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

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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<sup>1</sup> (Narain and Gupta 2011; Baudh, this volume).<sup>2</sup> 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<sup>3</sup> 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 (Corréa 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 transgenderism 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 (Ranchhodas 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’ (Narain 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 <sup>1</sup>	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).<sup>4</sup> 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,<sup>5</sup> 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 Kamallesh 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 Kamallesh 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).<sup>6</sup>

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.



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