Court as seen above has jurisdiction to interpret the Constitution. Article 31(2) (a) however, appears to be very clear and specific. However, it may not be in line with the spirit and body of the Constitution, and so may require interpretation vis-à-vis the rest of the Constitution. I am not sure whether this can be legally done, but even if it were so, the rule of harmony may stand in the way of a favourable ruling. In *Attorney General v. David Tinyefuza [Constitutional Appeal No. 1 of 1997]* Supreme Court Judge Oder framed the rule as 'Another important principle governing interpretation of the constitution is that all provisions of the constitution concerning an issue should be considered all together. The constitution must be looked at as a whole'.

There is also the argument that parliament can legislate on any undesirable behaviour in a free and democratic society. That in Uganda, homosexual practices are undesirable and are thus criminalised. That it is not discrimination for it is not homosexual persons being treated differently but rather all those involved in same-sex conduct regardless of sexual orientation. The law applies to all without discrimination. This view is of course flawed for there is no doubt that the majority of those engaging in same-sex conduct are homosexuals by orientation.

In determining the constitutionality of a law, the Constitutional Court must interpret the Constitution and if the law is inconsistent with or in contravention of the Constitution, then that law is unconstitutional. The constitutionality of a law must be tested against the very words and spirit of the Constitution. Uganda's Constitution, though progressive and using language like 'all people', does not specifically mention sexual orientation as one of the protected grounds. Of course arguments have been made elsewhere

that sex includes sexual orientation[63] but this has not been interpreted as yet in Uganda.

Again, the precedents set in other countries on decriminalisation, including the United States[64] and most recently India,[65] are not binding precedents for Uganda, and even those of the European Court of Human Rights are only of persuasive value. No Ugandan precedent on the issue exists. As for the decisions of international bodies like the UN Human Rights Committee,[66] these bind only the particular states which were party to the decision: Uganda's sodomy laws have not been decided upon by any international body.

Finally, the reasoning that 'Ugandans are not ready' – popularised by the Botswana court's ruling in *Kanani v. The State,*[67] where Sections 164 and 167 of the Botswana Penal Code (dealing with unnatural offences and indecent practices between males) were upheld – may be of persuasive value to the court. Public opinion seems to be in favour of further criminalisation of homosexuality, and courts may prefer not to defer from popular opinion, though to its credit the Constitutional Court of Uganda has on various occasions made very independent opinions regardless of public opinion.[68]

Legal approach summary

All in all, the most open and direct route to decriminalisation is through courts of law. So far this route has been and still is used satisfactorily by

63 In *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), the Human Rights Committee found that for the purposes of article 26 of the ICCPR, the reference to 'sex' in Article 26 is to be taken as including sexual orientation.

64 *Lawrence v. Texas*, 539 U.S. 558 (2003).

65 *Naz Foundation v. Govt. of NCT of Delhi*, 160 Delhi Law Times 277.

66 For example, *Toonen v. Australia* (supra).

67 Criminal Trial No. F94/1995, judgement delivered on 22 March 2002. Sections 164 and 167 dealing with unnatural offences and indecent practices between males were upheld.

68 For example, when the Constitutional Court on 25 June 2004 handed down a judgment ruling that the Referendum (Political Systems) Act 2000 was unconstitutional, this provoked harsh criticism from the president directed specifically at the court and judiciary. In a televised speech delivered on Sunday 27 June 2004, President Museveni stated: 'A closer look at the implications of this judgment […] shows that what these judges are saying is absurd, doesn't make sense, reveals an absurdity so gross as to shock the general moral of common sense. […] In effect what this means, is that this court has usurped the power of the people […]. This court has also usurped the power of parliament, to amend the constitution. Government will not allow any institution even the court to usurp the power of the constitution in any way.' Following the president's statement, government supporters went to the streets to demonstrate against the judges. See International Bar Association (2007, pp. 21–2).

Ugandan activists. However, the decision to pursue direct decriminalisation of homosexuality through the courts of law is one that needs to be taken strategically, for a bad precedent may close the avenue for a long time. Factors like the composition of the Constitutional Court and ultimately the Supreme Court[69] come into play as do public opinion and independence of the judiciary.

Decriminalisation through the legislative branch

Apart from using the courts of law to approach decriminalisation, efforts have also been directed towards using parliament, which under the Constitution has the powers to make, amend or repeal laws.[70] Parliament can amend the Penal Code without a court ruling and thus could decriminalise homosexuality.

Participating in parliamentary committee proceedings

Activists have actively engaged with parliamentary committees handling bills affecting the rights of LGBTI persons in Uganda. The two most significant committees are the Legal and Parliamentary Affairs Committee and the Social Services Committee. The Legal and Parliamentary Affairs Committee was the Committee tasked with collecting people's views on the Anti-Homosexuality Bill 2009 and with making a report. On 10 May 2011, the Coalition presented a 14–page memorandum to the Committee on its position as regards the Bill.[71] They were joined by other stakeholders who included the UNAIDS country representative and various embassies. The Committee was informed of the unconstitutionality of the Bill, its effect on public health, and on democracy and good governance. The Committee members present were provided with copies of relevant documents concerning the topic. The Committee gave the impression that they were not aware of the key issues under discussion and were of the view that homosexuality is a learned behaviour and thus could be unlearned. They wanted evidence to prove the existence of a gay gene, and also stated that parliament can legislate on anything, a view that the Coalition humbly disagreed with, stating that parliament cannot legislate against the Constitution as such resulting legislation can be declared unconstitutional by the Constitutional Court in the light of its powers under Article 137 of the Constitution.

A member organisation of the Coalition, Uganda Health and Science Press Association (UHSPA) took the lead on engagement with the Social Services Committee over the HIV/AIDS Prevention and Control Bill. UHSPA,

69 Appeals from the Constitutional Court go to the Supreme Court of Uganda and it is very important to be aware of the views of persons who sit on both courts in order to make a strategic decision whether to litigate at a particular time.

70 Article 79(1) of the Constitution.

71 The Coalition's delegation was composed of four lawyers, one medical doctor and a leading LGBTI activist who identifies as lesbian.

members of the LGBTI community in Uganda and the Coalition presented a memorandum to the Committee containing their views about the Bill and more especially on how the Bill would affect LGBTI persons. International organisations like Human Rights Watch and Amnesty International, in consultation with the Coalition and the LGBTI community, also developed opinions which were sent to Parliament.

Distribution of literature to parliamentarians

The Coalition and the LGBTI community have on a number of occasions distributed literature concerning the Anti-Homosexuality Bill and various people's views which have been distributed through the clerk of parliament's office. They are intended to inform parliamentarians about the dangers of further criminalisation of homosexuality and the need for decriminalisation. Two editions of the media compilation entitled *Uganda's ANTI-HOMOSEXUALITY BILL: The Great Divide*[72] were developed and distributed to MPs through their pigeonholes.

Inviting MPs to academic debates and presentations about homosexuality

The Coalition and the LGBTI community have also invited MPs to attend presentations and speeches by prominent persons concerning decriminalisation. Prominent among these was the *baraza* (deliberation meeting) with the theme 'Human rights and sexual orientation: interrogating homophobia'.[73] The guest speaker was Professor Makau Mutua, Dean of Law at SUNY Buffalo University, who spoke about human rights, how they are claims that must be fought for, and why homophobia exists. MPs were invited but only a handful turned up. Outspoken opposition MP Odonga Otto infamously stated that he would kill his own son if he discovered that he was gay and that he supported the death penalty and wants to see it carried out for homosexuals. Another MP gaffed by referring to bisexuals as 'biosexuals'.

Even the proponent of the Bill, MP Bahati himself, has been engaged in debates about the Bill and criminalisation of homosexuality in general. At a public debate organised by the Human Rights and Peace Centre (HURIPEC) under the auspices of the Coalition on 18 November 2001, he was the main debater alongside Professor Sylvia Tamale and Rtd. Major Rubaramira Ruranga.

Petitions to parliament

Just like the anti-gay movement, the LGBTI community also uses petitions to lobby parliament. Religious leaders and organisations from all over Africa

72 This can be accessed at the coalition website: www.ugandans4rights.org (accessed 28 Jan. 2013).

73 Held on 10 February 2010 at Imperial Royale Hotel, Kampala.

petitioned parliament over the Anti-Homosexuality Bill, as did Ugandan organisations. These petitions called upon parliament not to further criminalise homosexuality by passing the Anti-Homosexuality Bill. In addition Avaaz, an international online lobby group, compiled a petition signed by over 450,000 people worldwide, which was delivered to parliament by the Coalition and other groups (BBC 2010). This opportunity was also used by activists to meet with the Speaker of parliament and also for a press conference.

Lobbying regional and international bodies and parliaments

The Coalition also met various persons connected to parliaments in other countries all over the world as well as inter-parliamentary organisations. These efforts were aimed at having these bodies engage with the Ugandan parliament on the bill and the need for decriminalisation.

Results from parliamentary efforts

Engaging parliament has largely been an effective way of moving towards decriminalisation. The Anti-Homosexuality Bill failed to pass through the eighth parliament, has not been considered by the ninth parliament and will not be considered until at least the next parliamentary session beginning in February 2013.

Decriminalisation through the executive branch

Though not a *de jure* law-making body, the Executive in Uganda *de facto* has much influence on the making of policy, introduction of bills, positions on bills, implementation and enforcement of laws, and also enforcing punishments. The presidential assent powers are also important in the law-making process. Therefore, the incremental approach also involves using the executive in order to move towards decriminalisation, as shown below.

Petitions to the President

The President's position on proposed policies and bills carries a lot of weight in Uganda, and most of the time he states his position clearly on particular bills. His approach to the Anti-Homosexuality Bill was to regard it as 'a foreign policy issue' (Olupot and Musoke 2010). The chairman of the ruling National Resistance Movement (NRM) party, he wields a lot of influence.

Petitions have been made to the president, especially from Western countries, about the Anti-Homosexuality Bill. They usually urge him not to support the further criminalisation of homosexuality, and also ask him to veto the bill if it is passed by parliament. At the same time, he has been petitioned by groups supporting the Bill and it is also important to note that his wife has at times been linked to the pro-Bill group.

The Coalition has been encouraging petitions to the president and it was largely the president's caution to NRM MPs during a retreat that ensured the Bill's delay in getting through parliament. The president told MPs that the Bill was a foreign policy issue and that they should therefore go slow on it. He revealed that both US Secretary of State Hillary Clinton and then British Prime Minister Gordon Brown had called him about the Bill (Olupot and Musoke 2010).

Policy advocacy

The coalition has also been engaged in advocacy for policies that are inclusive of LGBTI persons in Uganda. One area where progress has been made is in the health sector where LGBTI organisations are engaging with the process of making the Health Sector Strategic Plan III (HSSP III). UHSPA has been instrumental in this regard, working under the auspices of the Coalition. The Ministry of Health has largely been the most progressive of government agencies in reaching out to sexual minorities. The Most At Risk Populations Initiative (MARPI) is a Ministry of Health project reaching out to most at risk populations including sex workers and men who have sex with men. However, sexual minorities do not appear in most policy documents, and thus LGBTI activists have been taking the opportunity to develop HSSP III to advocate for inclusion of sexual minorities. Recently, a member of UHSPA was appointed to the Central Decision-making Committee of the Uganda AIDS Commission.[74]

Decriminalisation through combating homophobia and ignorance

One of the factors identified as contributing to discrimination against homosexuals is homophobia, largely fuelled by ignorance. Unfortunately, homophobia is so entrenched in Ugandan society that most people would rather remain ignorant about homosexuality. Attempts to discuss homosexuality with Ugandans are not usually successful. LGBTI activists have been denied space at conferences, denied airtime on TV and radio, and events aimed at fighting homophobia are not covered by the media.

Nevertheless the Coalition and LGBTI organisations have used any available opportunities to publicise their cause, including paying for newspaper space for coverage.

Messages aimed at promoting awareness about homosexuality and dispelling myths have been packaged and distributed in publications by the different organisations. However, incidents of people rejecting the materials are frequent: for example, during the distribution of the *Great Divide* publication,

74 See Uganda: Aids Commission Appointment a Boost for Gay Rights, www.wgnrr.org/news/uganda-aids-commission-appointment-boost-gay-rights (accessed 28 Jan. 2013)

many of the organisations and individuals approached turned the distributors away saying that they did not want materials concerning homosexuality.

Decriminalisation efforts through international systems

The Coalition has also made use of the international systems available to agitate for decriminalisation in Uganda. The country is part of the UN system, and party to a number of international conventions. What the international community thinks and does certainly affects Uganda, a factor that has prompted the Coalition to use the international systems in several ways.

Use of the UN systems to call for decriminalisation in Uganda

As a member state of the United Nations, Uganda is subject to many, if not all, UN systems and processes. The country has voluntarily ratified international human rights instruments, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and International Covenant on Civil and Political Rights (ICCPR). One of the provisions of the Bahati Bill includes nullifying international documents that 'promote' homosexuality. This has been brought to the attention of the relevant bodies, as have other parts of the Bahati Bill. The CEDAW Committee, for example, has called upon Uganda to decriminalise same-sex relations.[75] Freedom and Roam Uganda (FARUG), in collaboration with the International Gay and Lesbian Human Rights Commission (IGLHRC), had submitted a shadow report on Uganda to the Committee.

Uganda is also a member of the UN Human Rights Council (HRC) (until 2013). Activists from Uganda have on various occasions addressed the HRC on the human rights situation of LGBTI persons in Uganda and the laws criminalising homosexuality. The HRC operates a system of Universal Periodic Review (UPR) where all UN members are reviewed on their human rights record every four years. Uganda was reviewed in October 2011, to which

75 In para. 43 of the Concluding Observations of the Committee on the Elimination of Discrimination against Women on Uganda 2010, the Committee called on Uganda 'to decriminalise homosexual behaviour and to provide effective protection from violence and discrimination against women based on their sexual orientation and gender identity, in particular through the enactment of comprehensive anti-discrimination legislation that would include the prohibition of multiple forms of discrimination against women on all grounds, including on the grounds of sexual orientation and gender identity. To this end, the Committee urges the state party to oppose the private member's proposed Anti-Homosexuality Bill. The Committee also urges the state party to intensify its efforts to combat discrimination against women on account of their sexual orientation and gender identity, including by launching a sensitisation campaign aimed at the general public, as well as providing appropriate training to law enforcement officials and other relevant actors'., , UN Doc. CEDAW/C/UGA/CO/7.

LGBTI activists and the Coalition submitted a report. The Coalition has made a point of participating in every session of the Human Rights Council since the Coalition was established.

The Office of the UN High Commissioner for Human Rights (OHCHR), both the Uganda field office and the headquarters, has also been used in the UPR process and to call upon the government to decriminalise. The High Commissioner herself was in Uganda in 2010 and met LGBTI activists and senior officials in government. One of the key issues brought to her attention was the Anti-Homosexuality Bill. Her offices in Uganda and in Geneva have continued to follow up on what is happening in Uganda, and she also wrote an opinion piece in the *Daily Monitor* newspaper after prominent gay rights activist David Kato was murdered in January 2011.

The UN Special Rapporteur on Human Rights Defenders, Margaret Sekagya, is a Ugandan and former chairperson of the Uganda Human Rights Commission. Her office has also been used to call for decriminalisation and protection of LGBTI human rights activists in Uganda. Activists have also engaged with her in Geneva during HRC sessions and when she is in Uganda. She has made protection of the rights of LGBTI human rights defenders one of her key focal points and has reached out to the Coalition and LGBTI organisations on various occasions for information and updates.

Use of other governments

The Coalition has also lobbied other governments to call for decriminalisation and to prevent further criminalisation of homosexuality in Uganda. Some governments have openly opposed the Bahati Bill, including those of the USA, Sweden and the UK. Many countries condemned the murder of David Kato.

This aspect of the Coalition's work is crucial and has largely been successful as governments usually listen to each other. It runs the risk, however, of the campaign being labelled 'Western' or 'neo-colonialist'. The other downside of this approach has been different countries' 'aid conditionality statements', especially those of Sweden and the UK. These statements have the unfortunate impact of being labelled racist, neo-colonial, and Western, and of causing the LGBTI community to be the most blamed for the cut in aid, leading to it being further ostracised.

Use of international and human rights organisations

Various international human rights organisations have joined the struggle against the Bahati Bill and homophobia, and for decriminalisation. Human Rights Watch (2009), endorsed by Amnesty International, has released reports and written position statements about the Anti-Homosexuality Bill, and both have petitioned parliament. And, as already mentioned above, the online

organisation Avaaz collected 450,000 signatures from all over the world in protest against the Bill and delivered the petition to parliament.[76]

Use of the international media

The international media has also been used in the campaign against the Bill and against criminalisation of homosexuality. Many articles have been written in the press about Uganda and also many TV features as well as internet discussions and articles. The Coalition and activists have given interviews on BBC, CNN and Al Jazeera, among others.

Conclusion

Experiences elsewhere show that homosexuality can be decriminalised. The difference may be in how long it takes. Many African countries which are Commonwealth states do not even discuss the possibility of decriminalisation. It is thus a great achievement that decriminalisation is being debated in Uganda.

Despite all the challenges documented above, it is plain to see that Uganda has moved a long way through its incremental approach to decriminalisation. Activists in Uganda are optimistic that decriminalisation will finally be achieved. However, the future holds more challenges. It is not clear which of the approaches will ultimately deliver the goal, but what is clear is that each of the approaches above will have made a contribution towards decriminalisation. It may take many more years, but that is not unusual, for in most Commonwealth countries that have decriminalised, the struggle was long and a culmination of various processes.

Each of the above approaches plays its own role and the outcome of them all combined is difficult to ignore. Activists in Uganda have been very brave and continue to be. It is interesting to observe that something done by the British authorities by the stroke of a pen at the advent of colonialism, now requires gargantuan efforts to get rid of – indeed, this has been one of the longest-lasting legacies of British colonialism in the Commonwealth countries.

Bibliography

Abrams, K. and S. Lively (1995) *The Pink Swastika: Homosexuality in the Nazi Party* (Keizer, OR: Founders Publishing Corporation).

Amory, D. P. (1997) '"Homosexuality" in Africa: issues and debates', *Journal of Opinion* XXV (1), pp. 5–10.

Ahlberg, B. M. (1994) 'Is there a distinct African sexuality? A critical response to Caldwell', *Africa* 64 (2), pp. 220–41.

BBC News (2010), 'Uganda gay bill critics deliver online petition', 1 Mar.,

76 See 'Uganda gay bill critics deliver online petition', http://news.bbc.co.uk/2/hi/africa/8542341.stm (accessed 28 Jan. 2013).

available at http://news.bbc.co.uk/2/hi/africa/8542341.stm (accessed 28 Jan. 2013).
Coke, E., (1669) *Third Part of the Institutes of the Laws of England*, 4th edn. (London: A. Crooke et al.), Cap. X, at p. 58.
Driberg, J. (1923) *The Lango* (London: Thorner Coryndon).
Edel, M.M. (1996) *The Chiga of Western Uganda*, 2nd edn. (New Brunswick, NJ: Transaction Publishers).
Faupel, J.F. (1984) *African Holocaust: The story of the Uganda Martyrs* (Kampala: St. Paul's Publications).
Human Rights Watch (2008) *This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism* (New York: Human Rights Watch).
— (2009) 'Uganda: 'Anti-Homosexuality' Bill threatens liberties and human rights defenders', 15 Oct., available at www.hrw.org/news/2009/10/15/uganda-anti-homosexuality-bill-threatens-liberties-and-human-rights-defenders (accessed 28 Jan. 2013).
International Bar Association (2007) *Judicial Independence Undermined: A Report on Uganda* (London: International Bar Association).
Jjuuko, A. (2008) *Aren't These Emperors Naked? Revealing the Nexus Between Culture, and Human Rights over the Issue of Homosexuality in Uganda*, LLB dissertation, Makerere University, Uganda.
— (2011) 'The implications of criminalisation of homosexuality to forced migration; Uganda's Anti Homosexuality Bill 2009 in the spotlight', paper presented at the 13th IASFM Conference, 3–6 July, hosted by Refugee Law Project, Commonwealth Resort Hotel, Munyonyo, Kampala, Uganda.
Kaggwa, A. (1971) *Bassekabaka ba Buganda* [*The Kings of Buganda*] (Nairobi: East African Publishing House).
Karugaba, P. (2005) 'Public interest litigation in Uganda, practice and procedure; shipwrecks and seamarks', paper presented at the Judicial Symposium On Environmental Law For The Judges Of The Supreme Court And Court Of Appeal, Imperial Botanical Beach Hotel Entebbe, 11–13 Sep.
Lawrance, J. (1957) *The Iteso: Fifty Years of Change in a Nilo-Hamitic Tribe of Uganda* (Oxford: Oxford University Press).
Lively, S. (2010) 'The death penalty in Uganda', Abiding Truth Ministries, 11 Mar., available at www.defendthefamily.com/pfrc/newsarchives.php?id=4480922 (accessed 28 Jan. 2013).
Murray, S.O. and W. Roscoe (1998) 'Preface: "All very confusing"', in S.O. Murray and W. Roscoe (eds.), *Boy-Wives and Female Husbands: Studies of African Homosexualities* (New York: St. Martin's Press), pp. xi-xxii.
Mushanga, M. (1973) 'The Nkole of Southwestern Uganda', in A. Molnos (ed.), *Cultural Sources Materials for Population Planning in East Africa: Beliefs and Practices* (Nairobi: East African Publishing House).

Mayamba, J. (2011) 'Gay activist murderer sentenced', *Daily Monitor*, 10 Nov.

Nanyonga-Tamusuza, S. (2005) *Baakisimba: Gender in the Music and Dance of the Baganda People of Uganda* (New York: Routledge).

Needham, R. (1973) 'Right and left in Nyoro symbolic classification' in R. Needham (ed.), *Right and Left: Essays on Dual Classification* (Chicago: University of Chicago Press).

Olupot, M. and C. Musoke (2010) 'Museveni warns NRM on Homosexuality Bill', *The New Vision*, 12 Jan.

Read, J. S. (1963) 'Criminal Law in Africa of today and tomorrow', *Journal of African Law* 17 (1) (Spring), pp. 5–17.

Southwold, M. (1973) 'The Baganda of Central Uganda', in A. Molnos (ed.), *Cultural Source Materials for Population Planning in East Africa: Beliefs and Practices* (Nairobi: East African Publishing House).

Tamale, S. (2007) *Homosexuality: Perspectives From Uganda* (Uganda: Sexual Minorities Uganda (SMUG)).

— (2003) 'Out of the closet: unveiling sexuality discourses in Uganda', *Feminist Africa* 2, p. 29.

Walkowitz, J.R. (1992) *City of Dreadful Delight: Narratives of Sexual Danger in Late Victorian London* (Chicago: The University of Chicago Press).

15

Religious institutions and actors and religious attitudes to homosexual rights: South Africa and Uganda

Kevin Ward

Introduction: religion and law in South Africa and Uganda

The interplay between religion and law is a fascinating and intricate one. In Europe, the law has often been understood as springing out of a Christian culture and ethos. Christians have often sought to influence legislators in ways which furthered the creation of a society based on Christian principles. On the other hand, Christianity may be perceived by some Christians to be 'antinomian',[1] not in the sense that Christianity works against the establishment of a law-abiding society, but rather that religion stands over against the law in offering 'grace' and 'forgiveness', and the judgement of God rather than of civil institutions or social norms. Legal judgements may also emphasise this distinction, both in asserting the boundaries which separate religion and law, and the secularity of the law. The law cannot uphold the views of one particular religious institution, even if 'established', at the expense of other Christian churches, other faiths, or secular ethical outlooks. Christian churches have historically supported the civil power in its establishment of legislation to prohibit same-sex relations and to punish offenders. Yet Christian churches and individuals have also, in some instances, actively advocated for the decriminalisation of same-sex activity, and have witnessed against the homophobic attitudes of society.

This chapter focuses specifically on these issues in Africa by comparing two Commonwealth countries whose recent history has, in the area of gay and lesbian rights, appeared to be going in the opposite direction: South Africa

1 As well as literally meaning 'against the law', antinomianism has a specifically theological meaning. It describes an unorthodox Christian view which has, from time to time and in different guises, asserted that born-again Christians are no longer bound to obey the law. They are 'above the law' in the sense that, filled with the Holy Spirit, they are incapable of acting immorally. Most Christian traditions are strongly opposed to this point of view.

and Uganda. Both are strongly Christian countries in which a large majority of the population describes itself as Christian.[2] Each has important religious minorities, Islam being the most important.[3] In both South Africa and Uganda, African Traditional Religions (ATRs) still play an important role in nurturing and sustaining underlying attitudes, sensibilities and mentalities on human sociability, including sexuality.[4] The chapter will argue that historically in African societies neither defined 'gay' identities nor homophobia were major factors (Epprecht 2008). But if both homophobia and a self-consciously gay community are, arguably, products of modernity and globalisation, same-sex relationships certainly are not. There is evidence of a rich variety of homosexualities in Africa's history, and varying levels of acceptance and esteem for same-sex relations. This chapter will argue that whereas South Africa has, since the end of apartheid, achieved a remarkable degree of legal acceptance for Lesbian, Gay, Bisexual and Transgender (LGBT) human rights, nevertheless, South Africa has evinced a longer and deeper antipathy against homosexuals than Uganda. Moreover, social attitudes in South Africa lag behind the progressive, liberal legal framework which has been created since 1994. Homosexual rights were, so to speak, dictated from above, through the protection afforded by the 1996 Constitution. Popular opinion, shaped both by shared values about what it means to be 'African' and by membership of ethically conservative religious communities, is less convinced about the benefits of a gay-friendly state.

The situation in Uganda is somewhat the reverse: a government and a legal framework critical of and hostile to gay people, and, historically, a relatively tolerant society. Uganda has recently been at the forefront of legislative proposals which aim to penalise homosexuality further and exacerbate its punishment. The murder of the gay human rights activist David Kato on 27 January 2011 has widely been interpreted as a predictable outcome of the homophobic

2 The *World Christian Encylopedia*, in its figures for 2000, puts the percentage of Christians in South Africa as 83.1%, and in Uganda as 88.3% (the figures given for 1900 are 40.7% for South Africa and 6.8% for Uganda, so in both countries the growth of Christianity during the 20th century has been substantial). The *Enyclopedia* figures are compiled through an evaluation of government census and church membership statistics (Barrett et al. 2001, vol. I pp. 675 (South Africa) and 762 (Uganda)).

3 The respective *World Christian Encylopedia* figures in 2000 for Muslims in South Africa are 2.4% and Uganda 5.2%. However, this latter figure is rather at odds with government census figures, which consistently put Muslims at around 10% –12.1% in the 2002 census.

4 African indigenous religions do not operate as 'religions' in ways which can be captured statistically They are not, in East Africa, considered to be *dini* (an Arabic loan word for religion) as are Islam and Christianity, with defined criteria of membership. As a result, statistical material tends to ignore or undervalue the importance played by African religion, which permeates and informs ethnic identities and culture norms generally.

atmosphere which has characterised the debates over this proposed legislation. The ethos in present-day Uganda is deeply suspicious of gay and lesbian people and wishes to eliminate them from society. Politicians, religious leaders and the press, as leaders of public opinion, carry a major responsibility for this state of affairs. In his 2011 BBC3 documentary, Scott Mills had no difficulty in finding ordinary, young, educated English-speaking men and women in Kampala who were forthright in their strong hostility towards gay people (BBC 2011). Nevertheless, as this chapter is concerned to demonstrate, the fear and hatred of gay people are fairly recent phenomena in Uganda, where homophobia is both more recent and 'shallower' than in South Africa.

African Traditional Religion

A word, first of all, on what is often called African Traditional Religion (ATR) – though the word 'traditional' has to be used with caution. This is not a religious tradition which can simply be described as orientated towards the past, nor should it be understood as an unchanging essentialism. Moreover, it would be wrong to outline a single African 'religion' which can be applied to all parts of Africa. Religious and ethnic identity overlap, ethnic identity is porous and malleable, religious movements transcend specific ethnicities. Notwithstanding the success of Christianity and Islam, ATR persists throughout Africa, forming the underlying cultural environment within which Africans, whether Christian or Muslim, view the world and make moral decisions. It would be incorrect to see this form of religion as something distinct from society or culture, a 'sacred' sphere in contrast to the 'secular'. In East Africa, *dini* (an Arabic loan word) is widely used to describe Islam and Christianity, but it was not, until recently, used to describe the traditional religions. The first time I encountered the use of the word *dini* to characterise traditional religion was in McIntosh (2009). Here, the author argues that *dini ya kienyeji* (indigenous religion) has become a common description over recent years of a Giriama religion, alongside the dominant Swahili Islam of the Kenya coast. In Luganda, the language of the Buganda, the word *empisa* – the norms of human conduct – had religious, ethical and legal implications. Kiganda religion reinforced and guided Baganda as they attempted to fulfil the norms of society. Equally, law was not expressed in statute or even specific cases, but in the general mores of the community (Kagwa 1993).[5]

Norms of marriage and procreation in Africa

The establishment of norms of behaviour in relation to marriage was particularly important for Africans. African society has been preoccupied with issues of

5 Sir Apolo Kagwa (1884–1927) was one of the dominant figures in Buganda's early colonial history, the Katikkiro, Prime Minister of Buganda within the British protectorate of Uganda. His writing on culture, *Empisa za Buganda,* dates to the early years of the 20th century.

survival, the fragility of populations, issues of procreation, the ordering of marriage, and the enhancement of fertility, through the establishment of family, clan and lineage alliances (Iliffe 2007). The 'self' was affirmed and achieved permanence through the production of children. An individual lived with reference to the 'ancestors' and the expectation of descendants. Much African religion is concerned with the active role of those who have died, their intervention in the community of the living and the proper respect accorded to them. All were expected to marry; the community would act to assist those who, for whatever reason, were unable or unwilling to procreate (Kisembo et al. 1998).

Sexual activity between people of the same gender was of a different order from the duty of marriage and procreation. But, in societies where gender roles were clearly demarcated, and where sociability was often gender specific, close relations between people of the same gender were expected and esteemed (Coquery-Vidrovitch 1997). There was little suspicion of homoeroticism. Same-gender relations might involve peers and, particularly in acephalous and age-grade societies, played a strong role in socialising the young. In some more hierarchical societies (Buganda, Rwanda, Azande are often cited) then close relations between chiefs/leaders and young (non-related) dependants/servants were expected (Murray 2000). Same-sex activity might be encouraged as a prelude to the assumption of heterosexual activity and the duties of procreation and continuation of the clan. If a culture of silence prevailed about the sexual content of such relations, that applied equally to heterosexual activities (Mudavhanu 2010). What seems clear is that same-sex activities did not generally invoke criminal penalties. Same-sex activity operated within the realm of friendship and play rather than of duty and obligation, where sanctions for failure to conform to the demands of society were more likely to be invoked. The reversal of gender roles also had a religious value in many cults of possession, where a man became the 'spouse' of the divinity or spirit (see, for example, Fadiman 1993).

African Christian understandings of marriage and homosexuality

These norms have been challenged both by religious institutions and by African nationalism. The latter has sometimes expressed its opposition to 'homosexuality' as a Western import, one to be rejected along with other aspects of the colonial past. In West Africa, in particular, the sense of the slave trade as an emasculation of Africans, has sometimes been carried over into denunciations of homosexuality as a new assault on African masculinity (a theme often addressed in 'Balfour's Beefs' in the monthly political magazine *New African* in the 1990s).

In South Africa, homosexual practice was for a long time associated with white society, to be rejected along with apartheid and its dehumanising practices.

One of these was the compound system in the mines, and the institution of 'boy-wives' by which older men took on roles as protector of new mine workers in return for services, both material and sexual. That system has died along with the legal and economic system which sustained it (Moodie et al. 1998).

The Christian churches have presented an even greater challenge to traditional African sexuality, in particular the tolerance of same-sex activity. Christianity challenged polygamy; the idea that a marriage is only completed, indeed only starts to exist, once children have been produced; practices of arranged marriage and the *lobola* bride price (Blum 1989). In general, Christianity claimed to stand for more equality between man and wife, and on the claims of affection/love rather than family and clan considerations. Same-sex relations were seen to undermine all these values. On the other hand, Christianity has often encouraged forces which make same-sex activity more rather than less likely. Early marriage has been discouraged in the interests of education, often in single-sex boarding schools. The strategic alliance between Christians and some aspects of traditional culture, by which all the traditional stages of marriage should be completed before marriage in church can be performed, has often discouraged young people from going through a long, costly and tedious process before they can enjoy relations. This has led to the loosening of traditional practices without actually establishing widespread Christian marriage (Ward 2002). In South Africa, particularly in Uganda, despite the adhesion of the majority to Christianity, Church marriage has not become anything like universal (Taylor 1958).

In Africa, Christianity has been a powerful vector of modernity, and one consequence of this has been a general emphasis on individualistic choice and the importance of the emotions. This has certainly been a contributory factor to the rise in Africa of gay sensibilities and a self-consciously gay community which rejects the prescriptive nature of marriage and procreation as the sole way of achieving human fulfilment.

The Roman-Dutch law tradition and the Dutch Reformed Churches of South Africa

In South Africa, Christianity has shaped the law and customs of society very profoundly, but this has not necessarily penetrated deeply into the life of African societies (Meierhenrich 2008). The anti-sodomy articles of the Roman-Dutch legal codes were invoked in the Cape at least from the 18th century. Moral panics emanating from Amsterdam penetrated into the Cape. The formative influence of the official church, the Dutch Reformed Church, helped to shape these campaigns, not least the necessity of extracting confessions from the suspected victims for their transgressive behaviour. One early 18th-century court case in Cape Town concerned a white man, Jiykhaart Jacobsz, and a Claas Blank, a Khoi – a member of the indigenous community of the

western Cape, but 'Coloured' in the (much later) apartheid racial classificatory system. Both were imprisoned on Robben Island, where they became lovers. They were accused of sodomy, tried in the civil courts, found guilty on their own admission and executed. The case has become a *locus classicus* of racial and sexual stereotyping in South Africa, not least through the research of Jack Lewis, and the reworking of this in *Proteus* (1994), directed by the Canadian John Greyson.

The Dutch Reformed Church (and other Afrikaner churches in the Reformed tradition) are sometimes seen as particularly homophobic, reflecting the moral conservatism of the Afrikaner community (du Pisani 2001). But other churches were, historically, just as condemnatory of same-sex relations. The importance of the Dutch Reformed Churches (DRC) lies in their strategic position at the heart of the National Party regime after 1948. The ideology of apartheid was advanced by the DRCs as a Christian solution to the 'problem of race'. In more general ways, the Afrikaner churches shaped the moral universe of all South Africans, whether white or black, long before the formal inauguration of apartheid in 1948 by the National Party. African communities may not have felt the direct impact of Afrikaner Christian morality or of Roman Dutch Law to any great extent until the 20th century, but such communities were increasingly drawn into the moral and legal framework of the white South African state.

South Africa was a racially segregated state long before the introduction of apartheid. But the implementation of apartheid exacerbated the repressive quality of the state, not least how legislation intruded more into the lives of black people, both in the rural slums of the 'Bantu homelands 'and in the urban areas, where black people were only supposed to be temporary residents. In many ways, 'traditional' cultural values flourished, and were encouraged by a state whose policies were designed to immunise Africans from western values.

Despite the enormously disruptive consequences of apartheid in terms of the stability and viability of family life, the apartheid regime did not claim to control African marriage or sexuality. Insofar as the apartheid regime tried to repress same-sex activity, it directed its invective mainly against gay white groups, seen as 'liberals' and 'Communists' intent on subverting the political order. The control of African homosexuality was not attempted. Like other aspects of African sexuality, the government did not officially intervene, as long as the sexual practices did not cross the race divide. This further encouraged the idea that 'homosexuality' was an issue primarily for the white community, that it was 'unAfrican', indeed an assault on African masculinity (Pattman 2001; Roux 2001).

Since the end of apartheid in 1994, South Africa has become, in its legal structures, one of the most gay-friendly places in Africa, indeed in the world (Tucker 2009). Gay rights have been pursued as an extension of the struggle against apartheid. Archbishop Desmond Tutu, in particular, has been a vocal supporter of gay rights:

> If the church, after the victory over apartheid, is looking for a worthy moral crusade, then this is it: the fight against homophobia and heterosexism. I pray that we will engage in it with the same dedication and fervour which we showed against the injustice of racism. (1997, p. x)

The DRCs have, through a number of official statements, repented of their participation in the creation of apartheid and their continued support for it. The churches are now eager to advance progressive causes, even if these do not necessarily reflect the more conservative views of their members. This is true both in the DRC itself, now officially open without racial discrimination, and in the Uniting Reformed Church (a union of the former Coloured, Black and Indian Reformed churches).[6] In this position, these churches are not very different from the Anglican Church, where (despite Tutu) opinion is divided about support for gay causes, and definitely uneasy about the implications of the legislation allowing for same-sex marriage (see the website of Anglican Mainstream South Africa (2013)). Since 1994, South Africa has seen a rapid growth in more conservative Pentecostal churches. They are self-consciously apolitical, in contrast to what they see as the excessive political role played by the mainstream churches in support or opposition to the apartheid regime. This charismatic Christianity has been widely attractive to all sections of South African society. For some white people embracing Pentecostalism provides a refuge from a society in which they see themselves as marginalised. There is also a growing number of black charismatic churches (worship in South Africa is still, on the whole, racially divided). Increasingly, this conservative tradition has developed a critique of what it sees as the excessively secular orientation of the ANC. The problems of urban violence should be tackled by a stress on traditional ethical values, a reintroduction of capital punishment, more censorship of pornography and a reassertion of family values (Balcolm 2004; 2008). Gay rights do not fit into this agenda, and some would like to see a reversal of the 1996 constitutional guarantee of gay rights, and are certainly opposed to the provision of same-sex marriage. But however heart-felt these anxieties, and however forcefully they are advanced as based on universally accepted traditional Christian standards, these campaigns do find difficulty in mobilising support. As seen in successive elections, the strength of the conservative religious right politically is minimal. The strong respect for the human rights provisions of the Constitution and the non-racial democratic society being created means that the traditional Christian arguments about morality and family values are, by and large, discussed with civility. An example of this can be seen in the South African chapter of Anglican Mainstream, which

6 The United Reformed Church has accepted the Belhar Confession of 1984 as its confession of faith. Belhar denounced apartheid as a theological aberration. It is hoped that the (formerly white) DRC might eventually accept Belhar and become part of a United Reformed Church of South Africa.

tends to be more moderate in its articulation of issues of homosexuality than is the British Anglican Mainstream (2013), based in Oxford.

Religion and Ugandan society

In Uganda, by contrast, opposition to homosexuality has recently been shrill in the extreme. However, it is my contention that homophobia in Uganda is more recent and less firmly grounded than in South Africa. During the colonial period, aspects of the English legal system were introduced into Uganda, and at independence the legal system stayed in place. Uganda achieved independence in 1962, after the Wolfenden report in Britain, but before the 1967 legislation in that country which decriminalised homosexual practice between consenting adults. This has meant that pre-1962 legislation, including the body of law concerning sexual relations and marriage, remained on the statute book in Uganda. However, I am unsure about whether laws relating to homosexuality were ever invoked in Uganda or, if they were, whether they were applied only to the small white population in the country (Uganda was never a settler country and therefore, unlike Kenya, Zimbabwe and South Africa, did not have a substantial permanent white population).

A marriage ordinance modelled on British practice was introduced into Uganda, but rarely used. The colonial administration saw it as applying largely to whites and to 'educated' black people who wished to make use of its provisions. Monogamy was never legally enforceable in colonial Uganda, nor is it to this day. Rather, sexual conduct generally, and marriage in particular, was controlled by 'tribal' custom, and did not come before British courts unless custodial sentences were required, or property issues involving individual tenure were involved. The colonial government recognised registered clergy as registrars of marriage, as in England, but only a small number of church members were actually married in the church. By and large, for the population as a whole, customary law governed these issues. This was recognised, even encouraged, by the colonial state. In these circumstances offences under homosexuality laws rarely if ever came before the courts. Moreover as Uganda did not have the kind of mining compound system of South Africa, Africans themselves did not have recourse to British courts to redress grievances arising from failed same-gender relations, nor did these kind of activities come under the gaze of white supervisors, in marked contrast to the use of the courts to deal with same-sex activities in the mines of South Africa and Southern Rhodesia, as described by Epprecht (2004). The peasant-orientated economy of colonial Uganda kept same-sex activity away from the colonial gaze. Although research needs to be done in this area, it appears that this situation continued into the post-independence era. One of the criticisms of the police in the contemporary debates is their failure to make use of existing legislation with any vigour or effectiveness.

Religion plays a more central role in Uganda's life than in South Africa's. The two major Christian churches are the Church of Uganda (COU – Anglican) and the Roman Catholic Church (RCC), each claiming about 40 per cent of the population. Muslims account for about 10 per cent. The Anglican Church of Uganda has the highest proportion of members in the world (bigger than England or Nigeria as a proportion of the total population) (Ward 2006). Although, as in South Africa, Pentecostal churches are expanding rapidly, they tend to be under-reported in official censuses, largely because of the tenacity of the idea that all Ugandans are either Protestant (in the Ugandan context this means 'Anglican'), Catholic or Muslim (Ward 2005). Even people who attend the 'newer' Pentecostal churches tend to record themselves as belonging to one of the main denominations. The Anglican Church was, in colonial Uganda, considered to be a kind of quasi-establishment, and it still retains some of the aura – all the presidents of Uganda since 1962 have been Anglican, apart from the Muslim Idi Amin. There has never been a Roman Catholic president, despite the numerical strength of the RC Church.

The Ugandan churches have increasingly become unofficial legislators of public opinion – during the collapse of the state into violence during the Amin and Obote II days, they remained an important bulwark of opposition, one of the few effective institutional curbs on governmental despotism. The churches were regarded as having an integrity which could not be expected from the state. In the late colonial period, the church was very active in promoting the rights of women, and particularly arguing for a stricter enforceable marriage code (still not achieved), protection for first wives in polygamous households, safeguards for widows in relation to the inheritance of property and a general raising of women's rights (Brown 1988; Tripp 2000). Despite these campaigns and some considerable achievements in the promotion of women's equality, by and large the churches have failed to achieve the results they were seeking in purely legislative terms.

The 'gay agenda' and the Anti-Homosexuality Bill in Uganda

Issues of homosexuality were hardly articulated in Uganda until the 1990s. They were not seen as moral issues which needed to be preached about (unlike heterosexual relations) nor as an arena where the state should become involved. It was only in 1997 that homosexuality began to be discussed, in preparation for the 1998 Lambeth Conference of bishops. The subsequent controversies within the worldwide Anglican communion about homosexuality have ensured that homosexuality became for the first time a Ugandan issue. The COU has appealed to its evangelical tradition, and specifically the tradition of the East African Revival (born in Uganda in the 1920s), as a rationale for opposing gay rights: homosexual practice is a sin (the Bible is invoked to prove this). But homosexuals, like all sinners, are capable of repentance and forgiveness (Ward

and Wild-Wood 2010). This attitude is not substantially different for the RCC, but, unlike the Anglicans, Ugandan Catholics have tended to display less moral outrage, nor have they spent so much energy in fighting gay inclusion. Both Churches celebrate Martyrs Day every year, when some 200 of the first generation of young Christians were put to death in 1886. The trigger for this was, notoriously, the demands by Kabaka Mwanga (a young man himself of about 20 years) that his favourite page (a boy in his early teens) should be available for his sexual pleasure (Faupel 1962). When this was refused, a purge of Christians at the court occurred (Hoad 2005, chapter 1). The vast majority of those who died did so not because they refused sexual favours, but because they would not deny their Christian allegiance. For Mwanga, fears that the Christians were about to invite colonial powers to invade the country were more important in provoking the massacre than homosexuality as such. In the 1950s and 1960s Mwanga was applauded for his defence of Buganda's independence. In the Amin period, the brave resistance of the early Christians against tyranny was celebrated on Martyrs Day (Ward 2002).

The Anglican preoccupation with the gay issue since 1997 has generated a realignment in international alliances within the COU. Before 1997, relations with the American Episcopal Church were sporadic but friendly. Since that date, the COU has aligned itself strongly with the dissidents who have opposed gay inclusion within the Episcopal Church. The first vice-chancellor of the Uganda Christian University from 2000–10 was recruited from the ranks of the American traditionalists to establish an Anglican University. The archbishop of Uganda's international advisor, the gatekeeper for relations with other churches, is a traditionalist American priest, a woman (the COU ordained women some years before this happened in the Church of England). In protest against the consecration of Gene Robinson as a bishop, the archbishop of Uganda has broken relations with the Episcopal Church, and has forbidden diocesan bishops from receiving money from tainted sources, even for development and HIV/AIDS programmes. He argues that such 'bitter money' brings no real benefit to a society, since it embodies the wrong values (Hassett 2007). The COU has conducted a campaign of abuse against a retired bishop, Christopher Senyonjo, for his support of gay people within the church in Uganda. Bishop Senyonjo was present at the funeral of David Kato. At this service the officiating lay reader took the opportunity to denounce gay people and to threaten them with hell, until he was shouted down by the gay and lesbian friends of the deceased. Senyonjo has criticised the recently established (and previously almost unknown) newspaper *Rolling Stone* for its intemperate campaign of 'outing' the hundred most 'prominent' gays in Uganda with the banner 'Hang Them!': Senyonjo himself was included, though no one has ever suggested that he is gay (Rice 2010).

Some years earlier, the Ugandan bishops had judged homosexuality to be 'unbiblical and inhuman'. The church should not countenance the establishment

of groups where people are encouraged to see homosexuality as an acceptable life choice. In particular church leaders are adamant that homosexual practice is not, nor can be, a 'human right'. They emphasise that 'sexual orientation' is not mentioned in the Universal Declaration of Human Rights (Tamale 2007).

The COU has always had a strain of ethical rigorism within its teaching and practice. Monogamy and a church wedding are considered essential to be a full communicant member. For many years Anglican couples were prevented from bringing their children for baptism unless they were formally married in church. The relaxation of those rules in the 1970s provoked criticism from groups who wished to retain strict standards. There has been a tension between those who stress the role of the church as an institution with broad support and integrated into the community, and those who see the church as a 'saved' community, whose way of life should be distinguished from that of the wider society. The Balokole, the 'saved people', adherents of the East African Revival have been particularly important in the life of the COU, standing for an uncompromising sexual morality and strict moral code generally. The Balokole have always been a minority in the church, but their influence has been crucial in establishing the doctrinal and moral standards of the church, accepted by the non-Balokole majority as the norm, even for those who fail to live up to those standards. The COU embodies this tension between a 'folk church' and a gathered community (Ward 1995). The majority of the bishops have come from this Revivalist background. Archbishop Henry Orombi has pointed to the values of the East African Revival as justification for the COU's rejection of homosexual practice. The COU alliance with the American dissidents within the Episcopal Church emerged in 1997 when the Americans organised a series of meetings throughout the world for Anglican bishops who were about to assemble for the 1998 Lambeth Conference. The Americans alerted the bishops in the 'Global South' to the likelihood that proposals to modify traditional condemnation of homosexuality would be tabled at Lambeth, and that there was a need for concerted action to assert biblical values. These fears found expression in the Kuala Lumpur Declaration of Anglican leaders from the south (Hassett 2007). It was the beginning of strong ties between the American dissidents, some of whom would eventually leave the Episcopal Church to form their own 'Anglican Church of North America' (ACNA), with support from African and South Asian bishops. In the decade between the 1998 and the 2008 Lambeth Conferences, there developed a rhetoric that this new strategic alliance was breaking the mould of the old British colonial model of the Anglican Communion. Moreover in this alliance, the COU saw itself as the senior partner, helping a fledgling, needy and oppressed American Anglican church to survive (Sadgrove et al. 2010).

Pentecostals, the rising force in Uganda's religious scene, are even more aggressive in their denunciation of homosexuality. Their links with the American conservative scene are also stronger than the Anglicans. The strategic

alliances between Anglicans and Pentecostals with conservative religious groups in the USA has given the debates in Uganda the appearance of an extension of the North American 'culture wars' by other means. It was the visit of members of the Washington conservative lobby group Focus on the Family, invited by Pentecostal pastors, which provoked the current histrionic debate in Uganda (Kapya 2009). A climate of moral panic has been created about an international 'gay agenda'. In this scenario rich Western homosexuals are intent on subverting Uganda's youth by offers of money and threats of violence. This perspective on gay issues has come to dominate the media. Rather like moral panics against witches, or against foreigners spreading the HIV virus, it has become an urban myth – everyone has stories of someone else's child having been offered dollars for sex with an older boy, or getting beaten up for refusing. I visited the (Anglican) Uganda Christian University in August 2010, where the gay conspiracy was a common topic of conversation among staff and students. The story is linked to, and reinforces, the campaign of women's groups to tackle the problems of sexual harassment and child abuse, or 'defilement' as it is generally called in Uganda (Tripp and Kweiga 2002; ANPPCAN).

The popular view is that homosexuality has become intimately connected with paedophilia. In this climate David Bahati, a government party MP from Kigezi in south-west Uganda, introduced his Anti-Homosexuality Bill (The Amnesty International website gives useful information, cf. especially Amnesty International 2010). Bahati has an Anglican and Revivalist background, but has strong links with Kampala Pentecostal churches and also with American conservative evangelicals. The Bahati Bill, as well as introducing capital punishment for certain offences, and thus greatly exceeding any penalties in the existing British laws, also vastly increases the scope of 'homosexual acts' to include even 'touching'. This would mean that evidence of anal intercourse would no longer be the criterion for bringing a criminal charge. The bill also makes failure to report such an incident (for example by parents, siblings, friends or counsellors) a criminal offence, subject to imprisonment. The Catholic Church was quick to condemn the proposed legislation, not least for its invasion of the sanctity of the confidential pastoral relationship. The Anglican archbishop of Uganda also spoke of his disquiet (Uganda Church Association 2010). He opposed the death penalty and insisted, in good Revivalist language, on the need to bring the offender to a sense of his/her sinfulness through the offer of God's forgiveness after repentance. Nevertheless, he and other church leaders have generally welcomed the fact that the new bill would strengthen existing legislation, to deal in particular with what is seen as the new problem of the harassment of vulnerable young males, especially school boys.

Critiques of current homophobia within Uganda

Yet Ugandan society and religious leaders are not necessarily as strident or unwilling to discuss the issues as the public outrage would suggest. There is extensive (if rather muted) criticism within the COU of bishops who seem more interested in the international crisis within the Anglican Communion than in tackling the real problems and conflicts within the COU. There is general embarrassment about how Bishop Senyonjo has been treated. This goes against deeply felt Ugandan codes of respect and civility. There is also general distaste concerning the antics of Pentecostal pastors in the so-called Pastors' Wars of 2009, during which several of them brought cases to court against other pastors (including a brother of the archbishop of York), using 'informers' who claim they were abused by these pastors when they were teenagers. These cases have generally been thrown out of court, and the accusing pastors themselves have recently been summoned to answer charges of defamation. In late 2010, new 'red top' paper *Rolling Stone* published the names and photos of a so-called list of '100 of Uganda's top homos', which, among other things, confuses being gay with supporting gay equality (Bishop Senyonjo was pictured as one of the 'homos'). The courts have accepted that the newspaper is liable to compensation claims for defamation. Martin Ssempa, the head of a church near Makerere University with a large student population, has recently inspired disgust for his graphic, pornographic portrayals of gay sex which he has shown to his congregation. One of his major critics is the blogger 'GayUganda' whose blog provides one of the most articulate, civilised and humorous commentaries on Uganda's homophobia (GayUganda 2012).

Given the way in which religion is so deeply entwined in Ugandan society, it is clear that many gay Ugandans are deeply religious. 'GayUganda' states clearly that he is not a believer, but he has an Anglican upbringing and his lover remains a devout Catholic. But many gay and lesbian people do want to continue to practise their faith, and most do so within their local congregations. Some have tried to form their own fellowship groups or alternative churches, but the climate is hardly congenial at the moment for such high-profile and (to the society at large) provocative actions. At present few church leaders are prepared to support these groups – the punishment of Bishop Senyonjo serves to warn against anyone putting their head above the parapet to support LGBT groups. There is, however, some hope that a gay inclusive tendency will develop in the church. Although the church has a strict marriage policy, it has had to accept that most of its members do not follow it, and prefer informal marriage arrangements or more casual relationships not sanctioned by the church. It is possible to imagine a similar acceptance of gay Christians, even if there is as yet no substantial call by church leaders for legislative reform to end discrimination. The fear of gays in Uganda does not have a long and entrenched history, and it can evaporate quite quickly when more liberal voices

begin to assert themselves, both in churches and civil society more generally (Ward 2011).

Conclusion

Do the South African and Ugandan cases throw light on the relationship between the legacy of colonialism and attitudes towards homosexual practice? One hypothesis offered as an explanation for what seems to be a prevailing African hostility to modern, Western forms of homosexuality, is the visceral sense of colonialism as an emasculation of African manhood. The struggle for human dignity was and is a struggle for autonomy, a reassertion of masculinity. This allows no place for the 'unmanly' qualities associated with homosexuality. It is, I suspect, easier to find evidence for this thesis in West Africa, where the legacy of the Atlantic slave trade and the plantation slavery of the New World give legitimacy to such rhetoric and rationalisation. Within the Anglican debate, there is a visceral quality to the Nigerian polemic against the liberal West by religious leaders like Archbishop Peter Akinola. But it also seems to characterise the reactions of ordinary Nigerian Christians, perhaps according with the more confrontational style of political argument which informs deteriorating Christian-Muslim relations.

In the case of South Africa, this chapter has already noted the association between homosexual practice and the former apartheid structures of society and the economy, particularly in the mines. Nevertheless, as Gevisser (2007) shows in his biography of Thabo Mbeki, the African National Congress did come to the firm conclusion that the end of racial discrimination in South Africa must also be accompanied by the end of apartheid discrimination against sexual minorities. This decision was taken by the leadership and did not necessarily reflect the feelings of the rank and file ANC freedom fighters who began to return from exile after 1990, nor the feelings of ordinary people in the townships and countryside of South Africa, where HIV/AIDS was just beginning to be recognised as serious threat, but where it was still associated with white gay men. The corrosive effects of the pass system and other apartheid discrimination on South African men persist in leaving a legacy of aggressive masculinity, with tragic effects particularly on women's development, lesbian 'corrective rape' and new forms of aggression against gay men.

In Uganda, it is more difficult to associate the rise of homophobia with the colonial legacy, partly because colonialism is typically understood by Ugandans as having been more benign and less destructive of indigenous institutions and values. These were indeed disrupted and deformed by the colonial experience. Nevertheless Ugandans, and particularly the Baganda, retained a strong sense of agency – the Baganda in fact were dubbed 'sub-imperialists' in their enthusiasm to spread Christianity, along with Kiganda values, to the rest of the protectorate. Unlike Nigeria or South Africa, it is less easy to discern an

aggressive masculinity as a major underlying factor in explaining Uganda's recent homophobia. It is true that a post-colonial rhetoric has emerged as Ugandan Anglican leaders have articulated and justified their stand on homosexuality, on the basis of the COU's evangelical heritage, respect for biblical teaching and Revivalist foundations. These are more decisive than any residual deference to the Church of England and the archbishop of Canterbury. However, Uganda is less likely than the church in Nigeria to welcome any decisive break with Canterbury – if only because the concept of being Anglican is deeply ingrained for Ugandan Protestants, not least as a badge of distinction from the Roman Catholic Church, and thus part of a specifically Ugandan discourse (Ward 2005).

In both South Africa and Uganda, acceptance and antipathy with regard to homosexuality co-exist, but the actual manifestation of acceptance and antipathy differs between the two countries. South Africa's liberal Constitution and legal support for gay and lesbian people are accompanied by levels of violence against them which are far in excess of that in Uganda. In Uganda there is a highly emotive public debate about the dangers of homosexual subversion of core Christian and African social values, and the threat of new and draconian legislation. Yet actual violence against homosexuals is still relatively rare. A recent survey of the American Pew Forum on Religion and Public Life throws some light on societal attitudes in both South Africa and Uganda. The report itself was an investigation of relations between Christians and Muslims in Sub-Saharan Africa. In addition to this main focus, the survey asked a number of questions on social and ethical issues, including one on attitudes to homosexuality: 'Is homosexual behavior morally acceptable, morally wrong, or is it not a moral issue?' The Ugandan response showed a level of acceptance above any other of the 19 African countries surveyed: 11 per cent of respondents thought homosexual behaviour to be acceptable, with a further nine per cent stating that it was not a moral issue at all, or depended on the situation. This compared with the South African response, where only three per cent found homosexuality acceptable (Pew Forum on Religion and Public Life 2011, p. 276).

The director of the survey, Timothy Shah, in an article for the Evangelical magazine *Christianity Today* (Shah 2011), used these findings to criticise those in the USA who see Uganda as irredeemably homophobic and who see this as the 'fruit of American evangelical homophobia':

> More Ugandans consider homosexual behaviour morally acceptable or neutral – almost one in five – than people in any other major African country, including sexually tolerant South Africa, according to a 2010 Pew Forum survey.

Shah's article may underestimate the extent of Ugandan support for the Bahati bill, but responses to other ethical questions in the Pew survey do tend to reinforce the picture of an ethically questioning and open society. Uganda's

responses to questions about suicide, the consumption of alcohol, sex outside marriage, polygamy and abortion, all show a high level of tolerance in comparison with many other countries in the survey. The vigorous debates in the local Ugandan press on homosexuality and other ethical issues, in English, Luganda, Luo and many other local languages, reinforce this picture of a society where values are contested and a pluralism flourishes. The questioning of values in open debate is also integral to the moral landscape of South Africa, with the churches providing a safe space for such discussion in ways which are not so well developed in the more prescriptive traditions of Ugandan Christianity. Both societies offer some degree of hope, in the long term, of substantial and permanent improvement in the human rights of gay and lesbian people, and their acceptance in society. However, there is no getting away from the fact that Uganda is not, at the moment, a congenial place for the struggle for gay rights as a constitutionally entrenched human right, recognised by the courts and accepted by social opinion.[7]

Bibliography

Andersson, J., R. Vanderbeck, G. Valentine, K. Ward, J. Sadgrove (2011) 'New York encounters: religion, sexuality and the city', *Environment and Planning A* 43 (3), pp.618–33.

Anglican Mainstream (2013) available at www.anglican-mainstream.net (accessed 29 Jan. 2013).

Anglican Mainstream (South Africa) (2013) available at www.anglican-mainstream.org.za (accessed 29 Jan. 2013).

ANPPCAN (2013) African Network for Prevention against Child Abuse and Neglect, Uganda Chapter, available at www.anppcanug.org (accessed 29 Jan. 2013).

Amnesty International (2010) 'Uganda: Anti-Homosexuality Bill is inherently discriminatory and threatens broader human rights', Amnesty International AFR 59/003/2010, available at www.amnesty.org/en/library/info/AFR59/003/2010/en (accessed 29 Jan. 2013).

Balcolm, A. (2004) 'From apartheid to the new dispensation: evangelicals and the democratization of South Africa', *Journal of Religion in Africa* 34 (1–2), pp. 5–38. Reprinted as chapter 6 of T.O. Ranger (ed.) (2008)

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Evangelical Christianity and Democracy in Africa (Oxford: Oxford University Press).

Barrett, D., G. Kurian and T. Johnson (2001) *World Encylopedia: A Comparative Survey of Churches and Religions in the Modern World,* 2nd edn. (Oxford: Oxford University Press).

BBC (2011) *The World's Worst Place to be Gay?*, BBC3 TV programme, 14 Feb.

Blum, W. (1989) *Monogamy Reconsidered* (Nairobi: Gaba Publications).

Brown, W. (1988) *Marriage, Divorce and Inheritance: The Uganda Council of Women's Movement for Legislative Reform* (Cambridge: Cambridge African Studies Monographs) [a republication of a work composed in Kamapa in the 1960s].

Coquery-Vidrovitch, C. (1997) *African Women: A Modern History* (Boulder, CO: Westview).

Du Pisani, K. (2001) 'Puritanism transformed: Afrikaner masculinities in apartheid and post-apartheid period', in R. Morrell (ed.), *Changing Men in Southern Africa* (Pietermaritzburg: University of Kwa-Zulu Press and London: Zed Book), pp. 157–66.

Epprecht, M. (2004) *Hungochani: The History of a Dissident Sexuality in Southern Africa* (Montreal and Kingston: McGill-Queen's University Press).

— (2008) *Heterosexual Africa? The History of an Idea from the Age of Exploration to the Age of AIDS* (Athens, OH: Ohio University Press).

Fadiman, J. (1993) *When We Began There Were Witchmen: An Oral History from Mount Kenya* (Los Angeles, CA: University of California Press).

Faupel, J.F. (1962) *Uganda Holocaust* (London: Geoffrey Chapman).

GayUganda (2012), available at http://gayuganda.blogspot.com (accessed 29 Jan. 2013).

Gevisser, M. (2007) *Thabo Mbeki: The Dream Deferred* (Johannesburg: Jonathan Ball).

Hassett, M. (2007) *Anglican Communion in Crisis: How Episcopal Dissidents and their African Allies are Reshaping Anglicanism* (Princeton, NJ: Princeton University Press).

Hoad, N. (2005) *African Intimacies: Race, Homosexuality and Globalization* (Minneapolis, MN: University of Minnesota Press).

Iliffe, J. (2007) [1995] *Africans: The History of a Continent* (Cambridge: Cambridge University Press).

Kagwa, A. (1993) *Empisa za Buganda (Buganda Culture)* (Kampala: Crane Publisher) [a reprint of a book originally written in the early 20th century].

Kapya, K. (2009) 'Globalizing the culture war: US Conservatives, African churches and homophobia', Political Research Associates report, Somerville, MA.

Kisembo, B., L. Magesa and A. Shorter (1998) [1977] *African Christian Marriage* (London: Chapman).

McIntosh, J. (2009) *The Edge of Islam: Power, Personhood, and Ethnoreligious Boundaries on the Kenyan Coast* (Durham, NC: Duke University Press).

Meierhenrich, J. (2008) *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652–2000* (Cambridge: Cambridge University Press).

Moodie, D., V. Ndatshe and Mpande Wa Sibuyi (1998) 'Migrancy and male sexuality in the South African gold mines', *Journal of Southern African Studies* 14, pp. 228–56.

Mudavanhu, J. (2010) *The Attitude of the Methodist Church in Zimbabwe to Homosexuality: Towards a Socio-sexological Theological Investigation,* PhD thesis, University of Birmingham.

Murray, S.O. (2000) *Homosexualities* (Chicago: Chicago University Press).

Pattman, R. (2001) 'The beer drinkers say I had a nice prostitute, but the church-goers talk about things spiritual', in R. Morrell (ed.), *Changing Men in Southern Africa* (Pietermaritzburg: University of Kwa-Zulu Press and London: Zed Book), pp. 233–95.

Pew Forum on Religion and Public Life (2010) *Islam and Christianity in Sub-Saharan Africa*, available at www.pewforum.org/uploadedFiles/Topics/Belief_and_Practices/sub-saharan-africa-full-report.pdf (accessed 29 Jan. 2013).

Rice, X. (2010) 'Uganda paper calls for gay people to be hanged', *The Guardian,* 21 Oct., available at www.guardian.co.uk/world/2010/oct/21/ugandan-paper-gay-people-hanged?INTCMP=SRCH (accessed 29 Jan. 2013).

Roux, R. (2001) 'Mkhumbane and new traditions of unAfrican same-sex weddings', in R. Morrell (ed.), *Changing Men in Southern Africa* (Pietermaritzburg: University of Kwa-Zulu Press and London: Zed Book), pp. 287–95.

Sadgrove, J., R. Vanderbeck, G. Valentine, K. Ward and J. Andersson (2010) 'Constructing the boundaries of Anglican orthodoxy: an analysis of the Global Anglican Future Conference (GAFCON)', *Religion* 40, pp. 193ff.

Shah, T. (2011) 'The Uganda conspiracy theory', *Christianity Today,* 15 Mar., available at www.christianitytoday.com/ct/2011/marchweb-only/ugandaconspiracytheory.html (accessed 29 Jan. 2013).

Tamale, S. (ed.) (2007) *Homosexuality: Perspectives from Uganda* (Kampala: Sexual Minorities of Uganda).

Taylor, J.V. (1958) *The Growth of the Church in Buganda* (London: SCM).

Tripp, A.M. (2000) *Women and Politics in Uganda* (Oxford: James Currey/Kampala: Fountain/Madison, WI: University of Wisconsin).

Tripp, A.M. and J.C. Kwesiga (2002) *The Women's Movement in Uganda* (Kampala: Fountain Publishers).

Tucker, A. (2009) *Queer Visibilities: Space, Identity and Interaction in Cape Town* (Oxford: Wiley-Blackwell).

Tutu, D. (1997) Foreword to P. Germond and S. de Gruchy, *Aliens in the Household of God: Homosexuality and Christian Faith in South Africa* (Cape Town: David Philip), p. x.

Uganda Church Association (2010) *Annual Newsletter*, British Library General Reference Collection: P101/2137.

Valentine, G., R. Vanderbeck, J. Andersson, J. Sadgrove and K. Ward (2010a) 'Emplacements: the event as a prism for exploring intersectionality; a case-study of the Lambeth conference', *Sociology* 44.5, pp. 925–43.

— (2010b) 'The meanings of Communion: Anglican identities, the sexuality debaters, and Christian relationality', *Sociological Research Online* 15 (2).

— (2011) 'Religion, sexuality and social movement spaces: scenes from the 2008 Lambeth Conference', *Annals of the Association of American Geographers* 101 (3), pp. 670–89.

Ward, K. (1995) 'The Church of Uganda amidst conflict', in H.B. Hansen and M. Twaddle (eds.), *Religion and Politics in East Africa* (London: James Currey), pp. 72–105.

— (2002) 'Same-sex relations in Africa and the debate on homosexuality in East African Anglicanism', *Anglican Theological Review* 84 (1), pp. 81–111.

— (2005) 'Eating and sharing: church and state in Uganda', *Journal of Anglican Studies* 3 (1), pp. 99–120.

— (2006) *A History of Global Anglicanism* (Cambridge: Cambridge University Press).

— (2011) *Response,* in T.E. Charry, 'Same-sex relations and the nature of marriage: a theological colloquy', *Anglican Theological Review* 93 (1), pp. 135–40.

Ward, K. and E. Wild-Wood (eds.) (2010) *The East African Revival: History and Legacies* (Kampala: Fountain Publishers).

16

‘Buggery’ and the Commonwealth Caribbean: a comparative examination of the Bahamas, Jamaica, and Trinidad and Tobago

Joseph Gaskins Jr.

Introduction

Over the last decade the attitudes of Commonwealth Caribbean people towards homosexuality have been discussed at length in the popular media. This is especially true of media outside of the Caribbean, which has taken a keen interest in what has often been called ‘Caribbean homophobia’. In 2006, *Time Magazine* published an article by Tim Padgett entitled ‘The most homophobic place on Earth’, in reference to what he described as Jamaica’s ‘rampant violence against gays and lesbians’. Popular gay magazine *Advocate* (2005) suggested in an article that the Bahamas should be moved to a ‘watch-list’ so that gay and lesbian tourists will know to avoid it as a destination. Peter Dayle, a reporter for *The Guardian,* wrote in 2010 that ‘examples abound of government-supported homophobia in the Caribbean’. That the Caribbean is a region marked by homophobia is, for the most part, taken for granted. The assertions by the media highlighted above are reflected in the legal codes of many Commonwealth Caribbean countries. According to the International Lesbian, Gay, Trans and Intersex Association’s (ILGA) 2011 report, ‘State-sponsored homophobia’, 11 of the 12 Commonwealth Caribbean countries have laws that make same-sex intimacy illegal. Guyana and Trinidad and Tobago’s laws prescribe the harshest punishment – life and 25 years in prison respectively – for ‘buggery’ committed between two consenting adults (ILGA 2011).[8]

Cecile Gutzmore (2004) argues that homophobia in Jamaica is underpinned by five ideological imperatives. Among them, the illegality of homosexuality

8 Historically, the term ‘buggery’ is considered interchangeable with sodomy and was used in English legal documents and formal language to describe sexual intercourse between men (Goldsmith 1998).

'mobilizes the authority of the state and the celebrated connection between law and morality to deny the right of sexual privacy' (2004, p. 133). The law and heterosexuality are positioned as the basis of order, while consensual same-sex intimacy is placed on the legal continuum alongside heterosexual sexual violence – scripting the psyche of homosexuality as one of criminality (Alexander 1994).

Though Gutzmore (2004) foregrounds the specificity of 'Jamaican homophobia', and lists the criminalisation of homosexuality as a secondary ideological imperative, the importance of the criminalisation of homosexuality throughout the Commonwealth Caribbean in fostering sexual prejudice and stigma should not be doubted. While many of these laws are used on rare occasions (usually coupled with other more serious crimes), 'the very existence of sodomy laws creates a criminal class of gay men and lesbians, who are consequently targeted for violence, harassment and discrimination because of their criminal status' (Leslie 2000, p. 103).

This chapter examines the history of the criminalisation of same-sex intimacy in the Commonwealth Caribbean, highlighting the challenges to and successes of efforts focused on decriminalisation and discussing key factors that may present opportunities for changes to existing 'buggery laws'. This will be undertaken through a comparison of three countries – Jamaica, Trinidad and Tobago and the Bahamas – using academic research, popular media accounts, reports from non-governmental organisations (NGOs) and correspondence with local activists. Most of the research on sexual prejudice and stigma in the Caribbean focuses on these three countries, especially Jamaica and Trinidad and Tobago. The Bahamas is an important case study to include in this comparison because it is the only Commonwealth Caribbean country to have decriminalised same-sex intimacy. Each of these countries present sufficiently different contexts and, as this chapter will illustrate, considering them together can be instructive for how one views 'Caribbean homophobia' and the work of decriminalising same-sex intimacy in the region.

1. A history of criminalisation

The laws in the Commonwealth Caribbean that criminalise same-sex intimacy are remnants of the region's colonial past; however, the history of present-day anti-homosexual legislation is more complicated than this statement might suggest. This section will focus on Jamaica and Trinidad and Tobago, recounting how the criminalisation of same-sex intimacy came about in each country, the effects of these laws and how they have been used. The Bahamas will be considered in the following section along with the story of decriminalisation in that country.

Even though colonies in the Caribbean adopted British buggery laws in their various incarnations during the colonial project, the colonial environment was

much more relaxed than the British 'home base' (Hyam 1991). It was in the final decades of the 19th century that outright hostility towards homosexual acts became common, specifically during the Victorian era. Anxiety about homosexuality was fuelled by fears of declining middle-class values and perceived threats to the British Empire (Upchurch 2009).

In general, the colonies provided greater space and privacy, separation from family ties and moral pressures, along with the power that accompanies conquest (Hyam 1991). During the first half of the Caribbean colonial project British colonisers lived in an almost all-male society with few outlets for heterosexual sex and with little legal restriction (Dunn 1972; Burg 1983). Though these demographics changed significantly by the 18th century, sexual licence was among the most distinctive characteristics of British Caribbean society (Green, in Hyam 1991, p. 93).

As for slave communities in the British Caribbean, little is known of how their attitudes towards same-sex sexualities manifested in the colonial context. Planters preferred to buy healthy young adult males from West Africa, specifically Papaw, Cormantin and Ibo (modern-day Benin, Ghana and Nigeria). Sweet's (1996) historical analysis suggests that many of the spiritual traditions of these West African people created a social and cultural space for male homosexuality.

Despite the existence of 'buggery laws,' attitudes concerning sexuality prior to the Victorian period were fairly liberal. Sometime between 1678 and 1680, Francis Dilly was executed in Jamaica by order of the Governor for being the ringleader of a group of 'sodomites' but the other three men implicated were pardoned (Burg 1984). Even after the demographical imbalance was rectified in Barbados, Thomas Walduck wrote a poem describing the sins of Sodom as excelling in that colony. It is possible, as Burg (1984) points out, that the use of 'Sodom' as a descriptor by Walduck could suggest general lasciviousness in Barbados; however, its continued and repeated use by a number of travel writers suggests that they were referring to the prevalence of same-sex intimacy in Caribbean colonies. 'The judgement of Sodom was to befall the islands [... and] Port Royal was the Sodom of the Universe. All were descriptions given by contemporary commentators' (Burg 1984, p. 105). Madam Margaret Heathcote provides the most frank account from the English Caribbean island of Antigua. Writing to her cousin, John Winthrop Jr in 1655, she said, 'And truely, Sir, I am not so much in love with any as to goe [sic] much abroad … they all be a company of sodomites that live here' (Burg 1984, p. 105).

In 1962 both Jamaica and Trinidad and Tobago gained independence from Britain, with Trinidad becoming a republic in 1976. The Bahamas also successfully negotiated its independence, more than a decade after Jamaica and Trinidad and Tobago, which came into effect in 1973. In each case, the constitutions provided that the laws in force immediately before or on 'the appointed day' of independence would continue to be in force thereafter. This

meant that the buggery law of 1861, which was not repealed in England and Wales until 1967, was retained by Jamaica and Trinidad and Tobago.

1.1 Jamaica and the 'Unnatural Offence'

Today, Jamaica's 'buggery law' still reads like the original 1861 British law. Article 76 of the Offences Against the Person Act, entitled the 'Unnatural Crime,' says, 'Whosoever shall be convicted of the abominable crime of buggery [anal intercourse] committed either with mankind or with any animal, shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years' (Offences Against the Person Act 2009). Article 77 goes further, making the *attempt* to engage in 'buggery' or 'indecent assault' on a male punishable by seven years with or without hard labour. Article 78, in keeping with the 1828 amendment to the British Offences Against the Person Act, requires only penetration – not emission – as proof of the crime. Finally, the law also makes it illegal for 'male persons' to engage in or attempt to engage in 'acts of gross indecency,' in public or private, a misdemeanour offence punishable by two years in prison with or without hard labour (Offences Against the Person Act 2009, a. 79).

No other crime in the Offences Against the Person Act is described as 'unnatural'. It seems an unnatural offence is only so when it occurs between persons of the same sex, as the law does not describe rape, incest and heterosexual sex *per anum* in such terms. Operating within a paradigm that views heterosexuality as not just normative but exclusively 'natural', the law rejects same-sex intimacy as outside the boundaries of nature itself (Phillips 1997). This is a view often reflected in Jamaican popular culture. Gutzmore (2004) examines the lyrics of a number of popular Jamaican songs from the reggae and dancehall genres, many of which '[foreground] the naturalness of heterosexual sex while inveighing violently against homosexuality on the grounds of its unnaturalness' (Gutzmore 2004, pp. 131–2).

Former Prime Minister Bruce Golding, while debating the 'buggery laws' in 2009, said, 'Every society is shaped and defined by certain moral standards and the laws that evolve in that society are informed by a framework that the society recognises' (Luton 2009). The summary of the 2004 Human Rights Watch report, 'Hated to death: homophobia, violence and Jamaica's HIV/AIDS epidemic', details the violence perpetrated against homosexuals and those perceived to be homosexual in a society that views such persons as unnatural. In 2004, Jamaica's leading gay rights activist, Brian Williamson, was mutilated and murdered in his own home (Human Rights Watch 2004). Williamson's murder was the 30th since the 1997 prison riot, set off by Jamaica's Commissioner of Corrections when he insisted on providing condoms for inmates to curb the spread of sexually transmitted infections in the prison population. Seventeen men thought to be homosexual were

killed – beaten, stabbed or burned to death – and another 40 were injured (Gutzmore 2004).

The number and frequency of violent acts against lesbian, gay, bisexual, transgender/same gender loving (LGBT/SGL) people is difficult to quantify because these incidents often go unreported. Police apathy in responding to complaints by LGBT/SGL people is common and by reporting such abuses, LGBT/SGL persons might incriminate themselves with the 'buggery laws' still on the books. In this climate, LGBT/SGL activists in Jamaica have seen increasing reports of discrimination and harassment, according to Dane Lewis, executive director of the LGBT rights group, Jamaican Forum for Lesbians, All-Sexuals and Gays (J-FLAG 2011a).

Though former Prime Minister Golding assured Jamaicans that 'We will never start hounding down people because they may have lifestyles that we would prefer did not exist', the law has resulted in police raids on known gay establishments (Luton 2009). In 2011, heavily armed police officers raided a club in Montego Bay, 'aggressively accosting patrons, kicking in doors, beating and pistol-whipping indiscriminately,' all the while insulting the club's patrons (Tomlinson 2011). In the confusion, patrons from other venues began joining in with officers in the abuse, hurling bottles and slurs alike, and leaving 20 people to seek treatment for injuries at a local hospital. This was not the first time such action was taken by police. Earlier in 2011, police raided another gay establishment without their badges, intimidating patrons with guns and bright flashlights (Tomlinson 2011).

Apart from the actual physical abuse the law incites, experts who have studied the spread of HIV/AIDS in Jamaica believe the law is partially responsible for the virus's continued spread (Human Rights Watch 2004; Carr and White 2005; Carr et al. 2006). Jamaica's HIV/AIDS rate is over one per cent, representing tens of thousands of cases. HIV/AIDS patients report being abused by family members and their communities because of their perceived 'sexual deviance' (Carr et al. 2006). Information about HIV/AIDS patients is routinely leaked to the public by health workers prejudiced against homosexuals and these abuses are perpetrated in a climate of impunity, given the 'buggery law' (Human Rights Watch 2004).[9]

While much of the scholarly work and popular media accounts concerning Jamaica's culture of homophobia highlights abuses faced by gay or SGL men, the abuse of lesbians, SGL women and trans-women is also not uncommon. In 2010, the Jamaican Association of Women for Women published a report

9 It must be noted, however, that class plays a significant role in one's exposure to sexual and HIV-stigma, prejudice and violence in Jamaica (Gutzmore 2004; Carr and White 2005). Throughout the Caribbean, middle-class homosexuals are afforded some tolerance due to their economic capital and the social spaces which they can create for themselves (Donnell 2006).

involving 11 participants of various sexual orientations and one trans-woman, all of whom were victims of 'corrective rape' (ILGA 2010). Two of them reported being raped by law enforcement officials. In one particularly brutal case, a 17-year-old was held captive by her mother and raped by multiple religious leaders in the hope that she would be 'cured'. The report concludes that lesbian, bisexual and especially trans-women do not report rape because they fear they will be arrested instead of helped.

Though Jamaica successfully fought for its independence from the British Empire, the 'buggery law' imposed on this former colony remains completely intact. Utilising a discourse of morality and the 'natural', this law has served to foster a popular culture rife with homophobia and abuses by state agents. The 'unnaturalness' of homosexuality has become an especially prolific ideological anchor for homophobic rhetoric among religious leaders, popular artists and politicians. Despite the protection that former Prime Minister Golding promised to the LGBT community during the 2009 parliamentary debate concerning the law, evidence shows clearly that Jamaica's 'buggery' law is truly harmful to sexual minorities.

1.2 Trinidad and Tobago: the symbolism of the law and the 'prohibited class'

Unlike Jamaica, Trinidad and Tobago did not retain the original 1861 'buggery law'. Instead, in 1986 the Parliament of the Republic of Trinidad and Tobago passed the Sexual Offences Act which repealed the 1861 law and outlawed same-sex intimacy in clearer terms (Sexual Offences Act 2000). With this gesture, M. Jacqui Alexander (1997, pp. 7–8) asserts, 'It was the first time the postcolonial state confronted earlier colonial practices which policed and scripted "native" sexuality to help consolidate the myth of imperial authority'.

Section 13 of Trinidad and Tobago's Sexual Offences Act 2000 makes 'buggery' and 'acts of serious indecency' illegal and punishable by various terms of imprisonment. Acts of buggery with a minor, with an adult, or as a minor all carry different sentencing requirements. As is the case with Jamaican law, buggery is defined as sex *per anum*; however, in Trinidad and Tobago buggery describes both homosexual and heterosexual anal sex. Whereas in Jamaica, 'acts of gross indecency' are left undefined, in Trinidad and Tobago an 'act of serious indecency' is understood as an 'act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of the genital organ for the purpose of arousing or gratifying sexual desire' (Sexual Offences Act 2000). An 'act of serious indecency' cannot, however, occur between two heterosexual consenting adults who are of age.

Although the law in Trinidad and Tobago does not explicitly characterise buggery as 'unnatural' like the Jamaican law does, it does make clear that vaginal sex is the only and most 'natural' option for sexual intercourse. The precise definition of 'acts of serious indecency' essentially outlaws any other inventive

ways one might employ to enjoy same-sex intimacy. Again, the law attempts to define the boundaries of the 'natural' and 'unnatural.' That these laws are necessary shows that what is natural 'is in fact very deliberately constituted discursively through social and intellectual construction' (Phillips 1997, p. 47).

Unique to Trinidad and Tobago – when compared to both the Bahamas and Jamaica – is Article 8 (18/1) of the Immigration Act. In 1974, the Immigration Act was amended to prevent homosexuals from entering the country, labelling them as a 'prohibited class'. Other 'prohibited classes' include idiots and the feeble-minded, drug addicts, those with serious infectious diseases, chronic alcoholics and other 'persons reasonably suspected as coming to Trinidad and Tobago for these or any other immoral purposes' (Immigration Act 1995, A.8). The 'prohibited class' thus becomes a descriptor for those who do not belong – those who pose a danger to the nation.

Despite the obvious problems these laws cause for LGBTQ/SGL (lesbian, bisexual, transgender, queer/same-gender loving) Trinidadians, it seems they are rarely – if ever – used to prosecute persons exclusively on the basis of their sexuality. Appeals by religious leaders to ban gay pop-singer Elton John from Trinidad were denied by government officials (*Daily Mail* 2007). Also, Trinidad's world-renowned carnival is becoming 'increasingly coded as a gay and lesbian affair, especially by the gay and lesbian tourist industry' (Puar 2001, p. 1039). Through websites and email lists, community meetings and gay-friendly parties are becoming popular. Scholar Jasbir Puar (2001) attended 'Diva', a drag show performed yearly in Port of Spain city. 'Diva' is perhaps the most popular but not the only LGBT event in Trinidad: 'Annual gay fetes during the holidays and Carnival had become routine, and public events for International AIDS day and even gay pride had previously been staged in Trinidad' (Puar 2001, p. 1041). Furthermore, Trinidad's Coalition Advocating for the Inclusion of Sexual Orientation (CAISO) is flourishing in its advocacy work.

The most recent cases in which the buggery and 'serious indecency' laws were used seem to involve paedophilia, rape and other serious charges. In the case of *The State v. Samuel Duke* (1999), Duke was charged with both incest and serious indecency after his daughter filed a complaint. In another case, appeal papers for Kester Benjamin (2008) show that the appellant was charged with rape, buggery and robbery with aggravation after assaulting a female furniture store attendant. More recently, in 2011 three men were charged with buggery after kidnapping and raping a 14-year-old boy (*Trinidad and Tobago Guardian Online* 2011). In December of 2011, a 58-year-old man was sentenced to 24 years for the buggery of a 12-year-old school boy (*Trinidad and Tobago Newsday* 2011).

Are these laws innocuous because law enforcement has not targeted the LGBTQ/SGL community using the buggery law and given the obvious disregard for the Immigration Act? Does the gender-neutral prohibition of

buggery mean that the law is not meant to discriminate against gay or SGL men alone? Leslie (2000) asserts that often people assume that unenforced laws are harmless and therefore that sodomy laws which go unenforced are harmless. Leslie (2000, p. 112) writes:

> Sodomy laws exist to brand gay men and lesbians as criminals. Social ordering necessitates the criminalization of sodomy, thereby creating a hierarchy that values heterosexuality over, and often to the exclusion of, homosexuality. This symbolic effect of sodomy laws is not dependent on their enforcement. Even though very few men and virtually no women ever suffer the full range of criminal sanctions permitted under state sodomy laws, these statutes impose the stigma of criminality upon same-sex eroticism.

Though Trinidad and Tobago's law does not exclusively target same-sex intimacy, it can be argued that what Leslie (2000) says of the United States is true elsewhere. Despite the gender-neutrality of the law, sodomy laws are almost always mischaracterised as applying exclusively to homosexuals and it is usually animus towards homosexuals that prevents their repeal. Leslie (2000) highlights the symbolic power of the law and this is exemplified particularly in Trinidad and Tobago's 'prohibited classes' law, which groups the homosexual with drug addicts, alcoholics, prostitutes and the feeble-minded. Moreover, the use of what is likely understood to be an anti-homosexual law alongside a host of other charges, including rape and molestation, conflates these violent offences with same-sex intimacy.

This symbolism is not limited exclusively to the Trinidadian context but is an underlying contributor to homophobia throughout the Caribbean, where laws create a criminal class of sexual minorities. The term 'sexual stigma' describes a society's antipathy towards non-heterosexuals. In social psychology 'stigma' is used to refer to a 'physical or figurative mark borne by an individual … not inherently meaningful; [but whose] meanings are attached to it through social interaction … [and] involves a negative valuation' (Herek 2004, p. 14). This stigma envelops the identity of such persons and results in asymmetrical power relations and access to resources compared to those who fit the norm (Herek 2004). In effect, even though these laws are not often used to prosecute otherwise law-abiding sexual minorities, the 'negative valuation' of same-sex intimacy stigmatises LGBT/SGL people. Together 'sexual stigma' and 'sexual prejudice' – the negative attitudes people have towards non-heterosexuals and the abusive behaviour that results from these attitudes – work in tandem (Herek 2004). Anti-homosexual laws *stigmatise* non-heterosexual subjects and this *stigmatisation* is used to rationalise *sexual prejudice*.

Trinidad and Tobago did away with the original 1861 buggery law in favour of a new, more specific, gender-neutral law. It also made homosexuals a part of a 'prohibited class' of people, disallowed from entering the country. While these laws are not used to prosecute LGBTQ/SGL people, they are not innocuous.

As Leslie (2000) argues, unenforced sodomy laws have symbolic power and relegate LGBTQ/SGL people to a criminal class, promoting an environment of discrimination and allowing for differential and unequal treatment. Perhaps this explains why more than two-thirds of the Trinidadians surveyed in the 2009 'Norms and Values Report: A Nationwide Study on the Degree of Conformity of Social Norms and Values in Trinidad and Tobago', conducted by Trinidad and Tobago's Ministry of the People and Social Development's Social Investigations Division were unsupportive of equal rights for gays and lesbians (2011).[10]

2. Activism, change and resistance in the Caribbean

As stated previously, the Bahamas is the only country of the 12 Commonwealth Caribbean countries that has repealed its 'buggery laws'. This section will discuss what key factors may have led to this move by government officials, what decriminalisation has meant for LGBTQ/SGL Bahamians and how activists were involved in this process. It will also highlight the strategic work of LGBTQ/SGL rights advocacy groups in Jamaica and Trinidad and Tobago, their success and the resistance to change they have faced. Although the criminalisation of same-sex intimacy is almost universal among Commonwealth Caribbean countries, the path to decriminalisation will be unique for each.

2.1 Decriminalisation and discrimination in the Bahamas: the impact of religion

It is clear that when the Bahamian government sought to alter already existing sexual offence laws, it had every intention of strengthening these laws in opposition to same-sex sexualities. As if taking its cue from the government of Trinidad and Tobago, the government of the Bahamas passed the Sexual Offences Act of 1989, replacing the original law from 1861 with what was termed by Law Commissioners as 'an attempt to provide one comprehensive piece of legislation setting out sexual offences which are indictable,' seeking, in its words, 'to make better provision in respect of the rights in the occupation of the matrimonial home' (quoted in Alexander 1994, p. 8).

Section 16 of the 1989 law read, 'If any two persons are guilty of the crime of buggery – an unnatural crime, or if any person is guilty of unnatural connection with any animal, every such person is guilty of an offence and

10 The survey reported that persons who earned less, had less education or who were older tended to be more opposed to equal rights and were also less likely to associate with gays and lesbians. While this does illustrate widespread opposition to homosexuality, it should be noted that surveyors did not make clear what they meant by equal rights and did not investigate why people felt the way they did (Trinidad and Tobago's Ministry of the People and Social Development's Social Investigations Division 2011).

liable to imprisonment for twenty years' (quoted in Alexander 1994, p. 8). Like Trinidad and Tobago, the Bahamian government also wrote the law to encompass female same-sex intimacies, but did not rely on the term 'serious acts of indecency' to do so. The legislation stated plainly, 'Any female who has sexual intercourse with another female, whether with or without the consent of that female, is guilty of the offence of lesbianism and is liable to imprisonment for twenty years' (quoted in Alexander 1994, p. 8). As in the case of Jamaica, the law meant to clearly define the bounds of the natural, making that solely the dominion of normative heterosexuality. And, like Trinidad and Tobago, legislators amended the original law's silence on female same-sex intimacy to include 'lesbianism'.

Although the Bahamian government seemed to have made it clear that same-sex sexualities were not welcomed in the Bahamas, just two years later in 1991 the government changed the law. The newly amended Sections 5B and 16 in the Sexual Offences Act of 1991 punished 'sexual intercourse' between people of the same-sex more harshly when done in public or with a minor, compared to heterosexual sex. The age of what was considered a 'minor' was increased by two years – from 16 to 18 – for those engaged in same-sex intimacy. The law, however, removed the prohibition against 'buggery' and 'lesbianism' in private, despite the fact that the laws dealing with same-sex intimacy were still kept under the heading 'unnatural', along with the 'unnatural connection with any animal' (Sexual Offences Act 1991).

The author has uncovered no scholarly work which would help in understanding why the Bahamian government took such drastic steps in 1989 and why there was such a sudden change in 1991.[11] It seems Bahamians were not concerned with homosexuality enough to express their disdain through the legislative process. Dr Nicolette Bethel, an anthropologist at the College of the Bahamas said, '[…]historically Bahamians have been far more tolerant of different sexualities than other West Indians' (quoted in Thompson 2010). According to Dr Bethel, in the 1970s and early 1980s homosexuality 'wasn't talked about, wasn't condemned. People might have laughed, might have ridiculed, but no one was talking about (gay) people going to hell' (quoted in Thompson 2010). However, Dr Bethel believed something changed in the closing years of the 1980s.

> The 1980s were a watershed in recent history in two ways: it was the drug era and the reaction to the drug era was the interest in fundamentalist Christianity. And fundamentalists around the world are far more interested in sex than most other Christian manifestations, so I don't think that they are unrelated. (quoted in Thompson 2010)

11 This is the focus of the author's ongoing doctoral research. Much of what happened in 1991 is recorded in the Bahamian newspapers, *The Nassau Guardian* and *The Tribune*. However, the archives for these papers were not available to the author at the time this chapter was written.

Erin Green, Bahamian activist from the now inactive Rainbow Alliance of the Bahamas (RAB), a LGBTQ/SGL civil rights organisation, had a similar theory, saying, 'Homophobia in these colonial communities is complex but the starting point could be when American southern Baptist churches started coming in, you started seeing the homophobia' (quoted in Thompson 2010).

Christian fundamentalist discourses are often used as a popular rationale for discrimination against homosexuals throughout the Caribbean – as is the case in many other regions – and this is especially true in the Bahamas, even after the decriminalisation of same-sex intimacy. A group known as 'Save the Bahamas' was formed in early 1998 to protest about the arrival of a cruise ship carrying gay passengers. The group, headed by Christian religious leaders, 'asked Bahamians to sign a petition calling for the reinstatement of sodomy laws, a ban on facilities for "sodomites" and a ban on "open sodomites" holding government office. It also called for the declaration of 8 May as a national day of repentance' (Reuters 1998). Similarly, in a show of community outrage, in 2004 Bahamian religious leaders organised a protest to meet disembarking passengers on a gay family cruise (Rainbow Alliance 2011). While Prime Minister Hubert Ingraham spoke out about discrimination in 1998, Perry Christie, Prime Minister during the 2004 protest seemed to have faced a more difficult decision. WikiLeaks cables obtained by *The Nassau Guardian* were quoted saying, '[Christie] owes his election to the active intervention of the conservative end of the Bahamian protestant religious spectrum … [they] expect some payback' (McCartney 2011a). The separation between church and state is unclear in the Bahamas, and religious leaders have used the Bahamian Constitution's preamble, affirming an 'abiding respect for Christian values', to influence policy (Constitution of the Bahamas 1973).

Indeed, the most vocal opposition to homosexuality is centred among religious leaders, unlike in Jamaica where both political and religious leaders, as well as secular artists, express their opposition to homosexuality openly. Recently, Bishop Neil Ellis told his congregation that the Bahamas was plagued by three demons, one of which was the 'demon of sexual immorality' (Brown and Johnson 2009). He named an increase in the visibility of homosexuals as one of the signs of this demon's presence. Another popular religious leader, Bishop Simeon Hall, responded to a rise in HIV/AIDS rates among men who have sex with men (MSM) saying, 'Homosexuality … is anti-family and it goes against what God has ordained' (Jones 2011).

In the Bahamas, over a seven-month period from 2007–8, four gay men were murdered in their homes. A 17-year-old man pleaded guilty to one murder but was sentenced to only three years' probation, claiming the murder victim made sexual advances towards him. The Court of Appeals ruled that the man was 'provoked' to act violently because of the nature of the sexual advances (Rainbow Alliance 2011). Chief Justice Joan Sawyer stated, 'one is entitled to use whatever force is necessary to prevent one's self being the victim

of a homosexual act' (Bahamas Local 2010). Murder cases for the three other victims have not been solved.

Though the Bahamas repealed its anti-sodomy laws, it has failed to enact any legal protections for non-heterosexual persons facing discrimination (ILGA 2011). The United States Department of State's Bureau of Democracy, Human Rights and Labour (BDHRL) reported in 2006 that there was no legislation addressing the human rights violations the LGBT community was facing and that the government actively encouraged opposition to homosexuality; furthermore, 'there were continued reports of job termination following disclosure of sexual orientation, as well as discrimination in housing' (BDHRL 2006).

Whereas Beckford and Richardson (2009) suggest that most religious campaigns to regulate what might be regarded as social problems happen on the margins of mainstream politics, in the Bahamas conservative, evangelical fundamentalist Christianity is the mainstream. This is perhaps different from Trinidad, for example, with its diverse population of Catholics, Hindus, Anglicans, Pentecostals and Muslims (Green 1999). Susan Harding (1994) argues that evangelical, fundamentalist narratives are – in effect – discourses which constitute subjects both historically and politically. Influential preachers in the 1980s began telling their congregations that as the rest of the modern world sped towards the end, if they responded to God's call for Christian living through political action, God would reward them for halting the moral deterioration of their own societies (Harding 1994). It is no surprise then that when the Deputy Prime Minister and Minister of Foreign Affairs, Brent Symonette, supported a United Nations' resolution affirming equal rights for LGBT people around the world, local pastors responded by saying, 'Whose views was Mr Symonette representing at the UN meeting – his personal views, his party's views, or the country's views that are decidedly against the expansion of special rights for homosexuals?' (Johnson 2011)? Bahamian religious leaders believe the Bahamas does in fact need saving and that measures to secure rights for sexual minorities do not only represent the failure of the church to uphold godly moral standards but spell doom for the entire nation.

Symonette, deputy leader of the governing Free National Movement party (FNM), claimed he had not actually seen the resolution but that the government supports the rights of 'people of any persuasion' (McCartney 2011b). Symonette continued, 'Our record is clear, we continue to support freedom of expression and the right for people to express their opinions' (McCartney 2011b). The opposition Progressive Liberal Party (PLP) also supported the resolution as part of a commitment to 'progressive policies – policies that emphasise our commitment to human rights' (McCartney 2011c). Both parties have characterised their support of the resolution as a fundamental commitment to human rights on the international stage, but this commitment has not translated fully at home where progress on expanding the right of LGBT/SGL people has stalled since the decriminalising of 'buggery' in 1991.

2.2 Making change possible in the Bahamas: key factors

Just as there is a lack of information concerning the escalation of anti-homosexual attitudes in the Bahamas, there is a similar lack of information concerning the decriminalisation of same-sex intimacy. Looking at an interview (Appendix A) with Mindell Small, Bahamian activist and a former lead member of the RAB,[12] it is possible to begin ascertaining why the Bahamian government amended the Sexual Offences Act of 1989 to decriminalise same-sex intimacy in 1991. It seems that what sparked the debate among government officials in that year, according to Small (2012), were a number of raids made by police on gay establishments and the subsequent arrest of the patrons. Simultaneously, there was a 'sissy list' being circulated, naming men who were suspected of being gay. Small recounts:

> Apparently the sissy list was circulating for a few weeks and kept growing and growing to a point where names of prominent people and close relatives of politicians started appearing on it. This is what triggered a huge debate in parliament on the invasion of privacy, and how the list or any other such list (HIV+ people list for example) was a violation of an individual's right to privacy. (Small 2012)

At the height of misinformation about HIV/AIDS and its attendant anti-gay fervour, being labelled a homosexual was especially embarrassing and dangerous for those on the list. Small (2012) remembers, 'it was happening not too long after the discovery of AIDS, which was still considered by some at that time to be a gay disease. So labelling people as gay was like bringing to them and their families the ultimate shame and embarrassment.'

As the author could find no research done on this about-face by Bahamian politicians, this chapter relies heavily on that preliminary interview. At the time, the PLP was in power – the party responsible for shepherding the Bahamas to majority rule and eventually independence. The PLP was considered the party of the black masses, the majority of whom were Christian and religiously involved (Hughes 1981). The PLP was also on the verge of losing the 1992 election. According to political observers, after 25 years of governing the Bahamas, accusations of drug cover-ups and bribery would prove too great a challenge for the then PLP leader, Sir Lynden Pindling (Blair 2000). Despite this, both leaders of the politically weak PLP and the opposition FNM – which went on to win the 1992 election – supported the decriminalisation of same-sex intimacy (Small 2012). Given the PLP's waning power, it seems irrational for them to have taken such a controversial position before the elections. Furthermore, the FNM could very well have politicised the amendment of

12 Since 1998, RAB has been the primary LGBT/SGL advocacy organisation in the Bahamas and was essential in archiving reports of discrimination, anti-gay protests and other information concerning the community. Small was instrumental in their work.

the Sexual Offences Act by opposing it as a party. This suggests that something drastic and perhaps personal happened to force such a sudden pivot from the reifying of anti-homosexual legislation in 1989 to the bipartisan amending of law in 1991. It can be argued that the language of the 'right to privacy' used in the debates concerning the decriminalisation of same-sex intimacy suggests this as well. For example, according to Small (2012), the Attorney General at the time, former PLP Member of Parliament Paul Adderley, was against the idea of decriminalising homosexuality because he feared it could open a door to same-sex marriage. After advocating the continued criminalisation of same-sex intimacy, Adderley 'was featured on the front page of T*he Nassau Guardian* saying that every Bahamian is entitled to a right to privacy under the constitution. Adderley's government (PLP) then voted to change the law' (Small 2012).

This language of privacy – instead of a language of sexual rights or LGBT rights, for example – is reflected in Prime Minister Ingraham's speech admonishing those involved in the Save the Bahamas protests of 1998. Ingraham is quoted as saying:

> An individual's right to privacy is a basic human right cherished by all people. It is a right which citizens of democratic countries expect to be respected by their Government. Quite simply, it is not the role of the Government to investigate and pass judgement on the sexual behaviour of consenting adults so long as their activity is conducted in private. (Bahamas Ministry of Tourism 1998)

In this statement, delivered through the Bahamas Ministry of Tourism (1998), Prime Minister Ingraham reminded the population that the Bahamas relies on a tourism-based economy. In his words, 'These visitors to the Bahamas form the basis of our economic lifeblood. Without tourism and financial services the standard of living of our country would be dramatically different. We would be measurably poorer with tremendously fewer opportunities'.

Alexander (1994) argues that the original Sexual Offences Act of 1989 was a response by the state to protect its very existence. For Alexander, the source of the state's legitimation is anchored in the heterosexual family and the family itself becomes important as state power is continually eroded by internationalisation. In an attempt to legislate its existence, the state criminalises threats to this archetypal source of its legitimation – these include the prostitute, the single woman, the HIV-infected and the homosexual (Alexander 1994). State managers mobilise conservative discourses around sexuality to 'reassure men, for they are the archetypal citizen, and conservative elements, and religious constituencies in a context in which the religious provides important explanations for daily life' (Alexander 1994, p. 20). Other scholars contend that the assumed (re)productiveness of heterosexual sex is of primary importance in understanding sexual stigma and prejudice in the Commonwealth Caribbean. Kempadoo (1994, p. 3) asserts that 'an economy

depends upon the organisation and productivity of human labour, and that labour that rests upon sexual energies and parts of the body is integral to the economy, whether this is explicitly commodified … deployed to expand slave labour, or used to fortify a national or ethnic group'. For Alexander (1994, p. 14), in her examination of sexual offences legislation in Trinidad and Tobago and the Bahamas, the indictment of those who practice 'unnatural' sexualities, 'registers a suspicion of an unruly sexuality, omnipotent and omniscient enough to subvert the economic imperatives of the nation's interests'. But the events of 1991, 1998 and 2010 in the Bahamas highlight conflicts that make this narrative more complicated. The collusion between state and religious authorities in the Bahamas is not as seamless as these arguments might suggest and economic imperatives seem to have been at the heart of Prime Minister Ingraham's statement *defending* the rights of sexual minorities in 1998.

Without further research the Bahamian case leaves us with important questions. Is it true, as Dr Bethel claims, Bahamians have historically been more accepting of sexual minorities compared to other West Indians? Why has this been the case? How can we explain the change in Bahamian's attitudes toward sexual minorities? What was it about the 'sissy list' and club raids that invoked a bipartisan response, against the will of the general population, a year before elections? What has continued to facilitate the rift between political and religious authorities in a country where fundamentalist, evangelical Christianity holds enormous sway? And, does the Bahamian case challenge existing theories of the post-colonial Caribbean state and the role of homophobia in processes of state legitimation?

2.3 Jamaica and Trinidad and Tobago: resistance and local, regional and international activism

It was after the decriminalisation of same-sex intimacy, that a number of LGBT/SGL civil rights groups formed in the Bahamas, including Bahamian Gays and Lesbians against Discrimination (BGLAD) and Hope Through Education and Awareness (Hope TEA). These groups eventually consolidated their work, becoming the Rainbow Alliance of the Bahamas (RAB). The decriminalisation of same-sex intimacy in the Bahamas was not the result of direct engagement by LGBT organisations. For activists in Jamaica and Trinidad and Tobago this is not an option. Much of the work being done by these activists is happening in a climate that is not only often hostile, but can also be legally perilous. Despite these obstacles, both countries have a history of LGBTQ/SGL activism, and with the development of global media and an international gay rights advocacy there is a new, more complicated chapter being added to this history.

Batra's (2010) archival analysis provides important perspective on the history of activism in Jamaica. Starting in 1974, the Gay Freedom Movement (GFM), Jamaica's first group advocating for gay and lesbian rights and HIV

awareness, often met in local gay bars to discuss plans of action or set up clinics for the gay and lesbian community. The GFM's emergence, Batra (2010) observes, coincided with the rise of Jamaica's democratic socialist government under the People's National Party (PNP). The organisation dissolved as violence increased in the wake of Edward Seaga's capitalist Jamaican Labour Party (JLP) government coming to power during the opening years of the 1980s (Batra 2010). GFM activists constantly battled with apathy on the part of the larger gay and lesbian community, a lack of funding and organisation, and an increase in social violence.[13] Yet writers of the *Jamaica Gaily News,* the GFM's newsletter, made a thoughtful attempt to create a history and document the presence of gays and lesbians in Jamaica, little of which remains (Batra 2010). A GFM pamphlet, contributed to the Digital Library of the Caribbean by the Caribbean International Resource Network, lists as one of its aims and objectives 'To press for the repeal of the buggery law' (GFM n.d.)

Today J-FLAG works to continue in this tradition, advocating for the protection of the LGBTQ/SGL community in Jamaica. Its website states that the organisation was started in 1998 by a group of Jamaicans from varying walks of life, with the intention of advocating for the protection of LGBT people from both state-sanctioned and community violence. 'One of J-FLAG's first major undertakings was a submission to the Joint Select Committee on the Charter of Rights Bill seeking to amend the non-discrimination clause to include "Sexual Orientation"' (J-FLAG). Legal reform features heavily among its objectives, a goal it hopes to achieve by engaging with other local organisations across the Jamaican socio-political landscape concerned with equality for all Jamaicans.

The organisation has also joined medical professionals in the region to call for a repeal of the 'buggery law'. Attempts to stem the spread of HIV have opened a 'back door' for advocacy in favour of tolerance and decriminalisation, not just as a human rights issue, but as an issue of national health. In a recent video released by J-FLAG entitled, *I Must Respect All Jamaicans*, community leaders, including those in the arts, social work, religion and even a Miss Jamaica World, advocate publically for tolerance of gay and lesbian Jamaicans to help address the spread of HIV (J-FLAG 2011b). Represented in the video are both gay activists and heterosexual allies and such a public cross-community appeal for tolerance and respect, according to my research, is unprecedented for Jamaica. Also, calls for the decriminalisation of homosexuality by political leaders in the Caribbean, health professionals and other community activists

13 Batra (2010) uses Urvashi Vaid's critique of political indifference among gays and lesbians in the United States to explain the apathy of the Jamaican gay and lesbian community during calls to action by the GFM. Vaid suggests that 'they are more interested in fulfilling their social needs than in shouldering political responsibility' (Batra 2010, p. 53).

within the context of addressing the HIV/AIDS pandemic have not been uncommon (J-FLAG 2011c).

There have been calls for the arrest of J-FLAG members and dismantling of the organisation, namely by former JLP MP, Ernest Smith. In 2009, Smith 'called for the director of public prosecutions to instruct the police to charge members of the Jamaica Forum for Lesbians, All-sexuals and Gays (J-FLAG) with conspiracy to corrupt public morals' (Luton 2009). The absence of political will on issues concerning the protection of the non-heterosexual citizens in Jamaica comes as no surprise. Carr and White (2005, p. 352), for example, tell of instances where 'homosexuality has been used in smear campaigns against opposing political parties'.

Recently, charges were made during the 2011 elections that the PNP was being funded by international gay rights organisations after Prime Minister Portia Simpson-Miller suggested that it was time to review the country's buggery laws. In the *Jamaican Observer* (2011b) Daryl Vaz, treasurer for the ousted JLP, asked whether or not international gay rights organisations were interfering in Jamaica's elections with the hope of guaranteeing changes in the law. What perhaps makes the Bahamas different from Jamaica is that the decriminalisation of same-sex intimacy was never politicised. In 1991, just as in 2010, support – albeit superficial – for the expansion of rights for LGBT/SGL people was bipartisan in nature.

The evidence available suggests that Jamaica's long history of LGBT/SGL activism is inherently connected to political change. Differences in the treatment of LGBT/SGL issues under the various Jamaican political parties are exemplified in Batra's (2010) account that GFM activists found Jamaica's climate more conducive to their work under the democratic socialist PNP government as were Prime Minister Portia Simpson-Miller's comments compared to her JLP counterparts. This can perhaps be explained by the ideological differences that characterise Jamaica's main political parties. Carl Stone (1976, p. 183) asserts that the JLP has propagated an ideology of capitalist free enterprise and party symbolism has been consistently 'parochial, nativist, and mainly emotive'. In comparison, the PNP has adopted left-leaning ideas 'derived mainly from foreign metropolitan areas' (Stone 1976, p. 183). How these parties approach the question of nationalism is also different. 'The PNP's version of nationalism has also reflected a consequent cosmopolitan, regional, outward-looking, and internationalist perspective while the JLP has been basically parochial and localist in its view of nationalism' (Stone 1976, p. 183).

Academic and popular responses to calls for censorship of Jamaica's native dancehall music by Euro-American organisations, like the Gay and Lesbian Alliance Against Defamation (GLAAD), have viewed such protests as neo-imperialist, thus garnering popular national opposition (Barnes 2006). Similarly, some fear British Prime Minister David Cameron's threat to cut aid to countries whose laws discriminate against gays and lesbians will lead

to a backlash throughout the Caribbean (Caribbean360 2011). The editorial in the *Jamaica Observer* (2011a) reads, 'Where the homosexual lobby and their supporters have erred is in trying to force their lifestyle on societies that regard it as wrong and ungodly'. As is the case throughout the Commonwealth Caribbean, Jamaica has become a prime example of how the violent responses to same-sex intimacy have become a nationalist trope – placing homosexuality outside of the nation as a Western import (Althuri 2001). To challenge 'Jamaican homophobia' is to challenge Jamaica itself, which makes the involvement of international organisations a minefield.[14]

In Trinidad and Tobago, the Coalition Advocating for Inclusion of Sexual Orientation (CAISO) has been active both locally and regionally. The organisation formed in 2009 in response to a statement made by the Minister of Community Development, Culture and Gender Affairs, Marlene McDonald. Concerning the draft document for the National Gender Policy and Action Plan, Minister McDonald declared, 'We are not dealing with any issues related to ... same-sex unions, homosexuality or sexual orientation' (quoted in Dassrath 2009). Disturbed by the minister's comments, members of already-existing groups, Friends for Life, 4 Change, Velvet Underground, Men who have Sex with Men (MSM) and the Trinidad and Tobago Anti-Violence Project, decided collectively to come together to advocate for the LGBTQ/SGL community in Trinidad and Tobago addressing the silences in government policy (Dassrath 2009).

Since its formation, CAISO has been a vocal advocate for LGBT/SGL people. When the group celebrated International Day Against Homophobia and Transphobia (IDAHO) on 17 May 2010, it delivered messages to six ministries detailing six steps the government should take to help address homophobia in Trinidad and Tobago (Gonzales 2011). Director of CAISO, Colin Robinson said, 'We didn't hear any name-calling and we haven't been treated as anything but citizens and we also noted the (Gender Affairs) minister in the *Guardian* has commented positively on our effort' (*Trinidad and Tobago Guardian* 2011). Still, Robinson claimed there is a lot of work left to be done address sexual stigma in the country. Decriminalisation of same-sex intimacy is not included among the six steps. According to Robinson:

> Decriminalization of same-sex intimacy is not in our top six things … The most serious issue is discrimination, and related to that is violence, and related to both of those are areas of social vulnerability – the ways in which we are seen as legitimate targets of discrimination and differential treatment. (Rothaus 2011)

Locally, CAISO advocacy has undertaken a partnership with the University of the West Indies (UWI), the Rape Crisis Society, Young Men's Christian

14 Despite this aversion to international interference, the job announcement for J-FLAG's (2012) new Policy Advocate is tagged with the USAID logo.

Association (YMCA) and the Family Planning Association to strengthen local responses to increased violence and discrimination (Dassrath 2009). In March of 2009, Trinidad and Tobago Anti-Violence Project (created in response to homophobic violence in Caribbean music) and UWI organised training on sexual orientation and social work practice for 25 government social workers (Robinson 2009). CAISO's leadership joined heads of other LGBT organisations in St Lucia to speak at a press conference concerning LGBT issues in the region, held in January 2012. CAISO has also recently been recommended for funding by UNAIDS and the Foundation for AIDS Research (amfAR) along with one other local organisation (UNAIDS Caribbean 2012).

As evidence of these organisations' growing success, Trinidad and Tobago passed its first 'pro-gay' legislation in 2011. The Data Protection Act 2011 establishes the boundaries of what is a person's private information and protects it from intrusion. In Part 1 (2) of the new law, 'sensitive personal information' is defined to include 'sexual orientation or sexual life' (Data Protection Act 2011). The CAISO (2011) blog reads, 'Ensuring citizens' autonomy in their consensual sexual affairs requires *both* protecting their sexual lives from unwarranted intrusion *and* protecting them from discrimination based on their sexuality.'

Where the Trinidadian state has failed to protect LGBT/SGL people, the courts have attempted to intervene. The Court of Appeal of Trinidad and Tobago ruled in 2004 that the Equal Opportunity Act of 2000 (EOA) was inherently unconstitutional (*Suratt et al. v. Attorney General*). In the decision, the Justices ruled that, 'By specifically, excluding sexual preference or orientation from the definition of "sex", persons who allege discrimination on these grounds are denied the equality of treatment under the law' (*Suratt et al. v. Attorney General* 2004, Section 20). Unfortunately, the Privy Council reaffirmed the EOA without provisions protecting sexual minorities (*Trinidad and Tobago Newsday* 2007).

This brief survey suggests that, instead of violent opposition by the state and its agents, Trinidadian LGBT/SGL activists and their allies face the erasure and silencing of LGBT/SGL persons and their issues. Through local partnerships with anti-violence organisations and UWI these issues are being highlighted and responded to, increasing advocates' reach and influence. It is important to note that – as in the case of the Bahamas – it is around the question of a right to personal privacy that progress is being made for the protection of LGBT/SGL people. International LGBT rights organisations have favoured a discourse of 'sexual rights as human rights' for the last decade and a half (Tiefer 2002). The effectiveness of this relatively new 'sexual rights' discourse is debatable in countries where state and religious authorities champion the inequality of non-heterosexuals (Plummer 2005). If the ultimate goal is to change the laws in Trinidad and Tobago, the courts seem to be the route through which LGBT/SGL activists seek recourse. The Court of Appeal's progressive statement

in favour of including sexual orientation as a protected class in the EOA is encouraging; however, this may do little to change popular opinion. As the Bahamas illustrates, changes in law by political elites do not necessarily lead to changes in popular opinion.

Conclusion

Though buggery laws in the Commonwealth Caribbean originate from a single legal code and a shared colonial past, these separate cases illustrate that the law's existence and application have developed differently in each national context. The question of how to approach the decriminalising of same-sex intimacy in the Commonwealth Caribbean is essentially one of challenging homophobia in the region, and must be answered on a case-by-case basis. While there are themes that stretch beyond national borders – the conservative Christian fundamentalist discourses in the Bahamas, the outlawing of the 'unnatural homosexual' in Jamaica, and the stigma-creating symbolism of the law in Trinidad and Tobago – the differences complicate reductive narratives of a pan-Caribbean homophobia and in each case present particular challenges and areas of resistance. To import Euro-American models of advocacy or strategies that have worked in one Caribbean country to another, or even relying on legal remedies to address homophobia – like the decriminalisation of same-sex intimacy – without a critical examination of each country's political, social, cultural and economic environments is unproductive. Questions concerning intimacy, citizenship and nationalism are deeply embedded in interpersonal, inter-group, national and international tensions and conflicts (Plummer 2005).

When examined, these complexities also present diverse opportunities for advocacy. The rift between religious and state authority in the Bahamas opens the door for strategic engagement with fair-minded political leaders across the party spectrum to pass new laws addressing the issues facing LGBT/SGL Bahamians. There is evidence to suggest Jamaica's left-leaning PNP is more open to progress on the issue of decriminalising same-sex intimacy than the JLP. Decriminalisation is a top priority for J-FLAG and activists have no doubt realised that the election of a PNP government gives them a window of opportunity that must be leveraged. While decriminalisation is not of primary importance for CAISO, it has addressed issues of discrimination and violence in Trinidad and Tobago by building local partnerships with a number of NGOs and the UWI. Unlike elsewhere, the judiciary in Trinidad and Tobago has shown itself to be sympathetic to issues facing sexual minorities.

Finally, these questions remain. Is it accurate to suggest that the Bahamas has always displayed a more progressive attitude towards sexual minorities relative to other countries in the Commonwealth Caribbean? If so, why has this been the case? Why did the Bahamian LGBT/SGL community fail to organise prior to the decriminalisation of same-sex intimacy, while LGBT/SGL

advocacy groups in both Jamaica and Trinidad and Tobago have existed since the 1970s? And, given statements of support by politicians in Jamaica and the Bahamas, how does one make sense of academic discourses that theorise the Caribbean post-colonial state as necessarily mobilising conservative discourses to appease their religious constituents, legitimate state authority and ensure economic viability?

These questions can only be answered by a more detailed historicisation of sexual prejudice and stigma, and the work of LGBT/SGL advocates, in each Commonwealth Caribbean country. Furthermore, new models of how state and non-state actors, like religious leaders, must be theorised where the 'overall picture of the state, then, is one of messiness rather than smooth functioning, one of power rather than neutrality, one of tensions between power and resistance rather than outright domination, and one of variability rather than fixity' (Kim-Puri 2005, p. 184). A more critical understanding of how national and cultural discourses involving sexuality are constructed and deployed is important for advocacy work that is concerned with both changing the law and changing popular opinion.

Bibliography

Alexander, M.J. (1994) 'Not just (any) body can be a citizen: the politics of law, sexuality and postcoloniality in Trinidad and Tobago and the Bahamas', *Feminist Review* 48, pp. 5–23.

Althuri, T. (2001) 'When the closet is a region: homophobia, heterosexism and nationalism in the Commonwealth Caribbean', Center for Gender and Development Studies, University of the West Indies.

Bahamas Ministry of Tourism (1998) 'Islands of the Bahamas' position on gay and lesbian travel', press release, 8 Mar., available at www.bahamas-mon.com/pressrelease.html (accessed 5 Feb. 2013).

Beckford, J. A. and J.T. Richardson (2009) 'Religion and regulation', in J.A. Beckford and N.J. Demerath (eds.), *The SAGE Handbook of the Sociology of Religion* (London: SAGE Publications Ltd.), pp. 396–418.

Blair, J. (2000) 'Lyden Pindling, 70, who led Bahamas to Independence', *The New York Times*, 28 Aug., available at www.nytimes.com/2000/08/28/world/lynden-pindling-70–who-led-the-bahamas-to-independence.html (accessed 5 Feb. 2013).

Brown, S. and L. Johnson (2009) 'Bishop: demons loose in country', *The Tribune*, 17 Jan., available at www.tribune242.com/news/2009/feb/23/bishop-demons-loose-in-country/ (accessed 5 Feb. 2013).

Bureau of Democracy, Human Rights and Labor (2006) 'Bahamas', United States Department of State, 8 Mar., available at www.state.gov/g/drl/rls/hrrpt/2005/61714.htm (accessed 5 Feb. 2013).

Burg, B. R. (1983) *Sodomy and the Perception of Evil: English Sea Rovers in the Seventeenth-Century Caribbean* (New York and London: New York University Press).

CAISO (2011) 'Privacy rights for sexual orientation calmly take a small step forward in T&T', 26 June, available at http://gspottt.wordpress.com/2011/06/26/privacy-rights-for-sexual-orientation-calmly-take-a-small-step-forward-in-tt/ (accessed 10 Feb. 2012).

Caribbean360 (2011) 'Britain warned of serious backlash over "anti-gay"', 31 Oct., available at www.caribbean360.com/index.php/news/jamaica_news/513782.html#axzz1odflcXgb (accessed 9 Mar. 2012).

Carr, R. and R. White (2005) 'Homosexuality and HIV/AIDS stigma in Jamaica', *Culture, Health and Sexuality* 7 (4), pp. 347–59.

Carr. R., J. Jimenez and L. Norman (2006) 'Sexual stigma and sympathy: attitudes towards living with HIV in Jamaica', *Culture, Health and Sexuality* 8 (5), pp. 423–33.

Chin, T. (1991) '"Bullers" and "Battymen": contesting homophobia in black popular culture and contemporary Caribbean literature', *Callaloo* 20 (1), pp. 127–41.

Daily Mail (2007) 'Elton John could turn us gay', 16 Mar., available at www.dailymail.co.uk/tvshowbiz/article-442724/Elton-John-turn-gay-says-archdeacon.html (accessed 5 Feb. 2013).

Dayle, P. (2010) 'HIV fears put repeal of homophobic laws on the table for Caribbean nations', *The Guardian*, 1 Dec., available at www.guardian.co.uk/law/2010/dec/01/caribbean-gay-rights-laws (accessed 5 Feb. 2013).

Dessrath, M. (2009) 'CAISO- seeking rights for gays, lesbians', *Trinidad and Tobago News Day*, 9 Aug., available at www.newsday.co.tt/features/0,105248.html (accessed 5 Feb. 2013).

Donnell, A. (2006) *Twentieth-century Caribbean Literature: Critical Moments in Anglophone Literary History* (London and New York: Routledge).

Dunn, R.S. (1972) *Sugar and Slaves: The Rise of the Planter Class in the English West Indies* (Chapel Hill, NC: University of North Carolina Press).

Fraser, J. and S. Rothaus (2011) 'Same-sex unions becomes heated issue in Trinidad', *Miami Herald*, available at http://miamiherald.typepad.com/gaysouthflorida/2011/07/same-sex-unions-becomes-heated-issue-in-trinidad.html#storylink=cpy (accessed 5 Feb. 2013).

Gay Freedom Movement (n.d.) *Gay Freedom Movement Brochure*, available at http://dloc.com/AA00002992/00001 (accessed 5 Feb. 2013).

Goldsmith, N.M. (1998) *The Worst of Crimes* (Aldershot, England: Ashgate).

Gonzales, G. (2011) 'Gays call for end to homophobia', *Trinidad Express*, 18 May, available at www.trinidadexpress.com/news/Gays_call_for_end_to_homophobia-122132498.html (accessed 5 Feb. 2013).

Green, G. L (1999) 'Blasphemy, sacrilege, and moral degradation in the Trinidad Carnival: the Hallelujah controversy of 1995', in J.W. Pulis (ed.), *Religion, Diaspora, and Cultural Identity: A Reader in the Anglophone Caribbean* (Amsterdam: Gordon and Breach Publishers).

Gutzmore, C. (2004) 'Casting the first stone: policing of homo/sexuality in Jamaican popular culture', *Interventions: International Journal of Postcolonial Studies* 6 (1), pp. 118–34.

Harding, S. (1994) 'Imaging the last days: the politics of apocalyptic language', in R.S. Appleby and M.E. Marty (eds.), *Accounting for Fundamentalisms: The Dynamic Character of Movements* (Chicago and London: University of Chicago Press).

Herek, G. M. (2004) 'Beyond "homophobia": thinking about sexual prejudice and stigma in the twenty-first century', *Sexuality Research and Social Policy* 1 (2), pp. 6–24.

Hughes, C. A. (1981) *Race and Politics in the Bahamas* (London and St. Lucia: University of Queensland Press).

Human Rights Watch (2004) 'Hated to death: homophobia, violence and Jamaica's HIV/AIDS epidemic', *Human Rights Watch* 16 (6), pp. 1–79.

Hyam, R. (1991) *Empire and Sexuality: The British Experience* (Manchester and New York: Manchester University Press).

International Gay, Lesbian, Bisexual and Trans and Intersex Association (2010) 'Violence against LBT women in Jamaica', 16 Feb., available at http://ilga.org/ilga/en/article/miePUwr1UN (accessed 5 Feb. 2013).

— (2011) *State Sponsored Homophobia: A World Survey of Laws Criminalizing Same-Sex Sexual Acts*, available at http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2011.pdf (accessed 18 Jan. 2012).

Jamaica Observer (2011a) 'Why the British PM can wield a big "homosexuality" stick', 4 Nov., available at www.jamaicaobserver.com/editorial/Why-the-British-PM-can-wield-a-big--homosexuality--stick_10047555#ixzz1loMPP3OM (accessed 5 Feb. 2013).

— (2011b) 'Has PNP received financing from gay community?' 25 Dec., available at www.jamaicaobserver.com/news/Has-PNP-received-financing-from-gay-community-_10453549 (accessed 5 Feb. 2013).

J-FLAG (2011a) 'Homophobic violence on the increase in Jamaica', 7 July, available at www.jflag.org/2011/07/homophobic-violence-on-the-increase-in-jamaica/ (accessed 5 Feb. 2013).

— (2011b) *I Must Respect All Jamaicans: Tolerance*, available at www.jflag.org/about/video/ (accessed 26 Mar. 2013).

— (2011c) 'Our leaders must repeal to reduce HIV infections', press release, 1 Dec., available at www.jflag.org/2011/12/our-leaders-must-repeal-to-reduce-hiv-infections/ (accessed 5 Feb. 2013).

—(2012) 'Your community needs you', 18 Jan., available at www.jflag.org/2012/01/your-community-needs-you/ (accessed 5 Feb. 2013).

Johnson, L. (2011) 'Pastors question DPM's resolution support', *The Tribune*, 28 June, available at www.tribune242.com/news/lj-Pastors_news_pg3 [accessed 25 Jan. 2012].

Jones, R. (2011) 'Bishop hits out at homosexuals', *The Nassau Guardian*, 15 Nov., available at www.thenassauguardian.com/index.php?option=com_content&view=article&id=16600&Itemid=27 (accessed 5 Feb. 2013).

Kempadoo, K. (2004) *Sexing the Caribbean* (New York and London: Routledge).

Kim-Puri, H. J. (2005) 'Conceptualizing gender-sexuality-state-nation: an introduction', *Gender and Society* 19 (2), pp. 135–59.

Leslie, C. R. (2000) 'Creating criminals: the injuries inflicted by unenforced sodomy laws', *Harvard Civil Rights-Civil Liberties Law Review* 35 (1), pp. 103–82.

Luton, D. (2009) 'Buggery laws firm – PM says life or 15 years for some sex-offence breaches', *Jamaican Gleaner*, 4 Mar., available at http://jamaica-gleaner.com/gleaner/20090304/lead/lead1.html (accessed 5 Feb. 2013).

McCartney, J. (2011a) 'Cable examines Bahamian views on gay rights', *The Nassau Guardian*, 22 June, available at www.thenassauguardian.com/index.php?option=com_content&view=article&id=11129%3Acables-examine-bahamian-views-on-gay-rights&Itemid=27 (accessed 5 Feb. 2013).

— (2011b) 'Bahamas backs gay rights', *The Nassau Guardian*, 18 June, available at: www.thenassauguardian.com/index.php?option=com_content&view=article&id=11069&Itemid=27 (accessed 5 Feb. 2013).

— (2011c) 'PLP supports gay rights', *The Nassau Guardian*, 25 June, available at www.thenassauguardian.com/index.php?option=com_content&view=article&id=11197&Itemid=27 (accessed 5 Feb. 2013).

Padgett, T. (2006) 'The most homophobic place on Earth', *Time World*, 12 April, available at www.time.com/time/world/article/0,8599,1182991,00.html (accessed 5 Feb. 2013).

Puar, J. (2001) 'Transnational sexualities and Trinidad', *Signs* 26 (4), pp. 1039–65.

Phillips, O. (1997) 'Zimbabwe', in R. Green and D.J. West (eds.), *Sociolegal Control of Homosexuality: A Multi-National Comparison* (New York and London: Plenum Press), pp. 43–56.

Plummer, K. (2005) 'Intimate citizenship in an unjust world', in E. Margolis and M. Romero (eds.), *The Blackwell Companion to Social Inequalities* (Oxford and Malden, MA: Blackwell), pp. 75–99.

Rainbow Alliance (2011) *Rainbow Alliance of the Bahamas*, available at http://bahamianglad.tripod.com (accessed 5 Feb. 2013).

Reuters (1998). 'Nasty Christians in the Bahamas', 9 Mar., available at www.glapn.org/sodomylaws/world/bahamas/banews001.htm (accessed 5 Feb. 2013).

Robinson, C. (2009) 'Groups label gays' exclusion from national gender policy "1919" thinking', *International Federation of Black Prides*, July, available at www.ifbprides.org/news/ifbp_news_jul_09_coalition.php (accessed 5 Feb. 2013).

Rothaus, S. (2001) 'Same-sex unions becomes heated issue in Trinidad' *Miami Herald Blog,* July, available at http://miamiherald.typepad.com/gaysouthflorida/2011/07/same-sex-unions-becomes-heated-issue-in-trinidad.html (accessed 5 Feb. 2013).

Stone, C. (1976) 'Class and the institutionalisation of two-party politics in Jamaica', *The Journal of Commonwealth and Comparative Politics* 14 (2), pp. 177–96.

The Advocate (2005) 'How homophobic is the Caribbean?', 26 April, available at www.thefreelibrary.com/+homophobic+is+the+Caribbean%3F+Find+out+where+you+can+be+gay+and...-a0133014823 (accessed 5 Feb. 2013).

Tiefer, L. (2002) 'The emerging global discourse of sexual rights', *Journal of Sex and Marital Therapy* 28, pp. 439–44.

Tomlinson, M. (2011) 'Jamaica: brutality against MoBay gays' (Letter to the Editor), *Jamaican Gleaner* 26 Feb., available at http://jamaica-gleaner.com/gleaner/20110225/letters/letters5.html (accessed 5 Feb. 2013).

Thompson, T. (2010) 'Homosexuality and the Bahamas', *The Tribune*, 1 Mar., available at www.tribune242.com/03012010_tt-homophobia_insight_pg (accessed 26 Jan. 2012).

Trinidad and Tobago's Ministry of the People and Social Development (2011) 'Perception of teenager (violence and sexual behaviors), disability and homosexuality', *Norms and Values Report: A Nationwide Study on the Degree of Conformity of Social Norms and Values in Trinidad and Tobago,* vol. 2, available at http://gspottt.files.wordpress.com/2011/05/social-norms-volume-2–final.pdf (accessed 5 Feb. 2013).

Trinidad and Tobago Newsday (2007) 'Privy Council allows Equal Opportunity Act', 18 Oct., available at www.newsday.co.tt/sport/0,66262.html (accessed 5 Feb. 2013).

UNAIDS Caribbean (2012) 'Furthering the MSM agenda in T&T', available at http://unaidscaribbean.org/node/185 (accessed 5 Feb. 2013).

Upchurch, C. (2009) *Before Wilde: Sex Between Men in Britain's Age of Reform* (Berkeley, Los Angeles and London: University of California Press).

Legislation and case law

Data Protection Act 2011 (No. 13), available at www.ttparliament.org/legislations/a2011–13.pdf (accessed 5 Feb. 2013) (Port of Spain, Trinidad: Ministry of Legal Affairs).

Immigration Act 1995 (c.18:01), available at www.oas.org/dil/Immigration_Act_Trinidad_and_Tobago.pdf (accessed 5 Feb. 2013) (Port of Spain, Trinidad: Ministry of Legal Affairs).

Kester Benjamin v. The State [2008] Cr. App: 54 of 2008 [pdf], available at http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2008/narine/ca_08_54DD17dec2009.pdf (accessed 5 Feb. 2013).

Offences Against the Person Act 2009 (c.248), available at www.moj.gov.jm/sites/default/files/laws/Offences%20Against%20the%20Person%20Act.pdf (accessed 5 Feb. 2013) (Kingston, Jamaica: Ministry of Justice).

Sexual Offences Act 1991 (c.99:1), available at www.oas.org/dil/Sexual_Offences_and_Domestic_Violence_Act_Bahamas.pdf (accessed 5 Feb. 2013) (Nassau, Bahamas: Office of the Attorney General and Ministry of Legal Affairs).

Sexual Offences Act 2000 (c.11:28), available at http://rgd.legalaffairs.gov.tt/Laws2/Alphabetical_List/lawspdfs/11.28.pdf (accessed 5 Feb. 2013) (Port of Spain, Trinidad: Ministry of Legal Affairs).

State v. Samuel Duke [1998] H.C. Cr. No. 70/07, available at http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/Persad/2007/hc_07_70DD8mar2010.pdf (accessed 5 Feb. 2013).

Suratt et al. v. Attorney General [2004] Civil Appeal No. 64, available at http://webopac.ttlawcourts.org/LibraryJud/lib_judg_recd_0601.htm (accessed 20 Mar. 2012).

The Constitution of the Commonwealth of the Bahamas 1973, available at www.lexbahamas.com/bahconcitizen.htm (accessed 8 Feb. 2012).

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Beyond cross-cultural sensitivities: international human rights advocacy and sexuality in Jamaica

Conway Blake and Philip Dayle

1. Introduction

Among the complex bundle of challenges facing local and international activists working on the subject of sexual orientation in Jamaica, perhaps the most debilitating may be described as 'post-colonial sensitivities'. This reference to 'sensitivities' borrows from a coinage by Professor Eric Heinze in his essay entitled 'Sexual orientation and international law: a study in the manufacture of cross-cultural "sensitivity"' (Heinze 2000–1). The authors firmly believe that no useful advocacy in the name of human rights or other liberationist projects can be a success in Jamaica without an understanding of colonialism and its continued impact on how Jamaica imagines itself and relates to the outside world. That said, we also believe that there has been a tendency to fixate on these problems and to view all advocacy in local versus global and north versus south terms. This chapter suggests there is need and scope for advocates and scholars to move beyond these 'sensitivities' and embrace a pragmatic approach to advocacy for change.

The following section of this chapter contextualises some religious and cultural considerations that shape homophobia in Jamaica, the third examines how the law reflects so-called national values, while the fourth maps the origins and trajectory of rights-based sexuality advocacy in Jamaica in three distinct periods. Some of the ways in which 'sensitivities' affect transnational advocacy are unpacked in the fifth section, and the sixth proffers suggestions for pragmatic and collaborative partnerships for transnational advocacy. The conclusion is that essentially the realisation of human rights in respect of sexual orientation and human rights requires tough-minded pragmatism and collaboration.

2. Locating Jamaican homophobia

Jamaica is widely perceived to be the most homophobic country in the Caribbean and, by some accounts, the world (Padgett 2006). Sexuality-based oppression in Jamaica is institutionalised throughout the legal system, health and social welfare institutions, popular culture, religion and through extreme forms of social stigma (White and Carr 2005). Though 'homophobia permeates the [Caribbean] region' (Noel 1993), a particularly virulent strain is associated with Jamaica. ('It is something that is Trinidadian. It is something that is Barbadian. It is part of the culture of the Caribbean. Homosexuality is taboo' (Noel 1993)). This was underscored in a 2011 empirical study conducted by sociologists at the University of the West Indies which found that Jamaicans had 'strong negative views of homosexuality and there is the overwhelming belief that it should not be legalised among consenting adults' (Boxhill et al. 2011, p. 36). The study further noted that these 'strong negative perceptions and attitudes towards homosexuality cut across all social classes, gender and social groups in Jamaica' (ibid. p. 36). Some sense of the human impact of these 'attitudes' may be further gleaned from the following excerpt from a report published by Human Rights Watch:

> Violent acts against men who have sex with men are commonplace in Jamaica. Verbal and physical violence, ranging from beatings to brutal armed attacks to murder, are widespread. For many, there is no sanctuary from such abuse. Men who have sex with men and women who have sex with women reported being driven from their homes and their towns by neighbors who threatened to kill them if they remained, forcing them to abandon their possessions and leaving many homeless. The testimony of Vincent G., 22, is typical of the accounts documented by Human Rights Watch: 'I don't live anywhere now . . . Some guys in the area threatened me, battyman, you have to leave. If you don't leave, we'll kill you'.
>
> Victims of violence are often too scared to appeal to the police for protection. In some cases the police themselves harass and attack men they perceive to be homosexual. Police also actively support homophobic violence, fail to investigate complaints of abuse, and arrest and detain them based on their alleged homosexual conduct. In some cases, homophobic police violence is a catalyst for violence and serious, sometimes lethal, abuse by others. On 18 June 2004, a mob chased and reportedly 'chopped, stabbed and stoned to death' a man perceived to be gay in Montego Bay. Several witnesses told Human Rights Watch that police participated in the abuse that ultimately led to this mob killing, first beating the man with batons and then urging others to beat him because he was homosexual. (Human Rights Watch 2004, p. 2)

Attempting to explain the causes of Jamaican homophobia is a complex enterprise. White and Carr (2005, p. 7) argue that conservative Christian

beliefs have a key role as the ideological and rhetorical basis for resisting human rights claims in relation to sexual orientation. Christian dogma, they argue, plays an outsized role in public discourse and shaping social values and ethics, dating back to slavery, when Christian missionaries were deployed as part of the indoctrination of African slaves in the so-called New World.

Other scholars opine that virulent homophobia stems from the pervading 'hyper-masculinity' that pervades Jamaican society (Chevannes 2002; Hope 2006). Early sexual intercourse, concurrent multiple partners and extramarital affairs are all badges of normal, heterosexual male behaviour. At its most extreme, masculinity means power over women within sexual relationships. Homosexuality is therefore seen as the antithesis of masculinity, as it represents the feminisation of the man. As such, gay sex must be vilified for corrupting and undermining ideas of authentic masculinity. Homophobia may be understood as part and parcel of patriarchy in Jamaican – and, perhaps, the wider Caribbean society.

3. Post-colonial law as homophobic law

As with many Commonwealth countries in the Caribbean, Africa and Asia, Jamaica inherited British colonial laws which prohibit homosexuality. Noted Caribbean academic Jacqui Alexander has observed that anti-homosexuality laws are deployed as a highly charged symbol of non-Western difference. This symbol has been utilised by postcolonial governments, not only to deny homosexual rights but also to bolster ideas of cultural integrity and nationalistic difference.

The 1864 Offences Against the Person Act of Jamaica prohibits 'acts of gross indecency' (generally interpreted as referring to any kind of physical intimacy) between men, in public or in private. Further, the offence of buggery is created by section 76, and is defined as anal intercourse between a man and a woman, or between two men. Most prosecutions involve consenting adult men suspected of indulging in anal sex. The penalty for the offences is ten years' imprisonment and hard labour. The concept and language of the Offences Against the Person Act squares with Victorian readings of Old Testament accounts of Sodom and Gomorrah. Ideas of 'carnal knowledge' and 'the order of nature', mentioned in the Act, sharply redefined customary, unnamed or marginal behaviours.

Jacqui Alexander (1994) argues that law enforces the disapproval of non-procreative sex, such as gay and lesbian sex, and its practitioners are debarred from full moral citizenship, for which there is a heterosexual imperative. Intriguingly, values have reversed so that a colonial provision such as the Offences Against the Person Act has become a seal of post-colonial identity. Modern states are imbued with the old, 'modernising' colonial responsibility to protect the boundaries of nationhood, through laws that proscribe sex 'against the order of nature'. The offences of buggery and gross indecency are viewed as

critical in the protection of heterosexuality – the only viable and self-sustaining option for the nation. The spectre of unnaturalness and criminality from these offences dispossesses lesbians, gays and bisexuals of full moral citizenship. In the ultimate paradox – and the most satisfying to postcolonial politicians – these offences mark new nations, such as Jamaica, as being distinctly morally superior to the former colonial power.

In the UK, the move towards 'gay rights' was developed in the 1957 Wolfenden report (Committee on Homosexual Offences and Prostitution 1957; Waites, this volume). The report concluded that homosexual behaviour between consenting adults in private was part of the 'realm of private morality which is, in brief and crude terms, not the law's business' and should no longer be criminal. The European human rights system eventually became receptive to sexual-orientation-based claims. In 1981, the European Court on Human Rights declared the offences of buggery and gross indecency in Northern Ireland to violate the right to privacy under article 8 of the European Convention in the case of *Dudgeon v. UK*. Dudgeon, a gay man, argued that the very existence of the offences in Northern Ireland made him liable to criminal prosecution and infringed his right to privacy. The court agreed with these arguments and decided similarly in 1988 and 1993 in the cases of *Norris v. Ireland* and *Modinos v. Cyprus* respectively.

One notes that by the mid 1990s 'sodomy' had been decriminalised in nearly all states in western Europe. The resistance in some postcolonial states is all the more peculiar, because many of the offending sodomy laws actually come from Britain and have a genealogical relationship to the United Kingdom provision that the first European Court decision overturned. This colonial break – i.e. the difference between how law developed in its metropolitan points of origin, and how it continued in postcolonial settings – is clearly seen in how the trajectory of international rights mechanisms *has* and *has not* affected domestic laws in countries such as Jamaica. The assertion of Jamaican national identity is meant to provide a sharp moral contrast to the first-world countries of Europe and North America, casting the objection to homosexuality as an issue of 'culture'.

The break-up of the British Empire and the ensuing experiments with nationalism provided a moment of self-definition for newly autonomous states. This historical episode was dominated by male nationalist leaders, and at its best constituted a laudable quest for defining nationhood for formerly colonised peoples. Lawmaking meant not just laying down rules, but the framing of ethical limits and the defining of communities through laws. This symbolic function of law in states recovering from the trauma of colonialism contributes important insights into the debate over legal reform in postcolonial societies.

The Caribbean nationalist project, for example, was motivated by an impulse to prove competence and make assurances about the continued viability of the former colonial territories. One scholar argues that independence made it

urgent that black men, in their newly won capacity as citizens, 'prove themselves the masculine equals of Englishmen' (Edmonson 1999, p. 8). This impulse to assess the success of new political power *in relation to* white male colonial stewardship provided the psychic frame for the new black male leaders.

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

The retention of these laws in independent, formerly British territories, has been radicalised as *the* moment of disjuncture that now defines newly independent states in contradistinction to the former British colonisers (and the liberal tradition of the European Convention on Human Rights system). Through this auspicious departure from the former colonial masters (ironically retaining British Victorian laws), there is a chance to assert an *original* moral authenticity.

The objection to homosexuality as being uncharacteristic of Caribbean society is of course not unique; it is not just southern countries that invoke 'nation' as the criterion for the unacceptability of homosexuality. In the now-overruled 1987 US Supreme Court decision *Bowers v. Hardwick* (478 US 186 (1986)) the majority deployed reasoning that perfectly resembles the rhetoric used in Southern countries to retain sodomy laws. Justice Byron White, delivering the majority opinion, declared that the Federal Constitution did not confer a 'fundamental right upon homosexuals to engage in sodomy', finding the prohibition of sodomy 'deeply rooted in this Nation's history and tradition'. This kind of reasoning may explain how the rhetoric that defends 'sodomy laws' and the suppression of sexual rights has its roots in discourses and strategies of power originating in the colonising states and their history.

4. Putting up resistance: a sketch of Jamaican rights activism

The discourse on sexuality in Jamaica has not been monolithic, but rather a contested and dynamic one. Though subject to considerable constraints, there have been significant acts of resistance on the part of sexual minorities and sustained calls for equality and full recognition of civic entitlements. Three 'waves' of activism surrounding sexuality rights in Jamaica over the past five decades are identified here.

The 'first wave', which began in the early 1970s, was focused on raising consciousness about the plight of gays and lesbians in Jamaica. Its most critical contribution was the formation of an incipient 'gay community' in Jamaica and the forging of a collective of activists. The 'second wave' of resistance, marked by greater institutionalisation and a distinct shift towards the political sphere, began in the 1990s. Specifically, it can be characterised by the development of a sophisticated form of political engagement with the state and a focus on governmental lobbying on issues of legislative and constitutional reform. In this context, the discourse on gay rights in Jamaica was transformed from a purely cultural debate into a wider conversation on the meaning of democratic constitutional citizenship for minorities – and significantly, about how human rights applies to sexual orientation.

The third and most recent wave of resistance is marked by a turn to the international legal sphere. More accurately, it sees a move beyond local politics towards what are known as 'global judicial spaces'. In this latter phase of advocacy, activists have sought to explore the liberationist potential of international human rights law. It will be evident that the analytical frames that are employed here are by no means discrete; the different stages overlap considerably. Though, as outlined below, each wave is marked by new modes of activism and reflects successive stages in the maturation of the local movement.

4.1 Identity as resistance

Existing evidence suggests that the genesis of activism on the issue of sexuality in the English-speaking Caribbean began as early as the 1970s with the establishment of the Gay Freedom Movement (GFM). This was formed in Jamaica in 1974 as the first movement in the region aimed at promoting the rights for gays and lesbians. Its stated aims included raising 'gay consciousness and awareness'; providing 'counselling and support for ... oppressed brothers and sisters'; and removing 'homophobic prejudice and ignorance through public education' (Gay Freedom Movement Archive 2013). In this way, the first wave of activism employed means of consciousness-raising as its main mode of resistance. This aim was pursued through the publication of a gay-rights newsletter – the *Jamaica Gaily News* – and the operation of a number of social outreach programmes focused on health and young people. Members of the GFM were the first Jamaicans to publicly self-identify as homosexual, were often interviewed on local radio and television, and wrote various letters to the press. These activities were crucial symbolic acts of resistance, in that they defied prevailing notions about the invisibility of homosexual identity in Caribbean societies.

Arguably, the most important contribution of the GFM was its critical role in the formation of an incipient 'LGBT community' in Jamaica. In her recent work, Kanik Batra has credited the GFM with starting efforts towards

the forging of an 'imagined community' of gays and lesbians in Jamaica (Batra 2011). The concept of imagined communities has come to denote groupings where 'the members … will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion' (Anderson 1991). In this way, the communications and networks formed by the GFM served to create a community forged on the basis of a common cause and trajectory.

These acts of community building operated on two levels: nationally and transnationally. On the national plane the activities of the GFM initiated a dialogue about homophobia among the members of the 'community', and between the community and the rest of Jamaican society. But equally important was the way in which the GFM imagined itself as a part of a wider 'transnational community' which offered solidarity and legitimacy to the nascent local movement. This is evident, for example, in the GFM's 'strategic links established with the International Gay Association (IGA), the world body of gay rights movement … [and] with gay groups in North, Central and South American, the Caribbean and Europe' (GFM Archive 2012). The transnational dimensions of community were forged on the basis of shared identity, as well as shared notions of human dignity. In this last respect, the GFM's literature suggests the international resonance and legitimacy of the idea of universal human rights was a crucial source of legitimacy for their cause. They summed this up in their deployment of the assertion 'that gay rights are human rights' (GFM Archive – Gay Rights and Human Rights Information Sheets, p. 1). In this way, human rights was not merely a means of articulating grievances and asserting claims based on the demands of humanity dignity; it served as a common language which oriented and bound a global discursive community of activists.

4.2 Reform as resistance

After the cessation of the GFM, its work was renewed and continued by a new generation of activists in the form of the Jamaica Forum for Lesbians, All-Sexuals and Gays (J-FLAG). It was founded in 1998 as a human rights organisation dedicated to the service of the needs of Lesbians, Gay, Bisexual and Transgender (LGBT) people in Jamaica. This organisation operated much more in the mode of traditional human rights NGOs, and was primarily aimed at redressing legal and social discrimination against sexual minorities. The advent of J-FLAG ushered in a new wave of advocacy, which emphasised formal political engagement with the institutions of the state. In this context, advocacy was more firmly focused on the legal realm and particularly on the scope and reach of constitutional protection for minorities.

One of J-FLAG's first major undertakings was the submission of written and oral representations to the Joint Select Committee of Parliament on the

then proposed re-writing of the Constitutional Bill of Rights. The heart of their submission was that sexual orientation should be included as a prohibited ground of discrimination in the new constitutional bill of rights. They argued, *inter alia*, that:

> The Constitutional Bill of Rights and Freedoms should seek to protect the inherent human identity from abuse and that what was included in human identity were those features of a person, or characteristics, that that person was born with. They argued that, sexual orientation, was one of those features or characteristics of human identity, in the sense that everyone has a sexual orientation and that that sexual orientation was largely, if not entirely, outside the individual's control. (Robinson 2003, p. 35)

The Committee gave due recognition to the submission, but rejected the proposed inclusion of sexual orientation as a prohibited ground of discrimination. The main pretext for this rejection was the Committee's concerns about the implications of gay rights for the institution of marriage, parenting and family life in general. In the portion of its report responding to the submission on sexual orientation, the Committee noted that it was:

> Concerned, as to the effect which implementation of that proposal would have in relation to the Marriage Act and the institution of marriage and on parenting. The representatives of J. Flag had themselves conceded that the Marriage Act would be inconsistent with such a constitutional provision … Other matters which the Committee has taken into account include the view of some of its members that the proposal by J-Flag challenges Christian society, and that, as heterosexuality is what assures the perpetuation of the human race, homosexuality could be regarded as a challenge to the existence of the human race. (Robinson 2003, p. 35)

Yet, the Committee's rejection did not signal a deathblow to the efforts of J-FLAG. While not supporting the move to include the issue of sexual orientation in the Constitution, the Committee agreed with J-FLAG on the need for reversal of the sodomy law. Consequently, the Committee's report noted that it would: 'bring to the attention of the Government, as a matter for consideration, the issue of the repeal of the provisions of the Offences Against the Person Act in so far as it related to the offence of buggery between consenting adults in private' (Parliament of Jamaica 2002, p. 28). Robinson, commenting on this development, observes that, 'the concession was practically significant but the message of second-grade citizenship was clear' (Robinson 2003, p. 36). This latter observation was underscored by subsequent government statements making it clear that the recommendations were not welcomed and would not be considered.

Though largely unsuccessful, this episode is a significant part of the continuing story of sexual minorities in the Caribbean and their struggle for equality. Law is one of many societal institutions which constructs and defines

'the homosexual' and, in so doing, tells various 'truths' about the worth of those it labels with this identity. For the first time, lesbians and gays were able to officially dispute these supposed 'truths', told through the homophobic narrative of Jamaican law.

In addition, the response of the Committee suggests that there may be some impetus within certain political institutions for the decriminalisation of sodomy. While Jamaican political culture is often perceived as homogenous and immutable in relation to sexuality, such episodes show that it is in fact layered and at various points being questioned and challenged. Indeed, a growing number of individuals and civil society organisations (CSOs) have joined J-FLAG in contesting Jamaica's homophobia. Accordingly, the 'second wave' of advocacy has seen a maturity in the local movement in terms of the expansion of the actors involved as well as the modes of resistance and advocacy employed.

4.3 The internationalisation of resistance

The strategies of organisations like J-Flag have to date borne limited fruit. Despite the sustained advocacy on the issue of constitutional reform, the Charter of Fundamental Rights and Freedoms was passed in 2011 with provisions that explicitly preclude constitutional protection for sexual minorities. This radical gesture of oppression and erasure has prompted a new form of advocacy on the part of local activists. Rather than a focus on domestic politics, local actors have now begun to look beyond the state towards the liberationist potential of the international sphere. In particular, activists have turned to international law as a forum for the assertion and vindication of their equal status as citizens. Much international law is often criticised as being 'soft law'. Critics argue that, though international human rights law presents binding principles, it lacks effective sanctions and enforcement. Yet, to dwell on these perceived shortcomings is to be blind to the real power and potential within the international legal system. While international law may not resemble local law and legal processes, Caribbean activists are now seeking to leverage the economic, reputational and political costs for states associated with negative international human rights rulings and opinions.

In October 2011, an international anti-AIDS organisation called AIDS-Free World – with an officer based in Jamaica – announced that it presented the first-ever legal challenge to Jamaica's anti-gay laws. The organisation filed a petition at the Inter-American Commission on Human Rights ('Commission') on behalf of two gay men. As a signatory to the American Convention on Human Rights, Jamaica is subject to the supervisory and quasi-judicial jurisdiction of the Commission, which has the power to receive, analyse and investigate individual petitions alleging human rights violations against a state party to the Convention. Where the Commission finds that an alleged violation

has been proved, it may recommend measures be taken to remedy the violation caused to the victim. The decisions of the Commission are not mandatory, and are not strictly binding as a matter of international law. However, the persuasive and political power of these rulings has often been exploited by local and global activists to encourage human rights compliance by recalcitrant states. The Commission has previously ruled that laws which discriminate against individuals on the basis of their sexual orientation are in breach of the American Convention, and international law more generally (*Karen Atala and Daughters v. Chile*). Thus, the door remains open for a ruling on sexuality-based discrimination in the Caribbean.

In its petition, AIDS-Free World seeks a declaration from the Commission to the effect that the maintenance and enforcement of laws by Jamaica in relation to private consensual sexual conduct by adult males breaches Jamaica's obligations under international law, and specifically under Articles 1, 4, 5, 11 and 26 of the American Convention on Human Rights. The petition also asserts that Jamaica has failed in its duty to protect the rights and well-being of its homosexual citizens, in violation of international law. At the time of writing the petition was still pending before the Commission. However, it appears that future developments on the issue of sexual orientation in the Caribbean will increasingly be played out in international legal forums. Indeed, indications are that J-FLAG will also file an international legal challenge to Jamaica's sodomy law and discriminatory constitutional provisions in the Commission, in conjunction with activists in the UK.

These legal challenges have renewed debate about the proper role of international law and transnational actors in the human rights project in the Caribbean. The petition before the Commission was prepared collaboratively between local and foreign activists, local lawyers, pro-bono lawyers from law firms in the US and students from a US law school. But while international actors played a significant role in this action, it remained a distinctly domestic effort fronted by local activists, local victims and grounded in local concerns. Such action signals a new mode of advocacy and a new collaborative relationship between local and global actors. Yet, as these developments gather pace, many vexatious questions about the politics of international activism will have to be confronted by local and global activists alike.

5. International advocacy: mapping 'the local' and 'the global'

Undoubtedly, transnational activism has been a critical element in the struggle for universal human rights and equality. Historical examples of such transborder alliances include anti-slavery and woman suffrage campaigns. Keck and Sikkink (1998), for example, have shown that transnational activism has had a significant impact on human rights in Latin America and that advocacy networks have strongly influenced other international issue areas such as

environmental politics. In the Caribbean context, the virtual repeal of the death penalty can in large part be attributed to the success of transnational advocacy and lawyering within multiple supranational judicial bodies (Tittemore 2004).

Yet, the triumphalism of the international human rights movement has been tempered in recent years by a growing awareness of the limitations and perils of transnational human rights campaigns. For example, the movement has been accused of systemic biases in selecting targets based on expected media exposure rather than principles and need (Ron et al. 2005). Scholars have also pointed out the unintended negative consequences of transnational mobilisation on the domestic level (Schmitz 2006; Kuperman 2008). Increasing local resistance has arisen against interventions by transnational activists (Hertel 2006). This has led many human rights scholars to view and theorise the dynamics between local and global actors in binary and often antagonistic terms. In debates about sexuality rights advocacy, tensions predominate about objectives and strategies between the international human rights movement and local activists. As a result, some activists and scholars have called for a level of separatism on the part of local sexual minority rights movements in the South. The following sections examine some of the arguments that have been made in this context.

5.1 Sensitivity games and cultural politics

Human rights scholars have often viewed inter-state politics as an obstacle against the achievement of human rights protection for sexual minorities in the post-colonial world. Eric Heinze has argued that sexual minorities have become pawns in what he calls the international 'sensitivity game' (Heinze 2000–2001). In this game, post-colonial regimes bolster their domestic authority by promoting nationalist campaigns based on ideas about sexuality, which depict minority sexual orientations as manifestations of Western decadence. Resistance to any programme of tolerance towards homosexuality is said to be rooted in 'ancient' and 'indigenous' traditions. Heinze also notes the tendency of western states to eagerly demonstrate that they are not imposing a 'first world' agenda on 'traditional' societies. As a consequence, there has been a self-censoring forbearance in challenging southern states, as a kind of deference to indigenous cultural beliefs. In short, Heinze complains that many western states have been willing to tolerate human rights relativity in the context of sexuality.

For a very long time, the United Nations was arguably the premier site of Heinze's 'sensitivity game' thesis. In 2003, for example, a Brazilian initiative to introduce a UN resolution on 'Human Rights and Sexual Orientation' was stymied in the 59th session of the UN Human Rights Commission. The draft resolution, among other things, called upon 'States to promote and protect the human rights of all persons regardless of their sexual orientation' (para. 3). However, in the face of formidable opposition mounted by many non-western countries, Brazil did not reintroduce the motion in 2004.

Many similar initiatives to use inter-governmental institutions to advance sexuality equality have been thwarted because of geo-political tensions.

This situation has had grave implications for the development of sexual minority rights in the context of the United Nations and in international relations more generally. The lack of political will on the issue of sexuality meant that in most cases the traditional 'shaming' and pressure techniques used by activists have been of limited effectiveness in this context. In addition, the geo-political dimensions of the sexuality debate meant that sexual minority rights remained a largely 'western' enterprise perceived as lacking universal legitimacy. As a result, the general assessment by many scholars was that significant advances for sexual minorities were unlikely in the foreseeable future in the Caribbean states (Heinze 2000–1, p. 291). In this way, the issue of 'cross-cultural sensitivities' has come to be viewed as a formidable obstacle to the rights of sexual minorities.

5.2. Post-colonial sensitivities: of 'savages' and 'saviours'

If the critique of western states has been largely about their inaction in relation to sexual minority rights, the charge against global NGOs' activism has been about its perceived over-zealous and culturally insensitive interventions into the 'Third World.' In particular, post-colonial scholars have been critical of what has been described as the imperialistic tendencies within international human rights law and movements. These criticisms are essentially two-fold. At one level, they offer a cultural critique of the substance of human rights norms. The objection is not new, and it relates to concerns about the western origins of the human rights idea and western dominance in the shaping and propagation of contemporary human rights norms. In this context, Mutua (2001, p. 204) has observed that 'the human rights corpus, though well meaning, is fundamentally Euro-centric … the corpus falls within the historical continuum of the Eurocentric colonial project, in which actors are cast into superior and subordinate positions'. The second strand of the critique is focused less on the substance or origin of norms, but rather on the actors and the politics of the 'human rights movement.' In this context, the concern is the privileging of western voices, actors and processes in the human rights project. In this vein, Massad has described sexual minority rights initiatives as driven by 'a super-ordinate Gay International, with … western-missionary-white-male-dominated organisations, omnipotently inciting gay-identity discourse' (Shalakany 2007, p. 10).

According to these critics, liberationist projects modelled on existing human rights discourses and movements offend post-colonial sensitivities and are therefore not viable in a non-western world. These critiques have prompted a number of scholars to encourage local activists to eschew engagement with transnational actors, or risk propagating western cultural impositions that are antithetical to liberatory outcomes.

The postcolonial 'sensitivities' around transnational sexuality rights advocacy were vividly played out in the context of campaigns around the homophobic content of popular Jamaican music. In 2003, a UK-based advocacy group began a campaign called 'Stop Murder Music' (SMM) aimed at raising consciousness and mobilising action over the homophobia in dancehall-reggae music. In this context, they used Jamaican dancehall music as an entry point for advocacy to condemn the culture of homophobia in Jamaica and the resulting mistreatment of sexual minorities by private and state entities. The organisation employed various methods, including protests and the criminal law. In regard to the latter strategy, it applied political pressure for the criminal investigation and prosecution of Jamaican artistes for hate speech and other hate-crime offences. As a result, various Jamaican artistes were investigated by the British police and questioned in connection with the lyrical content of their music (Petridis 2004).

Despite the laudable goals and arguably positive results of the SMM campaign, the initiative was not widely embraced by Jamaican activists or cultural critics. On one level, the criticism from cultural commentators was that the campaign was a mischaracterisation of 'Jamaica cultural expression'. For example, scholars like Professor Carolyn Cooper argued that these campaigns were wrongly premised on a literal reading of the lyrics and contended that, when understood in their proper context, the lyrics were not concerned with the subjugation of sexual minorities. She noted:

> [One must attempt] to define the culture-specific context within which to understand reggae music's articulation of anti-homosexual religious values in such inflammatory songs as 'Boom Bye-Bye.' One must also analyse the construction of masculinity within discourses of violence that make the phallus and the gun synonymous. The language of dancehall lyrics encodes elements of verbal play, especially male machismo, and cannot always be taken literally. I emphasise the metaphorical nature of the murderous discourse. (Thomas 2004)

Such cultural critiques suggested that there was a failure or refusal on the part on the human rights movement to grapple with the metaphorical significance of dancehall music. This, they argued, was reflective of a broader problem: the movement's inability to appreciate non-Euro-American cultural sensibilities within the human rights project.

While Jamaican LGBT activists by and large agreed with the ideals of the SMM campaign, they were divided on the methods and strategies employed. Indeed, local gays and lesbians were not included or represented in the initiative. Many believed that some of the SMM strategies framed the campaign in unnecessarily antagonistic terms. The perceived gap between human rights dogma and Jamaican culture swelled and dominated the public discussions on 'gay rights'. Among the wider public, the anecdotal evidence suggested there was a resurgence of ethno-nationalistic sentiment and a hardening of views

on homosexuality following the campaign. Many felt that SMM bore the disquieting undertones of a civilising mission – a bid to reform the barbarous bloodthirsty culture of a small subaltern state. The underlying questions that resulted were: is this form of engagement an effective, sustainable or culturally appropriate intervention strategy?

6. A new global sexual politics

In contemplating transnational LGBT advocacy, acquainting oneself with the cultural critiques of the human rights movement should be morally obligatory. Another precondition should also be critical consideration of the possible real-life impact of any campaign on the people who are the subjects of the advocacy. The result of that reflection could lead to the realisation that real damage can result from the very best intentions. David Kennedy refers to this as the 'dark side of virtue' (Kennedy 2004). Advocacy strategies that have gone through this type of assessment are likely to yield better practices from the point of view of those on whose behalf the advocacy is being pursued.

Yet there is still a worry concerning the tendency among scholars and activists, particularly in the South, to unduly fixate on 'cultural sensitivities'. We believe that such sentiments are growing in many parts of the Caribbean sexual minority rights movement. There is no unassailable evidence of this, but just a hunch – a crude, anecdotal sense of discomfort – about a growing retreat of many activists and scholars towards a separatist post-colonial sexual politics. If this is accurate, such a disposition may operate as an obstacle rather than a driver of progress. Three reasons are offered below for this concern.

Firstly, postcolonial critics and scholars often contribute to the framing of the sexuality debate in the third world as opposition between 'local/traditional' and 'international/modern' modes of life. To the authors, this echoes the discredited rhetoric that promoting human rights protection based on sexual orientation is inimical to indigenous culture and traditional moral codes. Far from challenging imperialism in new form, these critics sustain it by renewing the imperialistic division between the West and its 'Others.' In maintaining this division, they perpetuate the colonial paradigm of western powers claiming a monopoly of virtue and modernity (Marks and Clapham 2005, p. 39). In fact, the articulation of third world politics as a choice between tradition and modernity serves to 'impoverish local political discourse, often strengthening the hand of self-styled "traditionalists" who become cast as the only nationalistic option, enabling them to pursue whatever politics they may espouse' (Kennedy 2004, p. 21).

Secondly, advocacy initiatives which completely eschew engagement with international actors risk foreclosing the considerable experience, resources and leverage that can be obtained on the global plane. Indeed, scholars like Risse and Sikkink have argued that human rights advocacy is most effective when

'domestic and transnational social movements and networks have united to bring pressure "from above" and "from below" to accomplish human rights change' (Risse et al. 1999, p. 18). This would suggest that critical human rights scholarship and practice should be aimed at achieving a collaborative transnational vision of human rights advocacy rather than a fragmented one. Human rights advocacy should be informed but not inhibited by concerns about cross-cultural sensitivities. The authors believe that a failure to engage the transnational dimensions of advocacy may stunt the development of sexual minority rights.

Thirdly, a workable vision of transnational advocacy requires that advocates and scholars begin to move beyond 'sensitivities'. By this, it is not suggested that such considerations should be ignored or de-emphasised. However, they should not be fetishised and become a source of disproportionate pre-occupation. Instead, they should form the basis for critical dialogue and hopefully, pragmatic and collaborative strategy between local and global activists. Indeed, our sense is that nascent developments are signalling a shift towards a more inclusive transnational activism which ceases to view those they support as 'victims' of repression, but as equal partners in a joint struggle. These developments should encourage activists to eschew separatism and begin to work towards a more inclusive and self-critical sexuality rights agenda. Below are sketched some of the developments giving cause for optimism that this new form of global sexual politics is possible.

6.1 Beyond cross-cultural sensitivity

Earlier, Heinze's argument was highlighted that sexual minorities had become pawns in an international 'sensitivity game' among states, which threatened to thwart progress in sexual minority rights. However, contemporary developments suggest that global sexual politics have seen signs of a shift in recent years. Both US President Obama and then Secretary of State Hillary Clinton issued statements shortly after the murder of Ugandan gay rights activist, David Kato, urging a full investigation into the circumstances. The US president instructed State Department officials to consider how countries treat their gay and lesbian populations when making decisions about allocating foreign aid. The United Kingdom has also signalled its intention to link certain elements of international aid packages to a demonstrable respect for the human rights of sexual minorities (BBC 2011).

The message now seems clear: sexual minority rights command a legitimate place in the community of nations. This strong reaction from the US and UK also carries on the momentum of the UN Secretary General Ban Ki Moon's successful intervention in Malawi, when that country sentenced and imprisoned two men who purported to 'marry' in a public ceremony. There is further evidence that the issue of sexual orientation is making its way on the

agenda in a number of inter-governmental organisations. In the context of the Caribbean, the Organisation of American States (OAS) has recently issued a number of resolutions calling for member states to respect and protect the human rights of sexual minorities (for example, AG/RES. 2504 (XXXIX-O/09) and AG/RES.2435 (XXXVIII-O/08)).

The significance of these developments should not be over-emphasised. As post-colonial scholars will no doubt point out, there are possible dangers inherent in powerful states seeking to dictate moral standards to others. Apart from post-colonial anxieties about neo-imperialism in the guise of advocacy, there are also concerns about possible local backlash against western interventions and resultant harm for the indigenous gay and lesbian population. Yet, it is clear that arguments about nationalism, religion, culture or post-colonial anxieties should not preclude genuine international concern and legitimate intervention in debates about human rights. To argue otherwise is to render the very idea of universal human dignity nugatory. Accordingly, well-meaning advocates should cautiously welcome this new manifestation of political willingness to address the issue of homophobia at the inter-state level. This shift away from relativist sexual politics offers the opportunity for a new type of transnational advocacy based on partnerships that empower local activists to articulate their own concerns. Local activists would do well to actively explore these possibilities in good faith, and not forgo the opportunity to engage global counterparts in this critical new phase of the human rights project.

6.2 Beyond savages and saviours?

Another postcolonial criticism touched on earlier was the concern that human rights norms lacked legitimacy and effectiveness because they reflect largely Euro-American conceptions of sexual identity. In this regard Obendorf (1999) notes the tendency to think of the protection and provision of homosexual rights in terms purely derived from understandings of 'western' homosexual identity and the socio-political and legal positions which homosexuality occupies in Western societies. The authors acknowledge that the transplantation of Western constructs of 'homosexuality' may not adequately respond to the historical and cultural context in each case. Furthermore, they are of the view that a rejection of the hegemony of Western sexual identity can make for a more inclusive, representative, pluralistic and effective rights regime. As Muto Ichiyo (1998, p. 351) writes:

> Cross-fertilization can occur between civilisations as dominance of one upon others is overcome. It is happening already. The human rights concept, originating in Western Europe, has been greatly enriched and modified as it interacted with Third World realities, Asian civilizations, and indigenous people's cultures as well as feminist thoughts and ecological world views.

This process of cross-fertilisation must necessarily inform efforts to develop sexual minority rights, whether in the form of multilateral treaties and declarations, or activities within treaty bodies and various other political fora. The creation of these spaces offers an opportunity for non-western homosexual voices and experiences to be heard and understood.

The authors are optimistic about the prospects for a more inclusive, representative and pluralistic sexuality rights regime, indeed seeing signs of recognition for the necessity of including a broad cross-section of world views and voices in the formulation of international norms on sexuality. For example, in 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of international principles relating to sexual orientation and gender identity. This took the form of the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2006). The principles are meant to be a coherent and comprehensive articulation of the obligations of states and non-state actors to respect, protect, and fulfil the human rights of all persons regardless of sexual orientation and gender identity.

The formulation of these Principles was ground-breaking on a number of levels. First, it represented the first time that human rights principles relevant to sexual minorities were comprehensively and coherently articulated. In this way, the Principles represent a significant step towards placing sexual minority rights on stable normative and intellectual footing within the general corpus of international law. More importantly, the formulation of the Principles proceeded on the basis of a wide consensus between activists and experts from various regions, and religious and cultural backgrounds. As Douglas Saunders notes, 'careful organisation ensured representation from outside of the west and Latin America – with people from Botswana, China, India, Indonesia, Kenya, Nepal, Pakistan, South Africa, Thailand and Turkey. Participants came from 25 countries' (Saunders 2008, p. 5). As such, the Principles have gained broad-based support, legitimacy and acceptance by local activist across the north/south divide, and by various governments and inter-governmental organisations. The authors believe the formulation and drafting of these Principles represent a new model of collaborative advocacy that is evolving, and which needs to be fostered by global sexuality rights activists.

Similar developments are beginning to manifest in the context of advocacy in the Caribbean. As previously noted, activism on this issue of sexuality in Jamaica has entered a 'third wave,' which now focuses on engagement with international juridical spaces. The recent petition submitted by AIDS-Free World to the Inter-American Commission signals a new mode of advocacy and a new collaborative relationship between local and global actors. Again, as aforementioned, international actors played a significant role in the presentation of the petitions, but the action remained a distinctly domestic effort fronted

by local activists, local victims and grounded in local concerns. The authors believe that there is significant potential for progress in such alliances, provided that they are based on equal partnership between local and global actors, and mutual cultural understanding and dialogue. Rather than a focus on cultural 'sensitivities', this chapter suggests that transnational advocacy should be grounded on cross-cultural dialogue.

In advancing this approach, reference is here drawn to the work of Abdullahi Ahmed An-Na'im on 'cross-cultural dialogue' – more specifically, his concept of the generation of internal cultural discourses. In the authors' view, the present antagonistic relationship between global and local entities in the sexuality polemic, can be displaced and neutralised by a process of internal legitimacy building with regard to sexual minority rights. As An-Na'im (1995, p. 4) notes:

> Although ... antagonism may reflect the prevailing dominant view of [a] cultural position, it may not necessarily be the only available view. There may therefore be room for changing a cultural position from within, through *internal discourse* about the fundamental values of the culture and the rationale for these values. In view of the fact that such discourse is always taking place in relation to moral, political and social issues, it should not be difficult to focus attention on the human rights implications of these issues.
>
> It is imperative, however, that the proponents of alternative cultural positions on human rights issues should seek to achieve a broad and effective acceptance of their interpretation of cultural norms and institutions by showing the authenticity and legitimacy of that interpretation within the framework of their own culture.

The authors believe that such dialogue can be facilitated through strategic alliances between the local and international human rights networks, involving among other things: the sharing of best practice, provision of training, financing and the employment of other means of building public awareness. In so doing, indigenous voices and groups will be mobilised to engage in a process of engagement and contestation; from this process hopefully they will aid in building consensus and internal legitimacy of human right norms.

7. Conclusion

It must be clear from these arguments that we are not of the view that national identity, religion or unique cultural disposition insulates Jamaica from interrogation on human rights and sexual orientation. All such questioning can be legitimately pursued from advocacy conducted within Jamaica as well as from efforts that originate outside the country. An imperative for successful advocacy must be an appreciation of 'sensitivities' that complicate North v. South and international v. local debates – not just around sexuality, but generally, in light of its history. Activism should not smack of a 'rescue' mission by erstwhile

colonial masters or appear to be top-down gestures from rich industrialised nations to a backward third world country. Rather, genuine partnerships that empower local activists to articulate their own concerns are essential for useful intervention. At the same time, for human rights to be realised, there is a need for the lobbying resources, political heft and broad-based mobilisation that comes not just through local actors, but with international partners. Tough-minded pragmatism requires moving beyond 'sensitivities' in order to take full advantage of transnational partnerships.

Bibliography

Alexander, M.J. (1994) 'Not just (any) body can be a citizen: the politics of law, sexuality and postcoloniality in Trinidad and Tobago and the Bahamas, *Feminist Review* 48, p. 133.

Anderson, B. (1991) *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso).

An-Na 'im, A. (1995) *Human Rights in Cross Cultural Perspectives: A Quest for Consensus* (Philadelphia, PA: University of Pennsylvania Press).

Batra, K. (2011) 'Our own gayful rest: a postcolonial archive of gay and lesbian community building in Jamaica', *Small Axe: A Journal of Caribbean Criticism* 31, pp. 46–59.

Boxhill, I., J. Martin, R. Russel et al. (2011) *National Survey of Attitudes and Perception of Jamaicans Towards Same Sex Relationships*, Jan. (Department of Sociology, Psychology and Social Work, University of the West Indies).

Chevannes, B. (2002) *Learning to be a Man: Culture, Socialization and Gender Identity in Five Caribbean Communities*, University of West Indies.

Committee on Homosexual Offences and Prostitution (1957) *Report of the Committee on Homosexual Offences and Prostitution* (London: HMSO).

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

Gay Freedom Movement Archive (2013) 'Digital library of the Caribbean', available at http://dloc.com/AA00002985/00001/2j?search=human+%3d rights; http://dloc.com/AA00002992/00001 (accessed 7 Feb. 2013).

Gutzmore, C. (2004) 'Casting the first stone: policing of homo/sexuality in Jamaican popular culture', *Interventions* 6 (1), pp. 118–34.

Heinze, E. (2000–2001) 'Sexual orientation and international law: a study in the manufacturing of cross-cultural "sensitivity"', *Michigan Journal of International Law* 22, pp. 283–303.

Hertel, S. (2006) *Unexpected Power: Conflict and Change among Transnational Activists* (Ithaca, NY: Cornell University Press).

Hope, D. (2002) 'Love Punany Bad: Negotiating Misogynistic Masculinity in Dancehall Culture', Second Conference in Caribbean Culture University of the West Indies, Mona, 12–14 Jan., Jamaica.

— (2006) *Inna Di Dancehall: Popular Culture and the Politics of Identity in Jamaica* (Kingston: University of the West Indies Press).

Hopkins, P.D. (1992) 'Gender treachery: homophobia, masculinity and threatened identities', in L. May and R. Strikweda (eds.), *Rethinking Masculinity* (Boston: Rowman and Littlefield), p. 116.

Human Rights Watch (2004) *Hated to Death: Homophobia, Violence and Jamaica's HIV/AIDS Epidemic* (New York: Human Rights Watch).

Ichiyo, M. (1998) 'Alliance of hope and challenges of global democracy', in K. Chen (ed.), *Trajectories: Inter-Asian Cultural Studies* (London: Routledge), pp. 312–24.

Jamaica Gleaner (2002) 'Government say no to gay sex', 22 Jan., available at www.jamaica-gleaner.com/gleaner/20020122/news/news1.html (accessed 7 Feb. 2013).

Keck, M. and K. Sikkink (1998) *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY and London: Cornell University Press).

Kennedy, D. (2004) *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, NJ: Princeton University Press).

King, J. (2006) *Outing the Centre: Homophobia in Jamaica*, SIT Jamaica: Gender and Development, Independent Study Project Collection, Paper 380, available at http://digitalcollections.sit.edu/isp_collection/380 (accessed 26 Mar. 2013).

Kuperman, A.J. (2008) 'Mitigating the moral hazard of humanitarian intervention: lessons from economics', *Global Governance* 14 (2), pp. 219–41.

Marks S. and A. Clapham (2005) *International Human Right Lexicon* (Oxford: Oxford University Press).

Mutua, M. (2001) 'Savages, victims, and saviors: the metaphors of human Rights', *Harvard Journal of International Law* 42 (1), pp. 201–45.

Noel, P. (1993) 'Batty boys in Babylon', *Village Voice*, 12 Jan., p. 29.

Obendorf, S. (1999) 'Homosexual rights and the non-Western world: a postcolonial reading of homosexual rights in International Human Rights Law', *Third World Legal Studies* 15, pp. 179–204.

Padgett, T. (2006) 'The most homophobic place on Earth?', *Time World*, 12 April, available at www.time.com/time/world/article/0,8599,1182991,00.html (accessed 7 Feb. 2013).

Parliament of Jamaica (2002) 'Report of the Joint Select Committee on its deliberations on the Bill entitled, An Act to Amend the Constitution of Jamaica to Provide for a Charter of Rights and Connected Matters', available at www.jis.gov.jm/special_sections/Bills%20&%20Acts/pdf/charter%20of%20rights.pdf (accessed 7 Feb. 2013).

Petridis, A. (2004) 'Pride and prejudice', *The Guardian*, 10 Dec., available at http://arts.guardian.co.uk/fridayreview/story/0,12102,1369875,00.html (accessed 7 Feb. 2013).

Reddock, R.E. (2004) *Interrogating Caribbean Masculinities: Theoretical and Empirical Analyses* (Kingston: University of the West Indies).

Risse, T., S.C. Ropp and K. Sikkink (1999) *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press).

Robinson, T. (2003) 'Gender, feminism and constitutional reform in the Caribbean', paper presented at 'Gender in the 21st Century' academic conference at the University of the West Indies, Mona, 29–31 Aug.

Ron, J., H. Ramos and K. Rodgers (2005) 'Transnational information politics: NGO human rights reporting, 1986–2000', *International Studies Quarterly* 49 (3), pp. 557–87.

Saunders, D. (2008) 'The role of the Yogyakarta Principles', 4 Aug., available at http://sxpolitics.org/wp-content/uploads/2009/03/yogyakarta-principles-2–douglas-sanders.pdf (accessed 7 Feb. 2013).

Seabrook, J. (2004) 'It's not natural: the developing world's homophobia is a legacy of colonial rule', *The Guardian*, 3 July, available at www.guardian.co.uk/world/2004/jul/03/gayrights.comment (accessed 7 Feb. 2013).

Shalakany, A. (2007) 'On a certain queer discomfort with orientalism', *American Society of International Law Proceedings*, pp. 7–11.

Schmid, H. (2000) 'Decriminalization of sodomy under South Africa's 1996 Constitution: implication for South African and U.S. Law', *Cordoza Journal of International and Comparative Law* 8, p. 163.

Schmitz, H.P. (2006) *Transnational Mobilization and Domestic Regime Change: Africa in Comparative Perspective* (Basingstoke: Palgrave Macmillan).

Thomas, G. (2004) 'ProudFlesh inter/views with Carolyn Cooper', *PROUDFLESH: A New Afrikan Journal of Culture, Politics and Consciousness* 3, available at www.africaknowledgeproject.org/index.php/proudflesh/article/view/220 (accessed 7 Feb. 2013).

Thomas, K. (1992) 'Beyond the privacy principle', *Columbia Law Review* 92, p. 1441.

Tittemore, B. (2004) 'The mandatory death penalty in the Commonwealth Caribbean and the inter-American human rights system: an evolution in the development and implementation of international human rights protections', 13 William and Mary Bill of Rts. J., p. 445.

White, R. and R. Carr (2005) 'Homosexuality and HIV/AIDS stigma in Jamaica', *Culture, Health and Sexuality* 7, p.1.

Williams, L. (2000) 'Homophobia and (gay rights) activism in Jamaica', *Small Axe* 4 (7), pp. 106–11.

Legal cases and resolutions

Karen Atala and Daughters v. Chile, Case 1271–04, Report No. 42/08, Inter-Am. C.H.R., OEA/Ser.L/V/II.130 Doc. 22, rev. 1 (2008).
Bowers v. Hardwick (478 US 186 (1986).
Dudgeon v. UK (1982) 4 EHRR 149.
Norris v. Ireland (1988) 13 EHRR 186.
Modinos v. Cyprus, 259 Eur. Ct H. R. (ser. A) (1993).
United Nations Commission on Human Rights (2003), Draft resolution on 'Human rights and sexual orientation', UN Doc. E/CN.4/2003/L.92 (17 Apr. 2003)
Organization of American States, 'Human rights, sexual orientation and gender identity', (OAS) AG/RES. 2504 (XXXIX-O/09).
Organization of American States, 'Human rights, sexual orientation and gender identity', (OAS) AG/RES.2435 (XXXVIII-O/08).

18

The use of equality and anti-discrimination law in advancing LGBT rights

Dimitrina Petrova[1]

1. Towards a strategy of equality

The rights of LGBT persons are increasingly interpreted in the light of the universality of human rights. Among human rights advocates it is now understood that while single-identity causes and identity politics have historically been instrumental in empowering the most disadvantaged identity groups, they have limitations, including in the case of advancing LGBT rights. The position of Human Rights Watch in respect of LGBT rights in the Middle East is relevant in a broader context:

> In a few places, like Egypt and Morocco, sexual orientation and gender identity issues have begun to enter the agendas of some mainstream human rights movements. Now, unlike in earlier years, there are lawyers to defend people when they are arrested, and voices to speak up in the press. These vital developments were not won through identity politics. Those have misfired disastrously as a way of claiming rights in much of the Middle East; the urge of some western LGBT activists to unearth and foster 'gay' politics in the region is potentially deeply counterproductive. Rather, the mainstreaming was won largely by framing the situations of LGBT (or otherwise-identified) people in terms of the rights violations, and protections, that existing human rights movements understand. (Human Rights Watch 2009, p. 18)

In Commonwealth countries, too, the challenge that exists at a strategic level is to bring LGBT rights into the mainstream human rights agenda.

The rights to equality and non-discrimination are integral to the notion of universality of rights, and are indispensable cross-cutting rights in the international human rights system. Therefore, a holistic approach to equality

1 Executive director of The Equal Rights Trust. I am grateful to Jarlath Clifford, Jim Fitzgerald and Isidora Stakic who have contributed to the research in this chapter.

and human rights is needed to promote LGBT rights, both in terms of conceptual legal consistency and political solidarity.

Several UN and regional bodies and jurisdictions have applied a holistic approach to equality and human rights to benefit LGBT persons, including the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights, among others. In a parallel process, cultural and religious justifications for persisting homophobic legislation increasingly meet with opposition from non-LGBT human rights advocates, on the basis of the universality of human rights and the ensuing need for comprehensiveness and consistency of equality legislation.

This chapter seeks to contribute to debates on existing and potential advocacy approaches to advancing LGBT rights, particularly in countries of the Commonwealth that are still ridden by strong cultural, legal, political or religious opposition to sexual minority rights. It focuses on the potential of equality and anti-discrimination law as tools in the struggle for decriminalisation of homosexuality. Its central claim is that the unified framework of equality, as expressed in particular in the 2008 Declaration of Principles on Equality (Equal Rights Trust 2008a), provides a solid strategic direction in advancing LGBT rights, including through the decriminalisation of homosexuality.[2] The chapter addresses the following questions:

1. What are the barriers, expressed in terms of violations of equal rights, that legal challenges and advocacy seek to remove?
2. How have legal principles related to equality been instrumental in defending the rights of LGBT persons?
3. What can LGBT advocates in the Commonwealth learn from the jurisprudence in which equality is invoked in arguments related to LGBT issues?
4. On the basis of the unified conception of equality, what are the possible legal strategies and claims that can be aimed at decriminalising same sex conduct and advancing LGBT rights?

Developments regarding LGBT issues at national and international levels – both positive and negative – make this an interesting and relevant time to examine these questions. In December 2008, in a statement to the UN General Assembly, 66 states called for an end to discrimination based on sexual orientation and gender identity. The statement went beyond simply declaring that LGBT persons should be tolerated, insisting that protecting the right

2 Strictly speaking, the term 'decriminalisation' may be problematic: as will be shown in this analysis, one potentially powerful legal strategy includes claiming that homosexuality is not *de jure* a criminal offence in existing domestic law, because provisions containing certain expressions (for example prohibiting 'carnal knowledge against the order of nature') should not apply to homosexual conduct among consenting adults.

to equality and dignity of people of different sexual orientations and gender identities is of paramount concern:

> We reaffirm the principle of universality of human rights, as enshrined in the *Universal Declaration of Human Rights* whose 60th anniversary is celebrated this year, Article 1 of which proclaims that 'all human beings are born free and equal in dignity and rights' [...] We reaffirm the principle of non-discrimination which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity. (Statement to the UN General Assembly, A/63/635, 22 December 2008)

This positive step has been accompanied by important legal victories at the national level which have sought to end the criminalisation of homosexuality (see, for example, *Naz Foundation v. Government of NCT of Delhi and Others* 2001) and regional initiatives condemning all forms of discrimination on grounds of sexual orientation and gender identity (see, for example, Council of Europe's Committee of Ministers 2010). Simultaneously to these developments fierce opposition to progress in affirming LGBT rights has been gathering pace. The day after the 66 states made their statement on human rights, sexual orientation and gender identity, the Syrian Arab Republic read a counterstatement on behalf of a large group of states contending that 'rights based on sexual orientation and gender identity […] have no legal foundation in any international human rights instrument' (Statement to the UN General Assembly, A/63/635, 22 December 2008). The infamous Anti-Homosexuality Bill in Uganda and persecution of gay men in Malawi illustrate the resistance to progressive implementation of universal rights in respect of LGBT persons.

Within the Commonwealth of Nations, the struggle to advance LGBT rights is evolving against the backdrop of a variety of political, cultural and religious contexts. But this diversity notwithstanding, what many Commonwealth countries have in common is the legacy of colonial sodomy laws and the ironic ways in which the persistence of such laws functions as a gesture of affirming independence from former colonial powers (Blake and Dayle, this volume; see also Human Rights Watch 2008). In these countries with sodomy laws, the public acceptance of general principles on equality exists to some degree, and is strong among civil society, while public opposition to the criminalisation of homosexuality is weak and inarticulate. If this is so, the specific case for decriminalisation should benefit from being construed as part of the general case for equality, whereby equality is understood in a unified human rights framework as a right equally applicable to people of a different sexual orientation or gender identity.

The unified framework on equality is also a good common platform for addressing the key challenges within civil society in order to promote effective human rights and equality outcomes for LGBT persons. In most countries of the Commonwealth, a number of human rights groups are unwilling to

support LGBT issues due to prejudice or because of fear of reprisal from the authorities. This has left many LGBT organisations and their issues isolated from the mainstream human rights agenda. It has also cultivated reluctance among LGBT groups to work with previously uncooperative mainstream human rights organisations. Increasing collaboration between LGBT groups and other human rights groups is crucial, as is increasing support for LGBT organisations so that they can effectively advocate for their constituencies.[3]

2. Criminalisation and its impact on LGBT rights

At the time of writing, 43 countries of the Commonwealth still have laws in force criminalising homosexuality. The criminalisation of homosexuality or same-sex sexual conduct constitutes a serious violation of basic rights. At the same time, it is a key driver and a source of legitimation to discrimination and all other human rights violations suffered by LGBT persons in these countries. Sodomy laws, usually introduced by British colonial authorities – whether persisting in their original form, modified or re-created in post-independence penal codes – are frequently used to justify the ongoing human rights abuses suffered by LGBT persons. The Hon. Michael Kirby, speaking about these laws in Commonwealth countries, has stated that:

> Sadly, in most parts of the Commonwealth, the laws [criminalising homosexual acts] are no dead-letter having no official backing. Far from being unenforced and no more than an embarrassing legal relic, the criminal laws are used in many lands to sustain prosecutions, police harassment and official denigration and stigmatisation. (Kirby 2009)

Sodomy laws, in addition to being the major barrier to realising LGBT rights, have an extremely damaging impact on the protection of the LGBT community, even when not enforced. The presence of such provisions on the statute books creates an underlying condition which legitimises and reinforces the broader discrimination against the LGBT community, denying people of a different sexual orientation or gender identity their fundamental rights to freedom of expression, association and assembly, equality in healthcare, criminal justice, education, employment and other spheres of political and social life. The Ugandan Anti-Homosexuality Bill, brought before parliament in October

3 The Equal Rights Trust (ERT) currently works in a number of countries, including in the Commonwealth (for example Guyana, Kenya, and Malaysia) on promoting equality from a unified perspective, building capacity of civil society actors to combat discrimination on a number of grounds including sexual orientation and gender identity. Among the challenges identified through this work has been the relative isolation of LGBT activists from other civil society groups, and the non-inclusion or only marginal inclusion of sexual orientation and gender identity issues in work aimed at eliminating discrimination and strengthening the legal and policy frameworks related to equality. ERT has a policy of insisting on the participation of LGBT activists and inclusion of LGBT issues in its activities.

2009, is an example of how broader strategies to criminalise homosexual conduct can potentially entrench systematic discrimination for LGBT persons. It gave explicitly legal expression of the discriminatory consequences that in other countries are tacitly drawn from the existing prohibition of homosexuality.[4] Some of the patterns of discrimination buttressed by criminalisation are briefly outlined below.

Discrimination in criminal justice: The arbitrary arrest and imprisonment of LGBT persons has been well documented by human rights organisations in many countries of the Commonwealth. In Malawi, on 28 December 2009, Tiwonge Chimbalanga and Stephen Monjeza were arrested on multiple charges of 'unnatural practises' and 'gross indecency', following Malawi's first openly same-sex engagement celebration on 28 December 2009 (AllAfrica.com 2010; see also Mwakasungula, this volume). In Tanzania, in June 2009, well-known gay activists Zuberi Juma and Ibrahim Ramadhani were arrested and charged with debauchery. In September 2009, 39 gay and lesbian activists were arrested in the Buguruni area of Dar es Salaam. Following reports of lawlessness in the area, police singled out the gay activists as 'prostitutes' and 'vagrants' and charged them with operating as commercial sex workers under Section 176(a) of the Penal Code.

Human rights organisations have also reported that in Cameroon laws which make same-sex consensual relations a criminal offence have been used to arrest and convict people due to suspected homosexual conduct. In May 2005, 11 men were arrested in a bar believed to have a gay clientele, and sent to prison where they spent more than a year. A further six men were arrested on 19 July 2007, after a young man who had been arrested on theft charges was coerced by police into naming associates who were presumed to be homosexual (Working Group on Arbitrary Detention 2006; Human Rights Committee 2007; Johnson 2007).

Discrimination in healthcare: Healthcare is a key area where discrimination against LGBT persons frequently occurs in Commonwealth countries that criminalise homosexuality. In February 2009, it was reported that a Rwandan lesbian woman was subjected to multiple rounds of questioning and degrading

4 The Bill proposed several new offences within Ugandan criminal law. These include: i) 'The offence of homosexuality' which under Article 2 criminalises same-sex sexual conduct (including 'touching with the intention to commit the act of homosexuality') and carries a penalty of life imprisonment; ii) 'Aggravated homosexuality' under Article 3 which imposes the death penalty on persons who are found guilty of committing 'homosexuality' in a range of 'aggravated' circumstances including 'committing homosexuality' with persons under the age of 18, and 'committing homosexuality' where the offender is living with HIV; and iii) 'Same-sex marriage' which under Article 12 provides that people who contract a marriage with a person of the same sex are liable on conviction to life imprisonment (see also Jiuuko, this volume).

treatment based on her sexual orientation during a medical examination in a hospital in Kigali (Global Rights and the International Gay and Lesbian Human Rights Commission 2009a). In June 2009, the first openly transgender woman in Tanzania suffered degrading treatment due to the conduct and comments of doctors during treatment for possible poisoning and meningitis (Global Rights and the International Gay and Lesbian Human Rights Commission 2009b). Similarly, a 2008 joint submission – to the UN Universal Periodic Review by Global Rights and the International Gay and Lesbian Human Rights Commission on Zambia's human rights record – noted that the National AIDS Control Programme fails to mention men who have sex with men. In addition human rights organisations have reported that there are no programmes – government-sponsored or privately funded – that respond to the HIV-related needs of same-sex practising men in Zambia (Global Rights and the International Gay and Lesbian Human Rights Commission 2007). Human rights defenders have stressed that if the Ugandan anti-homosexuality bill is passed it will have far-reaching consequences, leading to setbacks in the implementation of the healthcare policies aimed at combating the spread of HIV/AIDS and treating victims of the disease that have to date been successful (Tamale 2009). In Kenya, in December 2010, The Equal Rights Trust documented cases of discrimination against homosexuals in allowing access to HIV/AIDS treatment. This led to tuberculosis and other opportunistic infections. These individual cases reflect the broader health discrimination patterns that exist in many Commonwealth countries.

Discrimination in education and employment: Numerous cases of discrimination against LGBT persons in education and employment have been reported by human rights groups in countries criminalising homosexuality. Patterns of discrimination include denial of access to education for LGBT persons, dismissal of homosexual teachers, harassment of students and various forms of less favourable treatment in the work place.

Discriminatory denial of fundamental freedoms: The persisting criminalisation of homosexuality results in discriminatory denial of freedom of expression, association and assembly for LGBT persons. The Human Rights Watch 2009 report *Together, Apart* stated that there is an 'ever-looming possibility of backlash' and that almost every time LGBT activists in sub-Saharan Africa have first gained public visibility, a crackdown followed: 'Virtually any move LGBT groups make, from renting an apartment to holding a press conference, can feed a violent moral panic, where media, religious figures, and government collude'(Human Rights Watch 2009, p. 10). It has been reported that the Zambian government has threatened to arrest anyone attempting to officially register a group which aims to support LGBT rights. The offence of 'promotion of homosexuality' within the Ugandan Anti-Homosexuality Bill specifically targets actions aimed at forming associations in support of LGBT rights, for example, where individuals or organisations participate in the

production, procuring, marketing, broadcasting, or disseminating materials for purposes of 'promoting homosexuality', or where they offer premises and other related fixed or movable assets for purposes of homosexuality or 'promoting homosexuality' (Anti-Homosexuality Bill 2009).

Hate speech: In addition, political, religious and cultural leaders in Commonwealth countries, seeking political dividends, have occasionally made inflammatory homophobic statements. For example, on 28 November 2010, Kenyan Prime Minister Raila Odinga stated that any person engaging in homosexual conduct should be arrested. Following protests by human rights and LGBT activists, he partially withdrew his comments, but stopped short of either an apology or a statement reaffirming equal rights for homosexuals.

3. LGBT rights jurisprudence applying equality principles and concepts of anti-discrimination law

International and regional law: International human rights law instruments provide a sufficient basis to maintain that discrimination on grounds of sexual orientation or gender identity is prohibited under international human rights law. This observation reflects a broad range of international human rights standards which relate to equality and discrimination.

Sexual orientation and gender identity are not explicitly mentioned in Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR), Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), or Article 26 of the ICCPR.[5] However, the Human Rights Committee (HRC) has stated that discrimination on grounds of sexual orientation is prohibited under the ICCPR (Human Rights Committee 1994; 2003). In 1994, in the landmark decision of *Toonen v. Australia* the HRC rejected the argument of the Australian government that laws criminalising homosexual acts were an issue of public morality and thus purely a matter of domestic concern. In this case, the HRC, finding a violation of Article 17 (privacy), did not consider whether the specific non-discrimination article of the Covenant (Art. 26) was also violated. Since then, however, the HRC has referred to Article 26 on numerous occasions when expressing concern about discrimination on the grounds of sexual orientation (see, for example, Human Rights Committee 1997; 1998; 1999; 2002; 2004; 2005a; 2005b).

The UN Committee on Economic, Social and Cultural Rights (CESCR) has expressed concern over discrimination on grounds of sexual orientation

5 Article 26 ICCPR states: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

in a number of general comments (UN Committee on Economic, Social and Cultural Rights 2000a; 2002a; 2006) and concluding observations (UN Committee on Economic, Social and Cultural Rights 2000b; 2001; 2002b). More significantly, CESCR has recently provided an authoritative interpretation of Article 2(2) of the ICESCR in General Comment No. 20 where it has explicitly stated that discrimination on the grounds of sexual orientation and gender identity are covered by the 'other status' clause of Article 2(2):

> **Sexual orientation and gender identity**:'Other status' as recognized in Article 2(2) includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realising Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the work place. (UN Committee on Economic, Social and Cultural Rights 2009, para. 32)

As the criminalisation of homosexual conduct is incompatible with the states parties' obligation to protect the human rights of all persons, including those of a different sexual orientation and gender identity, in a non-discriminatory manner, by inference they are also under an obligation to repeal any legislation that might criminalise or discriminate against people on the basis of their sexual orientation.

In General Comment No. 4, the Committee on the Rights of the Child has asserted that Article 2 of the Convention of the Rights of the Child[6] covers sexual orientation and health status:

> State parties have the obligation to ensure that all human beings below 18 enjoy all the rights set forth in the Convention without discrimination (art. 2) including with regard to 'race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. These grounds also cover adolescents' sexual orientation and health status (including HIV/AIDS and mental health). (UN Committee on the Rights of the Child 2003, para. 6)

The UN Committee against Torture has also explained in General Comment No. 2 that laws in relation to fulfilling obligations under the UN Convention against Torture must be:

6 Article 2 provides: '1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.'

> [A]pplied to all persons, regardless of […] sexual orientation, transgender identity […] States parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection, including but not limited to those outlined above. (UN Committee against Torture 2008, para. 21)

General Comment No. 2 also calls to attention the importance of combating torture that is a result of multiple or intersectional discrimination:

> State reports frequently lack specific and sufficient information on the implementation of the Convention with respect to women. The Committee emphasizes that gender is a key factor. Being female intersects with other identifying characteristics or status of the person such as race, nationality, religion, sexual orientation, age, immigrant status etc. to determine the ways that women and girls are subject to or at risk of torture or ill-treatment and the consequences thereof. (ibid.)

All regional human rights instruments also guarantee equality and should be interpreted as prohibiting discrimination on grounds of sexual orientation under their 'other status' clauses. For example, the right to equality and non-discrimination is guaranteed by Article 2 of the African Charter on Human and Peoples' Rights which provides:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

Case law: This chapter will now turn to claims brought in domestic and international courts where courts have relied on equality and non-discrimination provisions in deciding issues of criminalisation of homosexuality or various types of discrimination against LGBT persons.

At the national level, courts in Canada, South Africa and other countries have used the autonomous right to equality within their respective constitutions to assert equal rights for persons of a different sexual orientation and to decriminalise homosexual behaviour. These cases constitute best practice examples of how the interrelated rights to equality and non-discrimination should be used at the national level to defend and promote LGBT rights in all areas of activity (employment, education, health and so on).

Section 15(1) of the Canadian Charter of Rights and Freedoms, which does not explicitly prohibit discrimination on grounds of sexual orientation,[7] has

7 Section 15(1) of the Canadian Charter of Rights and Freedoms states: 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without

been interpreted as also prohibiting discrimination based on sexual orientation in the landmark 1995 case of *Egan v. Canada*. The Canadian Supreme Court followed a purposive interpretation approach to the question of the prohibited grounds of discrimination. While dismissing Egan's claim that the definition of 'spouse' in the Old Age Security Act – as being of the opposite sex – violated section 15 of the Canadian Charter, the Supreme Court unanimously held that sexual orientation was a prohibited ground of discrimination (*Egan v. Canada* 1995). In the later case of *Vriend v. Alberta* the Supreme Court ruled that sexual orientation was analogous to other grounds contained in section 15(1) and invoked the disadvantage suffered by persons of a different sexual orientation as a justification for this position.

> In *Egan*, it was held, on the basis of 'historical social, political and economic disadvantage suffered by homosexuals' and the emerging consensus among legislatures (at para. 176), as well as previous judicial decisions (at para. 177), that sexual orientation is a ground analogous to those listed in s. 15(1). (*Vriend v. Alberta* (1998) 1 S.C.R. 493, per Cory J., Para. 90)

On the basis of this approach, it is well established in Canadian jurisprudence that what prohibited grounds of discrimination have in common 'is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity' (*Corbière v. Canada* [1999] 2 S.C.R. 203, Para. 13).

In Canada the struggle to fully defend LGBT rights has been a lengthy judicial process requiring strong judicial and legal activism. Former Justice of the Supreme Court and ardent defender of LGBT rights Claire L'Heureux-Dubé, commenting on the evolution of this approach, explained that discrimination on grounds of sexual orientation was one of the most challenging equality issues the Supreme Court faced; she was proud of the fact that most of her dissents in the past (in which she favoured LGBT rights) in those areas are now the law (Equal Rights Trust 2010).

In 1998, in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, the South African Constitutional Court struck down sodomy laws finding that their existence violated the constitutional right to equality (section 9).[8] Acknowledging the disadvantaging and negative impact that sodomy laws

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discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'.

8 Section 9 of the South African Constitution states: '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law; (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken; (3) The state may not unfairly discriminate directly or indirectly

have had on gay men, Justice Ackerman wrote:

> I turn now to consider the impact which the common law offence of sodomy has on gay men in the light of the approach developed by this Court [...] (a) The discrimination is on a specified ground. Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate. (*National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1998)

The Court in *National Coalition for Gay and Lesbian Equality* ruled that as with all other grounds, discrimination on grounds of sexual orientation degrades and violates dignity in an intolerable way in contravention of the dignity clause of the South African Constitution.

> Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 [Human Dignity] of the Constitution. (ibid. p. 30)

By drawing parallels with other vulnerable groups and other grounds of discrimination, the South African Constitutional Court made it plain that while LGBT persons are a vulnerable and marginalised group in South African society, it is the explicit purpose of the right to equality and the right to dignity to end such cycles of vulnerability and marginalisation. This emphasis – that the purpose of a substantive right to equality is to end cycles of discrimination and oppression suffered by socially vulnerable groups – is inherent to the right to equality understood in a holistic framework of indivisibility of human rights.

The substantive right to equality set by the Constitutional Court in *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (1998) has been applied in subsequent South African cases, which have further entrenched the prohibition of discrimination on grounds of sexual orientation and made them applicable to issues such as adoption (*Du Toit and Another v. Minister of Welfare and Population Development and Others* 2002), healthcare (*J and Another v. Director General, Department of Home Affairs and Others* 2003) and marriage (*Minister of Home Affairs and Another v Fourie and Another* 2005).

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against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination; (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

Another landmark case in the struggle to strike down sodomy laws (albeit outside the Commonwealth), which relied on the constitutional protection of equality, must be mentioned here due to its strong impact on LGBT rights: the case *Lawrence v. Texas* during which in 2003 the US Supreme Court found in a 6–3 ruling that sodomy laws still in force in Texas violated the Fourteenth Amendment of the Constitution guaranteeing equal protection of the law (*Lawrence v. Texas* 2003). In 2005, the High Court of Hong Kong in *Leung v. Secretary for Justice* also ruled that 'When a group of people, such as gays, are marked with perversity by the law then their right to equality before the law is undermined' (*Leung TC William Roy v. Secretary for Justice* 2005 para. 115).

In June 2009, the Delhi High Court, benefiting from South African and Canadian jurisprudence, as well as the Declaration of Principles on Equality and the Yogyakarta Principles, 'read down' section 377 of the Indian Penal Code, which had been previously interpreted as criminalising homosexuality, and declared that it did not apply to consenting same-sex adults. In the case of *Naz Foundation v. Government of NCT of Delhi and Others*, the Court held that the discrimination perpetuated by section 377 severely affected the rights and interests of homosexuals and deeply impaired their dignity.[9] It found that the inevitable conclusion was that the discrimination caused to the gay community was unfair, unreasonable and in breach of Article 14 (right to equality) of the Constitution of India.[10] The High Court also found that section 377 violated Article 15 (right to non-discrimination) of the Constitution and concluded 'that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15' (*Naz Foundation v. Government of NCT of Delhi and Others* 2001, para. 104).

A key strategy employed by the Naz Foundation in bringing this case was to emphasise the damaging effects that section 377 has on LGBT persons' access to medical treatment – in particular HIV/AIDS testing and treatment. This strategy contextualised the egregious nature of the criminalisation provision and clearly demonstrated its damaging and even life-threatening effect.

In a number of judgements the European Court of Human Rights has found that infringements of Convention rights of LGBT persons violate the non-discrimination provision (Art. 14) of the European Convention on Human Rights (ECHR). In 1999, in the case of *Salgueiro da Silva Mouta v. Portugal*, the Court stated that 'sexual orientation' was 'a concept which is undoubtedly covered by Article 14 of the Convention. The Court reiterates

9 It should be noted that Section 377 is a variant of the colonial laws introduced in the second half of the 19th century across the British Empire, and for this reason it bears a resemblance to equivalent sections in a number of Commonwealth penal codes.

10 Article 14 of the Constitution of India states: 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India'.

in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words "any grounds such as" (in French *notamment*)' (*Salgueiro da Silva Mouta v. Portugal* 1999, Para. 28). More recently, on 22 January 2008, the Court held that France had violated Article 14 (right to non-discrimination) in conjunction with Article 8 (right to private and family life) of the ECHR in refusing the adoption application of a lesbian woman. The case of *E.B. v. France* was filed in the Strasbourg Court in 2002 following the rejection of a number of national appeals to overturn the decision of an adoption board to reject the adoption application of the applicant. The Court made it clear that '[w]here sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8' (*E.B. v. France* 2008). On 2 March 2010, in the case of *Kozak v. Poland*, the Court found that a same-sex partner should be able to succeed to a tenancy held by their deceased partner. The Court held that the Polish authorities' exclusion of same-sex couples from succession could not be justified as necessary for the legitimate purpose of protection of the family and was a violation of the right to non-discrimination under Article 14 of the ECHR (*Kozak v. Poland* 2010). On 21 October 2010, in the case of *Alekseyev v. Russia*, the Court found that freedom of peaceful assembly should be guaranteed without discrimination on the basis of sexual orientation, irrespective of the moral and religious beliefs of the majority of society. The Court held that the banning of gay pride marches due to the anticipated violent reaction and threat to public order could not be justified as necessary in a democratic society and was therefore a violation of both Articles 11 (assembly) and 14 (non-discrimination) of the ECHR. Referring to the earlier case of *Kozak v. Poland*, it reiterated that sexual orientation is a concept covered by Article 14, stating that:

> Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow, and in such situations the principle of proportionality does not merely require the measure chosen to be suitable in general for realising the aim sought; it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention. (*Alekseyev v. Russia* 2010)

National and sub-national courts around the world have also recently handed down decisions finding discrimination against LGBT persons, based either on constitutional claims or on claims under anti-discrimination laws. Examples include the decision of the Supreme Court of Nepal of 21 December 2007 to issue directive orders to the Government of Nepal to end discrimination against people of different sexual orientation or gender identity (Equal Rights Trust 2008b). The case leading up to the issuing of the directive orders was initiated on 18 April 2007 by a petition, filed by the Blue Diamond

Society in the Supreme Court, seeking non-discrimination provisions for people of different sexual orientation or gender identity, the nullification of discriminatory laws and the introduction of protective legislation.

In one example out of dozens of recent cases from within European Union member state jurisdictions, on 2 July 2009, the Constitutional Court of Slovenia held that Article 22 of the Registration of Same Sex Partnerships Act (RSSPA) violated the right to non-discrimination under Article 14 of the Constitution on the ground of sexual orientation. The applicants challenged Article 22, which sets out the inheritance regulations for same-sex partnerships, on the basis that it regulated inheritance for same-sex partners differently, and less favourably, than the Inheritance Act regulated inheritance for opposite sex partners (*Blažić and Kern v. Slovenia* 2009).

4. Legal strategies for decriminalisation and advancement of LGBT rights

4.1. The unified framework of equality

Building on progressive international, regional and domestic jurisprudence that supports an integrated approach to equality, two civil society initiatives have sought to provide progressive conceptual frameworks for defending LGBT rights: the 2007 Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity and the 2008 Declaration of Principles on Equality. These standard-setting initiatives can be built upon to mainstream LGBT concerns into human rights agendas, but they can also be helpful as a conceptual basis of legal strategies aimed at challenging the criminalisation, discrimination and oppression experienced by LGBT people.

This section comments on the Declaration of Principles on Equality and its role as a conceptual basis for litigating LGBT rights.[11] The unified (integrated, unitary) framework on equality is a holistic approach which, while keeping in view the specificities of the different strands of equality and the different types of discrimination, seeks more effective implementation of the right to equality through seeing each separate case in a broader context. The unified framework brings together: i) the types of inequalities based on different grounds, such as race, gender, religion, nationality, disability, sexual orientation and gender identity, among others; and ii) the types of inequalities in different areas of life, such as the administration of justice, employment, education, provision of goods and services and so on. The unified framework of equality is enshrined in the Declaration of Principles

11 Regarding the role of the Yogyakarta Principles, see the commentary by Michael O'Flaherty and John Fisher (2008).

on Equality, a document reflecting a new international understanding on equality principles among human rights and equality advocates and experts from all regions of the world.

The Declaration of Principles on Equality has integrated the fragments of the struggle for equality in four significant ways:

- First, the unified conception fuses the approaches to discrimination developed within international human rights law and equality law, with the result of strengthening equality and non-discrimination as autonomous human rights that are central to the international human rights system;
- Second, the unified conception departs from the concept of formal equality, provides legal definitions reflecting the notion of substantive equality, and interprets positive action (affirmative action) as inherent in substantive equality rather than as an exception or a temporary special measure;
- Third, it deletes the bright lines that have historically been drawn between civil and political rights, on one hand, and economic, social and cultural rights, on the other. Furthermore, it creates a basis, at the level of legal principle, for integrating the two historically segregated notions of equality: identity-based equality (on the basis of sex, race, religion, disability, sexual orientation and so on) and socio-economic equality.
- Fourth, it ensures consistency and comprehensiveness in dealing with different types of discrimination – enabling stakeholders to enshrine the right to equality in a way that eliminates the gaps, inconsistencies and hierarchies of current equality regulations.

On the basis of this conceptual framework, the Declaration of Principles on Equality – elaborated and endorsed by 128 experts from 46 countries – was launched in October 2008 (Equal Rights Trust 2008). The Declaration has begun to influence the interpretation of international human rights law and serve as a reference point for equality law and policy reform in several national contexts. In July 2009, it formed part of the basis for the decision of the Delhi High Court in the case of *Naz Foundation v. Government of NCT of Delhi and Others* which decriminalised homosexual conduct. The Court relied on the legal definitions in the Declaration, describing it as 'the current international understanding of Principles on Equality ... [which] ... reflects a moral and professional consensus among human rights and equality experts' (*Naz Foundation v. Government of NCT of Delhi and Others* 2001, para. 83).

The Declaration of Principles on Equality addresses the complex and complementary relationship between different types of discrimination, and seeks to advance and level up the exercise of equal rights for those groups that have weaker protection from discrimination in international and/or national

settings. By constructing both legal argumentation and political solidarity around LGBT rights, it brings conceptual and practical advantages for the LGBT movement. The conceptual advantages that can be utilised when developing litigation strategies to promote LGBT rights are derived from: i) an integrated legal definition of discrimination and the right to equality; ii) the specific approach to the question of grounds (open list versus closed list and in-between solutions); iii) the requirement for levelling-up protection against discrimination to the levels afforded to the best protected groups; iv) the concepts of multiple discrimination, additive (aggravated) discrimination and intersectionality; v) the approach to the issue of discriminatory violence motivated by prohibited grounds ('hate crime'; homophobia as aggravating circumstance in criminal justice); and vi) solutions offered by the unified framework regarding scope, evidence, standard and burden of proof, remedy, positive obligations and so on.

The Declaration of Principles on Equality is intended to assist efforts of legislators, the judiciary, civil society organisations (CSOs) and anyone else involved in combating discrimination and promoting equality by serving as a compass for securing equality in law, policy and practice. When used as a basis for developing litigation strategies to challenge criminalisation of homosexuality and discrimination of LGBT persons, a statement of a universal autonomous right to equality would be a very important starting point. In the Declaration, the right to equality is defined as:

> [T]he right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and benefit of the law. (The Equal Rights Trust 2008, p. 5)

This definition departs from the traditional approach of formal equality. Instead it adopts a notion of substantive equality derived from international human rights law. The content of the right to equality includes the following aspects: i) the right to recognition of the equal worth and equal dignity of each human being; ii) the right to equality before the law; iii) the right to equal protection and benefit of the law; iv) the right to be treated with the same respect and consideration as all others; and v) the right to participate on an equal basis with others in any area of economic, social, political, cultural or civil life (Petrova 2008; see also Hepple 2008). This is a richer notion than equality before the law and equality of opportunity, requiring that individuals are recognised for their inherent and equal dignity in all fields of life, including economic, social, political, cultural and civil life.

Central to the right to equality is the right to non-discrimination which is 'a free-standing, fundamental right, subsumed in the right to equality' (Equal Rights Trust 2008, Principle 4). It is important to note that the Declaration's

right to non-discrimination is not contingent on the violation of any other human right. The right to non-discrimination, as reflected in Principle 4, is freestanding. The right to equality and the right to non-discrimination can thus be freely applied and upheld in all spheres of life, even if no legal rights are recognised in some of these spheres, making the reliance on the rights to equality and non-discrimination a strong approach in defending LGBT rights.

Principle 5 of the Declaration formulates a comprehensive and multilayered legal definition of discrimination, deriving from the fusion of the best approaches manifested in equality law and in international human rights law, and due to its importance should be quoted here:

> Discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds.
>
> Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.
>
> Discrimination must also be prohibited when it is on the ground of the association of a person with other persons to whom a prohibited ground applies or the perception, whether accurate or otherwise, of a person as having a characteristic associated with a prohibited ground.
>
> Discrimination may be direct or indirect.
>
> Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.
>
> Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

> Harassment constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.
>
> An act of discrimination may be committed intentionally or unintentionally. (Equal Rights Trust 2008a, Principle 5)

Principle 6 of the Declaration provides: 'Legislation must provide for equal protection from discrimination regardless of the ground or combination of grounds concerned'.

One critical issue related to the definition of discrimination, which can give one or other direction to claims related to sexual orientation, is the approach to the question of 'prohibited grounds'. Most countries have adopted a variant of one of two broad approaches when setting the scope of the prohibition of discrimination. The first is 'the closed-list approach'. It narrowly construes the right to equality to apply to a limited range of protected grounds, or classes, and respective personal characteristics, such as race, sex or disability that are set out in a written or codified list. The basis for this is that these characteristics have historically resulted in discrimination and victimisation against individuals who have them.[12] Through specifying that the right to equality applies only to certain characteristics, a closed-list approach is seen by some to have the advantage of guaranteeing that the scope of protection from discrimination is not inflated. It also ensures that the right to equality is not misused by preventing legitimate distinctions from being made or by allowing spurious claims of discrimination. While the closed-list approach permits greater legal certainty, it is often too restrictive and non-flexible in its application. The impossibility of seeking protection from discrimination based on a new

12 The United Kingdom and until recently European Union legislation have followed this approach. In the European Union in particular, the limitation to only six grounds of discrimination on which binding directives establishing minimum standards can be adopted – sex, race (including ethnic origin), religion or belief, sexual orientation, disability and age – was based on Article 13 of the Treaty of the European Union, now Article 19 of the consolidated version of the Treaty on the Functioning of the European Union. However, the recent enforcement of the EU Charter on Fundamental Rights extended the protection against discrimination to grounds beyond the above and, through the phrase 'such as', introduced an open list of protected grounds. The Charter devotes Title III to 'Equality'. Its Article 21 'Non-discrimination' states in paragraph 1 that 'Any discrimination on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'. The Charter is 'addressed to institutions, bodies, offices and agencies of the union with due regard for the principle of subsidiarity, and to the Member States only when they are implementing Union law' (Article 51).

or emerging ground undermines the object and purpose of the constitutional guarantees of equality and of national equality legislation. Consequently, many legitimate claims of discrimination would fall because they cannot be argued with respect to an explicitly prohibited ground.

The second approach – that of the 'open-list' – also usually explicitly lists grounds of discrimination but in addition, opens up the list through the expressions 'such as', 'other status', or 'any status such as …' which enables new grounds of discrimination to be prohibited by law. This approach recognises that the grounds on which discrimination manifests itself are subject to historical change and that individuals are often victims of discrimination on emerging and new grounds. It therefore allows courts and other judicial bodies to expand the list of prohibited grounds of discrimination to analogous cases in which individuals can experience similar unjust discrimination. International human rights instruments elaborated in the framework of the United Nations in the wake of the 1948 Universal Declaration of Human Rights follow the open-list approach, established first by Article 2 of that Declaration. Making use of the open list (the 'other status' provision), international human rights treaty bodies, including the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights have determined that discrimination on grounds of sexual orientation is covered by the provisions of the respective Covenants they oversee because it is analogous to the explicitly proscribed grounds of discrimination.[13] Yet many legal systems avoid the open-list approach, believing that it allows an overly broad and flexible interpretation of the right to equality in which potentially any distinction, regardless of its triviality could become the basis of a claim of discrimination.

In response to the difficulties arising from both the open-list and closed-list approaches to grounds of discrimination, Principle 5 of the Declaration of Principles on Equality establishes a different solution that retains the flexibility and inclusiveness of the open-list approach, but encases it within a strict legal test to ensure that the protection against discrimination is not extended to spurious or illegitimate claims. Applying the test set out in the Declaration, in order for sexual orientation to constitute a prohibited ground of discrimination, it must be shown in the course of the litigation that either:

a) Discrimination on the grounds of sexual orientation or gender identity causes or perpetuates systematic disadvantage; or

b) Discrimination on the grounds of sexual orientation or gender identity undermines human dignity; or

c) Discrimination on the grounds of sexual orientation adversely

13 This test – the analogy with the explicitly listed characteristics – is also adopted in Article 1 (xxii)(b) of the South African Protection of Equality and Prevention of Unfair Discrimination Act 2000.

> affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds.

The test contained in Principle 5 provides three independent criteria; only one criterion needs to be satisfied in order for a new ground to receive protection.[14]

4.2. Possible legal claims in challenging criminalisation by utilising the unified framework on equality

Despite the commonalities in the legal cultures, strategies of challenging criminalisation in the courts of Commonwealth countries will differ from place to place, depending on peculiarities of the legal system and the existing national constitutional jurisprudence, as well as the agendas of political, religious and civil society actors. Globally, an important distinction to be made is whether homosexuality is prohibited through religious or secular law. In several Muslim countries around the world the prohibition of homosexual conduct falls into the remit of Sharia law. Within the Commonwealth, this applies for example to states of northern Nigeria. In 2006 the UN Special Rapporteur on Extrajudicial Executions documented the persecution of individuals accused under Sharia law of engaging in homosexual acts in northern Nigeria:

> In December 2005 the Katsina Sharia Court acquitted two other men charged with the capital offence of sodomy, because there were no witnesses. They had nevertheless spent six months in prison on remand which the judge reportedly said should remind them 'to be of firm character and desist from any form of immorality'. Regardless of the circumstances of the individual case, however, the incident serves to highlight several major problems. They are the use of stoning to death as a punishment, and the prescription of the death penalty for private sexual conduct. (UN Special Rapporteur on Extrajudicial Executions 2006)

While it seems unlikely that directly confronting Sharia law solely through equality principles and international human rights will be fruitful, there may be strategic advantages in opening legal debate and dialogue in order to reconsider the authenticity of the interpretations of Sharia law used in these countries. Efforts should also focus on assisting Muslim jurists and LGBT activists to research and develop Islamic jurisprudence, building upon interpretations of Islam which encompass the promotion of diversity, tolerance, non-compulsion and the principle that all people are equal before

14 The approach to this issue is based on the South African Protection of Equality and Prevention of Unfair Discrimination Act 2000. Experts from diverse jurisdictions participating in the development of the Declaration of Principles on Equality agreed that the South African approach represents the best practice on this issue.

God (*Taqwa*), and on this basis argue that LGBT persons should be tolerated and not subjected to criminal sanctions. Advocating for decriminalisation in the Sharia settings requires long-term strategies which focus both on developing progressive justifications within Islam and on holding such countries to account in respect of their international human rights obligations (see also Shah, this volume).

A number of Commonwealth countries, including Cameroon, Gambia, Kenya, Malawi, Tanzania, Uganda and Zambia, criminalise homosexuality through the application of secular sodomy laws. In spite of the strong religious and cultural influences that stigmatise the LGBT community in these countries, the laws which prohibit homosexual conduct have no link to religious doctrine, either in the formulation of the criminal act or in the prescribed punishment. In such countries strategic possibilities exist to push for decriminalisation through promoting equality principles and international human rights law. As shown in the previous sections, secular penal codes criminalising homosexuality also create substantial gaps in protection from discrimination through categorising LGBT persons as criminals, effectively converting the penalisation of a conduct into a penalisation of a status. Consequently, the risk of discrimination is greater in all areas of life. Hence, lawyers could rely on the strategic advantages presented by advocating for decriminalisation, using equality and non-discrimination norms as an entry point.

Invoking equality clauses in constitutions: Few countries in the Commonwealth, as well as globally, explicitly prohibit discrimination on grounds of sexual orientation and gender identity in legislation. Yet most constitutions do provide general guarantees to the right to equality and non-discrimination.

It is important, in developing legal arguments to combat laws that criminalise sexual orientation, that progressive national constitutional jurisprudence is – as much as possible – taken as the source of interpretation, rather than relying exclusively on international law. To ignore national jurisprudence would lead to charges of colonialism that have often been used to undermine the work of international human rights lawyers and organisations. Furthermore, using progressive national jurisprudence is a genuine opportunity to develop national law from the ground up and illustrate how national legal systems can be used in challenging serious societal problems.

Two separate legal situations present themselves within the equality clauses of constitutions: i) constitutions with an open-list of prohibited grounds of discrimination in the context of a constitutional right to equality; and ii) constitutions with a closed list of prohibited grounds. In countries with open-list provisions, such as the Gambia, strategies to defend LGBT rights through equality should focus on challenging the criminal provision on the basis that it

violates the constitutional right to equality.[15] In such countries the constitutional right to equality permits 'other grounds' of discrimination to be read into the right to equality. Open-list equality guarantees technically apply to any ground of discrimination that meets a certain threshold: consequently strong litigation initiatives could be developed to argue that laws which egregiously discriminate against LGBT persons violate the constitutional right to equality. On this basis, the ERT incorporated progressive decisions from the Ugandan constitutional court into its submission to the president of Uganda, urging the rejection of the Anti-Homosexuality Bill 2009 and the repeal of Section 145 of the Penal Code (Equal Rights Trust 2009). Similarly, in working to support the legal team defending Tiwonge Chimbalanga and Stephen Monjeza in Malawi, ERT relied on the Malawi case of *Marinho v. SGS (Blantyre) Pvt Limited* (2003) to demonstrate that a Malawian court had found that 'any type' of discrimination is prohibited (see also Mwakasungula, this volume).

In member states of the African Union, an open-list claim can be supported by reference to the African Charter on Human and Peoples' Rights which imposes obligations on states parties to protect the rights of every individual, both on the basis of specified grounds and on analogous grounds. Advocates could argue that these obligations cannot be negated by claiming that that LGBT rights do not fall within the scope of the Charter, because under Article 2 the explicitly proscribed grounds are illustrative and the Charter recognises the rights and freedoms of everyone 'without distinction of *any kind*' (emphasis added).

For countries with closed-list guarantees, such as Zambia,[16] gains can be

15 Article 33 of the Gambian Constitution states that: '(1) All persons shall be equal before the law […] (3) Subject to the provisions of subsection (5), no person shall be treated in a discriminatory manner by any person acting by virtue of any law or in the performance of the functions of any public office or any public authority; (4) In this section, the expression 'discrimination' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject, or are accorded privilege or advantages which are not accorded to persons of another such description' (emphasis added). Article 17(2) of the Gambian Constitution states: 'Every person in The Gambia, whatever his or her race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status, shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter, but subject to respect for the rights and freedoms of others and for the public interest.'

16 Article 23(3) of the Constitution of Zambia states: 'In this Article the expression "discriminatory" means affording different treatment to different persons attributable, wholly or mainly, to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons

made through arguing that discrimination on grounds of sex (which most of these countries do prohibit) includes or is directly equivalent to discrimination on grounds of sexual orientation or gender identity. In addition to the application of this approach by the HRC in *Toonen* discussed above, it has been endorsed in respect to gender identity by the European Court of Justice (ECJ), in the 1996 case of *P v. S and Cornwall County Council* (1996). The ECJ ruled that the prohibition of discrimination on grounds of sex for the purposes of the Equal Treatment Directive (Council Directive no. 76/207/EEC, 9 February 1976) included a prohibition of discrimination on grounds of transgender identity. Yet sexual orientation was held by the ECJ not to come within the protection of sex discrimination under the Equal Treatment Directive in the 1998 case of *Grant v. South-West Trains* (1998). The ECJ in *Grant* based its reasoning on the fact that the European Community, despite declarations by the European Parliament that it deplored all forms of discrimination based on an individual's sexual orientation, had not (at that time) specifically prohibited discrimination on this ground.

Reading down sodomy laws as 'not applying': In a number of penal codes within the Commonwealth, anti-homosexuality provisions are expressed in terms that are arguably too broad, vague and ambiguous, such as 'unnatural offences' and 'carnal knowledge of any person against the order of nature'. When secular laws use such language, it may be strategically advantageous to claim that the provisions do not in fact criminalise homosexual conduct of consenting adults. The judgment of the Delhi High Court in *Naz* creates an excellent precedent for seeking such a result in litigation. Advocates could challenge actions of law enforcement officials or other actors (preferably state actors) who are applying these 'neutral' laws to gays and lesbians, and seek findings of direct or indirect discrimination.

Arguing violations of the equal enjoyment of other rights as a result of criminalisation: An important lesson which must be drawn out from *Naz* is that emphasising the practical implications of criminalisation (for example, the effects that discrimination in healthcare has on health outcomes) could be a key replicable strategy to end criminalisation. In India, the approach of emphasising the social disadvantage and discrimination, caused by the secular law, circumvented much public criticism of homosexual conduct and overcame a wave of political opposition against the striking down of section 377 of the Penal Code.

The argument could include the following elements: the autonomous right to equality enshrined in international law (as synthesised in the Declaration of Principles on Equality) has important implications. First, laws which criminalise

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of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.'

homosexuality perpetuate an ideology that LGBT persons are unnatural, immoral and a threat to society. This fundamentally violates the dignity of all LGBT persons and encourages a system in which their stigmatisation and humiliation is acceptable and mandated by law. Second, by enforcing criminal sanctions for engaging in private consensual activities such laws denigrate LGBT persons as the lowest possible 'class' of their respective societies and send a blanket message that these people should be treated with the lowest possible respect and consideration. Third, subjecting a person to discrimination because of a characteristic which is innate to them not only violates the human dignity of the individual but it also institutionalises a system whereby these people will experience severe restrictions in terms of access to healthcare, employment and the provision of goods and services.

Claiming violation, resulting from the criminalisation of homosexuality, of the equal enjoyment of the right to be free from torture and other cruel, inhuman or degrading treatment or punishment: On the basis of the definitions and case law of the HRC, UN Committee against Torture and other jurisdictions, it can be argued that the application and implementation of laws which discriminate on grounds of sexual orientation or gender identity treat every person who engages in same-sex conduct in a degrading way. Such laws distinguish the sexual conduct of LGBT and heterosexual people and mark the former out for severely detrimental treatment. The abuse and punishment – imprisonment and civil fines – as well as harassment of people who engage in consensual homosexual conduct is unreasonable, unjustifiable and is of such severity that it clearly infringes the non-discriminative application of the right to be free from degrading treatment required by Article 7 in conjunction with Article 26 of the ICCPR.

Claiming indirect discrimination through application of 'neutral' provisions referring to 'obscenity' and similar offences: The well-established understanding in international law is that both direct and indirect discrimination are prohibited. Protecting against indirect discrimination on grounds of sexual orientation or gender identity is also extremely important. First, many laws which presumptively criminalise homosexual acts are often framed in neutral terms which do not expressly mention homosexual acts. Many anti-homosexuality legal provisions which are a legacy of colonial laws also often use more ambiguous language such as 'unnatural offences' and 'indecent acts'. It is through the application of these legal provisions that courts and law enforcement officials target persons of a different sexual orientation. Consequently, even in the event that authorities argue that they are not targeting a particular 'class' of people, but instead are targeting a particular 'act', a challenge can be brought on the basis of the indirect discrimination analysis. Only by looking past the legal language, and indeed past the intention of the legislator, and understanding the particular ways in which these provisions disadvantage persons of a different sexual orientation, will full and effective

equality become a possibility for them. The concept of indirect discrimination is a powerful legal instrument in combating legal provisions which on their face are neutral but which in application discriminate against the LGBT community.

Claiming harassment as a result of criminalisation: Persons of a different sexual orientation in countries criminalising homosexuality routinely face harassment from law enforcement as well as from other state and non-state actors. In Principle 5 of the Declaration of Principles on Equality, as in a number of jurisdictions, harassment is defined as a form of discrimination. The workplace, schools, universities and hospitals are all areas where LGBT persons are likely to be harassed as a result of prejudice and stigma, legitimised by anti-homosexuality laws. Bringing claims of harassment has the benefit of drawing from rich jurisprudence from countries with well-developed anti-discrimination protections.

Conclusion

The movement aimed at universal decriminalisation of homosexuality could benefit from relying on a unified equality framework for building a strategy. This would mean presenting the demand for decriminalisation as an indispensable, essential first step to ensuring equal respect, equal treatment and equal opportunity to all persons regardless of their sexual orientation. Criminalisation of same-sex conduct can and should be attacked as a form of discrimination. In this strategy, advocates could first seek to express the barriers faced by homosexuals in the terms of violations of equal rights, using the conceptual frameworks of equality law. In this context, advocates can draw from the existing judicial practice, invoking cases where legal principles related to equality have been instrumental in defending the rights of LGBT persons. Criminalisation can be challenged through many possible scenarios based on different claims. The choice of claim and how it could be argued – which should be made by taking into account the specific local circumstances – is central to successful strategic litigation.

Bibliography

AllAfrica.com (2010) *Malawi: Country Not Safe for Homosexuals*, 13 Mar., available at http://allafrica.com/stories/201003140001.html (accessed 8 Feb. 2013).

Equal Rights Trust (2008a) *Declaration of Principles on Equality*, available at www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf (accessed 8 Feb. 2013).

— (2008b) *Nepal Prohibits Discrimination on Grounds of Sexual Orientation and Gender Identity*, available at www.equalrightstrust.org/newsstory16012008/ (accessed 8 Feb. 2013).

— (2009) Legal opinion on the Anti-Homosexuality Bill 2009, submitted to President Edward Ssekandi Kiwanuka, available at www.equalrightstrust.org/ertdocumentbank/The%20Equal%20Rights%20Trust%20Uganda%20Anti%20Homosexuality%20Bill%20Opinion.pdf (accessed 8 Feb. 2013).
— (2010) 'Equality in the courts: a judicial perspective', *The Equal Rights Review* 4, pp. 87–96, available at www.equalrightstrust.org/ertdocumentbank/interview.pdf (accessed 8 Feb. 2013).
Global Rights and the International Gay and Lesbian Human Rights Commission (2007) *The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Zambia*, available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/ZM/GR-ILGRHRC_ZMB_UPR_S2_2008_GlobalRightsInternational-GayandLesbianHumanRightsCommission_uprsubmission_JOINT.pdf (accessed 8 Feb. 2013).
— (2009a) *The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Rwanda: A Shadow Report*, available at www2.ohchr.org/english/bodies/hrc/docs/ngos/LGBT_HRC95_Rwanda.doc (accessed 8 Feb. 2013).
— (2009b) *The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in The United Republic of Tanzania: A Shadow Report*, available at www2.ohchr.org/english/bodies/hrc/docs/ngos/LGBT_Tanzania96.pdf (accessed 8 Feb. 2013).
Hepple, B. (2008) 'The Declaration of Principles on Equality', *Equal Opportunities Review* 182, pp. 22–6.
Human Rights Committee (1997) Concluding Observations on Sudan, UN Doc. C/79/Add.85 (29 July 1997): para. 8.
— (1998) Concluding Observations on Zimbabwe, UN Doc. CCPR/C/79/Add.89 (6 Apr. 1998): para. 24.
— (1999) Concluding Observations on Lesotho, UN Doc. CCPR/C/79/Add.106 (8 Apr. 1999): para. 13.
— (2002) Concluding Observations on Egypt, UN Doc. CCPR/CO/76/EGY (28 Nov. 2002): para. 19.
— (2004) Concluding Observations on Poland, UN Doc. CCPR/CO/82/POL (2 Dec. 2004): para. 18.
— (2005a) Concluding Observations on Greece, UN Doc. CCPR/CO/83/GRC (31 Mar. 2005): para. 19.
— (2005b) Concluding Observations on Kenya, UN Doc. CCPR/CO/83/KEN (28 Mar. 2005): para. 27.
— (2007) *Opinions Adopted by the Working Group*, 2 Feb., UN Doc. A/HRC/4/40/Add.1 (2 Feb. 2007): para 91.
Human Rights Watch (2008) *This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism* (New York: Human Rights Watch).

— (2009) *Together Apart: Organising around Sexual Orientation and Gender Identity Worldwide* (New York: Human Rights Watch).

Johnson, C.A. (2007) *Arbitrary Arrests and Detention of Men in Cameroon on Charges Related to Sexual Orientation and Gender Identity*, International Gay and Lesbian Human Rights Commission (IGLHRC), 11 Sep.

Kirby, M. (2009) 'Homosexual law reform: an ongoing blind spot of the Commonwealth of Nations', *16th Commonwealth Law Conference*, Hong Kong, 8 April.

O'Flaherty, M. and J. Fisher (2008) 'Sexual orientation, gender identity and International Human Rights Law: contextualising the Yogyakarta Principles', *Human Rights Law Review* 8 (2).

Petrova, D. (2008) 'The Declaration of Principles on Equality: a contribution to international human rights: commentary', in *The Equal Rights Trust, Declaration of Principles on Equality*, p. xx.

Redding, J.A. (2006) 'Human rights and homo-sectuals: the international politics of sexuality, religion and law', *Northwestern Journal of International Human Rights* 4(3), pp. 436–92.

Special Rapporteur on Extrajudicial Executions (2006) Report on Nigeria, UN Doc. E/CN.4/2006/53/Add.4 (7 Jan. 2006), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/106/40/PDF/G0610640.pdf?OpenElement (accessed 11 Mar. 2011).

United Nations General Assembly (2008) Letter dated 18 December 2008 from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations, addressed to the President of the General Assembly, UN Doc. A/63/635 (22 Dec. 2008), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/667/99/PDF/N0866799.pdf?OpenElement (accessed 13 Nov. 2011).

Tamale, S. (2009) 'A human rights impact assessment of the Ugandan Anti-Homosexuality Bill 2009', *The Equal Rights Review* 4, pp. 49–57.

UN Committee Against Torture (2008) General Comment No. 2 – implementation of article 2 by states parties, UN Doc. CAT/C/GC/2 (24 Jan. 2008): para 21.

UN Committee on Economic, Social and Cultural Rights (2000a) General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), UN Doc. E/C.12/2000/4 (11 Aug. 2000): *Special Topics of Broad Application*, para. 18.

— (2000b) Concluding Observations on Kyrgyzstan, UN Doc. E/C.12/1/Add.49 (1 Sep. 2000): para. 17.

— (2001) Concluding Observations on (Hong Kong) China, UN Doc. E/C.12/1/Add.58 (21 May 2001): para. 15 (c).

— (2002a) General Comment No. 15: *The Right to Water* (arts. 11 and 12), UN Doc.E/C.12/2002/11 (20 Jan. 2002): para. 13.
— (2002b) Concluding Observations on Trinidad and Tobago, UN Doc. E/C.12/1/Add.80 (5 June 2002): para. 14.
— (2006) General Comment No. 18: *The Right to Work* (art. 6), UN Doc.E/C.12/GC/18 (6 Feb. 2006): para. 12.
— (2009) General Comment No. 20 (Non-Discrimination in Economic, Social and Cultural Rights (art. 2, Para. 2)), UN Doc. E/C.12/GC/20 (10 June 2009): para. 32.
UN Committee on the Rights of the Child (2003) General Comment No. 4 (Adolescent health and development in the context of the Convention on the Rights of the Child), UN Doc. CRC/GC/2003/4 (1 July 2003): para. 32.
Working Group on Arbitrary Detention (2006) *Opinion No. 22/2006 (Cameroon),* UN Doc. A/HRC/4/40/Add.1 (31 Aug. 2006)

Legal cases and resolutions

Alekseyev v. Russia (ECHR application nos. 4916/07, 25924/08 and 14599/09), Judgment of 21 Oct. 2010.
Blažić and Kern v. Slovenia (2009) Constitutional Court of Slovenia U-I-425/06–10.
Corbière v. Canada (1999) 2 S.C.R. 203.
Council Directive no. 76/207/EEC, 9 Feb. 1976.
Council of Europe's Committee of Ministers' Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, available at https://wcd.coe.int/ViewDoc.jsp?id=1606669&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383 (accessed 8 Feb. 2013).
Du Toit and Another v. Minister of Welfare and Population Development and Others (2002) (CCT40/01) [2002] ZACC 20; 2002 (10) BCLR 1006; 2003 (2) SA 198 (CC).
E.B. v. France (ECHR application No. 43546/02), GC Judgment of 22 Jan. 2008.
Egan v. Canada (1995) 2 S.C.R.
Grant v. South-West Trains (1998) ECJ case C-249/96, judgment of 17 Feb. 1998.
Human Rights Committee (1994) Communication No. 488/1992: Australia, Nicholas Toonen v. Australia, UN Doc. CCPR/C/50/D/488/1992 (4 Apr. 1994).
— (2003) Communication No. 941/2000: Australia, *Edward Young v. Australia*, UN Doc. CCPR/C/78/D/941/2000 (18 Sep 2003).

J and Another v. Director General, Department of Home Affairs and Others (CCT46/02) (2003) ZACC 3; 2003 (5) BCLR 463; 2003 (5) SA 621 (CC).

Kozak v. Poland (ECHR application No. 13102/02), Judgment of 2 Mar. 2010.

Lawrence v. Texas (2003) 538 US 558.

Leung TC William Roy v. Secretary for Justice, High Court of the Hong Kong Special Administrative Region, 24 Aug. 2005, HCAL 160/2004.

Marinho v. SGS (Blantyre) Pvt Limited, Civil Cause No. 508 of 1996, unreported. As quoted by Mwaungulu, J in *Sakala v. The Registered Trustees of The Designated School Board,* Civil Cause No. 2652 of 1999 (2003) MWHC 5, 13 Jan. 2003.

Minister of Home Affairs and Another v. Fourie and Another (CCT 60/04) (2005) ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC).

National Coalition for Gay and Lesbian Equality v. Minister of Justice, CCT 11/98, 1998.

Naz Foundation v. Government of NCT of Delhi and Others (2001) WP(C) No. 7455/2001.

P. v. S. and Cornwall County Council (1996). ECJ case C-13/94, judgment of 30 April 1996.

The Anti-Homosexuality Bill (2009) Bills Supplement to the *Uganda Gazette* No. 47, Volume CII, 25 Sep.. Parliament of Uganda. Printed by UPCC, Entebbe, by Order of the Government.

Salguero da Silva Mouta v. Portugal (ECHR application no. 33290/96), Judgment of 21 Mar. 2000.

Vriend v. Alberta (1998) 1 S.C.R. 493.

19

Conclusion
Comparative analysis of decriminalisation and change across the Commonwealth: understanding contexts and discerning strategies

Corinne Lennox and Matthew Waites

As the global struggle for human rights with respect to sexual orientation and gender identity intensifies, and the Commonwealth seeks to negotiate its role in this process, what can be learned from studying national experiences together? This concluding chapter offers a comparative analysis of the country and regional case studies included in this book. The aim is to identify some commonalities across cases, and important differences, and hence to learn some lessons from processes of decriminalisation and change across the Commonwealth. We focus centrally on the decriminalisation issues, but also offer wider comments on sexual orientation and gender identity, and issues of relevance to struggles over sexuality, gender and human rights.

This is the first systematic attempt in the academic literature to conduct a comparative analysis of sexual orientation and gender identity struggles in Commonwealth states; as such the analysis is offered tentatively, to initiate further conversations. In particular, it is offered with a consciousness of how power relations associated with post-colonialism constrain knowledge production, and as an invitation to further research and discussion with activists, politicians, researchers and all concerned. This volume does not seek to represent, summarise or synthesise all the many insights from the chapters within it, all of which stand in their own right. Rather, mindful of our own position based in the United Kingdom, we seek to identify some specific useful themes and patterns deserving attention.

It is worth emphasising from the outset that although many Commonwealth Member States do share some important commonalities – for example in terms of substantial parts of their state, legislative and legal structures (including the English law tradition), colonial language (English), and experiences of colonialism and decolonisation – there are also very significant differences: of

culture, history, economic status, duration of independence, political traditions (ranging from liberal to authoritarian), and composition of civil society and civil society organisations (CSOs). All of these factors can impact on prospects for decriminalisation. The region in which a state is based can also be an important variable; as Simmons (2009) has shown, the practice of neighbouring states can have an effect on how states will behave towards human rights norms. Nevertheless, we felt an important opportunity would be missed if we did not undertake some comparative analysis with the hope that in doing so, we could uncover some points that might assist activists in their ongoing struggles, and also governments strategising for positive change.

The chapter draws from theories of social mobilisation at the national and international levels (for example Keck and Sikkink 1998; Finnemore and Sikkink 1998; Tilly 2004; Tarrow 2005). It refers to social movement theories employed in political science and sociology, variously emphasising the importance for movements of the 'political opportunity structure', such as a state's legal and policy framework (Kitschelt 1986); of 'framing' strategies through which movements represent themselves in relation to such structures (McAdam 1996); and/or of 'resource mobilisation' drawing on various forms of economic, social and cultural resources which a movement can muster (McCarthy and Zald 1977). Work by scholars like McAdam, especially that emerging from the United States, has integrated these approaches as 'political process theory' (McAdam 1982; 1996; 2003). However, one should also be alert to a fourth tradition from Europe of analysing social movements since the 1960s with greater attention to issues of culture and identity (Touraine 1988), particularly in the case of Melucci who noted 'new social movements' emerging since the 1960s, among which he included the lesbian and gay movement (Melucci 1980; 1996). Political process theorists like McAdam subsequently gave a 'qualified endorsement of the cultural turn in social movement studies' (McAdam 2003, p. 281), also influential in the work of leading European social movement theorists Diani and Della Porta (Diani and McAdam 2003; Della Porta and Diani 2006). Work by movement theorists of lesbian and gay movements like Joshua Gamson echoes this, engaging with sociological approaches to the social construction of sexual and gender identities and with queer theory, to conceptualise dynamics of inclusion and exclusion (Gamson 1996; see also Waites 2010; Kollman and Waites 2011). In our view such understandings, including those concerning uses of language and symbolism, are central to comprehending contemporary gender and sexuality movements; moving from a focus on who is 'represented' in 'framing' to one on how discourses used in framing are often also implicated in constituting the identities of political subjects (as suggested in the work of Foucault, discussed by Waites in the United Kingdom chapter), and the parameters of movement belonging.

This chapter also examines the range of tactical 'repertoires' (Tilly 2004) used by activists, to deepen discussion of strategies. The term 'advocacy' is employed here to denote not only campaigns, but also other strategies, such as litigation, protest, and seeking or participating in legislative review, used for the purpose of advancing the decriminalisation process. The analytical framework will also draw upon aspects of sociology, including the developing sociology of human rights, which enables us to examine how, in practice, human rights are often not invoked as a holistic framework by actors; rather, particular human rights are often selectively invoked and interpreted (Hynes et al. 2010; 2011; 2012).

The data analysed in this discussion is drawn almost entirely from the chapter contributions to this book. In a few cases supplementary information was sought if felt necessary to consider further certain patterns of interest. Each chapter was reviewed against a set of variables to identify actor characteristics and mobilisation strategies.

The chapter is structured in two main parts. Part one discusses the main 'actors' involved – with 'actor' used very broadly to refer to a range of organisations – as a way to begin exploring their positions and character, drawing cross-national comparisons on actor characteristics (Keck and Sikkink 1998). Specifically, CSOs are examined first, such as lesbian, gay, bisexual, transgender and intersex (hereafter LGBTI)[1] organisations and human rights bodies, looking at the type of 'organisational platforms' that have been built for advocacy purposes (Finnemore and Sikkink 1998); then states, and actors within states; then religious institutions and the influence of religion. While these three types of actor are in practice overlapping – religious organisations are to some extent CSOs, and states may institutionalise certain religions – it was convenient to divide discussion into three subsections in this way, while also beginning to make reference to the political process and social movement theories mentioned.

Part two of the chapter moves into a deeper discussion and engagement with the analytical frameworks offered by political process and social movement theories, discussing 'framing' and 'political opportunity structure' approaches in turn, then moving into discussion of 'tactical repertoires' and 'resource mobilisation'. Following this is a concluding discussion of what can be learned

1 In places in this discussion the acronym LGBTI is used to refer to lesbian, gay, bisexual, transgender and intersex people; this echoes that used by ILGA, the International Lesbian, Gay, Bisexual, Trans and Intersex Organisation – the longest-established and globally representative international NGO focusing on sexual orientation and gender identity issues. However, it should be noted that typically most NGOs working to represent such groups in national contexts do not encompass all five groups suggested by LGBTI; and many NGOs also use other identity categories to avoid the Western associations of LGBTI (Waites 2009). The editors have tried to be more specific where possible.

from the chapter and the volume as a whole. Finally, some conclusions are suggested concerning future actions that might be made by parties such as NGOs, movements and governments, and the question of the role of the Commonwealth itself is addressed.

Actor characteristics

Civil society organisations: diversity in organisational platforms

The development of strong 'organisational platforms' (Finnemore and Sikkink 1998) can be important for achieving goals through social mobilisation. Such platforms can be highly institutionalised, for example, as non-governmental organisations (NGOs), or looser associations, like networks or coalitions, or event-specific alliances, such as for mass protests. Such platforms function to exchange information, create a common discourse or provide leadership and/or administrative support for activities (see also Keck and Sikkink (1998) on 'transnational advocacy networks').

On the issue of decriminalisation, and sexual orientation and gender identity rights more broadly, activists have faced additional challenges ranging from stigma of association and public reprobation to harassment, violence and even murder. To build an organisational platform is difficult under even the best of conditions but the activists profiled here have mobilised with courage, determination, and usually few resources, in spite of the hostile environment in which they have worked or are working. Particular remembrance can be given here to David Kato of Uganda and Brian Williamson of Jamaica, two leading rights activists who were murdered; sadly, they are not the only activists who have lost their lives in this fight.

Virtually all of the cases in the book denote the existence of at least one NGO working at the national level on sexual orientation and gender identity issues. Most states have more than one such NGO; Uganda, for example, has nearly ten, an impressive number given the high levels of intolerance for such mobilisation domestically. This suggests that, in spite of the obvious barriers, there is still some space for open civil society organisation on these issues.

Names of organisations are useful to consider as a reflection of who is being represented; clearly such names may often represent in part a framing strategy relative to political opportunity structures, and it should be kept in mind that – as activist Antony Grey suggested in relation to the Homosexual Law Reform Society, discussed in the UK chapter – respectable homosexual exteriors may conceal more radical and transgender interiors. While early decriminalisations involved such organisations with names focused on the 'homosexual', or had more ambiguous and deferential titles such as ASK (Association for Social Knowledge) in Canada, contemporary organisations usually have broader or more explicit framings in their titles. However, there remains considerable

variability in the extent to which transgender or intergender people are included. Jamaica is indicative, having moved from the Gay Freedom Movement in the 1970s, to J-FLAG: the Jamaican Forum for Lesbians, All-Sexuals and Gays (Blake and Dayle, this volume) – a title that does not clearly signal the inclusion of gender identity issues. Sexual Minorities Uganda is somewhat similar. By contrast, in Malaysia the NGO katagender clearly signals a gender focus, reflecting regional differences. The equality advocacy group People Like Us in Singapore and Voices Against 377 in India both have titles which are inclusive of diversity, including diversity of gender identity and expression; both may appear non-threatening in a difficult political context, but may be radical in relation to many Western NGOs in their gender inclusivity.

While relations between LGBTI organisations and internal movement dynamics are often discussed, perhaps an equally important theme, which is less frequently analysed, is how organisations and movements focused on sexual orientation and gender identity relate to wider human rights and CSOs. In a number of cases, human rights NGOs have clearly taken up the issue of decriminalisation or other such rights issues (for example on HIV/AIDS) as part of their portfolio of work. In Malawi, where sexual orientation has only recently been coming into public discussion, it is organisations such as the Centre for Human Rights and Rehabilitation and the Centre for Development of People that have led initiatives. Such alliances have not always come easily; Mwakasungula's Malawi chapter reports that the Council for NGOs in Malawi, CONGOMA, denounced LGBTI activism, possibly under pressure from the government, while in Botswana, according to Tabengwa and Nicol, the Botswana Council of NGOs (human rights NGOs) has failed to agree a position on this issue. However, Mwakasungula still emphasises the benefit of his organisation using a conference to engage a range of human rights actors and CSOs; the subsequent formation of a Technical Working Group on Most At Risk Populations (MARP) also involved various actors, and utilised a wide health and HIV/AIDS framing to achieve such collaboration. National coalitions, comprising LGBTI and human rights organisations and other civil society actors have been formed with varying degrees of success in, for example, India (Voices Against 377), South Africa (National Coalition for Gay and Lesbian Equality), Uganda (Civil Society Coalition on Human Rights and Constitutional Law) and in Malaysia for the petition to the National Human Rights Institution (NHRI) to take up decriminalisation. In the Malaysian context, Shah's discussion suggests that making connections with broad political reform movements like Bersih 2.0 is an important strategy to pursue. Perhaps this is more so where there is a need to establish an initial foothold in public debates.

It appears that in India the emergence of a substantial and organised national coalition to argue and campaign publicly for change was an important factor in changing the political climate and winning the legal ruling for

decriminalisation. Crucially, Voices Against 377 was a broad-based coalition; it included groups working with LGBTI people, MSM (men who have sex with men), *hijras*, *kothis* and people using various other South Asian forms of identification; but it also included women's groups, sexual rights NGOs and children's rights groups, which was crucial to its success (Baudh, this volume; Waites 2010). This is an important insight, since it goes against the tendency of Western lesbian and gay social-movement scholarship to exaggerate the need for 'identity' as a basis for successful campaigning, and it opens up the possibility of alliances with wider rights movements. In relation to existing global and comparative academic literature, it shifts us away from a focus on 'gay and lesbian' politics in national contexts being viewed as 'imprints of a worldwide movement' (cf. Adam et al. 1999), or a singular global 'gay and lesbian movement' (Tremblay et al. 2011) towards a greater emphasis on the diversity of forms of identification, subjectivity and culture. Hence, rather than this volume discerning a single desirable model of structure, strategy or identity for movements, it suggests that movement strategies are and should be creative to address their specific context – with Voices Against 377 providing an impressive new model of such contextual creativity to emulate (Waites 2010).

There are also several examples of transnational organisational platforms discussed in the chapters. These include the North American Conference of Homophile Organisations (NACHO, mentioned by Kinsman), Coalition of African Lesbians (which was refused formal recognition by the African Commission on Human and Peoples' Rights, as discussed by Tabengwa and Nicol), and CAISO – Coalition Advocating for the Inclusion of Sexual Orientation, in the Caribbean region (see Gaskins; Blake and Dayle). Notably, all three are regional transnational advocacy networks, in contrast to globally oriented international NGOs (INGOs) working on sexuality and gender, such as the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), the International Gay and Lesbian Human Rights Commission (IGLHRC) or ARC-International; or those working on human rights globally with a strong LGBTI focus, such as Human Rights Watch (HRW). However, it should be noted also that ILGA has important regional networks. Regional level transnational mobilisation can be easier to consolidate because of shared discourses, historical and contemporary experiences, and common advocacy targets at the national and regional level (Tarrow 2005); this is certainly the emphasis, for example, of some activists in CAISO in the Caribbean context, as discussed in our opening chapter and in the contribution from Blake and Dayle. This implies that in considering the role of international organisations and activism, it is vital to not conflate the international with the global, but rather to attend to existing regional and/or continental coalitions, organisations and activism, and to recognise their (leading) role in struggles for change.

In addition to the horizontal cooperation between national NGOs within regions, what can be termed 'vertical cooperation' or 'vertical relations' between

INGOs and national or local NGOs might also be considered. One finds, however, that although organisations such as the IGLHRC and Amnesty International are noted to join in condemning human rights abuses (as in Malawi, for example) there is actually little discussion of vertical relations with INGOs in the state chapters. This is telling and has both positive and negative implications. The positive aspect is that most of the key processes of international learning between activists that are described are perhaps better characterised as horizontal rather than vertical. Willett's account of Australian decriminalisation struggles begins by emphasising the English Homosexual Law Reform Society as an inspiration for Laurence Collinson to attempt to form the first campaigning organisation for decriminalisation, although his account is also suggestive of the difficulties of global communications. It was indicative of international learning that the first Australian organisation to become established; the Homosexual Law Reform Society of the Australian Capital Territory directly echoed the name of the English organisation. The example of exiled London-based activists of the African National Congress engaging with British activists during the 1980s is a more recent example, discussed by Gomes da Costa Santos and the most pivotally important, of how transnational dialogues can contribute to future changes. In this case, the subsequent inclusion of 'sexual orientation' in the South African Constitution seems to have emerged partly as a result, with all the global benefits that has subsequently entailed.

In general, the lack of convergence on the role of INGOs may reflect that the main focus of the chapters is on movement engagements with states. However, the more negative implication of this lack of discussion of vertical relations may be that national NGOs, and movements fighting for reform and rights, do not feel they are currently receiving many resources beyond statements and information from global NGOs and movements, or transnational governmental organisations; and there is no sign that they feel they are receiving any from the Commonwealth. Authors may not expect much more to be plausible or possible, although from most chapters there is not as strong a sense of wariness of global NGOs as that described in the Caribbean by Blake and Dayle. The need is emphasised for further reflection on this issue of what more globally oriented organisations could do for national and sub-national NGOs, a point that the introductory chapter began to problematise. This relates also to the issue of resources raised by resource mobilisation approaches, to which the second part of this chapter will return.

Vertical relations the other way around also need to be considered, and what INGOs based in the UK, or other countries where decriminalisation happened some time ago – as in Canada and Australia – could learn from NGOs and movements in states where it has only recently occurred, or is still to occur. This chapter would suggest that gender identity is an area where there is much to learn. For example, the publications and practices of Voices Against 377,

which have consistently foregrounded experiences of *hijra* people and gender diversity, are a useful example of a more sophisticated approach to gender identity, transgender issues and transphobia for other NGOs to emulate. More generally, there is also much to learn about how anti-colonial and/or religious nationalisms are being formed in specific contexts.

Epistemic communities – groups that develop shared frameworks of authoritative knowledge – have also played an important role, as noted in several of the chapters. These are often from the legal community, mentioned specifically in eight of the country chapters, but range also from medics, to artists, religious institutions, civil servants and academics. The individuals are drawn from within and outside the LGBTI community. The added value of such epistemic communities is that they can add a 'certification' (Tarrow 2005) to activism, based on their perceived expertise and independent authoritative voice.

In other social movements, the role of trade unions, opposition parties and the media is often emphasised. None of the chapters in this volume mention trade unions, perhaps suggesting that such actors have not been key allies in decriminalisation processes. In contrast, if political parties are considered, parties of the left, including the Labour Party in the United Kingdom and the African National Congress in South Africa, have tended to provide greater and significant support. The media are mentioned in many chapters, as both a supportive and regressive force. In Sri Lanka, for example, one newspaper group was so fearful of backlash that it refused to publish a public outreach advert on the International Day Against Homophobia, despite having offered discounted rates to publish similar advertisements in the past. In Singapore, strict fines are levied against television broadcasts with any references to homosexuality. In Malaysia, Shah suggests that the largely government-controlled media has been used to vilify persons accused of homosexuality at the same time as civil society initiatives of the groups raising sexual orientation and gender identity issues do get some reasonable press coverage. An important point is also made of alternative media sources created by LGBTI people in civil society, such as the influential newsletter of the Gay Freedom Movement in Jamaica, the *Jamaican Gaily News* (mentioned by Gaskins) and online websites – with servers outside of the country – of several LGBTI organisations in Singapore, as Obendorf notes.

States and governmental actors

Another element of the success or failure of social mobilisation is the characteristics of the target state. The important recent global collection, *The Lesbian and Gay Movement and the State* edited by Tremblay et al. (2011), has been valuable in emphasising the need to move analysis beyond viewing movements and the state as independent, towards regarding them as mutually

shaping one another, with a complex interplay. The various elements of the state in particular represent the central parts of the 'political opportunity structure' facing movements. Although all of the states profiled in the volume are Commonwealth Member States, and thus share some common histories and contemporary structures, they have also created different conditions for the process of decriminalisation. Some of these variables stand out in the chapter analyses.

The political characteristics of the states profiled have much in common in that most are formally democratic, albeit with several, such as Uganda and Singapore, exhibiting authoritarian leanings. Yet the development of substantive democracy, through democratic practice and a democratic culture of vigorous public debate, is much more variable. Also variable is the related constitutional entrenchment of human rights, and the social embeddedness of human rights, which are specifically important parts of political opportunity structures (Kollman and Waites 2011; Hynes et al. 2010; 2011; 2012).

All of the states profiled have differing degrees of penetration into the public sphere by religious institutions. The degree of secularism does not seem to correspond very directly with openness on sexual orientation and gender identity issues; for example, the United Kingdom has anti-discrimination laws embedded in the Equality Act 2010, while the Church of England remains the established state religion in England in ways such as via the monarchy, and representation in Parliament (there are reserved seats for Bishops in the House of Lords). Nevertheless, it is noteworthy that South Africa – with its distinctive constitutional equality clause, same-sex adoption and same-sex marriage – is a secular state. Several of the chapters noted that religion and politics are intertwined with the effect that the ability of political decision-makers to independently assert reform on criminalisation is in some cases severely limited by their interest in maintaining political support of faith-based institutions (for example in the chapters on Uganda, Malaysia, Pakistan and on the Caribbean states).

This extends in some of the chapters also to the judiciary, whose decisions on cases have been influenced by similar interests and constraints (for example in the Botswana chapter, and in Sri Lanka in the South Asia chapter). Thus, on the question of independence of the judiciary across the cases, the response is not clear. In some cases, where this influence of religious institutions is in evidence, the judiciary might on other criteria be considered independent. The chapters (for example on the Caribbean, South Africa, Malawi) also show that the judiciary at various levels can show more progressive opinions on decriminalisation (as in South Africa) or less progressive opinions (for example in the Bahamas, cf. Gaskins's comments on Chief Justice Joan Sawyer), suggesting that the legal community is not uniform in its views or in the pressures felt by external actors. The India case, discussed by Baudh, tends to suggest judicial willingness in the Delhi High Court to move ahead of societal opinion, as does at least one of the cases discussed by Jjuuko in Uganda.

The interface with the justice system for LGBTI activists can also differ across institutions. Some of the chapters show that the police can have differing views to the judiciary, as highly evident in the Australian, Indian, South African and Canadian cases. The police in several countries reportedly use various criminal laws for harassment of persons, sometimes also to coerce bribes out of them, without necessarily applying formal criminal proceedings (as discussed in the Bangladesh and Sri Lanka cases in South Asia). It is a general finding of the chapters that while the laws on criminalisation may appear dormant because criminal cases are rare, the laws are still being applied by state actors in harmful ways that cannot be monitored by the formal justice system. Importantly, this may also influence police attitudes in the application of other laws, such as on general public order offences or the neglect of protection from hate crimes. Kinsman, in his chapter, also makes the important point that the laws may be applied differently to different parts of the LGBTI community, whereby class intersects with LGBTI identity to create enclaves of freedom that the law does not so easily penetrate.

In considering governmental actors, it is useful to keep in mind those international governmental institutions, especially human rights institutions, which exist beyond the state and may have some scope for agency. At the global level, key cases like *Toonen* (discussed in the opening chapter), decided by the UN Human Rights Committee, demonstrate a progressive stance. The picture at the regional level is more varied. In addition to those in Europe, there are regional human rights conventions in the Americas (for example the American Convention on Human Rights (1969), monitored by both the Inter-American Commission and Court of Human Rights) and in Africa (the African Charter on Human and Peoples' Rights (1981), monitored by the African Commission on Human and Peoples' Rights); the Association of Southeast Asian Nations (ASEAN) has only recently begun to create regional human rights standards. Blake and Dayle mention a 'recent petition submitted by AIDS Free World to the Inter-American Commission'; and also mention recent resolutions by the Organization of American States. Otherwise, the lack of emphasis on regional human rights in the chapters is perhaps suggestive of regional bodies having an insufficiently pro-active role in affirming rights related to sexual orientation and gender identity. Tabengwa and Nicol record that the African Commission on Human and Peoples' Rights has refused accreditation to the Coalition of African Lesbians. In contrast, the Inter-American Commission on Human Rights has recently established a Unit on the Rights of Lesbian, Gay, Trans, Bisexual and Intersex Persons, while the Inter-American Court in March 2012 made its first ruling that supports non-discrimination on the grounds of sexual orientation (*Karen Atala and daughters v. Chile*). While global human rights discourses can at times become rather culturally insensitive, regional human rights are important to develop, not least because this can lead to a human rights shift from soft law to hard law, and to greater application in practice

and enforcement. Regional human rights institutions can in some cases be considered as potentially accommodating parts of the political opportunity structures facing movements, perhaps under-explored or utilised thus far.

Religious institutions

The diverse role of religious institutions in decriminalisation processes is one of the more notable findings in the case studies. This role has not been uniformly hostile, despite numerous examples of faith-based institutions virulently opposing decriminalisation and other LGBTI rights claims. In the chapter on Canada there is discussion of the more positive role played by some of the Christian churches, including the formation in the 1960s of the Canadian Council on Religion and the Homosexual. Similarly, in Australia, there was support for decriminalisation from the majority of mainstream Christian churches, albeit with strong opposition from some others. In the United Kingdom, there was also positive engagement from the Church of England, which published an influential report in 1954, *The Problem of Homosexuality,* which was an important factor in enabling the Wolfenden report in 1957 followed by a decriminalisation in 1967 – in significant contrast to Scotland where the opposition of the Church of Scotland was pivotal in delaying decriminalisation until 1981. In Malawi, there have been positive calls for inclusion and tolerance from clergy in both Anglican and Presbyterian churches.

The role of individual clergy in decriminalisation stands out in Gomes da Costa Santos's chapter on South Africa, highlighting Archbishop Desmond Tutu's outspoken support, and in Shah's chapter on Malaysia, citing some openly gay Christian leaders. The chapter on Malaysia goes into further detail on interpretations of Islam in that country, noting there are liberal/reformist groups such as Sisters in Islam, although Muslim religious leaders mostly promote criminalisation and social intolerance for homosexuality. In relation to the international context, it is noted that European Muslim scholar Tariq Ramadan has criticised state persecution of homosexuals, while openly gay imams in the US and South Africa are promoting inclusion for sexual diversity. In the analysis of Pakistan, where the decriminalisation discourse is very nascent, the influence of Islamic religious leaders is cited with less qualification as a key barrier to progress on decriminalisation.

Importantly, Ward's chapter comparing religious influence in South Africa and Uganda shows that hostility towards same-sex sexuality was not a common feature of pre-colonial religions in Africa, with many cultures showing tolerance for such practices. This challenges religious rhetoric casting homosexuality as a Western, colonial import. It is important to note that the British Monarch Queen Elizabeth II remains formally Head of the Anglican Church, which has an important influence in Commonwealth states, including in Africa and

elsewhere. Religious and governmental/Commonwealth institutions, therefore somewhat intertwined; but, notably, the Church of England has tended to favour decriminalisation for many decades, as discussed in the United Kingdom chapter (despite its ongoing opposition to same-sex marriage). Mwakasungula's discussion of Malawi emphasises the strong influence of religious attitudes, both positive and negative. The strong homophobic influence of the Pentecostal churches, described by Jjuuko in Uganda, and the rising negative influence of US Baptist churches in the Bahamas described by Gaskins, shows that it is not British imperial religious institutions that are leading the present wave of homophobia. Nor were they the only originators of this, as the role of the Dutch Reformed Church in South Africa demonstrates.

In the terms of political process theory, religious institutions can be considered as an important part of the political opportunity structure facing social movements. A crucial strategic question for progressive sexuality and gender movements concerns the extent to which framing should be focused in relation to the state, usually through a secular discourse, or whether to adopt framing and campaigning strategies, also in relation to religious organisations. Engagement in broad-based human rights alliances with other CSOs seems to be a central and necessary strategy. However, in a rich and nuanced discussion of religion in the volume, Shah on Malaysia offers deeper insight. In the Malaysian context, where religion is institutionalised by the state (with Islam as 'the religion of the federation') and where this state consistently leads efforts to defeat UN resolutions to protect and affirm sexual and gender diversity, Shah emphasises 'an understanding of the landscape of Islam is crucial for any effort to decriminalise "same-sex sexualities"'. Shah suggests that in Malaysian politics the competition between the two main political parties can be characterised as a 'competition […] to represent a more "authentic" Islam'. This implies that the political opportunity structure is overwhelmingly religious – not only the state but also in terms of political parties in opposition. In response, Shah's nuanced discussion of varying positions among Muslim politicians, scholars, religious leaders and people generally is suggestive of the need for contestation of the meanings of being Muslim, and of the relationship of Islam to the state. He argues that 'complementary interpretations of Islam and human rights could result in a minimum *acceptance* of sexual diversity' (italics in original), which might in turn lead to 'action on decriminalisation'. Shah comments that 'What does help is engaging Muslim leaders and scholars in the everyday experiences of sexual minorities'. This is surely work which both Muslim and non-Muslim members of social movements can engage in, perhaps in different ways. In sum, it is not sufficient for sexuality and gender movements to adopt human rights positions and strategies; a sustained wider engagement in religious debates and cultural politics is often also advisable – perhaps on the ground or face-to-face rather than via the media – particularly so where political opportunity structures do not offer secular alternatives.

The attitudes of the wider public do influence the decriminalisation process to a significant extent, and a focus on specific actors – whether CSOs, state actors or religious institutions – should not disguise this. It is perhaps the task of shifting public attitudes generally which makes it so important for activists to at least attempt to engage with religious organisations and viewpoints. The chapters show that homophobia and transphobia within a population at large can appear benign or emerge as violent; heterosexist people can be vocal or silent. As Obendorf points out in the Singapore chapter, it is important not to essentialise communities as 'anti-gay' (or, indeed, anti-bisexual or anti-transgender); public rhetoric of the most intolerant and powerful actors may not be indicative of general sentiments towards LGBTI persons.

Having discussed different kinds of actors involved – CSOs, state actors and religious institutions – and drawn some initial comparisons between states, the second part of the chapter will deepen analysis through more engagement with analytical frameworks from political process and social movement theories.

Analysing strategies of mobilisation in constraining contexts

This investigation will now be developed with reference to the four main conceptual approaches specified in the chapter's introduction for analysing the success of social movements. Themes will be examined under the following sequence of subheadings, which include coverage of (but do not entirely correspond to) those four conceptual approaches: i) *Framing strategies* (cf. McAdam 1986), incorporating discussion with reference to new social movement theories (cf. Melucci 1980; 1996; Touraine 1988); ii) *Political opportunity structures* (cf. Kitschelt 1986); iii) *Tactical repertoires* (cf. Tilly 2006); and iv) *Resource mobilisation* (cf. McCarthy and Zald 1977). The aim is to discuss these themes briefly, giving some examples of the applicability of each, in a way that may be suggestive for readers in different contexts. It is not possible here to comprehensively or systematically apply these approaches, due to constraints of time and space. This chapter can only begin to examine themes across the Commonwealth as a starting point for future researchers to investigate further. In general, a sociologically informed and critical approach implies not focusing excessively on movement agency, but rather balancing this against an appreciation of the limiting, constraining effects of social structural inequalities, contexts and cultures.

Framing strategies

There have been a wide range of frames employed by activists, with many commonalities evident across cases. The most popularly used frame across the cases is that of privacy. When initially used in England and Wales, and Canada, this was not used with an explicit emphasis on privacy as a right, but in contemporary usage it tends increasingly to be associated with the human

right to privacy – for example, as Gaskins describes in the Bahamas. Privacy is discussed in 11 of the chapters, although in recent efforts, as in India, it is often invoked by NGOs like the Naz Foundation alongside wider rights such as non-discrimination and equality. The separation of public and private spheres is the basis of this frame, thus avoiding the moral debate on decriminalisation and replacing it with distinctions on the reasonableness of the state regulating actions in the private sphere. This has pushed homosexuality into the private sphere, which many would argue has hurt long-term aims for equality in the public sphere, but it has proved a successful approach in some countries like the Bahamas where there is no strong support in civil society for LGBTI equality. To interpret such a specific focus on the human right to privacy requires acknowledging that, in practice, many actors – whether political elites or activists – do not proceed from a normative purism emphasising the full range of human rights (civil, political, social, economic and cultural) as a holistic indivisible framework. Rather, as the sociology of human rights suggests with reference to empirical research in specific contexts, invocations of human rights in practice are often restricted, selective and strategic (Hynes et al. 2010; 2011; 2012).

The Bahamas case seems extremely significant and deserves attention in the global context, since it illustrates how a narrow privacy framing with reference to a national constitution, rather than international human rights law, can be the basis of a successful decriminalisation – in this case only two years after new laws re-criminalising homosexuality had been passed in 1989. From this it can be argued that national and regional movements in hostile contexts should at least consider strategically adopting such narrow frames, in particular by focusing their public commentaries on national constitutional rights to privacy. Importantly, Gaskins's chapter on the Caribbean also reveals that, in Trinidad and Tobago, decriminalisation was not even listed as one of six key priority steps to address homophobia by the key NGO Coalition Advocating for the Inclusion of Sexual Orientation (CAISO), when addressing government – activists argued that the key priorities are discrimination and violence. This crucially illustrates that there is enormous diversity in movement framing globally on the decriminalisation issue, and that the precedence of the issue should not be assumed.

Another of the most common frames has been on HIV/AIDS: nine of the chapters mention HIV/AIDS as a frame used in advocacy. Addressing HIV/AIDS itself as a life and death issue, in a context where anti-retroviral drug treatments are still not available in many states, implies the importance of using such arguments. This has been a useful frame for building some dialogue with specific state actors, usually Ministries of Health, and also building alliances with HIV/AIDS, focused NGOs, for example, as discussed in Malawi. The frame has been used to bypass moral arguments against homosexuality to concentrate on the public health imperative and the dangers of pushing men

who have sex with men further away from prevention and treatment because of criminalisation.

Wider frames on equality, human rights and the rights of sexual minorities (also expressed as LGBT or LGBTI rights) have been widely used, as in South Africa and India where constitutional equality rights were invoked. This is partly linked to litigation strategies that have been argued on equality and non-discrimination lines. Framing specific rights for 'sexual minorities', 'LGBT' or 'LGBTI' persons has been less common than more general human rights and equality frames. This has sometimes translated into calls for introducing non-discrimination on the grounds of sexual orientation (for example in Jamaica and Malaysia). Thus, some activists are trying to work within existing legal frames whil others are trying to establish new legal frames for their advocacy.

Alternative frames have focused on 'psychological support', citizenship and anti-violence. The two cases where 'psychological support' frames were used are Canada and the UK, where the Wolfenden report used this angle to justify decriminalisation. Such frames, which tend to be associated with a privacy focus, are not highlighted in any of the latter cases of advocacy, although perhaps consideration of the governmentality theme, introduced in the United Kingdom chapter, might lead to analyses of present contexts discerning more such emphasis on psychological intervention – especially since for Foucault 'subjectification' occurs not only through medicine but also through religious and moral teachings including on citizenship (Waites, this volume). The citizenship frame is an interesting choice, emphasising not only equality and non-discrimination but the right to participate in the public sphere (discussed in chapters on the UK, South Africa and Singapore).

Frames emphasising the violence experienced by LGBTI persons are discussed in the chapters on the Caribbean states. Such frames could be a consideration for other activists. Frames focused on violations of bodily integrity have proved successful in many human rights advocacy examples (Keck and Sikkink 1998).

Activists in Singapore, discussed by Obendorf, have tried to frame decriminalisation as necessary for economic interests of the state, which seeks to attract foreign companies and tourism, and arguably could not do so effectively with such laws in place. Obendorf suggests that appealing to material interests of states can offer important leverage. Similarly, Gaskins's discussion of the Bahamas suggests the exceptionalism of the Bahamas might be explained partly by the significance of its tourism industry. These are very important insights for movements to reflect on; lobbying business leaders might quickly generate new allies with financial clout to influence government indirectly. This can create new dangers, since states and businesses may then ally, for example, to promote tourist industries focused on gay consumers characterised by what Lisa Duggan (in a US context) calls 'homonormativity' – involving consumerism and 'a politics that does not contest dominant heteronormative assumptions'

(Duggan 2002). Such tourism may privilege consumption by wealthy visitors above the needs of local populations. Elites will not reflect most people's priorities. Nevertheless, there may be much to be gained and some pragmatic compromises may be worth considering.

Important issues raised by the Touraine (1988) and Melucci (1980; 1996) approaches to social movement theorising can also – somewhat unusually – be addressed under this framing heading. Political process theories have often tended to assume movements have clear objectives and that the identities of participants can be taken as a given; hence framing can be approached as a somewhat tactical enterprise. The approaches of Touraine and Melucci, particularly Melucci (1996) in his later work influenced by postmodern theories, are helpful in bringing into the foreground issues of the social formation of identities through culture (also Della Porta and Diani 2006). More than most political process theorists, these writers help address the implications of social constructionist and queer theory approaches to identity (see Gamson 1995; and the opening chapter of this volume). In general, there is a need to attend to how lesbian and gay or LGBTI movements, for example, produce definitions and narratives of who they are as part of 'framing' processes. These are often expressed partly through terms and acronyms used. For example, in India, Voices Against 377 used a wide range of terms, including *hijra*, *kothi*, MSM, and the term 'queer', to describe movement members (Baudh, this volume; Waites 2010). This contrasts with narrower early uses of 'homosexual' in England and Wales, Canada and Australia. Such approaches helpfully illuminate the struggles where African governments claim 'homosexuality' is Western and un-African; from this analytical perspective one can see movement framing strategies as including narratives about histories and culture being reformulated. The way in which movements label and define themselves is not only a matter of pragmatic tactics, it is a central part of political action which simultaneously impacts upon the sense of identity of those participating (Kollman and Waites 2011). Movement leaders and participants are unlikely to be able to engage in framing in a detached unemotional way, which means shifting frames is not only a matter of instrumental choices, but a matter of feelings as well.

This has important implications in considering gender power dynamics, which need to be interpreted from a feminist perspective, as do the overall framings of movements that focus on the decriminalisation issue. As Kate Sheill has argued, 'the current LGBT rights movement has echoed the human rights movement … in being male-centred and thus focused on the issues that primarily affect gay men more than lesbians. An example would be the focus on laws that explicitly or implicitly criminalise homosexuality where such laws primarily target men' (Sheill 2009, pp. 60–1). This focus sidelines wider aspects of criminalisation and other human rights issues affecting lesbian and bisexual women. The imperial legacy of criminal law unfortunately creates a context that tends to fixate debates on men and maintain the invisibility of women.

A framing focus on criminalisation of sex between men also tends to lead to insufficient attention to transgender rights issues (Currah et al. 2006). For example, Mwakasungula's account of the experiences of Steven Monjeza and Tiwonge Chimbalanga (locally known as 'Aunt Tiwo'), who engaged in a same-sex engagement ceremony, suggests that judicial and cultural responses focused on the issue of 'homosexuality', while questions of gender identity and related rights seem to have been less explored or pressed by activists. Nevertheless, while human rights and criminalisation remain loaded frames in terms of gender representation, they are vital to engage with. It is recognised that the present volume is shaped in these ways due to the choice of decriminalisation as the central focus – to a large extent necessarily.

More generally with respect to framing, a central theme is how sexuality and gender movements do this in relation to human rights movements, which also have their own framing strategies. There is much to learn from accounts of creative alliances formed with human rights organisations in states like Uganda and Malawi. Models from Western[2] states of independent NGOs' leading struggles, focused only on a sexual orientation and/or gender identity framing, are less appropriate in many such contexts; a better strategy is often to seek participation in or an alliance with human rights NGOs and movements via a human rights framing. However, the unwillingness of the Botswana Council of NGOs to register the NGO LeGaBiBo (the Lesbians, Gays and Bisexuals of Botswana), or to adopt a position supporting sexual orientation and gender identity rights, illustrates the simultaneous need for independent organising. In the terms of social movement theory there still seems to be a need for social movement organisations (SMOs), which, if possible, are not simply human rights organisations. The difference from Western states seems more that social movements and SMOs should not be expected to emerge from wider LGBTI 'social networks' or a 'social movement community' – concepts increasingly used in social movement literature to describe existing social groups with shared culture and values, who thus can potentially be mobilised by movements (Diani and McAdam 2003). Many human rights-based social networks, for example, are often more established and have larger pools of resources than those which are LGBTI; and human rights movements may have more established mobilisation structures (including those focused on specific human rights issues rather than all of them, as is often the case).

However, there may also be other cultural resources, local traditions and political frameworks to draw on and connect with in positive ways. Perhaps the most important example of this with respect to political frameworks is how the broad emphasis on democracy and equality by the United Democratic Front

2 The West is conceived in this chapter as a cultural and political concept rather than strictly geographical, hence including Australia, although the difficulties and complexities of this contested usage are recognised.

and the African National Congress shaped the Constitution in South Africa. This was in large part a socialist emphasis. In Gramsci's terms, as adapted in the post-Marxist multi-dimensional politics of Laclau and Mouffe and mentioned in the United Kingdom chapter, working for a more radical 'hegemony' in a society makes new kinds of vocabulary and political ideology possible (Gramsci 1971; Laclau and Mouffe 1985). While the value of creativity in forming complex alliances around issues such as gender, sexuality, human rights and child rights, has already been emphasised as with Voices Against 377 in India, it is South Africa that presents this most profound lesson. For while the majority of the population or ANC supporters were not won to the case for sexual orientation as a right during the transition from apartheid, the predominant political leadership of the ANC was won to the case for sexual orientation to be in the Bill of Rights through a democratic process of political debate. This shows that progress can occur not only through law and at the discretion of judges, but also through democratic politics in conditions where equality as a value is loudly proclaimed.

Political opportunity structures

Political opportunity structures are used by activists to bring attention to their concerns and to advance their objectives. These can be external to such actors or created by them, at both the domestic and international levels. There is a wide range of relevant structures to consider.

Shifts in global human rights law and associated discourses have certainly presented openings in political opportunity structures that the chapters show have been significant to an extent, as with the Delhi High Court ruling in India. However, legal rights in constitutions at national level are also highly important, and mediate this global influence, so should not be treated as secondary. For example, in the Bahamas, Gaskins illustrates that the Attorney General invoked the right to privacy with reference to the national constitution, while it is not clear that international human rights were invoked at the time of decriminalisation. Similarly in India, as Baudh indicates and as argued further elsewhere, while international commentaries have focused on the role of international human rights law, the Naz Foundation petition and Delhi High Court ruling focus first and foremost on rights in the Indian Constitution (Waites 2010).

In seven of the chapters, parliamentarians have been a political opportunity structure, usually used to secure legislative review or the introduction of new bills to aid decriminalisation. Two of the chapters specifically mention elections processes – South Africa and Australia – although the key breakthrough in South Africa was surely in the formulation of the Constitution to include sexual orientation. Given the general lack of support in civil society for

decriminalisation, it is unsurprising that few activists have tried to use elections to boost support for their cause; on the contrary, prospective politicians in many countries can use anti-gay sentiment as a means of generating support, including from influential faith-based institutions. The case studies show that activists have turned often to symbolic political opportunities (Keck and Sikkink 1998). The Wolfenden report, the creation of the new Constitution in South Africa, mass social mobilisation for electoral reform in Malaysia, and the arrest of the gay couple in Malawi are some of the symbolic events that have been used to generate public and political debate on decriminalisation.

The use of statutory bodies features in many chapters. Disappointingly, the National Human Rights Institutions (NHRIs) mentioned have proved to be weak allies. They commonly cite their responsibility to lead only on issues decreed by the government to be lawful. This is the case in Malaysia with SUHAKAM and in Uganda with the Equal Opportunities Commission. The option remains, however, for NHRIs to play a more active socialisation and persuasion role with state actors, particularly in sharing international human rights law jurisprudence, which has been highly critical of criminalisation on grounds of equality, non-discrimination and right to privacy. Some chapters note that individual ministries, most commonly those on health (for example in Uganda, Malawi), have been open to cooperation, some of it good, as in the case of activists in Malaysia with the Ministry of Women, Family and Community Development on issues affecting transsexuals, and some of their dialogue with the Islamic Affairs Department in relation to religious laws that criminalise. Ministries can work against each other, however, as the Malawi chapter shows, where the Ministry of Information and Civic Education is actively trying to discredit LGBT activism at the same time that there has been positive cooperation with the Ministry of Health (a finding also in India).

The chapters suggest that political opportunities at the international level are much less used by activists. Only five of the chapters discuss such opportunities, usually focused on international human rights mechanisms such as the UN Treaty Bodies or the Human Rights Council's Universal Periodic Review. Only one discusses a regional human rights mechanism, the Inter-American Commission on Human Rights, in the Jamaica chapter – although, as noted elsewhere, the European Court of Human Rights played an important part in the history of decriminalisation in the UK. The African Commission on Human and Peoples' Rights does not appear to have taken much of a leadership role on decriminalisation issues, although human rights NGOs have made appeals to the Commission to at least help protect human rights defenders working on LGBTI rights. Similarly, the newly created ASEAN Inter-governmental Commission on Human Rights shows no signs of constructive engagement on decriminalisation, including in the new ASEAN Human Rights Declaration, adopted in November 2012.

Notably, the country case studies do not pay much attention to the Commonwealth institutions as political opportunity structures. The chapters by Fred Cowell and Michael Kirby (and the opening chapter in this volume) outline some of this engagement by CSOs and the Eminent Persons Groups but it clearly does not figure prominently other authors' understanding of the domestic struggles for decriminalisation and change, with UN institutions garnering much more mention in relation to sexual orientation.

In relation to gender identity, the limitations of political opportunity structures have been extremely important. Certainly, early decriminalisations of same-sex sexual behaviour in England and Wales and Canada were not linked to reforms on gender identity, which came later. In particular, the absence of gender identity from international human rights case law has been very significant, with the implication that global political opportunity structures related to human rights have not been utilised for advocacy on gender identity. Consequently, transgender and otherwise-defined groups campaigning on gender identity have tended to campaign for legal reform within states without being able to draw easily from international human rights jurisprudence. This has shifted somewhat with the development of the Yogyakarta Principles, which refer to both sexual orientation and gender identity. Baudh comments that in India the Delhi High Court ruling referred to the Yogyakarta Principles' definitions of sexual orientation and gender identity, and *hijras* were noted as one group affected; meanwhile, in Pakistan, activists believe Section 377 is occasionally used as a threat against trans women (Baudh, this volume; see also Waites 2010). The place of *hijras* and gender diversity in both the Voices Against 377 campaign and the judgement itself, contribute to opening up political opportunity structures for those advancing more inclusive politics of gender identity and expression in South Asia.

In the Southeast Asia states of Singapore and Malaysia, trans people (especially effeminate males and trans women) seem both more socially visible relative, say, to Australia. This is evidenced in part by the profile of NGOs such as katagender in Malaysia and SgButterfly in Singapore. In Malaysia, Shah notes the High Court in 2011 rejected a transgender woman's claim to change gender identity, and there is targeting of *lelaki lembut* (problematically translated as 'soft men' or 'effeminate gay') and *wanitas keras* (hard women). Transsexual women are seeking judicial review to challenge the constitutionality of *shariah* law that forbids cross-dressing. Interestingly, this national initiative is described without reference to international human rights; the rights enshrined in the Malaysian Constitution seem to be viewed as much more central in the political opportunity structures here.

In Singapore, Obendorf notes a 'more progressive stance towards transsexual individuals', who conform to the gender order's sex binary, and significant queer social scenes. Sex reassignment surgery is legal in Singapore and post-operative transsexual people can change legal gender on identity

documents (but not birth certificates) and marry accordingly. However, wider forms of transgenderism that do not accord with the male/female sex binary are given less legal recognition. This current situation may result from the absence of a broader transgender framing from SMOs, although it might also result from state resistance to such broad framings (this is not clear from the chapter). One possibility is that the lack of need for recent struggles to legalise sex reassignment might have had the consequence of less collective political mobilisation by trans people than in similar states where sex reassignment has been illegal, even though there is probably an ongoing need for struggles over treatment access. This might also have resulted in the Yogyakarta Principles not getting on the agenda, and hence lack of reference to their broad and potentially helpful definition of gender identity to include gender expression, which could assist in developing alliances between transgender groups and extending transgender rights struggles. These themes could be investigated in further research. Similarly, in South Africa where sex reassignment has also been legal (see tables of legal data and discussion in the opening chapter), the extensive legal progress on sexual orientation does not seem to have been reflected in the extension of all forms of rights in relation to gender identity.

Hence, an important dynamic to note is that initial openings in the political opportunity structures for transsexuals may in some ways indirectly delay further openings in these broader political opportunity structures related to various forms of transgenderism. This can be conceptualised with reference to what Judith Butler calls the 'heterosexual matrix' structuring dominant cultural understandings: 'that grid of intelligibility through which bodies, genders and desires are naturalized' (Butler 1990, p. 151). In the heterosexual matrix, for example, males must exhibit masculinity and heterosexual sexual desire towards females; biological males who feel feminine are drawn to sex reassignment surgery to achieve a required correspondence between sex and gender. In these terms we discern a tension between entrenching a 'new form' of the heterosexual matrix in rights discourse in a way that allows for transsexualism – as Waites (2009) has elsewhere suggested – or movements and strategies seeking to displace such a matrix.

Returning to the issue of political opportunity structures overall, with respect to both sexual orientation and gender identity, what tends to emerge as central is the importance of the state institutionalising human rights. If a state generally respects human rights, this has an important transformative impact on political opportunity structures. However, in understanding this process it should be kept in mind that in legal terms human rights typically arrive incrementally rather than all at once. For example, as in Malaysia and India, there are often certain rights in national constitutions, which over time have become redefined as (or in relation to) 'human rights' and extended in legal and social interpretation over time; so this aspect of political opportunity structure often extends gradually. Again, the sociology of human rights tends

to emphasise this contested and historically expanding definition of human rights in various international and national contexts (Hynes et al. 2010; 2011; 2012).

A symbiosis is suggested here between the emphasis emerging in part one's account of civil society actors (on the need for alliances with other human rights and CSOs) and the emphasis on the importance of the state institutionalising human rights – both formally and in its culture and practices – to transforming the political opportunity structures. Tremblay et al.'s (2011) general approach is useful to conceptualise this here, for its emphasis on how the state and movements both directly and indirectly shape one another (and see specifically Kollman and Waites 2011). Broadly speaking what seems to emerge is the value of broad-based coalitions with human rights and CSOs which, in the terms of the 'framing' approach, initially requires a framing of sexual orientation and gender identity issues as human rights issues by activists in order to win inclusion in broader human rights movements. It next involves human rights movements or coalitions addressing the state in ways which similarly frame the issues. This is often pivotal in sexual orientation and gender identity issues becoming human rights issues in a manner accepted by elements of the state such as the judiciary and/or political elites in government. Once such a profound shift in the political opportunity structures is achieved, as occurred with the new Constitution's Bill of Rights in South Africa, it may be further utilised to yield a series of positive rulings extending beyond sexual behaviour to affirm a range of other human rights. Petrova in this volume strongly affirms this kind of broad human rights-based strategy. Importantly, this is significantly different from the earliest decriminalisations in the Commonwealth, such as in England and Wales or Canada, where the issue was framed as one of privacy, tolerance, medicalisation and utilitarian governance rather than one of human rights (see Waites, Kinsman) – and hence where decriminalisation movements such as the English Homosexual Law Reform Society did not centrally define themselves as part of wider human rights movements.

However, Gaskins tends to suggest that human rights in recent times can still be narrowly defined as privacy. He importantly emphasises that political leaders in the Bahamas were able to change position to support decriminalisation in 1991 as privacy; as in Gomes da Costa Santos's account of South Africa (and Waites's account of England and Wales), this shows evidence of scope for political elites to move creatively ahead of public opinion. Yet while Gaskins suggests achieving human rights as privacy was an effective strategy in the Bahamas, and increasingly also is in Trinidad and Tobago, it yields a very narrow and unequal form of rights and citizenship relative to heterosexuality. Waites's discussion of governmentality in the final section of the United Kingdom chapter, drawing on Foucault, suggests such restricted contemporary affirmations of human rights in contexts like the Bahamas might be viewed as partly reflecting and embodying forms of governmentality by authorities

seeking to privatise, manage, depoliticise and conceal same-sex sexualities, even if also reflecting political elites moving ahead of public opinion. In such a context this chapter would emphasise that alongside broad coalition building to entrench human rights in state practices, it is also vital to build distinct independent sexuality and gender movements affirming the rights of LGBT and/or intersex people – or using other specific cultural identities – in order to pursue broader cultural changes, and (where and when appropriate) agendas for rights and citizenship beyond privacy.

Tactical repertoires

Tilly's (2006) study of domestic social movements identifies a set of common mechanisms used by social movements. He calls these 'repertoires of contention' and they include such actions as street protest, pamphleteering, sit-ins and other forms of demonstrations. In the decriminalisation process, the cases show a wide range of tactical repertoires used.

The most commonly used form of action is litigation: eight of the chapters discuss litigation and in most cases this has been proactive litigation, i.e. not in response to persecution but based usually on constitutional challenges to criminalisation laws. Most of this litigation has been to domestic courts; only in Jamaica and Australia are examples of using international legal mechanisms found, in these cases, the Inter-American Commission on Human Rights and the UN Human Rights Committee, respectively (although one example can be cited in Northern Ireland: the *Dudgeon v. the UK* case before the European Court of Human Rights). As a point of procedure, international human rights law complaints mechanisms will generally not admit cases unless all domestic remedies have been exhausted; for this reason, we may see more appeals to the international level in the future. For now, activists have had some success with domestic courts, although the decisions have not always been in line with their goals. In Botswana, for example, the case taken gave the judge the opportunity to proclaim that public attitudes had not changed and, therefore, the appeals of the NGO were invalid. In contrast, the *Naz Foundation* case in India found more receptive judges, who read down the Section 377. The two examples illustrate that domestic litigation is not a guaranteed success, much depending on the will of the judiciary to decide, often against public opinion and state positions. The same holds true for international litigation, which is usually quasi-judicial and relies entirely on the political will of the offending state to implement recommended remedies and reform.

An alternative but related strategy used has been legislative review. In these cases, activists appeal to specialised parliamentary groups or judicial bodies to review the legislation on decriminalisation with a view to proposing reforms. Ten of the chapters discuss some sort of review, including judicial review (for example, being sought by transsexual women on laws against cross-dressing

in Malaysia). Again, the results have been mixed: in both Botswana and Sri Lanka, the review process actually led to a hardening of the law criminalising same-sex sexual behaviour and extension to include lesbian sexual relations. The first Commonwealth decriminalisation process was also the result of a kind of legislative review in the form of the Wolfenden committee, appointed by the UK Parliament in 1954. It was not until 13 years later that the criminal legislation was changed, however, demonstrating that this is not necessarily a fast track to reform. Nevertheless, as the Canada chapter demonstrates well, Wolfenden did have an effect beyond UK borders. The comparative chapter on the Bahamas, in contrast, offers an interesting example of swift change through legislative review. Some of the cases show that, for legislative review to be successful, it is important to build parliamentary allies. This was clear in Canada, the UK and Australia where committed individual Members of Parliament (MPs) took the review process to the next essential step of tabling a new bill.

Various cultural tools have featured strongly in the repertoire of activists. This comes across strongest in the cases from Malaysia and Singapore, where arts festivals feature, and also in the Caribbean chapter, where Pride festivals are highlighted in Trinidad and Tobago. South Africa was the first African country to hold a Pride parade in 1990. Cultural tools can be useful for socialisation of civil society towards LGBTI communities, which can in turn create less resistance to persuasion by political decision-makers on decriminalisation. Notably, these cultural activities have mostly occurred in states where there are generally low levels of violent persecution of LGBTI persons, but which nevertheless exhibit strong public opinion against homosexuality. The cultural events also underscore the role that civil society actors can play outside of formalised NGOs in advancing the cause of decriminalisation.

Alongside culture, there is also evidence of public outreach campaigns. The chapters discuss this mostly in relation to HIV/AIDS education (for example in Sri Lanka, Botswana, Malawi, Jamaica). There are also good examples of outreach to religious groups in Malawi and Jamaica, and general public appeals through newspaper advertisements (Uganda), public service announcements (Jamaica) and open public meetings (Australia).

There is not much discussion of social movement repertoires such as direct action or protests. The chapters on Canada and Australia are the only ones to cite these more common repertoires, although Pride parades should be considered a form of protest march for many participants, especially in states where decriminalisation has not occurred. Protests have sometimes occurred in front of embassies outside of affected states (noted in the chapters on Malawi and Uganda), but the different extent of public protests no doubt reflects the different dangers and possibilities of visibility in public space in the context of hate crimes and authoritarian policing. Pamphleteering of MPs has also been used in Uganda and Australia. Furthermore, 'information politics' (Keck and

Sikkink 1998) does not feature much in the chapter discussions; information on human rights violations, and research with reliable data and systematic data-analysis, usually serve as key sources of leverage for many CSOs vis-à-vis target actors, usually states. It may be that data collection has been more of a role taken on by international NGOs (see, for example, ILGA's State Sponsored Homophobia reports: Itaborahy 2012), given that information politics is a common strategy of 'transnational advocacy networks' (Keck and Sikkink 1998). Access to information may also be scarce on the ground, due to constraints of freedom of expression and movement on activists or affected groups, or lack of resources and capacity of local organisations to gather this data. This is an important area that could be developed further at national level.

The chapters also show a range of creative tactics used. Activists in Botswana and Canada (with US allies) drafted declarations on LGBTI rights as an advocacy tool. In Malawi, training workshops have been offered for journalists, which have resulted in increased positive coverage in the media. Canadians used a mass letter-writing campaign and efforts were made to publish in leading law journals. Each of these tactics could be transferable across cases and harvested by other movements if appropriate for their context.

Resource mobilisation

Within national contexts there is limited discussion, and certainly a lack of systematic and focused discussion, of how movements and organisations are resourced, or strategies for resourcing. This certainly reflects the threadbare existence of many activist organisations, and so is very understandable. However, this is suggestive of scope for national activists and analysts to think more about how resourcing impacts on success, and on how to achieve greater resourcing. There appears to be much creative use of the limited resources available through innovative events such as the groundbreaking conference mentioned in Malawi. While Obendorf raises the issue of the internet in Singapore, there is potential for more discussion of how exactly websites, email, social networking and the internet generally are used as resources in the present, and how they could be better used to mobilise existing or potential movement members and their resources more effectively. For example, what are the modes of affiliation or membership in relation to national NGOs campaigning on sexuality and gender issues, and how might these be altered in ways to better use people's cultural, social and financial resources?

In terms of transnational relations, there is little emphasis on national NGOs being able to draw substantially on resources from global NGOs, especially economic resources, but also other kinds of resources: for example, workers with expertise. This is a central issue raised in the resource mobilisation theory approach to social movement theorising, which emphasises a movement's access to and ability to mobilise resources as crucial in determining success

(McCarthy and Zald 1977; McAdam 1982). Where international NGOs are occasionally mentioned in the chapters it is usually for 'information politics', for example making statements and condemning human rights abuses. More direct support for human rights campaigning by national or sub-national NGOs seems to be lacking. This suggests that the global resourcing of national organisations working for human rights remains an issue that should be further addressed.

However, it should also be noted that funding of projects by foreign governments is contentious, according to the example given of Norwegian funding in Mwakasungula's discussion of Malawi, and can play into perceptions of undue foreign intervention. Recent initiatives within major private foundations, such as the Open Society Foundations and the Ford Foundation, to create specific funds for LGBTI civil society initiatives may not be received more favourably by many Southern states. Care is therefore needed in determining how to disseminate resources internationally. It can be noted that not all resources are monetary: research data, expertise and social networks, for example, can also be shared. To give one suggestion: in the light of Obendorf's comments on Singapore's enthusiastic adoption of modern information and communication technologies, perhaps sharing experiences or expertise on how to develop national NGO websites, in order to more effectively channel resources and promote participation, might be one low key but effective way to assist. As a second suggestion for global human rights organisations, employing and collaborating with Southern[3] activists as researchers to work on sexual orientation and gender identity issues within frameworks critical of colonialism (as with Alok Gupta's role in writing *This Alien Legacy* for Human Rights Watch) is not only highly intellectually productive, it can also be a good way to build capacity for research and activism in different nations. There remains a need for more research agendas set by and led from the formerly colonised states.

Conclusion: decriminalisation, change and the role of the Commonwealth

This concluding chapter has presented a comparative analysis of developments in 16 states of the Commonwealth, utilising perspectives from political science and sociology. It began by comparing the various actors involved, including CSOs, state actors and religious organisations. It then moved on to use perspectives from political process and social movement theories to develop comparative discussion with reference to a range of themes: the framing

3 The South is invoked in this chapter as a political, rather than strictly geographical concept. Despite the geographically problematic associations in relation to Australia, for example, it is felt the concept has acquired a political significance that makes it appropriate to use in this way.

strategies of social movements; the political opportunity structures facing them; the tactical repertoires of practices used; and the forms and extent of resource mobilisation. This analysis has been intended to be facilitative and suggestive for readers in different national contexts, rather than prescriptive. However, it has proposed some important lessons that can be learned, and central points will be summarised here.

A key general finding of this book is that criminal laws against same-sex sexual relations are not heavily enforced in most of the countries examined. This is distinct from public or police harassment, which can be severe even where formal criminal prosecutions are rare. Baudh's discussion in South Asia quotes activists emphasising the rarity of prosecutions in states like Pakistan and Bangladesh, which shows that decriminalisation should not be assumed to be an overriding priority in all national contexts, although even in Pakistan activists suggest that the law forbidding sexual behaviour is used by police to threaten individuals, even where not applied. Criminal proceedings and convictions are low in most states discussed, relative to the extent of behaviour potentially encompassed by law, and even though criminal laws are deeply embedded and expanding in scope, in some cases, to cover same-sex sexual relations between women.

The main issue therefore is not continuation of a historical pattern of prosecutions; it is of largely dormant colonial laws being newly invoked in the context of new contemporary post-colonial nationalisms. These are being formulated partly in reaction to problematic aspects of European and Western sexual nationalisms and transnational moral discourses and political projects. The latter are led by political elites in the North, sometimes suffering delusions of moral grandeur, selectively invoking sexual orientation and gender identity which they perceive as conveniently cost-free human rights issues, while neglecting other more expensive or culturally challenging aspects of human rights (for example the rights of immigrants: Grigolo 2010). This complicates the global politics of decriminalisation, in a context where homosexuality has emerged as a pivotal issue of contestation in global cultural politics and sexual politics, since it implies that the newly global and universalising tendencies of transnational decriminalisation campaigns may have the unintended and indirect effect of fostering reactionary anti-colonial nationalisms which actually increase prosecutions using colonial sex laws. These reactionary nationalisms may exist in any case, but will be worsened by any transparent politicking or hypocrisy on human rights. Hence the political, strategic question is not: how should decriminalisation be pursued? (which is clear as a normative issue, even if some national movements do not see it as an immediate priority, as in Trinidad and Tobago); the key question for all parties seriously involved is, how do we pursue decriminalisation in a manner which does not have the opposite effect to that intended? This question underlies the remainder of the discussion.

While legal prohibitions on same-sex sexual activity are not heavily enforced in many formerly colonised states of the South, protective laws similarly are often not enforced in relation to sexual orientation and gender identity for persons who suffer discrimination, violence, invasions of privacy, restrictions on freedom of assembly and expression, and other human rights violations, including disproportionately to other people. This means that decriminalisation of same-sex sexual relations will not be a panacea for the range of harms suffered, harms that the justice system ignores, perpetuates or, in some cases, directly commits. Rather than assume decriminalisation via legal or political interventions as a primary focus, with a top-down model of social change, it is important to think from the viewpoint of understanding lived experiences of human rights to decide whether decriminalisation campaigns will be successful, and what their social effects will be.

For activists this is important because it means that their strategies for change need to look beyond the narrow laws and decriminalisation to broader human rights issues and standards. The chapters that document successful decriminalisation, such as in South Africa, show that social equality is far from achieved. However, significant landmarks on this road have been reached in many states, such as non-discrimination clauses on sexual orientation or gender identity, recognition of same-sex marriage, and reforms to the age of consent for same-sex sexual relations (see tables 1 and 2 in the introductory chapter).

This comparative analysis shows that there are many ways in which decriminalisation can be achieved, ranging from a Conservative government's initiation of Wolfenden's utilitarian approach of privatisation, medicalisation and moral regulation, as in England and Wales, to the example of South Africa where the equality clause in the Constitution's Bill of Rights emerged from a context of democratic and socialist values. In Singapore, Obendorf's discussion suggests that forming alliances with cosmopolitan neoliberal business interests might be the most effective strategy to win decriminalisation. This chapter therefore argues that decriminalisation may be achieved through a wide variety of political ideologies and strategies.

However, what is apparent in each case is the need for movements to win strong allies – LGBTI people and organisations have never won decriminalisation without support from others, whether from significant voices in the Church of England and political allies like Roy Jenkins, as in England and Wales, or key politicians in the Bahamas, or Nelson Mandela and ANC leaders in South Africa. Moreover, they have needed wide alliances and allies from the 'epistemic communities', discussed in part one, to embody expertise; for example, as Baudh notes in India, including children's rights organisations which could give assurances that decriminalisation would not lead to dangers of child abuse (Waites 2010). The editors feel the national cases analysed show the variety of ways in which this can be done, so above all emphasise the need for movements to show creativity in their own contexts. Recall that Voices

Against 377 shows the benefit of innovative thinking about how to form and project alliances in new ways, beyond all existing models.

To a large extent we believe that building alliances with other human rights groups and CSOs, in order to win decriminalisation via human rights arguments, is often a very helpful way to get rights in relation to sexual orientation and gender identity on the agenda. This can then open up political opportunity structures for further rights extensions in the future. Here, the unintended consequences of social action are important: once human rights become a reference point, this can open up opportunities for human rights NGOs to engage in dialogues with governments, while also introducing the human rights framework to a range of activists who may then innovatively deploy further rights arguments. In South Africa, for example, equality rights have been extended to the legalisation of same-sex adoption, even if such rights currently seem in danger of being undermined under the government of President Zuma.

However, a wariness of the consequences of decriminalisations that have been narrowly conceived in terms of privacy, as in England and Wales, Canada (as Kinsman agrees) and the Bahamas (discussed by Gaskins) has also been communicated. It is suggested that this can lead to a privatisation of same-sex sexualities which maintains second-class citizenship, and may derive partly from dynamics of governmentality involving forms of psychologisation, as identified in the UK chapter, and/or what Jeffrey Weeks (in the Waites UK chapter) terms 'moral regulation' – which the editors also interpret the Bahamas discussion as indicating. Governmentality is a concept originating with Foucault, but reinterpreted and extended in usage by others; it involves some dominant groups acting in a manner oriented to managing and containing those with less power, although typically this involves subscribing to the terms of pervasive discourses rather than highly self-conscious behaviour (a full discussion is not possible here; see Waites on the UK for consideration and references, especially final section). Governmentality may work through a selective usage of human rights – as 'privacy', for example. Gaskins's discussion of the Bahamas' decriminalisation can be interpreted in this way; it is also worth considering whether governmentality may sometimes operate in a much more diffuse and flexible form through a wider range of human rights. The point here is not that recognising governmentality to exist would render such privacy strategies necessarily invalid. Rather, the argument is that pragmatic accommodation with a privacy discourse, for example, can still be a legitimate short- or medium-term strategy for gaining initial acceptance of a human rights framework, since this then opens up the state's political opportunity structures significantly and in often durable ways. In the Bahamas, this has not immediately yielded a full panoply of human rights, but it is suggested here that the benefits have been worth having. Thus, attending to governmentality processes may be important to

recognise the full range of social dynamics occurring, but does not imply that strategic accommodations are invalid.

On the other hand, while emphasising contextual variation and tending to find strategic pragmatism acceptable in some contexts, this book has also placed emphasis on the benefits of trying to shift the wider social and cultural landscape, including via reference to the concept of hegemony. While Voices Against 377 India emerges as an admirable model of creativity in the formation of broad alliances, South Africa stands as the most impressive model of what can be achieved through alliances with other radical social movements oriented towards the values of equality and democracy. These two examples clearly go in somewhat different directions. Considering Singapore complicates the picture further since this book's argument has been against the view that movements should never strike strategic positions with conservative political elites, such as the business elites there, given that business arguments on tourism appear to have assisted decriminalisation in the Bahamas. Openness to different strategies is consistent with our emphasis on the pivotal benefits of getting human rights into state discourse as a way of opening up new national and international opportunity structures. Some strategic alliances with business elites in Singapore could be useful in the short term, while simultaneously building independent movements towards wider understandings of rights and equality. The view that one tends to draw from this analysis is that movements should pursue multiple strategies simultaneously, and the evidence is certainly that this is what many movements have tended to do in practice. This conclusion would emphasise both the need for sexuality- and gender-focused groups to form alliances with human rights groups, but also to develop independent movements which are better suited for engaging in wider dialogues and pressing for cultural change.

However, beyond this general approach, a disjuncture is emphasised here between how struggles over decriminalisation are analysed, and wider struggles over human rights. What the case studies clearly suggest is that what works for decriminalisation will not necessarily yield wider human rights. This is very clear in the early cases of England and Canada, but more importantly it is also clear in the more recent crucial case of the Bahamas. In this latter case initial progress on decriminalisation via the human right to privacy is found; yet unlike in South Africa this has not yielded a wider range of human rights. Somewhat similarly in Botswana, Tabengwa and Nicol note legal rulings for human rights in relation to non-discrimination with respect to HIV/AIDS, yet these have not been followed by decriminalisation or wider human rights related to sexual orientation or gender identity. Hence, while the value of the first state endorsement of human rights is emphasised as a way to open up political opportunity structures, the editors do not believe this necessarily or quickly yields wider progress; the range of civil, political, economic, social and cultural human rights remain highly contested.

Partly in response to concern over privacy framings and strategies, we would urge that a priority area of attention for many countries is to maintain public space for action and debate on these issues. Human rights defenders are operating at high risk in many states, often putting their lives on the line for this cause. Tightening laws on criminalisation of same-sex sexual relations is only one component of the efforts to shrink public space for debate on this issue. Protecting human rights defenders can be a common ground for building alliances with other human rights CSOs in-country. This can in turn build stronger solidarity for decriminalisation as CSO relations are solidified.

Regarding the forms of analysis pursued in the chapters, it is suggested that there remains scope for analytical deepening and development of accounts of struggles in different states. Kinsman, for example, draws on theoretical perspectives including materialism and feminist Dorothy Smith's approach to reading texts, and most chapters draw well on gender and sexuality theories. The chapters provide the basis for more sustained application of conceptual frameworks. There remains scope to apply and explore theoretical approaches introduced in Waites's chapter on the United Kingdom, including, for example, with respect to 'moral regulation', elaborations of 'citizenship', discussions of medicalisation, Gramsci's idea of 'hegemony' and Foucault's conception of governmentality. For example, Gaskins's account of how privacy was pivotal in winning decriminalisation in the Bahamas might usefully be interpreted further with reference to the governmentality debate. In general, it is suggested here that there is an important analytical agenda for the future, to deepen national and regional analyses, with reference to the political process and social movement theories foregrounded in this chapter, and also with reference to political, sociological and social science theories and perspectives more broadly.

Finally, this chapter comes to the question of the role of Commonwealth as an organisation in addressing these issues. To begin with, what does this volume's comparative analysis reveal about whether the Commonwealth has played a role until now? Authors of country chapters in this volume make no mention of support from the Commonwealth itself for any human rights initiatives on sexual orientation and gender identity worldwide. There is also little mention of the Commonwealth generally, suggesting scope for further research on how the Commonwealth specifically is perceived in the global South and different national contexts in relation to these issues. Shah's discussion of Malaysia does, however, comment that Premier Najib discussed the decriminalisation issue with UK Prime Minister David Cameron: 'it highlights the fact that the Malaysian government is still forced to respond to its Commonwealth counterparts when issues are made visible'. The opening chapter discussed other Commonwealth activity; however, the reality is that sexual orientation and gender identity have not yet been endorsed as human rights issues by the Commonwealth Heads of Government Meeting (CHOGM).

What does this book's comparative analysis reveal on the subject of whether the Commonwealth could play a positive role in the future? The editors believe the Commonwealth can serve as a useful international forum, including to address North/South power imbalances in certain ways. However, a risk of this volume is that it could be used to make the case for the Commonwealth as a medium to argue the case for decriminalisation, without focusing on how this would be interpreted and received in Southern states. Crucially, any decisions about using the Commonwealth must proceed not simply from normative views about human rights, but also from a careful and realistic understanding of how the Commonwealth is perceived and will be interpreted in the context of global sexual politics.

Authors of the chapters from Africa make negative comments on recent British government suggestions of linkage between LGBT human rights and development aid. Mwakasungula, writing from Malawi, comments: 'Threats of aid cuts if the country does not decriminalise homosexuality will not yield anything'. Similarly, Jjuuko in Uganda comments that 'aid conditionality statements … have the unfortunate impact of being labelled racist, neo-colonial and Western, and also the LGBTI community is largely blamed for the cut aid and further ostracised'. These comments, together with existing published statements from other activists (cited in the opening chapter) should serve as a warning to governments about how any interventions through the Commonwealth may be perceived, and their likely effects.

Given the current disputed status of human rights related to sexual orientation and gender identity within the Commonwealth, whether the organisation can play any significant role remains unclear. Certainly, it has to be said that if the Commonwealth is an organisation seriously concerned with human rights then it must move forward on these issues. Yet the Commonwealth is in many ways an institution in crisis. The last CHOGM failed to reach any significant agreements on reform in response to the Eminent Persons Group's 'urgent' set of recommendations (Eminent Persons Group 2011). The Commonwealth Secretariat is underfunded and its weak capacity often generates doubts about its effectiveness (Cooper 2011). The Commonwealth Ministerial Action Group (CMAG) has not managed to sanction Sri Lanka sufficiently for its gross violations of human rights; indeed, Sri Lanka will have the honour of hosting the next CHOGM, despite firm protests from civil society groups. Who will head the Commonwealth after Queen Elizabeth II is a looming question (Murphy and Cooper 2012). The former director of the funding organisation, the Commonwealth Foundation, was fired under allegations of racially motivated and sexist bullying of staff (Howden 2011); the Foundation is currently undergoing a relaunch.

The moral, political and operational leadership of the Commonwealth on decriminalisation is therefore severely hindered for these and other reasons discussed in this book, including the members' historical relations born out

of colonial injustices. Careful consideration, and perhaps further research, is needed on how the Commonwealth's characteristics are now perceived in formerly colonised states. For example, the Head of the Commonwealth is a wealthy monarch from a hereditary and thus racialised institution; the Secretariat is based in London at Marlborough House; and the organisation was unable to strike a unified stance on economic sanctions against South Africa under apartheid, largely due to the stance of then Conservative UK Prime Minister Margaret Thatcher. Human rights have only been selectively advanced in limited ways. The question of whether the Commonwealth can become usefully engaged on sexual orientation and gender identity issues is thus inseparable from the question of whether the Commonwealth can reform itself, and how it is perceived. Nevertheless, it is felt appropriate here to propose some possible entry points for Commonwealth institutions to be considered by them and civil society actors willing to countenance such cooperation.

The editors would suggest that if the Commonwealth is seeking a constructive role, it should perhaps play to its strengths. That is, in certain low-key and light-touch ways, such as through existing human rights and development projects and institutional relations, Commonwealth actors could play a greater role in promoting decriminalisation and protection of human rights. For example, existing universal human rights commitments can be invoked with benefits in relation to sexual orientation and gender identity, irrespective of whether new explicit statements on sexual orientation and gender identity emerge.

Within the Commonwealth Secretariat there are several platforms for encouraging reforms. The Secretary General, Kamalesh Sharma, has responded to pressure from NGOs to be vocal on this issue, and he has cautiously but consistently waded into debates in the last couple of years. His stance has been to emphasise human rights for all, without discrimination on any grounds, asserting that this includes on the basis of sexual orientation. He has encouraged individual Commonwealth states to find ways to harmonise their national laws and practices with these universal – and Commonwealth – principles.[4] This is a measured public position that befits his role in balancing the views of Member States. The editors would encourage him to continue these calls, particularly during country visits, where civil society can build on his position. The public rhetoric needs to be matched also by adequate quiet diplomacy to ensure that the calls for reform are being listened to and that support from the Commonwealth is made available when requested.

4 Paragraph 5 of the Affirmation of Commonwealth Values and Principles, declared at the Port of Spain CHOGM in 2009, states: 'our belief that equality and respect for protection and promotion of civil, political, economic, social and cultural rights for all without discrimination on any grounds, including the right to development, are foundations of peaceful, just and stable societies, and that these rights are universal, indivisible, interdependent and interrelated and cannot be implemented selectively'.

The Commonwealth Secretariat is significantly underfunded but nevertheless plays a role in technical cooperation that could be put to good use. One key area of work for the Commonwealth Secretariat's Human Rights Unit has been in supporting Member States to prepare for the UN Human Rights Council's Universal Periodic Review (UPR), wherein all UN Member States are reviewed by other states regarding their human rights record. States make recommendations to those under review, and that recipient state can accept or reject these recommendations in a final report that will be evaluated at the next round of the UPR in about four years' time. Only five Commonwealth states at the UPR have ever made recommendations on sexual orientation and gender identity: Canada, UK, Australia, New Zealand and Bangladesh (UPR Info 2012). Bangladesh, in fact, intervened to encourage the state in question, Tonga, to *retain* its criminalisation of same-sex sexual relations.[5] Thus, there is the possibility to encourage more Commonwealth states, particularly those in the South with progressive laws, to speak out in the Human Rights Council on these issues.

An analysis of UPR recommendations made specifically to Commonwealth Member States on sexual orientation and gender identity reveals that of the 239 recommendations made so far in the various UPR sessions, only 33 have been accepted by Commonwealth Member States, while 155 were rejected; a further 25 recommendations received no response. A comparison with non-Commonwealth states shows that they have accepted 147 of the 255 recommendations made to them on sexual orientation and gender identity. This constitutes a 57.5 per cent acceptance rate, compared to only 13.8 per cent acceptance of such recommendations by Commonwealth states. This is further evidence of the stalwart resistance of Commonwealth states to criticisms of their laws and practice concerning sexual orientation and gender identity (only about 0.4 per cent of UPR recommendations to Commonwealth states have been on this topic). Given the strong recommendations that Commonwealth states receive on these issues, it could be within the scope of the Commonwealth Secretariat to assist states in reviewing these UPR recommendations, and preparing now for the second round of UPR sessions, to see if incremental changes can be made. For example, the introduction of laws prohibiting discrimination in employment on the grounds of sexual orientation has been one important incremental step made in some Commonwealth states that still criminalise same-sex sexual behaviour (see table 1.1 in the opening chapter).

The Commonwealth Secretariat also extends support to NHRIs, police training, parliamentarian training and legislative reform. In each role, there

5 The UPR session report records that Bangladesh made the following recommendation: 'Continue to criminalize consensual same sex, which is outside the purview of universally accepted human rights norms, according to Tonga's national legislation'. UN Doc. A/HRC/8/48, 5 June 2008, para. 58.

is scope for introducing discussion on sexual orientation and gender identity, including in countries that criminalise. For example, NHRIs could be introduced to emerging trends in legislation and public policy globally on these issues, including identifying opportunities for incremental change. The police training should cover, *inter alia*, responsibilities to protect all persons against incitement to hatred and violence on the grounds of sexual orientation or gender identity. Parliamentarians who wish can discuss the constraints they face in leading reforms. Work on legislative drafting support can make recommendations for legal protections on sexual orientation and gender identity, where entry points exist, including beyond the narrow focus on laws prohibiting same-sex sexual behaviour.

The supposedly tougher arm of the Commonwealth on human rights is the CMAG. Given its lacklustre efforts on a wide range of human rights crises in the Commonwealth, it is unlikely to make a strong stand on decriminalisation. Where it could be useful is in mainstreaming LGBTI rights protection into broader statements on human rights, such as on freedom of association, human rights defenders and access to justice. The proposal for a Commonwealth Commissioner for Democracy, the Rule of Law and Human Rights is still on the table. Should such a position come into existence, decriminalisation ought to figure prominently on her/his agenda, but in the interests of stabilising a new and fragile institution, the Commissioner may take a cautionary approach. Much will depend on the identity of the individual chosen to fill this post and her/his personal networks with drivers of change in key states. Most importantly, the new Charter of the Commonwealth, enacted on 11 March 2013, emphasises human rights as indivisible and opposes 'all forms of discrimination', but does not explicitly mention sexual orientation and gender identity – a crucial omission (The Commonwealth 2013). The Charter does, however, reinforce certain principles, such as human dignity and tolerance, and human rights, including freedom of expression and freedom of assembly, which can contribute to future reforms.

Three other important themes of Commonwealth work are gender, HIV/AIDS and democracy. Ministerial level networks exist on these issues within the Commonwealth, providing opportunities for exchange. On gender, the Commonwealth has a Commonwealth Plan of Action for Gender Equality 2005–2015 and Commonwealth Gender Plan of Action Monitoring Group; while the former does not explicitly mention gender diversity or sexual orientation, there is scope for the latter to read this into the relevant sections of the Plan of Action. The Commonwealth Women's Affairs Ministers Meetings, held every three years, are another platform for integrating these issues. This change also hinges on national CSOs focused on gender equality broadening their understandings as well, and including attention to gender identity and sexual orientation in their advocacy and policy. HIV/AIDS deeply affects Commonwealth states and as the chapters here have shown, this frame has been

a starting point for useful cooperation. The Commonwealth Secretariat's work has focused on access to medication from both legal and policy perspectives; this could helpfully include a dimension on access for LGBTI persons and MSM. The Commonwealth Foundation has concentrated on building civil society capacities, which could also make efforts to include LGBTI organisations as beneficiaries and could encourage mainstream NGOs to support inclusion of these groups in their work. Finally, democracy has featured strongly in Commonwealth discourses and policy. This book has discussed how the narrow focus on decriminalisation may obscure wider aims for inclusive and equal citizenship rights, regardless of a person's sexual orientation or gender identity. From citizenship education to the Commonwealth Youth Programme, there may be outlets for sensitising people to sexual and gender diversity through the prisms of democracy, citizenship and equality.

The Commonwealth claims to be an institution for states but also for people. Numerous dedicated Commonwealth-focused NGOs exist on a range of topics from human rights to various professional associations. NGOs focused on LGBTI issues have been able to get recognition in the Commonwealth People's Forum, held ahead of the CHOGM. This has often come at great risk for human rights defenders and with little financing to enable their equal representation (Robinson 2012). In order to continue and expand this participation in Commonwealth civil society initiatives, designated funding streams are needed, particularly for those from the South. Special attention should be given by Commonwealth institutions and host states to protecting human rights defenders who want to make their voices heard in such fora and beyond. This means support to NHRIs, police training, media freedoms and review of laws on NGO registration, all of which have fallen within the purview of Commonwealth activities. Support to civil society initiatives for trans-Commonwealth dialogue and knowledge exchange is also needed. Funding can be scarce and the source of funding can be politically charged, particularly if coming from the North to support Southern initiatives. It is not clear how funding from Commonwealth institutions would be perceived by opposing groups but it is likely to instigate less reprobation than many other forms of direct state or private foundation funding.

There are also many branches of Commonwealth associations that could serve as a platform for further dialogue. The Commonwealth Lawyers Association has made important efforts to review criminal laws and has tried to stimulate spaces for free debate among representatives of Commonwealth Law Ministries (see Cowell, this volume). The Association has also come out with strong statements condemning violations of human rights. The Commonwealth Law Conference, held every three years for legal practitioners, is another example of a useful space for dialogue and sharing practical experiences of law reform and litigation. The Commonwealth Parliamentary Association and the Association of Commonwealth Universities are just two examples of other

Commonwealth-focused groups that could take up these issues with greater urgency. It is also worth noting the work of the Commonwealth Foundation is promoting cultural connections, mostly through English-language literature, across the Commonwealth. Within these initiatives for writers there could be opportunities for stories on sexual orientation and gender identity and associated struggles to be exposed and discussed.

The Commonwealth has made a great fanfare of its multi-faith dimension, evidenced by the number of Commonwealth Day multi-faith services held, including at Westminster Abbey. This concluding chapter has shown the great potential of faith-based groups for progressive or regressive views on criminalisation and other rights issues. The Commonwealth could use this dimension of its identity to bring faith leaders together for dialogue under the banner of Commonwealth values of human rights and democracy. This would not be likely to lead to consensus, but it could at least assist in dialogues over the legitimate role of states vis-à-vis promulgation of religious values, and could expose hardliners to faith-based arguments for accepting (or at least tolerating) different sexual orientations and gender diversity.

In concluding it must be re-emphasised that all these ways in which Commonwealth institutions might potentially be able to make a contribution are to be considered in the wider context of the contested nature and reforms of the Commonwealth, the ways in which national governments seek to utilise it, and global politics and economics more generally. These potential ways to use the Commonwealth will succeed or fail according to the extent to which it reinvents itself to address global power relations. Such power relations include colonialism's lasting influence on the structured inequalities of contemporary economic relations.

A critical assessment of the Commonwealth by former Indian Foreign Secretary and Deputy Secretary-General of the Commonwealth Krishnan Srinivasan (2005, 2006) suggests that the organisation has become 'Nobody's Commonwealth' due to a lack of coherence on issues such as South Africa and Zimbabwe. Srinivasan notes 'an almost total deficit in leadership' and poses the question 'whether any practical future can be envisaged' (Srinivasan 2006, pp. 266, 258). A major part of the answer currently being posed, notably by proponents of the Charter of the Commonwealth and in accordance with Srinivasan's call for a more 'principles-based' association, is human rights – and human rights related to sexual orientation and gender identity are inescapably wedded to this wider project of reinvention. Equal rights were endorsed in the Singapore Declaration of 1971, and the Harare Declaration of 1991 affirmed fundamental human rights, including equal rights and opportunities of all citizens regardless of race, colour, creed or political belief (see opening chapter). Only the new Charter of the Commonwealth in 2013 has fully embedded human rights in the Commonwealth, and although human rights work forms a significant part of the Commonwealth's activities, the development

of principles into practices remains limited. The pre-existing context therefore implies major risks and dangers if human rights related to sexual orientation and gender identity become perceived to be granted special attention.

Importantly any possible moves to use existing Commonwealth institutions, such as we have suggested, must be considered with an appreciation of the ways in which decolonisation has not taken place, and hence how colonial attitudes and practices sometimes persist, including within such institutions, their discourses, practices and cultures. Commonwealth institutions themselves, and their influence, should be analysed from sociological and intersectional perspectives attentive to multiple inequalities, and researched as such – a task beyond the scope of this book. However, the greater problem is how the Commonwealth is perceived globally, such that unless it takes symbolic and substantial steps to change – such as dispersing or rotating the currently London-based Secretariat, or removing the British monarchy's role – then its legitimacy in relation to human rights will be limited. Pursuit of human rights on sexual orientation and gender identity via Commonwealth institutions is only likely to be productive if within a project where those institutions can be reinvented to focus more on human rights generally, and where there is also institutional reform, democratisation and the dissemination of power. Yet the prospects for that general project, and the Commonwealth's overall coherence, remain highly uncertain.

Here we can only acknowledge the tensions and help open up, rather than resolve, necessary debates over the extent to which the Commonwealth can be reinvented through human rights to have a positive role. It is clear that if the Commonwealth were to become a vehicle for human rights related to sexual orientation and gender identity without being perceived to adequately address other pressing human rights issues, then it will lack credibility. Its involvement in that way could prove counter-productive in generating reactive responses.

A central task for the Commonwealth then is to seek more credibility and visibility in supporting human rights generally, and hence to pursue rights related to sexual orientation and gender identity within that framework. The opening chapter suggested that there is a need for Southern states in the Commonwealth to take positions of moral and political leadership in decriminalisation and change, and that is also the case in relation to human rights generally. The chapters have discussed in some depth the constraints that state actors face in taking such leadership roles and the tensions between Southern and Northern activists in working for state reforms. Northern states and international NGOs can still play a positive role if they espouse both Commonwealth values and universal principles of human rights in their calls for respecting human dignity, equality and non-discrimination for all, and also seek to advance these in practice. However, it is voices of the South that will carry the greatest legitimacy in eradicating a harmful colonial legacy. We hope this book has helped to make those voices heard and we hope its content will

contribute to continuing struggles for human rights, decriminalisation and change across the Commonwealth.

Bibliography

Adam, B.D., J.W. Duyvendak and A. Krouwel (1999) 'Gay and lesbian movements beyond borders? National imprints of a worldwide movement', in B.D. Adam, J.W. Duyvendak, and A. Krouwel (eds.), *The Global Emergence of Lesbian and Gay Politics: National Imprints of a Worldwide Movement* (Philadelphia: Temple University Press), ch. 14, pp. 344–72.

Butler, J. (1990) *Gender Trouble: Feminism and the Subversion of Identity* (London: Routledge).

Cooper, D. (2011) *The Commonwealth in Denial; Opinions, October 2011* (London: Commonwealth Advisory Bureau).

Currah, P., R.M. Juang and S.P. Minter (eds.) (2006) *Transgender Rights* (Minneapolis, MN: University of Minnesota Press).

Della Porta, D. and M. Diani (2006) *Social Movements: An Introduction*, 2nd edn. (Oxford: Blackwell).

Diani, M. and D. McAdam (2003) *Social Movements and Networks: Relational Approaches to Collective Action* (Oxford: Oxford University Press).

Duggan, L. (2002) 'The new homonormativity: the sexual politics of liberalism', in R. Castronovo and D.D. Nelson (eds.), *Materializing Democracy: Towards a Revitalized Cultural Politics* (Durham: Duke University Press), pp. 175–94.

Eminent Persons Group (2011) *A Commonwealth For the People: Time for Urgent Reform; Report of the Eminent Persons Group to Commonwealth Heads of Government* (Hampshire: Commonwealth Secretariat).

Finnemore, M. and K. Sikkink (1998) 'International norm dynamics and political change', *International Organization* 52 (4), pp. 887–917.

Gamson, J. (1996) 'Must identity-movements self-destruct? A queer dilemma', in S. Seidman (ed.), *Queer Theory/Sociology* (Oxford: Blackwell), pp. 395–420.

Gramsci, A. (1971) *Selections from the Prison Notebooks* (London: Lawrence and Wishart).

Grigolo, M. (2010) 'Human rights and cities: the Barcelona Office for Non-Discrimination and its work for migrants'; in P. Hynes, M. Lamb, D. Short and M.Waites (eds.), *Sociology and Human Rights: New Engagements*, special issue, *International Journal of Human Rights* 14 (6), pp. 896–914.

Howden, D. (2011) 'Commonwealth director sacked over "bullying"', *The Independent*, 21 Feb.

Hynes, P., M. Lamb, D. Short and M. Waites (2010) 'Sociology and human rights: confrontations, evasions and new engagements', in P. Hynes, M. Lamb, D. Short and M.Waites (eds.), *Sociology and Human Rights: New Engagements*, special issue, *International Journal of Human Rights* 14 (6), pp. 811–32.

— (eds.) (2011) *Sociology and Human Rights: New Engagements* (London: Routledge).

— (eds.) (2012) *The Sociology of Human Rights*, special issue, *Sociology* 46 (5).

Itaborahy, L.P. (2012) 'State-Sponsored Homophobia: A world survey of laws criminalising same-sex sexual acts between consenting adults (ILGA)', available at http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2012.pdf (accessed 27 Mar. 2013).

Keck, M.E. and K. Sikkink (1998) *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press).

Kitschelt, H. (1986) 'Political opportunity structures and political protest: anti-nuclear movements in four democracies', *British Journal of Political Science* 16 (1), pp. 57–85.

Kollman, K. and M. Waites (2011) 'United Kingdom: changing political opportunity structures, policy success and continuing challenges for lesbian, gay and bisexual movements, in M. Tremblay, D. Paternotte and C. Johnson (eds.), *The Lesbian and Gay Movement and the State: Comparative Insights into a Transformed Relationship* (Farnham: Ashgate).

Laclau, E. and C. Mouffe (2001) *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*, 2nd edn. (London: Verso).

McAdam, D. (1982) *Political Process and the Development of Black Insurgency 1930–1970* (Chicago, IL: University of Chicago Press).

— (1996) 'The framing function of movement tactics: strategic dramaturgy in the American civil rights movement', in D. McAdam, J. McCarthy and M. Zald (eds.), *Comparative Perspectives on Social Movements* (New York: Cambridge University Press), pp. 338–55.

— (2003) 'Beyond structural analysis: toward a more dynamic understanding of social movements', in M.Diani and D. McAdam (eds.), *Social Movements and Networks: Relational Approaches to Collective Action* (Oxford: Oxford University Press).

McCarthy, J.D. and M.Z. Zald (1977) 'Resource mobilization and social movement: a partial theory', *American Journal of Sociology* 82 (6).

Melucci, A. (1980) 'The new social movements: a theoretical approach', *Social Science Information*, 19 (2), pp. 199–226.

— (1996) *Challenging Codes: Collective Action in the Information Age* (Cambridge: Cambridge University Press).

Murphy, P. and D. Cooper (2012) 'Queen Elizabeth II should be the final Head of the Commonwealth', Commonwealth Advisory Bureau *Opinions*,

July (London: Commonwealth Advisory Bureau), available at www.commonwealthadvisorybureau.org/opinion/ (accessed 14 Mar. 2013).

Robinson, C. (2012) 'Decolonising sexual citizenship: who will effect change in the south of the Commonwealth?' Commonwealth Advisory Bureau *Opinions*, April (London: Commonwealth Advisory Bureau), available at www.commonwealthadvisorybureau.org/opinion (accessed 14 Mar. 2013).

Sheill, K. (2009) 'Losing out in the intersections: lesbians, human rights, law and activism', in K. Kollman and M. Waites (eds.), *The Global Politics of LGBT Human Rights*, special issue, *Contemporary Politics* 15 (1), pp. 55–71.

Simmons, B. (2009) *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press).

Srinivasan, K. (2005) *The Rise, Decline and Future of the British Commonwealth* (Basingstoke: Palgrave).

— (2006) 'Nobody's Commonwealth? The Commonwealth in Britain's post-imperial adjustment', *Commonwealth and Comparative Politics* 44 (2), pp. 257–69.

Tarrow, S. (2005) *The New Transnational Activism* (Cambridge: Cambridge University Press).

The Commonwealth (2013) *Charter of the Commonwealth*, available at www.thecommonwealth.org/files/252053/FileName/CharteroftheCommonwealth.pdf (accessed 27 Mar. 2013).

Tilly, C. (2004) *Social Movements, 1768–2004* (Boulder, CO: Paradigm Publishers).

Touraine, A. (1988) *Return of the Actor: Social Theory in Postindustrial Society* (Minneapolis, MN: University of Minnesota Press).

Tremblay, M., D. Paternotte and C. Johnson (eds.) (2011) *The Lesbian and Gay Movement and the State: Comparative Insights into a Transformed Relationship* (Farnham: Ashgate).

UPR Info (2012) Database of UPR recommendations and voluntary pledges, available at www.upr-info.org/database/ (accessed 16 Aug. 2012).

Waites, M. (2009) 'Critique of "sexual orientation" and "gender identity" in human rights discourse: global queer politics beyond the Yogyakarta Principles', in K. Kollman and M.Waites (eds.), *The Global Politics of LGBT Human Rights*, special issue, *Contemporary Politics* 15 (1), pp. 137–56.

— (2010) 'Human rights, sexual orientation and the generation of childhoods: analysing the partial decriminalisation of "unnatural offences" in India', in P.Hynes, M. Lamb, D. Short and M.Waites (eds.), *Sociology and Human Rights: New Engagements*, special issue, *International Journal of Human Rights* 14 (6), pp. 971–93.

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Human rights in relation to sexual orientation and gender identity are at last reaching the heart of global debates. Yet 78 states worldwide continue to criminalise same-sex sexual behaviour, and due to the legal legacies of the British Empire, 42 of these – more than half – are in the Commonwealth of Nations. In recent years many states have seen the emergence of new sexual nationalisms, leading to increased enforcement of colonial sodomy laws against men, new criminalisations of sex between women and discrimination against transgender people.

Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change challenges these developments as the first book to focus on experiences of lesbian, gay, bisexual, transgender and intersex (LGBTI) and all non-heterosexual people in the Commonwealth. The volume offers the most internationally extensive analysis to date of the global struggle for decriminalisation of same-sex sexual behaviour and relationships.

The book includes:

- The first quantitative analysis of legal change related to sexual orientation and gender identity across all the Commonwealth's 54 Member States, and an overview of existing transnational politics and activism.
- 13 peer-reviewed chapters by academics and activists presenting analyses of struggles for decriminalisation and change in 16 national contexts covering all regions of the Commonwealth: United Kingdom, Canada, Australia, Singapore, Malaysia, India, Pakistan, Sri Lanka, Bangladesh, South Africa, Botswana, Malawi, Uganda, Jamaica, Trinidad and Tobago, and the Bahamas.
- A unique comparative analysis across the Commonwealth, based on the 16 national analyses, focusing on learning lessons from states in the global South where decriminalisation of same-sex sexual behaviour has been achieved, including the Bahamas, South Africa and India.

Some recent transnational activism has sought to use the Commonwealth as a medium to achieve decriminalisation. This volume distinctively opens up questions of how such developments should be interpreted in the contexts of colonialism and post-colonialism, and critical perspectives on cultural racism, Southern theory and homonationalism. It thus offers analytical frameworks for developing struggles and strategies for decriminalisation and human rights in the context of a multi-dimensional understanding of inequalities and power.

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