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## Conclusion

### **Comparative analysis of decriminalisation and change across the Commonwealth: understanding contexts and discerning strategies**

*Corinne Lennox and Matthew Waites*

As the global struggle for human rights with respect to sexual orientation and gender identity intensifies, and the Commonwealth seeks to negotiate its role in this process, what can be learned from studying national experiences together? This concluding chapter offers a comparative analysis of the country and regional case studies included in this book. The aim is to identify some commonalities across cases, and important differences, and hence to learn some lessons from processes of decriminalisation and change across the Commonwealth. We focus centrally on the decriminalisation issues, but also offer wider comments on sexual orientation and gender identity, and issues of relevance to struggles over sexuality, gender and human rights.

This is the first systematic attempt in the academic literature to conduct a comparative analysis of sexual orientation and gender identity struggles in Commonwealth states; as such the analysis is offered tentatively, to initiate further conversations. In particular, it is offered with a consciousness of how power relations associated with post-colonialism constrain knowledge production, and as an invitation to further research and discussion with activists, politicians, researchers and all concerned. This volume does not seek to represent, summarise or synthesise all the many insights from the chapters within it, all of which stand in their own right. Rather, mindful of our own position based in the United Kingdom, we seek to identify some specific useful themes and patterns deserving attention.

It is worth emphasising from the outset that although many Commonwealth Member States do share some important commonalities – for example in terms of substantial parts of their state, legislative and legal structures (including the English law tradition), colonial language (English), and experiences of colonialism and decolonisation – there are also very significant differences: of

culture, history, economic status, duration of independence, political traditions (ranging from liberal to authoritarian), and composition of civil society and civil society organisations (CSOs). All of these factors can impact on prospects for decriminalisation. The region in which a state is based can also be an important variable; as Simmons (2009) has shown, the practice of neighbouring states can have an effect on how states will behave towards human rights norms. Nevertheless, we felt an important opportunity would be missed if we did not undertake some comparative analysis with the hope that in doing so, we could uncover some points that might assist activists in their ongoing struggles, and also governments strategising for positive change.

The chapter draws from theories of social mobilisation at the national and international levels (for example Keck and Sikkink 1998; Finnemore and Sikkink 1998; Tilly 2004; Tarrow 2005). It refers to social movement theories employed in political science and sociology, variously emphasising the importance for movements of the 'political opportunity structure', such as a state's legal and policy framework (Kitschelt 1986); of 'framing' strategies through which movements represent themselves in relation to such structures (McAdam 1996); and/or of 'resource mobilisation' drawing on various forms of economic, social and cultural resources which a movement can muster (McCarthy and Zald 1977). Work by scholars like McAdam, especially that emerging from the United States, has integrated these approaches as 'political process theory' (McAdam 1982; 1996; 2003). However, one should also be alert to a fourth tradition from Europe of analysing social movements since the 1960s with greater attention to issues of culture and identity (Touraine 1988), particularly in the case of Melucci who noted 'new social movements' emerging since the 1960s, among which he included the lesbian and gay movement (Melucci 1980; 1996). Political process theorists like McAdam subsequently gave a 'qualified endorsement of the cultural turn in social movement studies' (McAdam 2003, p. 281), also influential in the work of leading European social movement theorists Diani and Della Porta (Diani and McAdam 2003; Della Porta and Diani 2006). Work by movement theorists of lesbian and gay movements like Joshua Gamson echoes this, engaging with sociological approaches to the social construction of sexual and gender identities and with queer theory, to conceptualise dynamics of inclusion and exclusion (Gamson 1996; see also Waites 2010; Kollman and Waites 2011). In our view such understandings, including those concerning uses of language and symbolism, are central to comprehending contemporary gender and sexuality movements; moving from a focus on who is 'represented' in 'framing' to one on how discourses used in framing are often also implicated in constituting the identities of political subjects (as suggested in the work of Foucault, discussed by Waites in the United Kingdom chapter), and the parameters of movement belonging.

This chapter also examines the range of tactical ‘repertoires’ (Tilly 2004) used by activists, to deepen discussion of strategies. The term ‘advocacy’ is employed here to denote not only campaigns, but also other strategies, such as litigation, protest, and seeking or participating in legislative review, used for the purpose of advancing the decriminalisation process. The analytical framework will also draw upon aspects of sociology, including the developing sociology of human rights, which enables us to examine how, in practice, human rights are often not invoked as a holistic framework by actors; rather, particular human rights are often selectively invoked and interpreted (Hynes et al. 2010; 2011; 2012).

The data analysed in this discussion is drawn almost entirely from the chapter contributions to this book. In a few cases supplementary information was sought if felt necessary to consider further certain patterns of interest. Each chapter was reviewed against a set of variables to identify actor characteristics and mobilisation strategies.

The chapter is structured in two main parts. Part one discusses the main ‘actors’ involved – with ‘actor’ used very broadly to refer to a range of organisations – as a way to begin exploring their positions and character, drawing cross-national comparisons on actor characteristics (Keck and Sikkink 1998). Specifically, CSOs are examined first, such as lesbian, gay, bisexual, transgender and intersex (hereafter LGBTI)<sup>1</sup> organisations and human rights bodies, looking at the type of ‘organisational platforms’ that have been built for advocacy purposes (Finnemore and Sikkink 1998); then states, and actors within states; then religious institutions and the influence of religion. While these three types of actor are in practice overlapping – religious organisations are to some extent CSOs, and states may institutionalise certain religions – it was convenient to divide discussion into three subsections in this way, while also beginning to make reference to the political process and social movement theories mentioned.

Part two of the chapter moves into a deeper discussion and engagement with the analytical frameworks offered by political process and social movement theories, discussing ‘framing’ and ‘political opportunity structure’ approaches in turn, then moving into discussion of ‘tactical repertoires’ and ‘resource mobilisation’. Following this is a concluding discussion of what can be learned

1 In places in this discussion the acronym LGBTI is used to refer to lesbian, gay, bisexual, transgender and intersex people; this echoes that used by ILGA, the International Lesbian, Gay, Bisexual, Trans and Intersex Organisation – the longest-established and globally representative international NGO focusing on sexual orientation and gender identity issues. However, it should be noted that typically most NGOs working to represent such groups in national contexts do not encompass all five groups suggested by LGBTI; and many NGOs also use other identity categories to avoid the Western associations of LGBTI (Waites 2009). The editors have tried to be more specific where possible.

from the chapter and the volume as a whole. Finally, some conclusions are suggested concerning future actions that might be made by parties such as NGOs, movements and governments, and the question of the role of the Commonwealth itself is addressed.

## **Actor characteristics**

### *Civil society organisations: diversity in organisational platforms*

The development of strong 'organisational platforms' (Finnemore and Sikkink 1998) can be important for achieving goals through social mobilisation. Such platforms can be highly institutionalised, for example, as non-governmental organisations (NGOs), or looser associations, like networks or coalitions, or event-specific alliances, such as for mass protests. Such platforms function to exchange information, create a common discourse or provide leadership and/or administrative support for activities (see also Keck and Sikkink (1998) on 'transnational advocacy networks').

On the issue of decriminalisation, and sexual orientation and gender identity rights more broadly, activists have faced additional challenges ranging from stigma of association and public reprobation to harassment, violence and even murder. To build an organisational platform is difficult under even the best of conditions but the activists profiled here have mobilised with courage, determination, and usually few resources, in spite of the hostile environment in which they have worked or are working. Particular remembrance can be given here to David Kato of Uganda and Brian Williamson of Jamaica, two leading rights activists who were murdered; sadly, they are not the only activists who have lost their lives in this fight.

Virtually all of the cases in the book denote the existence of at least one NGO working at the national level on sexual orientation and gender identity issues. Most states have more than one such NGO; Uganda, for example, has nearly ten, an impressive number given the high levels of intolerance for such mobilisation domestically. This suggests that, in spite of the obvious barriers, there is still some space for open civil society organisation on these issues.

Names of organisations are useful to consider as a reflection of who is being represented; clearly such names may often represent in part a framing strategy relative to political opportunity structures, and it should be kept in mind that – as activist Antony Grey suggested in relation to the Homosexual Law Reform Society, discussed in the UK chapter – respectable homosexual exteriors may conceal more radical and transgender interiors. While early decriminalisations involved such organisations with names focused on the 'homosexual', or had more ambiguous and deferential titles such as ASK (Association for Social Knowledge) in Canada, contemporary organisations usually have broader or more explicit framings in their titles. However, there remains considerable

variability in the extent to which transgender or intergender people are included. Jamaica is indicative, having moved from the Gay Freedom Movement in the 1970s, to J-FLAG: the Jamaican Forum for Lesbians, All-Sexuals and Gays (Blake and Dayle, this volume) – a title that does not clearly signal the inclusion of gender identity issues. Sexual Minorities Uganda is somewhat similar. By contrast, in Malaysia the NGO katagender clearly signals a gender focus, reflecting regional differences. The equality advocacy group People Like Us in Singapore and Voices Against 377 in India both have titles which are inclusive of diversity, including diversity of gender identity and expression; both may appear non-threatening in a difficult political context, but may be radical in relation to many Western NGOs in their gender inclusivity.

While relations between LGBTI organisations and internal movement dynamics are often discussed, perhaps an equally important theme, which is less frequently analysed, is how organisations and movements focused on sexual orientation and gender identity relate to wider human rights and CSOs. In a number of cases, human rights NGOs have clearly taken up the issue of decriminalisation or other such rights issues (for example on HIV/AIDS) as part of their portfolio of work. In Malawi, where sexual orientation has only recently been coming into public discussion, it is organisations such as the Centre for Human Rights and Rehabilitation and the Centre for Development of People that have led initiatives. Such alliances have not always come easily; Mwakasungula's Malawi chapter reports that the Council for NGOs in Malawi, CONGOMA, denounced LGBTI activism, possibly under pressure from the government, while in Botswana, according to Tabengwa and Nicol, the Botswana Council of NGOs (human rights NGOs) has failed to agree a position on this issue. However, Mwakasungula still emphasises the benefit of his organisation using a conference to engage a range of human rights actors and CSOs; the subsequent formation of a Technical Working Group on Most At Risk Populations (MARP) also involved various actors, and utilised a wide health and HIV/AIDS framing to achieve such collaboration. National coalitions, comprising LGBTI and human rights organisations and other civil society actors have been formed with varying degrees of success in, for example, India (Voices Against 377), South Africa (National Coalition for Gay and Lesbian Equality), Uganda (Civil Society Coalition on Human Rights and Constitutional Law) and in Malaysia for the petition to the National Human Rights Institution (NHRI) to take up decriminalisation. In the Malaysian context, Shah's discussion suggests that making connections with broad political reform movements like Bersih 2.0 is an important strategy to pursue. Perhaps this is more so where there is a need to establish an initial foothold in public debates.

It appears that in India the emergence of a substantial and organised national coalition to argue and campaign publicly for change was an important factor in changing the political climate and winning the legal ruling for

decriminalisation. Crucially, *Voices Against 377* was a broad-based coalition; it included groups working with LGBTI people, MSM (men who have sex with men), *hijras*, *kothis* and people using various other South Asian forms of identification; but it also included women's groups, sexual rights NGOs and children's rights groups, which was crucial to its success (Baudh, this volume; Waites 2010). This is an important insight, since it goes against the tendency of Western lesbian and gay social-movement scholarship to exaggerate the need for 'identity' as a basis for successful campaigning, and it opens up the possibility of alliances with wider rights movements. In relation to existing global and comparative academic literature, it shifts us away from a focus on 'gay and lesbian' politics in national contexts being viewed as 'imprints of a worldwide movement' (cf. Adam et al. 1999), or a singular global 'gay and lesbian movement' (Tremblay et al. 2011) towards a greater emphasis on the diversity of forms of identification, subjectivity and culture. Hence, rather than this volume discerning a single desirable model of structure, strategy or identity for movements, it suggests that movement strategies are and should be creative to address their specific context – with *Voices Against 377* providing an impressive new model of such contextual creativity to emulate (Waites 2010).

There are also several examples of transnational organisational platforms discussed in the chapters. These include the North American Conference of Homophile Organisations (NACHO, mentioned by Kinsman), Coalition of African Lesbians (which was refused formal recognition by the African Commission on Human and Peoples' Rights, as discussed by Tabengwa and Nicol), and CAISO – Coalition Advocating for the Inclusion of Sexual Orientation, in the Caribbean region (see Gaskins; Blake and Dayle). Notably, all three are regional transnational advocacy networks, in contrast to globally oriented international NGOs (INGOs) working on sexuality and gender, such as the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), the International Gay and Lesbian Human Rights Commission (IGLHRC) or ARC-International; or those working on human rights globally with a strong LGBTI focus, such as Human Rights Watch (HRW). However, it should be noted also that ILGA has important regional networks. Regional level transnational mobilisation can be easier to consolidate because of shared discourses, historical and contemporary experiences, and common advocacy targets at the national and regional level (Tarrow 2005); this is certainly the emphasis, for example, of some activists in CAISO in the Caribbean context, as discussed in our opening chapter and in the contribution from Blake and Dayle. This implies that in considering the role of international organisations and activism, it is vital to not conflate the international with the global, but rather to attend to existing regional and/or continental coalitions, organisations and activism, and to recognise their (leading) role in struggles for change.

In addition to the horizontal cooperation between national NGOs within regions, what can be termed 'vertical cooperation' or 'vertical relations' between

INGOs and national or local NGOs might also be considered. One finds, however, that although organisations such as the IGLHRC and Amnesty International are noted to join in condemning human rights abuses (as in Malawi, for example) there is actually little discussion of vertical relations with INGOs in the state chapters. This is telling and has both positive and negative implications. The positive aspect is that most of the key processes of international learning between activists that are described are perhaps better characterised as horizontal rather than vertical. Willett's account of Australian decriminalisation struggles begins by emphasising the English Homosexual Law Reform Society as an inspiration for Laurence Collinson to attempt to form the first campaigning organisation for decriminalisation, although his account is also suggestive of the difficulties of global communications. It was indicative of international learning that the first Australian organisation to become established; the Homosexual Law Reform Society of the Australian Capital Territory directly echoed the name of the English organisation. The example of exiled London-based activists of the African National Congress engaging with British activists during the 1980s is a more recent example, discussed by Gomes da Costa Santos and the most pivotally important, of how transnational dialogues can contribute to future changes. In this case, the subsequent inclusion of 'sexual orientation' in the South African Constitution seems to have emerged partly as a result, with all the global benefits that has subsequently entailed.

In general, the lack of convergence on the role of INGOs may reflect that the main focus of the chapters is on movement engagements with states. However, the more negative implication of this lack of discussion of vertical relations may be that national NGOs, and movements fighting for reform and rights, do not feel they are currently receiving many resources beyond statements and information from global NGOs and movements, or transnational governmental organisations; and there is no sign that they feel they are receiving any from the Commonwealth. Authors may not expect much more to be plausible or possible, although from most chapters there is not as strong a sense of wariness of global NGOs as that described in the Caribbean by Blake and Dayle. The need is emphasised for further reflection on this issue of what more globally oriented organisations could do for national and sub-national NGOs, a point that the introductory chapter began to problematise. This relates also to the issue of resources raised by resource mobilisation approaches, to which the second part of this chapter will return.

Vertical relations the other way around also need to be considered, and what INGOs based in the UK, or other countries where decriminalisation happened some time ago – as in Canada and Australia – could learn from NGOs and movements in states where it has only recently occurred, or is still to occur. This chapter would suggest that gender identity is an area where there is much to learn. For example, the publications and practices of *Voices Against 377*,



which have consistently foregrounded experiences of *bijra* people and gender diversity, are a useful example of a more sophisticated approach to gender identity, transgender issues and transphobia for other NGOs to emulate. More generally, there is also much to learn about how anti-colonial and/or religious nationalisms are being formed in specific contexts.

Epistemic communities – groups that develop shared frameworks of authoritative knowledge – have also played an important role, as noted in several of the chapters. These are often from the legal community, mentioned specifically in eight of the country chapters, but range also from medics, to artists, religious institutions, civil servants and academics. The individuals are drawn from within and outside the LGBTI community. The added value of such epistemic communities is that they can add a ‘certification’ (Tarrow 2005) to activism, based on their perceived expertise and independent authoritative voice.

In other social movements, the role of trade unions, opposition parties and the media is often emphasised. None of the chapters in this volume mention trade unions, perhaps suggesting that such actors have not been key allies in decriminalisation processes. In contrast, if political parties are considered, parties of the left, including the Labour Party in the United Kingdom and the African National Congress in South Africa, have tended to provide greater and significant support. The media are mentioned in many chapters, as both a supportive and regressive force. In Sri Lanka, for example, one newspaper group was so fearful of backlash that it refused to publish a public outreach advert on the International Day Against Homophobia, despite having offered discounted rates to publish similar advertisements in the past. In Singapore, strict fines are levied against television broadcasts with any references to homosexuality. In Malaysia, Shah suggests that the largely government-controlled media has been used to vilify persons accused of homosexuality at the same time as civil society initiatives of the groups raising sexual orientation and gender identity issues do get some reasonable press coverage. An important point is also made of alternative media sources created by LGBTI people in civil society, such as the influential newsletter of the Gay Freedom Movement in Jamaica, the *Jamaican Gaily News* (mentioned by Gaskins) and online websites – with servers outside of the country – of several LGBTI organisations in Singapore, as Obendorf notes.

### ***States and governmental actors***

Another element of the success or failure of social mobilisation is the characteristics of the target state. The important recent global collection, *The Lesbian and Gay Movement and the State* edited by Tremblay et al. (2011), has been valuable in emphasising the need to move analysis beyond viewing movements and the state as independent, towards regarding them as mutually

shaping one another, with a complex interplay. The various elements of the state in particular represent the central parts of the ‘political opportunity structure’ facing movements. Although all of the states profiled in the volume are Commonwealth Member States, and thus share some common histories and contemporary structures, they have also created different conditions for the process of decriminalisation. Some of these variables stand out in the chapter analyses.

The political characteristics of the states profiled have much in common in that most are formally democratic, albeit with several, such as Uganda and Singapore, exhibiting authoritarian leanings. Yet the development of substantive democracy, through democratic practice and a democratic culture of vigorous public debate, is much more variable. Also variable is the related constitutional entrenchment of human rights, and the social embeddedness of human rights, which are specifically important parts of political opportunity structures (Kollman and Waites 2011; Hynes et al. 2010; 2011; 2012).

All of the states profiled have differing degrees of penetration into the public sphere by religious institutions. The degree of secularism does not seem to correspond very directly with openness on sexual orientation and gender identity issues; for example, the United Kingdom has anti-discrimination laws embedded in the Equality Act 2010, while the Church of England remains the established state religion in England in ways such as via the monarchy, and representation in Parliament (there are reserved seats for Bishops in the House of Lords). Nevertheless, it is noteworthy that South Africa – with its distinctive constitutional equality clause, same-sex adoption and same-sex marriage – is a secular state. Several of the chapters noted that religion and politics are intertwined with the effect that the ability of political decision-makers to independently assert reform on criminalisation is in some cases severely limited by their interest in maintaining political support of faith-based institutions (for example in the chapters on Uganda, Malaysia, Pakistan and on the Caribbean states).

This extends in some of the chapters also to the judiciary, whose decisions on cases have been influenced by similar interests and constraints (for example in the Botswana chapter, and in Sri Lanka in the South Asia chapter). Thus, on the question of independence of the judiciary across the cases, the response is not clear. In some cases, where this influence of religious institutions is in evidence, the judiciary might on other criteria be considered independent. The chapters (for example on the Caribbean, South Africa, Malawi) also show that the judiciary at various levels can show more progressive opinions on decriminalisation (as in South Africa) or less progressive opinions (for example in the Bahamas, cf. Gaskins’s comments on Chief Justice Joan Sawyer), suggesting that the legal community is not uniform in its views or in the pressures felt by external actors. The India case, discussed by Baudh, tends to suggest judicial willingness in the Delhi High Court to move ahead of societal opinion, as does at least one of the cases discussed by Jjuuko in Uganda.

The interface with the justice system for LGBTI activists can also differ across institutions. Some of the chapters show that the police can have differing views to the judiciary, as highly evident in the Australian, Indian, South African and Canadian cases. The police in several countries reportedly use various criminal laws for harassment of persons, sometimes also to coerce bribes out of them, without necessarily applying formal criminal proceedings (as discussed in the Bangladesh and Sri Lanka cases in South Asia). It is a general finding of the chapters that while the laws on criminalisation may appear dormant because criminal cases are rare, the laws are still being applied by state actors in harmful ways that cannot be monitored by the formal justice system. Importantly, this may also influence police attitudes in the application of other laws, such as on general public order offences or the neglect of protection from hate crimes. Kinsman, in his chapter, also makes the important point that the laws may be applied differently to different parts of the LGBTI community, whereby class intersects with LGBTI identity to create enclaves of freedom that the law does not so easily penetrate.

In considering governmental actors, it is useful to keep in mind those international governmental institutions, especially human rights institutions, which exist beyond the state and may have some scope for agency. At the global level, key cases like *Toonen* (discussed in the opening chapter), decided by the UN Human Rights Committee, demonstrate a progressive stance. The picture at the regional level is more varied. In addition to those in Europe, there are regional human rights conventions in the Americas (for example the American Convention on Human Rights (1969), monitored by both the Inter-American Commission and Court of Human Rights) and in Africa (the African Charter on Human and Peoples' Rights (1981), monitored by the African Commission on Human and Peoples' Rights); the Association of Southeast Asian Nations (ASEAN) has only recently begun to create regional human rights standards. Blake and Dayle mention a 'recent petition submitted by AIDS Free World to the Inter-American Commission'; and also mention recent resolutions by the Organization of American States. Otherwise, the lack of emphasis on regional human rights in the chapters is perhaps suggestive of regional bodies having an insufficiently pro-active role in affirming rights related to sexual orientation and gender identity. Tabengwa and Nicol record that the African Commission on Human and Peoples' Rights has refused accreditation to the Coalition of African Lesbians. In contrast, the Inter-American Commission on Human Rights has recently established a Unit on the Rights of Lesbian, Gay, Trans, Bisexual and Intersex Persons, while the Inter-American Court in March 2012 made its first ruling that supports non-discrimination on the grounds of sexual orientation (*Karen Atala and daughters v. Chile*). While global human rights discourses can at times become rather culturally insensitive, regional human rights are important to develop, not least because this can lead to a human rights shift from soft law to hard law, and to greater application in practice

and enforcement. Regional human rights institutions can in some cases be considered as potentially accommodating parts of the political opportunity structures facing movements, perhaps under-explored or utilised thus far.

### *Religious institutions*

The diverse role of religious institutions in decriminalisation processes is one of the more notable findings in the case studies. This role has not been uniformly hostile, despite numerous examples of faith-based institutions virulently opposing decriminalisation and other LGBTI rights claims. In the chapter on Canada there is discussion of the more positive role played by some of the Christian churches, including the formation in the 1960s of the Canadian Council on Religion and the Homosexual. Similarly, in Australia, there was support for decriminalisation from the majority of mainstream Christian churches, albeit with strong opposition from some others. In the United Kingdom, there was also positive engagement from the Church of England, which published an influential report in 1954, *The Problem of Homosexuality*, which was an important factor in enabling the Wolfenden report in 1957 followed by a decriminalisation in 1967 – in significant contrast to Scotland where the opposition of the Church of Scotland was pivotal in delaying decriminalisation until 1981. In Malawi, there have been positive calls for inclusion and tolerance from clergy in both Anglican and Presbyterian churches.

The role of individual clergy in decriminalisation stands out in Gomes da Costa Santos's chapter on South Africa, highlighting Archbishop Desmond Tutu's outspoken support, and in Shah's chapter on Malaysia, citing some openly gay Christian leaders. The chapter on Malaysia goes into further detail on interpretations of Islam in that country, noting there are liberal/reformist groups such as Sisters in Islam, although Muslim religious leaders mostly promote criminalisation and social intolerance for homosexuality. In relation to the international context, it is noted that European Muslim scholar Tariq Ramadan has criticised state persecution of homosexuals, while openly gay imams in the US and South Africa are promoting inclusion for sexual diversity. In the analysis of Pakistan, where the decriminalisation discourse is very nascent, the influence of Islamic religious leaders is cited with less qualification as a key barrier to progress on decriminalisation.

Importantly, Ward's chapter comparing religious influence in South Africa and Uganda shows that hostility towards same-sex sexuality was not a common feature of pre-colonial religions in Africa, with many cultures showing tolerance for such practices. This challenges religious rhetoric casting homosexuality as a Western, colonial import. It is important to note that the British Monarch Queen Elizabeth II remains formally Head of the Anglican Church, which has an important influence in Commonwealth states, including in Africa and

elsewhere. Religious and governmental/Commonwealth institutions, therefore somewhat intertwined; but, notably, the Church of England has tended to favour decriminalisation for many decades, as discussed in the United Kingdom chapter (despite its ongoing opposition to same-sex marriage). Mwakasungula's discussion of Malawi emphasises the strong influence of religious attitudes, both positive and negative. The strong homophobic influence of the Pentecostal churches, described by Jjuuko in Uganda, and the rising negative influence of US Baptist churches in the Bahamas described by Gaskins, shows that it is not British imperial religious institutions that are leading the present wave of homophobia. Nor were they the only originators of this, as the role of the Dutch Reformed Church in South Africa demonstrates.

In the terms of political process theory, religious institutions can be considered as an important part of the political opportunity structure facing social movements. A crucial strategic question for progressive sexuality and gender movements concerns the extent to which framing should be focused in relation to the state, usually through a secular discourse, or whether to adopt framing and campaigning strategies, also in relation to religious organisations. Engagement in broad-based human rights alliances with other CSOs seems to be a central and necessary strategy. However, in a rich and nuanced discussion of religion in the volume, Shah on Malaysia offers deeper insight. In the Malaysian context, where religion is institutionalised by the state (with Islam as 'the religion of the federation') and where this state consistently leads efforts to defeat UN resolutions to protect and affirm sexual and gender diversity, Shah emphasises 'an understanding of the landscape of Islam is crucial for any effort to decriminalise "same-sex sexualities"'. Shah suggests that in Malaysian politics the competition between the two main political parties can be characterised as a 'competition [...] to represent a more "authentic" Islam'. This implies that the political opportunity structure is overwhelmingly religious – not only the state but also in terms of political parties in opposition. In response, Shah's nuanced discussion of varying positions among Muslim politicians, scholars, religious leaders and people generally is suggestive of the need for contestation of the meanings of being Muslim, and of the relationship of Islam to the state. He argues that 'complementary interpretations of Islam and human rights could result in a minimum *acceptance* of sexual diversity' (italics in original), which might in turn lead to 'action on decriminalisation'. Shah comments that 'What does help is engaging Muslim leaders and scholars in the everyday experiences of sexual minorities'. This is surely work which both Muslim and non-Muslim members of social movements can engage in, perhaps in different ways. In sum, it is not sufficient for sexuality and gender movements to adopt human rights positions and strategies; a sustained wider engagement in religious debates and cultural politics is often also advisable – perhaps on the ground or face-to-face rather than via the media – particularly so where political opportunity structures do not offer secular alternatives.

The attitudes of the wider public do influence the decriminalisation process to a significant extent, and a focus on specific actors – whether CSOs, state actors or religious institutions – should not disguise this. It is perhaps the task of shifting public attitudes generally which makes it so important for activists to at least attempt to engage with religious organisations and viewpoints. The chapters show that homophobia and transphobia within a population at large can appear benign or emerge as violent; heterosexual people can be vocal or silent. As Obendorf points out in the Singapore chapter, it is important not to essentialise communities as ‘anti-gay’ (or, indeed, anti-bisexual or anti-transgender); public rhetoric of the most intolerant and powerful actors may not be indicative of general sentiments towards LGBTI persons.

Having discussed different kinds of actors involved – CSOs, state actors and religious institutions – and drawn some initial comparisons between states, the second part of the chapter will deepen analysis through more engagement with analytical frameworks from political process and social movement theories.

### **Analysing strategies of mobilisation in constraining contexts**

This investigation will now be developed with reference to the four main conceptual approaches specified in the chapter’s introduction for analysing the success of social movements. Themes will be examined under the following sequence of subheadings, which include coverage of (but do not entirely correspond to) those four conceptual approaches: i) *Framing strategies* (cf. McAdam 1986), incorporating discussion with reference to new social movement theories (cf. Melucci 1980; 1996; Touraine 1988); ii) *Political opportunity structures* (cf. Kitschelt 1986); iii) *Tactical repertoires* (cf. Tilly 2006); and iv) *Resource mobilisation* (cf. McCarthy and Zald 1977). The aim is to discuss these themes briefly, giving some examples of the applicability of each, in a way that may be suggestive for readers in different contexts. It is not possible here to comprehensively or systematically apply these approaches, due to constraints of time and space. This chapter can only begin to examine themes across the Commonwealth as a starting point for future researchers to investigate further. In general, a sociologically informed and critical approach implies not focusing excessively on movement agency, but rather balancing this against an appreciation of the limiting, constraining effects of social structural inequalities, contexts and cultures.

#### ***Framing strategies***

There have been a wide range of frames employed by activists, with many commonalities evident across cases. The most popularly used frame across the cases is that of privacy. When initially used in England and Wales, and Canada, this was not used with an explicit emphasis on privacy as a right, but in contemporary usage it tends increasingly to be associated with the human

right to privacy – for example, as Gaskins describes in the Bahamas. Privacy is discussed in 11 of the chapters, although in recent efforts, as in India, it is often invoked by NGOs like the Naz Foundation alongside wider rights such as non-discrimination and equality. The separation of public and private spheres is the basis of this frame, thus avoiding the moral debate on decriminalisation and replacing it with distinctions on the reasonableness of the state regulating actions in the private sphere. This has pushed homosexuality into the private sphere, which many would argue has hurt long-term aims for equality in the public sphere, but it has proved a successful approach in some countries like the Bahamas where there is no strong support in civil society for LGBTI equality. To interpret such a specific focus on the human right to privacy requires acknowledging that, in practice, many actors – whether political elites or activists – do not proceed from a normative purism emphasising the full range of human rights (civil, political, social, economic and cultural) as a holistic indivisible framework. Rather, as the sociology of human rights suggests with reference to empirical research in specific contexts, invocations of human rights in practice are often restricted, selective and strategic (Hynes et al. 2010; 2011; 2012).

The Bahamas case seems extremely significant and deserves attention in the global context, since it illustrates how a narrow privacy framing with reference to a national constitution, rather than international human rights law, can be the basis of a successful decriminalisation – in this case only two years after new laws re-criminalising homosexuality had been passed in 1989. From this it can be argued that national and regional movements in hostile contexts should at least consider strategically adopting such narrow frames, in particular by focusing their public commentaries on national constitutional rights to privacy. Importantly, Gaskins's chapter on the Caribbean also reveals that, in Trinidad and Tobago, decriminalisation was not even listed as one of six key priority steps to address homophobia by the key NGO Coalition Advocating for the Inclusion of Sexual Orientation (CAISO), when addressing government – activists argued that the key priorities are discrimination and violence. This crucially illustrates that there is enormous diversity in movement framing globally on the decriminalisation issue, and that the precedence of the issue should not be assumed.

Another of the most common frames has been on HIV/AIDS: nine of the chapters mention HIV/AIDS as a frame used in advocacy. Addressing HIV/AIDS itself as a life and death issue, in a context where anti-retroviral drug treatments are still not available in many states, implies the importance of using such arguments. This has been a useful frame for building some dialogue with specific state actors, usually Ministries of Health, and also building alliances with HIV/AIDS, focused NGOs, for example, as discussed in Malawi. The frame has been used to bypass moral arguments against homosexuality to concentrate on the public health imperative and the dangers of pushing men

who have sex with men further away from prevention and treatment because of criminalisation.

Wider frames on equality, human rights and the rights of sexual minorities (also expressed as LGBT or LGBTI rights) have been widely used, as in South Africa and India where constitutional equality rights were invoked. This is partly linked to litigation strategies that have been argued on equality and non-discrimination lines. Framing specific rights for 'sexual minorities', 'LGBT' or 'LGBTI' persons has been less common than more general human rights and equality frames. This has sometimes translated into calls for introducing non-discrimination on the grounds of sexual orientation (for example in Jamaica and Malaysia). Thus, some activists are trying to work within existing legal frames while others are trying to establish new legal frames for their advocacy.

Alternative frames have focused on 'psychological support', citizenship and anti-violence. The two cases where 'psychological support' frames were used are Canada and the UK, where the Wolfenden report used this angle to justify decriminalisation. Such frames, which tend to be associated with a privacy focus, are not highlighted in any of the latter cases of advocacy, although perhaps consideration of the governmentality theme, introduced in the United Kingdom chapter, might lead to analyses of present contexts discerning more such emphasis on psychological intervention – especially since for Foucault 'subjectification' occurs not only through medicine but also through religious and moral teachings including on citizenship (Waite, this volume). The citizenship frame is an interesting choice, emphasising not only equality and non-discrimination but the right to participate in the public sphere (discussed in chapters on the UK, South Africa and Singapore).

Frames emphasising the violence experienced by LGBTI persons are discussed in the chapters on the Caribbean states. Such frames could be a consideration for other activists. Frames focused on violations of bodily integrity have proved successful in many human rights advocacy examples (Keck and Sikkink 1998).

Activists in Singapore, discussed by Obendorf, have tried to frame decriminalisation as necessary for economic interests of the state, which seeks to attract foreign companies and tourism, and arguably could not do so effectively with such laws in place. Obendorf suggests that appealing to material interests of states can offer important leverage. Similarly, Gaskins's discussion of the Bahamas suggests the exceptionalism of the Bahamas might be explained partly by the significance of its tourism industry. These are very important insights for movements to reflect on; lobbying business leaders might quickly generate new allies with financial clout to influence government indirectly. This can create new dangers, since states and businesses may then ally, for example, to promote tourist industries focused on gay consumers characterised by what Lisa Duggan (in a US context) calls 'homonormativity' – involving consumerism and 'a politics that does not contest dominant heteronormative assumptions'



(Duggan 2002). Such tourism may privilege consumption by wealthy visitors above the needs of local populations. Elites will not reflect most people's priorities. Nevertheless, there may be much to be gained and some pragmatic compromises may be worth considering.

Important issues raised by the Touraine (1988) and Melucci (1980; 1996) approaches to social movement theorising can also – somewhat unusually – be addressed under this framing heading. Political process theories have often tended to assume movements have clear objectives and that the identities of participants can be taken as a given; hence framing can be approached as a somewhat tactical enterprise. The approaches of Touraine and Melucci, particularly Melucci (1996) in his later work influenced by postmodern theories, are helpful in bringing into the foreground issues of the social formation of identities through culture (also Della Porta and Diani 2006). More than most political process theorists, these writers help address the implications of social constructionist and queer theory approaches to identity (see Gamson 1995; and the opening chapter of this volume). In general, there is a need to attend to how lesbian and gay or LGBTI movements, for example, produce definitions and narratives of who they are as part of 'framing' processes. These are often expressed partly through terms and acronyms used. For example, in India, Voices Against 377 used a wide range of terms, including *bijra*, *kothi*, MSM, and the term 'queer', to describe movement members (Baudh, this volume; Waites 2010). This contrasts with narrower early uses of 'homosexual' in England and Wales, Canada and Australia. Such approaches helpfully illuminate the struggles where African governments claim 'homosexuality' is Western and un-African; from this analytical perspective one can see movement framing strategies as including narratives about histories and culture being reformulated. The way in which movements label and define themselves is not only a matter of pragmatic tactics, it is a central part of political action which simultaneously impacts upon the sense of identity of those participating (Kollman and Waites 2011). Movement leaders and participants are unlikely to be able to engage in framing in a detached unemotional way, which means shifting frames is not only a matter of instrumental choices, but a matter of feelings as well.

This has important implications in considering gender power dynamics, which need to be interpreted from a feminist perspective, as do the overall framings of movements that focus on the decriminalisation issue. As Kate Sheill has argued, 'the current LGBT rights movement has echoed the human rights movement ... in being male-centred and thus focused on the issues that primarily affect gay men more than lesbians. An example would be the focus on laws that explicitly or implicitly criminalise homosexuality where such laws primarily target men' (Sheill 2009, pp. 60–1). This focus sidelines wider aspects of criminalisation and other human rights issues affecting lesbian and bisexual women. The imperial legacy of criminal law unfortunately creates a context that tends to fixate debates on men and maintain the invisibility of women.

A framing focus on criminalisation of sex between men also tends to lead to insufficient attention to transgender rights issues (Currah et al. 2006). For example, Mwakasungula's account of the experiences of Steven Monjeza and Tiwonge Chimbalanga (locally known as 'Aunt Tiwo'), who engaged in a same-sex engagement ceremony, suggests that judicial and cultural responses focused on the issue of 'homosexuality', while questions of gender identity and related rights seem to have been less explored or pressed by activists. Nevertheless, while human rights and criminalisation remain loaded frames in terms of gender representation, they are vital to engage with. It is recognised that the present volume is shaped in these ways due to the choice of decriminalisation as the central focus – to a large extent necessarily.

More generally with respect to framing, a central theme is how sexuality and gender movements do this in relation to human rights movements, which also have their own framing strategies. There is much to learn from accounts of creative alliances formed with human rights organisations in states like Uganda and Malawi. Models from Western<sup>2</sup> states of independent NGOs' leading struggles, focused only on a sexual orientation and/or gender identity framing, are less appropriate in many such contexts; a better strategy is often to seek participation in or an alliance with human rights NGOs and movements via a human rights framing. However, the unwillingness of the Botswana Council of NGOs to register the NGO LeGaBiBo (the Lesbians, Gays and Bisexuals of Botswana), or to adopt a position supporting sexual orientation and gender identity rights, illustrates the simultaneous need for independent organising. In the terms of social movement theory there still seems to be a need for social movement organisations (SMOs), which, if possible, are not simply human rights organisations. The difference from Western states seems more that social movements and SMOs should not be expected to emerge from wider LGBTI 'social networks' or a 'social movement community' – concepts increasingly used in social movement literature to describe existing social groups with shared culture and values, who thus can potentially be mobilised by movements (Diani and McAdam 2003). Many human rights-based social networks, for example, are often more established and have larger pools of resources than those which are LGBTI; and human rights movements may have more established mobilisation structures (including those focused on specific human rights issues rather than all of them, as is often the case).

However, there may also be other cultural resources, local traditions and political frameworks to draw on and connect with in positive ways. Perhaps the most important example of this with respect to political frameworks is how the broad emphasis on democracy and equality by the United Democratic Front

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

and the African National Congress shaped the Constitution in South Africa. This was in large part a socialist emphasis. In Gramsci's terms, as adapted in the post-Marxist multi-dimensional politics of Laclau and Mouffe and mentioned in the United Kingdom chapter, working for a more radical 'hegemony' in a society makes new kinds of vocabulary and political ideology possible (Gramsci 1971; Laclau and Mouffe 1985). While the value of creativity in forming complex alliances around issues such as gender, sexuality, human rights and child rights, has already been emphasised as with *Voices Against 377* in India, it is South Africa that presents this most profound lesson. For while the majority of the population or ANC supporters were not won to the case for sexual orientation as a right during the transition from apartheid, the predominant political leadership of the ANC was won to the case for sexual orientation to be in the Bill of Rights through a democratic process of political debate. This shows that progress can occur not only through law and at the discretion of judges, but also through democratic politics in conditions where equality as a value is loudly proclaimed.

### *Political opportunity structures*

Political opportunity structures are used by activists to bring attention to their concerns and to advance their objectives. These can be external to such actors or created by them, at both the domestic and international levels. There is a wide range of relevant structures to consider.

Shifts in global human rights law and associated discourses have certainly presented openings in political opportunity structures that the chapters show have been significant to an extent, as with the Delhi High Court ruling in India. However, legal rights in constitutions at national level are also highly important, and mediate this global influence, so should not be treated as secondary. For example, in the Bahamas, Gaskins illustrates that the Attorney General invoked the right to privacy with reference to the national constitution, while it is not clear that international human rights were invoked at the time of decriminalisation. Similarly in India, as Baudh indicates and as argued further elsewhere, while international commentaries have focused on the role of international human rights law, the Naz Foundation petition and Delhi High Court ruling focus first and foremost on rights in the Indian Constitution (Waites 2010).

In seven of the chapters, parliamentarians have been a political opportunity structure, usually used to secure legislative review or the introduction of new bills to aid decriminalisation. Two of the chapters specifically mention elections processes – South Africa and Australia – although the key breakthrough in South Africa was surely in the formulation of the Constitution to include sexual orientation. Given the general lack of support in civil society for

decriminalisation, it is unsurprising that few activists have tried to use elections to boost support for their cause; on the contrary, prospective politicians in many countries can use anti-gay sentiment as a means of generating support, including from influential faith-based institutions. The case studies show that activists have turned often to symbolic political opportunities (Keck and Sikkink 1998). The Wolfenden report, the creation of the new Constitution in South Africa, mass social mobilisation for electoral reform in Malaysia, and the arrest of the gay couple in Malawi are some of the symbolic events that have been used to generate public and political debate on decriminalisation.

The use of statutory bodies features in many chapters. Disappointingly, the National Human Rights Institutions (NHRIs) mentioned have proved to be weak allies. They commonly cite their responsibility to lead only on issues decreed by the government to be lawful. This is the case in Malaysia with SUHAKAM and in Uganda with the Equal Opportunities Commission. The option remains, however, for NHRIs to play a more active socialisation and persuasion role with state actors, particularly in sharing international human rights law jurisprudence, which has been highly critical of criminalisation on grounds of equality, non-discrimination and right to privacy. Some chapters note that individual ministries, most commonly those on health (for example in Uganda, Malawi), have been open to cooperation, some of it good, as in the case of activists in Malaysia with the Ministry of Women, Family and Community Development on issues affecting transsexuals, and some of their dialogue with the Islamic Affairs Department in relation to religious laws that criminalise. Ministries can work against each other, however, as the Malawi chapter shows, where the Ministry of Information and Civic Education is actively trying to discredit LGBT activism at the same time that there has been positive cooperation with the Ministry of Health (a finding also in India).

The chapters suggest that political opportunities at the international level are much less used by activists. Only five of the chapters discuss such opportunities, usually focused on international human rights mechanisms such as the UN Treaty Bodies or the Human Rights Council's Universal Periodic Review. Only one discusses a regional human rights mechanism, the Inter-American Commission on Human Rights, in the Jamaica chapter – although, as noted elsewhere, the European Court of Human Rights played an important part in the history of decriminalisation in the UK. The African Commission on Human and Peoples' Rights does not appear to have taken much of a leadership role on decriminalisation issues, although human rights NGOs have made appeals to the Commission to at least help protect human rights defenders working on LGBTI rights. Similarly, the newly created ASEAN Inter-governmental Commission on Human Rights shows no signs of constructive engagement on decriminalisation, including in the new ASEAN Human Rights Declaration, adopted in November 2012.

Notably, the country case studies do not pay much attention to the Commonwealth institutions as political opportunity structures. The chapters by Fred Cowell and Michael Kirby (and the opening chapter in this volume) outline some of this engagement by CSOs and the Eminent Persons Groups but it clearly does not figure prominently other authors' understanding of the domestic struggles for decriminalisation and change, with UN institutions garnering much more mention in relation to sexual orientation.

In relation to gender identity, the limitations of political opportunity structures have been extremely important. Certainly, early decriminalisations of same-sex sexual behaviour in England and Wales and Canada were not linked to reforms on gender identity, which came later. In particular, the absence of gender identity from international human rights case law has been very significant, with the implication that global political opportunity structures related to human rights have not been utilised for advocacy on gender identity. Consequently, transgender and otherwise-defined groups campaigning on gender identity have tended to campaign for legal reform within states without being able to draw easily from international human rights jurisprudence. This has shifted somewhat with the development of the Yogyakarta Principles, which refer to both sexual orientation and gender identity. Baudh comments that in India the Delhi High Court ruling referred to the Yogyakarta Principles' definitions of sexual orientation and gender identity, and *hijras* were noted as one group affected; meanwhile, in Pakistan, activists believe Section 377 is occasionally used as a threat against trans women (Baudh, this volume; see also Waites 2010). The place of *hijras* and gender diversity in both the Voices Against 377 campaign and the judgement itself, contribute to opening up political opportunity structures for those advancing more inclusive politics of gender identity and expression in South Asia.

In the Southeast Asia states of Singapore and Malaysia, trans people (especially effeminate males and trans women) seem both more socially visible relative, say, to Australia. This is evidenced in part by the profile of NGOs such as katagender in Malaysia and SgButterfly in Singapore. In Malaysia, Shah notes the High Court in 2011 rejected a transgender woman's claim to change gender identity, and there is targeting of *lelaki lembut* (problematically translated as 'soft men' or 'effeminate gay') and *wanita keras* (hard women). Transsexual women are seeking judicial review to challenge the constitutionality of *shariah* law that forbids cross-dressing. Interestingly, this national initiative is described without reference to international human rights; the rights enshrined in the Malaysian Constitution seem to be viewed as much more central in the political opportunity structures here.

In Singapore, Obendorf notes a 'more progressive stance towards transsexual individuals', who conform to the gender order's sex binary, and significant queer social scenes. Sex reassignment surgery is legal in Singapore and post-operative transsexual people can change legal gender on identity

documents (but not birth certificates) and marry accordingly. However, wider forms of transgenderism that do not accord with the male/female sex binary are given less legal recognition. This current situation may result from the absence of a broader transgender framing from SMOs, although it might also result from state resistance to such broad framings (this is not clear from the chapter). One possibility is that the lack of need for recent struggles to legalise sex reassignment might have had the consequence of less collective political mobilisation by trans people than in similar states where sex reassignment has been illegal, even though there is probably an ongoing need for struggles over treatment access. This might also have resulted in the Yogyakarta Principles not getting on the agenda, and hence lack of reference to their broad and potentially helpful definition of gender identity to include gender expression, which could assist in developing alliances between transgender groups and extending transgender rights struggles. These themes could be investigated in further research. Similarly, in South Africa where sex reassignment has also been legal (see tables of legal data and discussion in the opening chapter), the extensive legal progress on sexual orientation does not seem to have been reflected in the extension of all forms of rights in relation to gender identity.

Hence, an important dynamic to note is that initial openings in the political opportunity structures for transsexuals may in some ways indirectly delay further openings in these broader political opportunity structures related to various forms of transgenderism. This can be conceptualised with reference to what Judith Butler calls the 'heterosexual matrix' structuring dominant cultural understandings: 'that grid of intelligibility through which bodies, genders and desires are naturalized' (Butler 1990, p. 151). In the heterosexual matrix, for example, males must exhibit masculinity and heterosexual sexual desire towards females; biological males who feel feminine are drawn to sex reassignment surgery to achieve a required correspondence between sex and gender. In these terms we discern a tension between entrenching a 'new form' of the heterosexual matrix in rights discourse in a way that allows for transsexualism – as Waites (2009) has elsewhere suggested – or movements and strategies seeking to displace such a matrix.

Returning to the issue of political opportunity structures overall, with respect to both sexual orientation and gender identity, what tends to emerge as central is the importance of the state institutionalising human rights. If a state generally respects human rights, this has an important transformative impact on political opportunity structures. However, in understanding this process it should be kept in mind that in legal terms human rights typically arrive incrementally rather than all at once. For example, as in Malaysia and India, there are often certain rights in national constitutions, which over time have become redefined as (or in relation to) 'human rights' and extended in legal and social interpretation over time; so this aspect of political opportunity structure often extends gradually. Again, the sociology of human rights tends

to emphasise this contested and historically expanding definition of human rights in various international and national contexts (Hynes et al. 2010; 2011; 2012).

A symbiosis is suggested here between the emphasis emerging in part one's account of civil society actors (on the need for alliances with other human rights and CSOs) and the emphasis on the importance of the state institutionalising human rights – both formally and in its culture and practices – to transforming the political opportunity structures. Tremblay et al.'s (2011) general approach is useful to conceptualise this here, for its emphasis on how the state and movements both directly and indirectly shape one another (and see specifically Kollman and Waites 2011). Broadly speaking what seems to emerge is the value of broad-based coalitions with human rights and CSOs which, in the terms of the 'framing' approach, initially requires a framing of sexual orientation and gender identity issues as human rights issues by activists in order to win inclusion in broader human rights movements. It next involves human rights movements or coalitions addressing the state in ways which similarly frame the issues. This is often pivotal in sexual orientation and gender identity issues becoming human rights issues in a manner accepted by elements of the state such as the judiciary and/or political elites in government. Once such a profound shift in the political opportunity structures is achieved, as occurred with the new Constitution's Bill of Rights in South Africa, it may be further utilised to yield a series of positive rulings extending beyond sexual behaviour to affirm a range of other human rights. Petrova in this volume strongly affirms this kind of broad human rights-based strategy. Importantly, this is significantly different from the earliest decriminalisations in the Commonwealth, such as in England and Wales or Canada, where the issue was framed as one of privacy, tolerance, medicalisation and utilitarian governance rather than one of human rights (see Waites, Kinsman) – and hence where decriminalisation movements such as the English Homosexual Law Reform Society did not centrally define themselves as part of wider human rights movements.

However, Gaskins tends to suggest that human rights in recent times can still be narrowly defined as privacy. He importantly emphasises that political leaders in the Bahamas were able to change position to support decriminalisation in 1991 as privacy; as in Gomes da Costa Santos's account of South Africa (and Waites's account of England and Wales), this shows evidence of scope for political elites to move creatively ahead of public opinion. Yet while Gaskins suggests achieving human rights as privacy was an effective strategy in the Bahamas, and increasingly also is in Trinidad and Tobago, it yields a very narrow and unequal form of rights and citizenship relative to heterosexuality. Waites's discussion of governmentality in the final section of the United Kingdom chapter, drawing on Foucault, suggests such restricted contemporary affirmations of human rights in contexts like the Bahamas might be viewed as partly reflecting and embodying forms of governmentality by authorities

seeking to privatise, manage, depoliticise and conceal same-sex sexualities, even if also reflecting political elites moving ahead of public opinion. In such a context this chapter would emphasise that alongside broad coalition building to entrench human rights in state practices, it is also vital to build distinct independent sexuality and gender movements affirming the rights of LGBT and/or intersex people – or using other specific cultural identities – in order to pursue broader cultural changes, and (where and when appropriate) agendas for rights and citizenship beyond privacy.

### *Tactical repertoires*

Tilly's (2006) study of domestic social movements identifies a set of common mechanisms used by social movements. He calls these 'repertoires of contention' and they include such actions as street protest, pamphleteering, sit-ins and other forms of demonstrations. In the decriminalisation process, the cases show a wide range of tactical repertoires used.

The most commonly used form of action is litigation: eight of the chapters discuss litigation and in most cases this has been proactive litigation, i.e. not in response to persecution but based usually on constitutional challenges to criminalisation laws. Most of this litigation has been to domestic courts; only in Jamaica and Australia are examples of using international legal mechanisms found, in these cases, the Inter-American Commission on Human Rights and the UN Human Rights Committee, respectively (although one example can be cited in Northern Ireland: the *Dudgeon v. the UK* case before the European Court of Human Rights). As a point of procedure, international human rights law complaints mechanisms will generally not admit cases unless all domestic remedies have been exhausted; for this reason, we may see more appeals to the international level in the future. For now, activists have had some success with domestic courts, although the decisions have not always been in line with their goals. In Botswana, for example, the case taken gave the judge the opportunity to proclaim that public attitudes had not changed and, therefore, the appeals of the NGO were invalid. In contrast, the *Naz Foundation* case in India found more receptive judges, who read down the Section 377. The two examples illustrate that domestic litigation is not a guaranteed success, much depending on the will of the judiciary to decide, often against public opinion and state positions. The same holds true for international litigation, which is usually quasi-judicial and relies entirely on the political will of the offending state to implement recommended remedies and reform.

An alternative but related strategy used has been legislative review. In these cases, activists appeal to specialised parliamentary groups or judicial bodies to review the legislation on decriminalisation with a view to proposing reforms. Ten of the chapters discuss some sort of review, including judicial review (for example, being sought by transsexual women on laws against cross-dressing



in Malaysia). Again, the results have been mixed: in both Botswana and Sri Lanka, the review process actually led to a hardening of the law criminalising same-sex sexual behaviour and extension to include lesbian sexual relations. The first Commonwealth decriminalisation process was also the result of a kind of legislative review in the form of the Wolfenden committee, appointed by the UK Parliament in 1954. It was not until 13 years later that the criminal legislation was changed, however, demonstrating that this is not necessarily a fast track to reform. Nevertheless, as the Canada chapter demonstrates well, Wolfenden did have an effect beyond UK borders. The comparative chapter on the Bahamas, in contrast, offers an interesting example of swift change through legislative review. Some of the cases show that, for legislative review to be successful, it is important to build parliamentary allies. This was clear in Canada, the UK and Australia where committed individual Members of Parliament (MPs) took the review process to the next essential step of tabling a new bill.

Various cultural tools have featured strongly in the repertoire of activists. This comes across strongest in the cases from Malaysia and Singapore, where arts festivals feature, and also in the Caribbean chapter, where Pride festivals are highlighted in Trinidad and Tobago. South Africa was the first African country to hold a Pride parade in 1990. Cultural tools can be useful for socialisation of civil society towards LGBTI communities, which can in turn create less resistance to persuasion by political decision-makers on decriminalisation. Notably, these cultural activities have mostly occurred in states where there are generally low levels of violent persecution of LGBTI persons, but which nevertheless exhibit strong public opinion against homosexuality. The cultural events also underscore the role that civil society actors can play outside of formalised NGOs in advancing the cause of decriminalisation.

Alongside culture, there is also evidence of public outreach campaigns. The chapters discuss this mostly in relation to HIV/AIDS education (for example in Sri Lanka, Botswana, Malawi, Jamaica). There are also good examples of outreach to religious groups in Malawi and Jamaica, and general public appeals through newspaper advertisements (Uganda), public service announcements (Jamaica) and open public meetings (Australia).

There is not much discussion of social movement repertoires such as direct action or protests. The chapters on Canada and Australia are the only ones to cite these more common repertoires, although Pride parades should be considered a form of protest march for many participants, especially in states where decriminalisation has not occurred. Protests have sometimes occurred in front of embassies outside of affected states (noted in the chapters on Malawi and Uganda), but the different extent of public protests no doubt reflects the different dangers and possibilities of visibility in public space in the context of hate crimes and authoritarian policing. Pamphleteering of MPs has also been used in Uganda and Australia. Furthermore, 'information politics' (Keck and

Sikkink 1998) does not feature much in the chapter discussions; information on human rights violations, and research with reliable data and systematic data-analysis, usually serve as key sources of leverage for many CSOs vis-à-vis target actors, usually states. It may be that data collection has been more of a role taken on by international NGOs (see, for example, ILGA's State Sponsored Homophobia reports: Itaborahy 2012), given that information politics is a common strategy of 'transnational advocacy networks' (Keck and Sikkink 1998). Access to information may also be scarce on the ground, due to constraints of freedom of expression and movement on activists or affected groups, or lack of resources and capacity of local organisations to gather this data. This is an important area that could be developed further at national level.

The chapters also show a range of creative tactics used. Activists in Botswana and Canada (with US allies) drafted declarations on LGBTI rights as an advocacy tool. In Malawi, training workshops have been offered for journalists, which have resulted in increased positive coverage in the media. Canadians used a mass letter-writing campaign and efforts were made to publish in leading law journals. Each of these tactics could be transferable across cases and harvested by other movements if appropriate for their context.

### ***Resource mobilisation***

Within national contexts there is limited discussion, and certainly a lack of systematic and focused discussion, of how movements and organisations are resourced, or strategies for resourcing. This certainly reflects the threadbare existence of many activist organisations, and so is very understandable. However, this is suggestive of scope for national activists and analysts to think more about how resourcing impacts on success, and on how to achieve greater resourcing. There appears to be much creative use of the limited resources available through innovative events such as the groundbreaking conference mentioned in Malawi. While Obendorf raises the issue of the internet in Singapore, there is potential for more discussion of how exactly websites, email, social networking and the internet generally are used as resources in the present, and how they could be better used to mobilise existing or potential movement members and their resources more effectively. For example, what are the modes of affiliation or membership in relation to national NGOs campaigning on sexuality and gender issues, and how might these be altered in ways to better use people's cultural, social and financial resources?

In terms of transnational relations, there is little emphasis on national NGOs being able to draw substantially on resources from global NGOs, especially economic resources, but also other kinds of resources: for example, workers with expertise. This is a central issue raised in the resource mobilisation theory approach to social movement theorising, which emphasises a movement's access to and ability to mobilise resources as crucial in determining success

(McCarthy and Zald 1977; McAdam 1982). Where international NGOs are occasionally mentioned in the chapters it is usually for ‘information politics’, for example making statements and condemning human rights abuses. More direct support for human rights campaigning by national or sub-national NGOs seems to be lacking. This suggests that the global resourcing of national organisations working for human rights remains an issue that should be further addressed.

However, it should also be noted that funding of projects by foreign governments is contentious, according to the example given of Norwegian funding in Mwakasungula’s discussion of Malawi, and can play into perceptions of undue foreign intervention. Recent initiatives within major private foundations, such as the Open Society Foundations and the Ford Foundation, to create specific funds for LGBTI civil society initiatives may not be received more favourably by many Southern states. Care is therefore needed in determining how to disseminate resources internationally. It can be noted that not all resources are monetary: research data, expertise and social networks, for example, can also be shared. To give one suggestion: in the light of Obendorf’s comments on Singapore’s enthusiastic adoption of modern information and communication technologies, perhaps sharing experiences or expertise on how to develop national NGO websites, in order to more effectively channel resources and promote participation, might be one low key but effective way to assist. As a second suggestion for global human rights organisations, employing and collaborating with Southern<sup>3</sup> activists as researchers to work on sexual orientation and gender identity issues within frameworks critical of colonialism (as with Alok Gupta’s role in writing *This Alien Legacy* for Human Rights Watch) is not only highly intellectually productive, it can also be a good way to build capacity for research and activism in different nations. There remains a need for more research agendas set by and led from the formerly colonised states.

### **Conclusion: decriminalisation, change and the role of the Commonwealth**

This concluding chapter has presented a comparative analysis of developments in 16 states of the Commonwealth, utilising perspectives from political science and sociology. It began by comparing the various actors involved, including CSOs, state actors and religious organisations. It then moved on to use perspectives from political process and social movement theories to develop comparative discussion with reference to a range of themes: the framing

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

strategies of social movements; the political opportunity structures facing them; the tactical repertoires of practices used; and the forms and extent of resource mobilisation. This analysis has been intended to be facilitative and suggestive for readers in different national contexts, rather than prescriptive. However, it has proposed some important lessons that can be learned, and central points will be summarised here.

A key general finding of this book is that criminal laws against same-sex sexual relations are not heavily enforced in most of the countries examined. This is distinct from public or police harassment, which can be severe even where formal criminal prosecutions are rare. Baudh's discussion in South Asia quotes activists emphasising the rarity of prosecutions in states like Pakistan and Bangladesh, which shows that decriminalisation should not be assumed to be an overriding priority in all national contexts, although even in Pakistan activists suggest that the law forbidding sexual behaviour is used by police to threaten individuals, even where not applied. Criminal proceedings and convictions are low in most states discussed, relative to the extent of behaviour potentially encompassed by law, and even though criminal laws are deeply embedded and expanding in scope, in some cases, to cover same-sex sexual relations between women.

The main issue therefore is not continuation of a historical pattern of prosecutions; it is of largely dormant colonial laws being newly invoked in the context of new contemporary post-colonial nationalisms. These are being formulated partly in reaction to problematic aspects of European and Western sexual nationalisms and transnational moral discourses and political projects. The latter are led by political elites in the North, sometimes suffering delusions of moral grandeur, selectively invoking sexual orientation and gender identity which they perceive as conveniently cost-free human rights issues, while neglecting other more expensive or culturally challenging aspects of human rights (for example the rights of immigrants: Grigolo 2010). This complicates the global politics of decriminalisation, in a context where homosexuality has emerged as a pivotal issue of contestation in global cultural politics and sexual politics, since it implies that the newly global and universalising tendencies of transnational decriminalisation campaigns may have the unintended and indirect effect of fostering reactionary anti-colonial nationalisms which actually increase prosecutions using colonial sex laws. These reactionary nationalisms may exist in any case, but will be worsened by any transparent politicking or hypocrisy on human rights. Hence the political, strategic question is not: how should decriminalisation be pursued? (which is clear as a normative issue, even if some national movements do not see it as an immediate priority, as in Trinidad and Tobago); the key question for all parties seriously involved is, how do we pursue decriminalisation in a manner which does not have the opposite effect to that intended? This question underlies the remainder of the discussion.

While legal prohibitions on same-sex sexual activity are not heavily enforced in many formerly colonised states of the South, protective laws similarly are often not enforced in relation to sexual orientation and gender identity for persons who suffer discrimination, violence, invasions of privacy, restrictions on freedom of assembly and expression, and other human rights violations, including disproportionately to other people. This means that decriminalisation of same-sex sexual relations will not be a panacea for the range of harms suffered, harms that the justice system ignores, perpetuates or, in some cases, directly commits. Rather than assume decriminalisation via legal or political interventions as a primary focus, with a top-down model of social change, it is important to think from the viewpoint of understanding lived experiences of human rights to decide whether decriminalisation campaigns will be successful, and what their social effects will be.

For activists this is important because it means that their strategies for change need to look beyond the narrow laws and decriminalisation to broader human rights issues and standards. The chapters that document successful decriminalisation, such as in South Africa, show that social equality is far from achieved. However, significant landmarks on this road have been reached in many states, such as non-discrimination clauses on sexual orientation or gender identity, recognition of same-sex marriage, and reforms to the age of consent for same-sex sexual relations (see tables 1 and 2 in the introductory chapter).

This comparative analysis shows that there are many ways in which decriminalisation can be achieved, ranging from a Conservative government's initiation of Wolfenden's utilitarian approach of privatisation, medicalisation and moral regulation, as in England and Wales, to the example of South Africa where the equality clause in the Constitution's Bill of Rights emerged from a context of democratic and socialist values. In Singapore, Obendorf's discussion suggests that forming alliances with cosmopolitan neoliberal business interests might be the most effective strategy to win decriminalisation. This chapter therefore argues that decriminalisation may be achieved through a wide variety of political ideologies and strategies.

However, what is apparent in each case is the need for movements to win strong allies – LGBTI people and organisations have never won decriminalisation without support from others, whether from significant voices in the Church of England and political allies like Roy Jenkins, as in England and Wales, or key politicians in the Bahamas, or Nelson Mandela and ANC leaders in South Africa. Moreover, they have needed wide alliances and allies from the 'epistemic communities', discussed in part one, to embody expertise; for example, as Baudh notes in India, including children's rights organisations which could give assurances that decriminalisation would not lead to dangers of child abuse (Waites 2010). The editors feel the national cases analysed show the variety of ways in which this can be done, so above all emphasise the need for movements to show creativity in their own contexts. Recall that Voices

Against 377 shows the benefit of innovative thinking about how to form and project alliances in new ways, beyond all existing models.

To a large extent we believe that building alliances with other human rights groups and CSOs, in order to win decriminalisation via human rights arguments, is often a very helpful way to get rights in relation to sexual orientation and gender identity on the agenda. This can then open up political opportunity structures for further rights extensions in the future. Here, the unintended consequences of social action are important: once human rights become a reference point, this can open up opportunities for human rights NGOs to engage in dialogues with governments, while also introducing the human rights framework to a range of activists who may then innovatively deploy further rights arguments. In South Africa, for example, equality rights have been extended to the legalisation of same-sex adoption, even if such rights currently seem in danger of being undermined under the government of President Zuma.

However, a wariness of the consequences of decriminalisations that have been narrowly conceived in terms of privacy, as in England and Wales, Canada (as Kinsman agrees) and the Bahamas (discussed by Gaskins) has also been communicated. It is suggested that this can lead to a privatisation of same-sex sexualities which maintains second-class citizenship, and may derive partly from dynamics of governmentality involving forms of psychologisation, as identified in the UK chapter, and/or what Jeffrey Weeks (in the Waites UK chapter) terms 'moral regulation' – which the editors also interpret the Bahamas discussion as indicating. Governmentality is a concept originating with Foucault, but reinterpreted and extended in usage by others; it involves some dominant groups acting in a manner oriented to managing and containing those with less power, although typically this involves subscribing to the terms of pervasive discourses rather than highly self-conscious behaviour (a full discussion is not possible here; see Waites on the UK for consideration and references, especially final section). Governmentality may work through a selective usage of human rights – as 'privacy', for example. Gaskins's discussion of the Bahamas' decriminalisation can be interpreted in this way; it is also worth considering whether governmentality may sometimes operate in a much more diffuse and flexible form through a wider range of human rights. The point here is not that recognising governmentality to exist would render such privacy strategies necessarily invalid. Rather, the argument is that pragmatic accommodation with a privacy discourse, for example, can still be a legitimate short- or medium-term strategy for gaining initial acceptance of a human rights framework, since this then opens up the state's political opportunity structures significantly and in often durable ways. In the Bahamas, this has not immediately yielded a full panoply of human rights, but it is suggested here that the benefits have been worth having. Thus, attending to governmentality processes may be important to

recognise the full range of social dynamics occurring, but does not imply that strategic accommodations are invalid.

On the other hand, while emphasising contextual variation and tending to find strategic pragmatism acceptable in some contexts, this book has also placed emphasis on the benefits of trying to shift the wider social and cultural landscape, including via reference to the concept of hegemony. While *Voices Against 377 India* emerges as an admirable model of creativity in the formation of broad alliances, South Africa stands as the most impressive model of what can be achieved through alliances with other radical social movements oriented towards the values of equality and democracy. These two examples clearly go in somewhat different directions. Considering Singapore complicates the picture further since this book's argument has been against the view that movements should never strike strategic positions with conservative political elites, such as the business elites there, given that business arguments on tourism appear to have assisted decriminalisation in the Bahamas. Openness to different strategies is consistent with our emphasis on the pivotal benefits of getting human rights into state discourse as a way of opening up new national and international opportunity structures. Some strategic alliances with business elites in Singapore could be useful in the short term, while simultaneously building independent movements towards wider understandings of rights and equality. The view that one tends to draw from this analysis is that movements should pursue multiple strategies simultaneously, and the evidence is certainly that this is what many movements have tended to do in practice. This conclusion would emphasise both the need for sexuality- and gender-focused groups to form alliances with human rights groups, but also to develop independent movements which are better suited for engaging in wider dialogues and pressing for cultural change.

However, beyond this general approach, a disjuncture is emphasised here between how struggles over decriminalisation are analysed, and wider struggles over human rights. What the case studies clearly suggest is that what works for decriminalisation will not necessarily yield wider human rights. This is very clear in the early cases of England and Canada, but more importantly it is also clear in the more recent crucial case of the Bahamas. In this latter case initial progress on decriminalisation via the human right to privacy is found; yet unlike in South Africa this has not yielded a wider range of human rights. Somewhat similarly in Botswana, Tabengwa and Nicol note legal rulings for human rights in relation to non-discrimination with respect to HIV/AIDS, yet these have not been followed by decriminalisation or wider human rights related to sexual orientation or gender identity. Hence, while the value of the first state endorsement of human rights is emphasised as a way to open up political opportunity structures, the editors do not believe this necessarily or quickly yields wider progress; the range of civil, political, economic, social and cultural human rights remain highly contested.

Partly in response to concern over privacy framings and strategies, we would urge that a priority area of attention for many countries is to maintain public space for action and debate on these issues. Human rights defenders are operating at high risk in many states, often putting their lives on the line for this cause. Tightening laws on criminalisation of same-sex sexual relations is only one component of the efforts to shrink public space for debate on this issue. Protecting human rights defenders can be a common ground for building alliances with other human rights CSOs in-country. This can in turn build stronger solidarity for decriminalisation as CSO relations are solidified.

Regarding the forms of analysis pursued in the chapters, it is suggested that there remains scope for analytical deepening and development of accounts of struggles in different states. Kinsman, for example, draws on theoretical perspectives including materialism and feminist Dorothy Smith's approach to reading texts, and most chapters draw well on gender and sexuality theories. The chapters provide the basis for more sustained application of conceptual frameworks. There remains scope to apply and explore theoretical approaches introduced in Waites's chapter on the United Kingdom, including, for example, with respect to 'moral regulation', elaborations of 'citizenship', discussions of medicalisation, Gramsci's idea of 'hegemony' and Foucault's conception of governmentality. For example, Gaskins's account of how privacy was pivotal in winning decriminalisation in the Bahamas might usefully be interpreted further with reference to the governmentality debate. In general, it is suggested here that there is an important analytical agenda for the future, to deepen national and regional analyses, with reference to the political process and social movement theories foregrounded in this chapter, and also with reference to political, sociological and social science theories and perspectives more broadly.

Finally, this chapter comes to the question of the role of Commonwealth as an organisation in addressing these issues. To begin with, what does this volume's comparative analysis reveal about whether the Commonwealth has played a role until now? Authors of country chapters in this volume make no mention of support from the Commonwealth itself for any human rights initiatives on sexual orientation and gender identity worldwide. There is also little mention of the Commonwealth generally, suggesting scope for further research on how the Commonwealth specifically is perceived in the global South and different national contexts in relation to these issues. Shah's discussion of Malaysia does, however, comment that Premier Najib discussed the decriminalisation issue with UK Prime Minister David Cameron: 'it highlights the fact that the Malaysian government is still forced to respond to its Commonwealth counterparts when issues are made visible'. The opening chapter discussed other Commonwealth activity; however, the reality is that sexual orientation and gender identity have not yet been endorsed as human rights issues by the Commonwealth Heads of Government Meeting (CHOGM).



What does this book's comparative analysis reveal on the subject of whether the Commonwealth could play a positive role in the future? The editors believe the Commonwealth can serve as a useful international forum, including to address North/South power imbalances in certain ways. However, a risk of this volume is that it could be used to make the case for the Commonwealth as a medium to argue the case for decriminalisation, without focusing on how this would be interpreted and received in Southern states. Crucially, any decisions about using the Commonwealth must proceed not simply from normative views about human rights, but also from a careful and realistic understanding of how the Commonwealth is perceived and will be interpreted in the context of global sexual politics.

Authors of the chapters from Africa make negative comments on recent British government suggestions of linkage between LGBT human rights and development aid. Mwakasungula, writing from Malawi, comments: 'Threats of aid cuts if the country does not decriminalise homosexuality will not yield anything'. Similarly, Jjuuko in Uganda comments that 'aid conditionality statements ... have the unfortunate impact of being labelled racist, neo-colonial and Western, and also the LGBTI community is largely blamed for the cut aid and further ostracised'. These comments, together with existing published statements from other activists (cited in the opening chapter) should serve as a warning to governments about how any interventions through the Commonwealth may be perceived, and their likely effects.

Given the current disputed status of human rights related to sexual orientation and gender identity within the Commonwealth, whether the organisation can play any significant role remains unclear. Certainly, it has to be said that if the Commonwealth is an organisation seriously concerned with human rights then it must move forward on these issues. Yet the Commonwealth is in many ways an institution in crisis. The last CHOGM failed to reach any significant agreements on reform in response to the Eminent Persons Group's 'urgent' set of recommendations (Eminent Persons Group 2011). The Commonwealth Secretariat is underfunded and its weak capacity often generates doubts about its effectiveness (Cooper 2011). The Commonwealth Ministerial Action Group (CMAG) has not managed to sanction Sri Lanka sufficiently for its gross violations of human rights; indeed, Sri Lanka will have the honour of hosting the next CHOGM, despite firm protests from civil society groups. Who will head the Commonwealth after Queen Elizabeth II is a looming question (Murphy and Cooper 2012). The former director of the funding organisation, the Commonwealth Foundation, was fired under allegations of racially motivated and sexist bullying of staff (Howden 2011); the Foundation is currently undergoing a relaunch.

The moral, political and operational leadership of the Commonwealth on decriminalisation is therefore severely hindered for these and other reasons discussed in this book, including the members' historical relations born out

of colonial injustices. Careful consideration, and perhaps further research, is needed on how the Commonwealth's characteristics are now perceived in formerly colonised states. For example, the Head of the Commonwealth is a wealthy monarch from a hereditary and thus racialised institution; the Secretariat is based in London at Marlborough House; and the organisation was unable to strike a unified stance on economic sanctions against South Africa under apartheid, largely due to the stance of then Conservative UK Prime Minister Margaret Thatcher. Human rights have only been selectively advanced in limited ways. The question of whether the Commonwealth can become usefully engaged on sexual orientation and gender identity issues is thus inseparable from the question of whether the Commonwealth can reform itself, and how it is perceived. Nevertheless, it is felt appropriate here to propose some possible entry points for Commonwealth institutions to be considered by them and civil society actors willing to countenance such cooperation.

The editors would suggest that if the Commonwealth is seeking a constructive role, it should perhaps play to its strengths. That is, in certain low-key and light-touch ways, such as through existing human rights and development projects and institutional relations, Commonwealth actors could play a greater role in promoting decriminalisation and protection of human rights. For example, existing universal human rights commitments can be invoked with benefits in relation to sexual orientation and gender identity, irrespective of whether new explicit statements on sexual orientation and gender identity emerge.

Within the Commonwealth Secretariat there are several platforms for encouraging reforms. The Secretary General, Kamlesh Sharma, has responded to pressure from NGOs to be vocal on this issue, and he has cautiously but consistently waded into debates in the last couple of years. His stance has been to emphasise human rights for all, without discrimination on any grounds, asserting that this includes on the basis of sexual orientation. He has encouraged individual Commonwealth states to find ways to harmonise their national laws and practices with these universal – and Commonwealth – principles.<sup>4</sup> This is a measured public position that befits his role in balancing the views of Member States. The editors would encourage him to continue these calls, particularly during country visits, where civil society can build on his position. The public rhetoric needs to be matched also by adequate quiet diplomacy to ensure that the calls for reform are being listened to and that support from the Commonwealth is made available when requested.

4 Paragraph 5 of the Affirmation of Commonwealth Values and Principles, declared at the Port of Spain CHOGM in 2009, states: 'our belief that equality and respect for protection and promotion of civil, political, economic, social and cultural rights for all without discrimination on any grounds, including the right to development, are foundations of peaceful, just and stable societies, and that these rights are universal, indivisible, interdependent and interrelated and cannot be implemented selectively'.

The Commonwealth Secretariat is significantly underfunded but nevertheless plays a role in technical cooperation that could be put to good use. One key area of work for the Commonwealth Secretariat's Human Rights Unit has been in supporting Member States to prepare for the UN Human Rights Council's Universal Periodic Review (UPR), wherein all UN Member States are reviewed by other states regarding their human rights record. States make recommendations to those under review, and that recipient state can accept or reject these recommendations in a final report that will be evaluated at the next round of the UPR in about four years' time. Only five Commonwealth states at the UPR have ever made recommendations on sexual orientation and gender identity: Canada, UK, Australia, New Zealand and Bangladesh (UPR Info 2012). Bangladesh, in fact, intervened to encourage the state in question, Tonga, to *retain* its criminalisation of same-sex sexual relations.<sup>5</sup> Thus, there is the possibility to encourage more Commonwealth states, particularly those in the South with progressive laws, to speak out in the Human Rights Council on these issues.

An analysis of UPR recommendations made specifically to Commonwealth Member States on sexual orientation and gender identity reveals that of the 239 recommendations made so far in the various UPR sessions, only 33 have been accepted by Commonwealth Member States, while 155 were rejected; a further 25 recommendations received no response. A comparison with non-Commonwealth states shows that they have accepted 147 of the 255 recommendations made to them on sexual orientation and gender identity. This constitutes a 57.5 per cent acceptance rate, compared to only 13.8 per cent acceptance of such recommendations by Commonwealth states. This is further evidence of the stalwart resistance of Commonwealth states to criticisms of their laws and practice concerning sexual orientation and gender identity (only about 0.4 per cent of UPR recommendations to Commonwealth states have been on this topic). Given the strong recommendations that Commonwealth states receive on these issues, it could be within the scope of the Commonwealth Secretariat to assist states in reviewing these UPR recommendations, and preparing now for the second round of UPR sessions, to see if incremental changes can be made. For example, the introduction of laws prohibiting discrimination in employment on the grounds of sexual orientation has been one important incremental step made in some Commonwealth states that still criminalise same-sex sexual behaviour (see table 1.1 in the opening chapter).

The Commonwealth Secretariat also extends support to NHRIs, police training, parliamentary training and legislative reform. In each role, there

5 The UPR session report records that Bangladesh made the following recommendation: 'Continue to criminalize consensual same sex, which is outside the purview of universally accepted human rights norms, according to Tonga's national legislation'. UN Doc. A/HRC/8/48, 5 June 2008, para. 58.

is scope for introducing discussion on sexual orientation and gender identity, including in countries that criminalise. For example, NHRIs could be introduced to emerging trends in legislation and public policy globally on these issues, including identifying opportunities for incremental change. The police training should cover, *inter alia*, responsibilities to protect all persons against incitement to hatred and violence on the grounds of sexual orientation or gender identity. Parliamentarians who wish can discuss the constraints they face in leading reforms. Work on legislative drafting support can make recommendations for legal protections on sexual orientation and gender identity, where entry points exist, including beyond the narrow focus on laws prohibiting same-sex sexual behaviour.

The supposedly tougher arm of the Commonwealth on human rights is the CMAG. Given its lacklustre efforts on a wide range of human rights crises in the Commonwealth, it is unlikely to make a strong stand on decriminalisation. Where it could be useful is in mainstreaming LGBTI rights protection into broader statements on human rights, such as on freedom of association, human rights defenders and access to justice. The proposal for a Commonwealth Commissioner for Democracy, the Rule of Law and Human Rights is still on the table. Should such a position come into existence, decriminalisation ought to figure prominently on her/his agenda, but in the interests of stabilising a new and fragile institution, the Commissioner may take a cautionary approach. Much will depend on the identity of the individual chosen to fill this post and her/his personal networks with drivers of change in key states. Most importantly, the new Charter of the Commonwealth, enacted on 11 March 2013, emphasises human rights as indivisible and opposes 'all forms of discrimination', but does not explicitly mention sexual orientation and gender identity – a crucial omission (The Commonwealth 2013). The Charter does, however, reinforce certain principles, such as human dignity and tolerance, and human rights, including freedom of expression and freedom of assembly, which can contribute to future reforms.

Three other important themes of Commonwealth work are gender, HIV/AIDS and democracy. Ministerial level networks exist on these issues within the Commonwealth, providing opportunities for exchange. On gender, the Commonwealth has a Commonwealth Plan of Action for Gender Equality 2005–2015 and Commonwealth Gender Plan of Action Monitoring Group; while the former does not explicitly mention gender diversity or sexual orientation, there is scope for the latter to read this into the relevant sections of the Plan of Action. The Commonwealth Women's Affairs Ministers Meetings, held every three years, are another platform for integrating these issues. This change also hinges on national CSOs focused on gender equality broadening their understandings as well, and including attention to gender identity and sexual orientation in their advocacy and policy. HIV/AIDS deeply affects Commonwealth states and as the chapters here have shown, this frame has been

a starting point for useful cooperation. The Commonwealth Secretariat's work has focused on access to medication from both legal and policy perspectives; this could helpfully include a dimension on access for LGBTI persons and MSM. The Commonwealth Foundation has concentrated on building civil society capacities, which could also make efforts to include LGBTI organisations as beneficiaries and could encourage mainstream NGOs to support inclusion of these groups in their work. Finally, democracy has featured strongly in Commonwealth discourses and policy. This book has discussed how the narrow focus on decriminalisation may obscure wider aims for inclusive and equal citizenship rights, regardless of a person's sexual orientation or gender identity. From citizenship education to the Commonwealth Youth Programme, there may be outlets for sensitising people to sexual and gender diversity through the prisms of democracy, citizenship and equality.

The Commonwealth claims to be an institution for states but also for people. Numerous dedicated Commonwealth-focused NGOs exist on a range of topics from human rights to various professional associations. NGOs focused on LGBTI issues have been able to get recognition in the Commonwealth People's Forum, held ahead of the CHOGM. This has often come at great risk for human rights defenders and with little financing to enable their equal representation (Robinson 2012). In order to continue and expand this participation in Commonwealth civil society initiatives, designated funding streams are needed, particularly for those from the South. Special attention should be given by Commonwealth institutions and host states to protecting human rights defenders who want to make their voices heard in such fora and beyond. This means support to NHRIs, police training, media freedoms and review of laws on NGO registration, all of which have fallen within the purview of Commonwealth activities. Support to civil society initiatives for trans-Commonwealth dialogue and knowledge exchange is also needed. Funding can be scarce and the source of funding can be politically charged, particularly if coming from the North to support Southern initiatives. It is not clear how funding from Commonwealth institutions would be perceived by opposing groups but it is likely to instigate less reprobation than many other forms of direct state or private foundation funding.

There are also many branches of Commonwealth associations that could serve as a platform for further dialogue. The Commonwealth Lawyers Association has made important efforts to review criminal laws and has tried to stimulate spaces for free debate among representatives of Commonwealth Law Ministries (see Cowell, this volume). The Association has also come out with strong statements condemning violations of human rights. The Commonwealth Law Conference, held every three years for legal practitioners, is another example of a useful space for dialogue and sharing practical experiences of law reform and litigation. The Commonwealth Parliamentary Association and the Association of Commonwealth Universities are just two examples of other

Commonwealth-focused groups that could take up these issues with greater urgency. It is also worth noting the work of the Commonwealth Foundation is promoting cultural connections, mostly through English-language literature, across the Commonwealth. Within these initiatives for writers there could be opportunities for stories on sexual orientation and gender identity and associated struggles to be exposed and discussed.

The Commonwealth has made a great fanfare of its multi-faith dimension, evidenced by the number of Commonwealth Day multi-faith services held, including at Westminster Abbey. This concluding chapter has shown the great potential of faith-based groups for progressive or regressive views on criminalisation and other rights issues. The Commonwealth could use this dimension of its identity to bring faith leaders together for dialogue under the banner of Commonwealth values of human rights and democracy. This would not be likely to lead to consensus, but it could at least assist in dialogues over the legitimate role of states vis-à-vis promulgation of religious values, and could expose hardliners to faith-based arguments for accepting (or at least tolerating) different sexual orientations and gender diversity.

In concluding it must be re-emphasised that all these ways in which Commonwealth institutions might potentially be able to make a contribution are to be considered in the wider context of the contested nature and reforms of the Commonwealth, the ways in which national governments seek to utilise it, and global politics and economics more generally. These potential ways to use the Commonwealth will succeed or fail according to the extent to which it reinvents itself to address global power relations. Such power relations include colonialism's lasting influence on the structured inequalities of contemporary economic relations.

A critical assessment of the Commonwealth by former Indian Foreign Secretary and Deputy Secretary-General of the Commonwealth Krishnan Srinivasan (2005, 2006) suggests that the organisation has become 'Nobody's Commonwealth' due to a lack of coherence on issues such as South Africa and Zimbabwe. Srinivasan notes 'an almost total deficit in leadership' and poses the question 'whether any practical future can be envisaged' (Srinivasan 2006, pp. 266, 258). A major part of the answer currently being posed, notably by proponents of the Charter of the Commonwealth and in accordance with Srinivasan's call for a more 'principles-based' association, is human rights – and human rights related to sexual orientation and gender identity are inescapably wedded to this wider project of reinvention. Equal rights were endorsed in the Singapore Declaration of 1971, and the Harare Declaration of 1991 affirmed fundamental human rights, including equal rights and opportunities of all citizens regardless of race, colour, creed or political belief (see opening chapter). Only the new Charter of the Commonwealth in 2013 has fully embedded human rights in the Commonwealth, and although human rights work forms a significant part of the Commonwealth's activities, the development

of principles into practices remains limited. The pre-existing context therefore implies major risks and dangers if human rights related to sexual orientation and gender identity become perceived to be granted special attention.

Importantly any possible moves to use existing Commonwealth institutions, such as we have suggested, must be considered with an appreciation of the ways in which decolonisation has not taken place, and hence how colonial attitudes and practices sometimes persist, including within such institutions, their discourses, practices and cultures. Commonwealth institutions themselves, and their influence, should be analysed from sociological and intersectional perspectives attentive to multiple inequalities, and researched as such – a task beyond the scope of this book. However, the greater problem is how the Commonwealth is perceived globally, such that unless it takes symbolic and substantial steps to change – such as dispersing or rotating the currently London-based Secretariat, or removing the British monarchy's role – then its legitimacy in relation to human rights will be limited. Pursuit of human rights on sexual orientation and gender identity via Commonwealth institutions is only likely to be productive if within a project where those institutions can be reinvented to focus more on human rights generally, and where there is also institutional reform, democratisation and the dissemination of power. Yet the prospects for that general project, and the Commonwealth's overall coherence, remain highly uncertain.

Here we can only acknowledge the tensions and help open up, rather than resolve, necessary debates over the extent to which the Commonwealth can be reinvented through human rights to have a positive role. It is clear that if the Commonwealth were to become a vehicle for human rights related to sexual orientation and gender identity without being perceived to adequately address other pressing human rights issues, then it will lack credibility. Its involvement in that way could prove counter-productive in generating reactive responses.

A central task for the Commonwealth then is to seek more credibility and visibility in supporting human rights generally, and hence to pursue rights related to sexual orientation and gender identity within that framework. The opening chapter suggested that there is a need for Southern states in the Commonwealth to take positions of moral and political leadership in decriminalisation and change, and that is also the case in relation to human rights generally. The chapters have discussed in some depth the constraints that state actors face in taking such leadership roles and the tensions between Southern and Northern activists in working for state reforms. Northern states and international NGOs can still play a positive role if they espouse both Commonwealth values and universal principles of human rights in their calls for respecting human dignity, equality and non-discrimination for all, and also seek to advance these in practice. However, it is voices of the South that will carry the greatest legitimacy in eradicating a harmful colonial legacy. We hope this book has helped to make those voices heard and we hope its content will

contribute to continuing struggles for human rights, decriminalisation and change across the Commonwealth.

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