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Chapter 2 (Volume 3)

Contesting Lesbian, Gay and Bisexual Human Rights in the Commonwealth

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1. Introduction

The Commonwealth is the intergovernmental organization of states that emerged from the former British Empire. Due largely to this imperial legacy, the majority of its 53 Member States still have laws criminalizing adult same-sex sexual behavior, subjecting more than 90% of the Commonwealth's population to such laws.¹ Mainly for this reason, the Commonwealth has in the past decade been engaged by lesbian, gay, bisexual, transgender and intersex (LGBTI) activists as a new institutional framework for transnational sexual politics.² Such engagements, while initiated by Sexual Minorities Uganda, in Kampala, in 2007, have more recently involved UK activists, and pose questions about postcolonial power relations in the 'global queer politics'³ that can be understood to encompass contestations of sex, gender and sexuality associated with a privileging of heterosexuality.

This chapter begins by offering an introduction to the Commonwealth and an overview of the legal regulation of sexual orientation in Commonwealth Member States, particularly with respect to the criminalization of consensual same-sex sexual conduct. With reference to the first study in this context, *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change*,⁴ this chapter provides an updated account of decriminalizations, recriminalizations and wider legal changes.

¹ Lewis Brooks and Alistair Stewart, *Collaboration and Consensus: Building a Constructive Commonwealth Approach to LGBT Rights*, London: Royal Commonwealth Society and Kaleidoscope Trust, March 2015: p. 4.

² There may be some deliberate variation in our choices of acronyms such as LGB, LGBT or LGBTI (lesbian, gay, bisexual, transgender, intersex) as appropriate in different contexts. We also use sexual orientation and gender identity, which are generally broader than the western identity concepts LGBT, so not interchangeable. For discussion see note 3, below.

³ Matthew Waites, 'Critique of "sexual orientation" and "gender identity" in human rights discourse: global queer politics beyond the Yogyakarta Principles', in eds. Kelly Kollman and Matthew Waites, *The Global Politics of LGBT Human Rights, special issue, Contemporary Politics* 15, no.1 (2009): 137-156.

⁴ Corinne Lennox and Matthew Waites eds., *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change* (London: School of Advanced Study, 2013), accessed April 13, 2018, <http://commonwealth.sas.ac.uk/resources/publications/house-publications/lgbt-rights-commonwealth/contents>.

Section 2 considers the efforts within Commonwealth institutions to address LGB rights, giving particular attention to the elements of success evident at the most recent Commonwealth Heads of Government Meetings (CHOGMs).

Section 3 surveys key activist work including the formation of The Commonwealth Equality Network (TCEN) as a new transnational activist network. The final section considers the relationship between grassroots, national and international contexts, and concludes that transnational activism with the Commonwealth has the potential to be beneficial, but this needs to utilize decolonizing strategies embodying consciousness of how imperialism continues to shape global power relations, especially given the risks of reaction from governments and movement leaders in states that still criminalize.

2. The Criminal Legacies of the British Empire

The British Commonwealth of Nations first emerged within the British Empire in the 1880s, prior to the emergence of the so-called modern Commonwealth as a voluntary association of equal states in the context of decolonization, as signaled by the 1949 London Declaration.⁵ It has been joined in recent years, by two African states that were not part of the British Empire – Mozambique and Rwanda.⁶ The current membership is thus 53 states, encompassing approximately two billion people of diverse cultures.⁷ The Commonwealth retains a number of features shaped by imperialism: for example, the Commonwealth Secretariat is based in London, and the Head of the Commonwealth remains the British Monarch, Queen Elizabeth II – with Prince Charles agreeing, in 2018, to follow.⁸ Indeed it is the history of British

⁵ The London Declaration (1949), accessed April 12, 2018, <http://thecommonwealth.org/sites/default/files/history-items/documents/London%20Declaration%20of%201949.pdf>.

⁶ For more information, see W. David McIntyre, "Expansion of the Commonwealth and the Criteria for Membership", *The Round Table*, Vol. 97, (395), 2008: pp. 273-285.

⁷ Commonwealth Secretariat, *Member Countries*, accessed April 12, 2018, <http://thecommonwealth.org/member-countries>.

⁸ There is no statutory requirement that the position of the Head of the Commonwealth is hereditary, so it is indeterminate whether future British Monarchs will retain this position in the

imperialism and its criminalization of same-sex sexual activity which has led to current interest in the Commonwealth in the politics of sexuality.

It was the British Empire that played the leading role in criminalizing same-sex sexual behavior between men worldwide. Following from buggery laws created by Henry VIII in England, Wales and Ireland in 1533,⁹ imperial criminalization of same-sex sexual behavior began in the mid-nineteenth century with the Indian *Penal Code* (1860). Section 377 created the 'Unnatural Offences' provision that included 'carnal intercourse against the order of nature with any man, woman or animal', with 'Penetration [...] sufficient to constitute the carnal intercourse'.¹⁰ Potential punishment included 'imprisonment for life', and consent in this formulation was irrelevant. This 'became the model for British colonies' legal systems' and was subsequently extended in similar formats across other territories of the Empire.¹¹ After the British state created a new offence of 'gross indecency' between men, via the *Criminal Law Amendment Act 1885*, criminalization spread; for example 'gross indecency' was used alongside 'carnal intercourse' in Sudan in 1899, and in Malaysia and Singapore in 1938. There were varying formulations such as in the Australian state of Queensland from 1899 which made explicit criminalization of any person who 'permits' 'carnal knowledge of him or her against the order of nature'.¹² In India, Section 377 gradually became more widely interpreted, for example, to include oral sex, and even rubbing a penis between thighs.¹³

British law did not criminalize sex between women, and the focus of 'carnal intercourse against the order of nature' on 'penetration' meant it was only applied to male perpetrators; in India it was not used 'to prosecute [...] a

future. Philip Murphy, *Monarchy and the End of Empire: The House of Windsor, the British Government and the Postwar Commonwealth*, Oxford: Oxford University Press, 2013: p. 47.

⁹ Jeffrey Weeks, *Politics and Society: The regulation of sexuality since 1800*, 3rd ed., (Abington: Routledge, 2012).

¹⁰ *Indian Penal Code* (1860) Act 45, 6 October 1860.

¹¹ Human Rights Watch, *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism* (New York: Human Rights Watch, 2008), p. 21, accessed April 12, 2017 <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>.

¹² *Ibid*, p. 22.

¹³ *Ibid*, p. 40-41.

lesbian couple'.¹⁴ Regarding sex between women, Human Rights Watch asserts that 'British colonialism never imported criminal penalties for it'; and that "gross indecency" [...] only targets acts between men'.¹⁵ There is scope for further research on the formulation and application of prohibitions against gross indecency across states, but generally these also seem to have focused on males. However, starting from the 1980s many Commonwealth states reformulated indecency laws by making them gender-neutral and or by adding females to bring women within their scope.¹⁶ This was sometimes the result of legal judgments that concluded that existing laws were 'discriminatory' as they only applied to men, as occurred in cases in Botswana and the Solomon Islands.¹⁷

Moves towards decriminalizing same-sex sexual behavior between men began in the United Kingdom, with the Wolfenden report of a government-appointed committee recommending that a consensual 'homosexual act' between adults 'in private' – meaning with only two men present – should not be a criminal offence.¹⁸ This provided the main rationale for the first partial decriminalization of same-sex behavior in the Commonwealth, in England and Wales in 1967; although this was not followed in Scotland until 1980, or in Northern Ireland until 1982.¹⁹ Currently 36 of the 53 Member States have laws criminalizing adult same-sex sexual behavior.²⁰ This is roughly half of

¹⁴ Arvind Narrain, 'The articulation of rights around sexuality and health: subaltern queer cultures in India in the age of the Hindutva', *Health and Human Rights* 7, no. 2 (2004): 151.

¹⁵ Human Rights Watch, *This Alien Legacy*, 37,49, pp. 48-51.

¹⁶ This was the case for Trinidad and Tobago in 1986, Solomon Islands in 1990, Barbados in 1992, Sri Lanka in 1995, Botswana in 1998, Malaysia in 1998, The Gambia in 2005, Zambia in 2005 and Malawi in 2011. Human Dignity Trust, *Breaking the Silence: Criminalisation of Lesbians and Bisexual Women and its Impacts*, London: Human Dignity Trust, 2016: p. 10, accessed April 20, 2018, http://www.humandignitytrust.org/uploaded/Library/Other_Material/Breaking_the_Silence-Criminalisation_of_LB_Women_and_its_Impacts-FINAL.pdf,

¹⁷ Ibid, p. 11.

¹⁸ Committee on Homosexual Offences and Prostitution, Home Office and Scottish Home Department, *Report of the Committee on Homosexual Offences and Prostitution*, Cmnd. 247 (London: HMSO, 1957).

¹⁹ Stephen Jeffery-Poulter, *Peers, Queer and Commons: The Struggle for Gay Law Reform from 1950 to the Present* (London: Routledge, 1991), 147-151.

²⁰ Kaleidoscope Trust, *Speaking Out: The Rights of LGBTI People Across the Commonwealth* (London: Kaleidoscope Trust, 2015); Human Dignity Trust, 'Commonwealth Countries Criminalising Private Consensual Sexual Conduct Between Adults of the Same Sex',

the 71 states where clear criminalization of same-sex acts in private has been recorded by ILGA.²¹

In 2013, two of the present authors provided the first systematic analysis of data on laws related to sexual orientation and gender identity in Commonwealth states.²² This drew on data from the International Lesbian, Gay, Bisexual, Trans and Intersex Association's (ILGA) Annual Report State-Sponsored Homophobia for 2012.²³ This chapter offers an updated account, drawing on the latest available data from the 2017 ILGA report.²⁴

Since the original analysis in 2013, the departure of Maldives from the Commonwealth has reduced the number of member states to 53.²⁵ The Gambia left the Commonwealth in 2013 during a period where it tightened criminalization of same-sex sexual behavior via the *Criminal Code (Amendment) Act 2005*, and provided the penalty of life imprisonment for 'aggravated homosexuality'.²⁶ Former President Jammeh was quoted in

accessed 26 May 2018

<http://www.humandignitytrust.org/pages/COUNTRY%20INFO/Commonwealth%20Countries>

²¹ ILGA, Aengus Carroll and Lucas Ramón Mendos, *State-Sponsored Homophobia: A world survey of sexual orientation laws – criminalisation, protection and recognition*, 12th edition (Geneva: International Lesbian, Gay, Bisexual Trans and Intersex Association, 2017), https://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf accessed 26 May 2018. www.antigaylaws.org argues for 74 instances where criminalisation exists under wider laws including Lesotho common law on sodomy; <https://antigaylaws.org/> accessed 26 May 2018.

²² Corinne Lennox and Matthew Waites, "Human rights, sexual orientation and gender identity in the Commonwealth: from history and law to developing activism and transnational dialogues", in Corinne Lennox and Matthew Waites eds., *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change* (London: School of Advanced Study, 2013), pp. 1-59, accessed April 13, 2018, <http://commonwealth.sas.ac.uk/resources/publications/house-publications/lgbt-rights-commonwealth/contents>

²³ Lucas Paoli Itaborahy, *State-Sponsored Homophobia: A World Survey of Laws Criminalising Same-Sex Sexual Acts between Consenting Adults*, 7th edition (Geneva: International Lesbian, Gay, Bisexual Trans and Intersex Association, 2012).

²⁴ ILGA, *State-Sponsored Homophobia*, 2017.

²⁵ BBC, 'UK regrets The Gambia's withdrawal from the Commonwealth', October 3, 2015, accessed April 14, 2018, <http://www.bbc.co.uk/news/uk-24376127>.

²⁶ The Guardian, 'The Gambia passes bill imposing life sentences for some homosexual acts', September 9, 2014, accessed April 14, 2018, <http://www.theguardian.com/world/2014/sep/09/gambia-passes-bill-life-imprisonment-homosexual-acts>.

2015, as saying 'If you do it, I will slit your throat'.²⁷ Under the new President Barrow, The Gambia was accepted back into the Commonwealth, in 2018.

Other developments since the last analysis include Fiji being reinstated as a member of the Commonwealth following the withdrawal of its suspension.²⁸ This is significant since Fiji is one of the few Commonwealth states to have decriminalized same-sex sexual acts.²⁹

There were also changes in the number of Member States which criminalize same-sex behavior. India was perceived as having decriminalized,³⁰ following the celebrated Delhi High Court ruling of 2009.³¹ However, four years later, on 11 December 2013, India's Supreme Court over-turned this decision in the case of *Suresh Kumar Kaushal v Naz Foundation* resulting in the first notable recriminalization to occur in the Commonwealth. A Supreme Court decision on a curative petition in February 2016, led to referral of several petitions to a Constitution Bench, which has reopened the possibility of Section 377 being found to be unconstitutional. A Supreme Court constitutional bench is considering the issue.³²

There has also been positive news. Mozambique decriminalized adult same-sex sexual behavior when introducing a new *Penal Code* in 2015, which did

²⁷ Kayla Ruble 'Gambian President Says He Will Slit Gay Men's Throats in Public Speech', *Vice News*, May 11, 2015, accessed April 15, 2018, <https://news.vice.com/article/gambian-president-says-he-will-slit-gay-mens-throats-in-public-speech>.

²⁸ Commonwealth Secretariat, 'Fiji flag flies again following Commonwealth Ministerial Action Group decision', 17 March 17, 2014, accessed April 15, 2018 <http://thecommonwealth.org/media/news/fiji-flag-flies-again-following-commonwealth-ministerial-action-group-decision>; Nexus Commonwealth Network, 'Welcome to Fiji', accessed April 14, 2018, <http://www.commonwealthofnations.org/country/Fiji/>.

²⁹ Fiji decriminalized in 2010. See, UNAIDS, *Fiji first Pacific Island nation with colonial-era sodomy laws to formally to decriminalize homosexuality*, 4 March 2010, accessed June 15, 2018, <http://www.unaids.org/en/resources/presscentre/featurestories/2010/march/20100304fiji>.

³⁰ Arvind Narrain and Alok Gupta, eds., *Law Like Love: Queer Perspectives on Law* (Delhi: Yoda Press, 2011).

³¹ Matthew Waites, 'Human rights, sexual orientation and the generation of childhoods: analysing the partial decriminalisation of "unnatural offences" in India'; in P.Hynes, M.Lamb, D. Short and M.Waites, eds. *Sociology and Human Rights: New Engagements, special issue, International Journal of Human Rights* 14, no. 6 (2010): 971-993.

³² Lawyers Collective 'Fresh petitions filed challenging constitutional validity of Section 377 IPC', <http://www.lawyerscollective.org/updates/fresh-petitions-filed-challenging-constitutional-validity-of-section-377-ipc> accessed 26 May 2018.

not include any offences 'against nature'.³³ Similarly, in the small Pacific island state of Nauru, the Parliament passed the *Crimes Act 2016*, which repealed the *Criminal Code of 1899* (based on that found in Queensland) and consequently legalized same-sex sexual behavior.³⁴ In the Seychelles, the Parliament amended, in 2016, section 151 of the *Penal Code* to decriminalize the 'unnatural offences' provisions.³⁵ In August 2016, a long awaited judgement from the Supreme Court of Belize decided in favour of the applicant Caleb Orozco, ruled that the ban on homosexual behavior was unconstitutional.³⁶ In a similar ruling, the High Court of Justice of Trinidad and Tobago ruled in April 2018 that the sections of the *Sexual Offences Act*, which prohibited "buggery" and "serious indecency", were unconstitutional.³⁷ It is possible that the rulings could support similar cases being made in other jurisdictions in Caribbean states, such as Jamaica.³⁸

Decriminalization in the Commonwealth has thus occurred in England and Wales (1967), Canada (1969), Malta (1973), Australia (commencing 1972, concluding in Tasmania in 1997), Scotland (1980), Northern Ireland (1982), New Zealand (1986), The Bahamas (1991), Cyprus (1998), South Africa (1998), Vanuatu (2007), India (2009, reversed 2013), Fiji Islands (2010), Lesotho (2010), Mozambique (2015), Nauru (2016), Seychelles (2016), Belize (2016) and Trinidad and Tobago (2018). Same-sex sexual acts have never

³³ BBC, 'Mozambique decriminalises gay and lesbian relationships', July 1, 2015, accessed April 15, 2018, <http://www.bbc.co.uk/news/world-africa-33342963>.

³⁴ The Guardian, 'Nauru decriminalises homosexuality and suicide', May 29, 2016, accessed April 15, 2018, <https://www.theguardian.com/world/2016/may/29/nauru-decriminalises-homosexuality-and-suicide>.

³⁵ Nick Duffy, 'Seychelles repeals colonial-era law banning gay sex', *Pink News*, May 18, 2016, accessed April 15, 2018, <http://www.pinknews.co.uk/2016/05/18/seychelles-repeals-colonial-era-law-banning-gay-sex/>.

³⁶ Colin Stewart, 'Top court in Belize overturns sodomy law', *Erasing 76 Crimes*, August 10 2016, accessed April 15, 2018, <https://76crimes.com/2016/08/10/top-court-in-belize-overturns-sodomy-law/>.

³⁷ Human Rights Watch, *Trinidad and Tobago: Court Overturns Same-Sex Intimacy Ban*, 13 April 2018, accessed 30 April 2018, <https://www.hrw.org/news/2018/04/13/trinidad-and-tobago-court-overturns-same-sex-intimacy-ban>

³⁸ The case in Jamaica was filed with the Supreme Court in November 2015 by Maurice Tomlinson to challenge the constitutionality of the criminalization laws; see Rebekah Kebede, 'Jamaica activist challenges anti-gay law in bid to end violence, discrimination', *Reuters*, December 10, 2015, accessed April 15, 2018, <http://www.reuters.com/article/us-jamaica-lgbt-reform-idUSKBN0TT30Q20151210>.

been criminalized in Rwanda.³⁹

There is one Commonwealth state, Nigeria, where the death penalty is available as a punishment for same-sex sexual behavior by men in 12 states under Sharia law; for women the punishment is up to 50 lashes and/or six months' imprisonment.⁴⁰ The Nigerian *Same-Sex Marriage (Prohibition) Act 2014* also criminalized 'public show of same-sex amorous relationships'. Brunei Darussalam has been phasing in a new *Syariah Penal Code*, which, when fully implemented, will include the death penalty for same-sex sexual acts.⁴¹

On the positive side, South Africa included a groundbreaking prohibition against discrimination on the basis of sexual orientation in its Constitution.⁴² The UK associate territory of the British Virgin Islands has also had this since 2007. Fiji had such a constitutional provision from 1997 until 2009, was and it was included again in the new Constitution adopted in 2013; Malta has also had a constitutional prohibition on discrimination on the basis of sexual orientation since 2014.⁴³

Apart from the criminalization laws, there are several other points of legal inequality worth noting. For example, the partial decriminalization for sex between men in England and Wales in 1967 created an age of consent of 21, influencing adoption of the same unequal age in Canada in 1969.⁴⁴ In Australia, equalization of age of consent laws commenced in South Australia

³⁹ ILGA, *State-Sponsored Homophobia*, 2017; Lennox and Waites, 'Human rights, sexual orientation and gender identity in the Commonwealth,' pp. 20-22.

⁴⁰ Human Dignity Trust, *Criminalisation of Homosexuality: Nigeria*, October 25, 2015, accessed April 15, 2018, http://www.humandignitytrust.org/uploaded/Map/Country_Reports/Nigeria.pdf.

⁴¹ In Brunei, Section 377 remains in the Penal Code. However, the Sultan Hassanal Bolkiah has decided to phase in Sharia law to the penal code. This includes plans to legislate death by stoning for sodomy (*liwat*) crimes including sexual intercourse between men. ILGA, *State-Sponsored Homophobia*, 2017: p. 123.

⁴² See Section 9(3).

⁴³ ILGA, *State-Sponsored Homophobia* 2017, 46-47. See Section 26(3)(a) of the Constitution of the Republic of Fiji (2013).

⁴⁴ Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (Houndmills: Palgrave Macmillan, 2005). Lennox and Waites, *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth*, 2013.

in 1975, and all federal states and territories followed suit by 2004⁴⁵ — except Queensland, which retained unequal age of consent laws until 2016⁴⁶ Mozambique does not appear to have an age of consent, so the recent decriminalization of same-sex behavior can be taken as an equalization of age of consent.⁴⁷

Employment discrimination laws relating to sexual orientation have emerged in 15 Commonwealth Member States.⁴⁸ Reforms emerging in areas of Africa is something from which strategists for change should derive lessons about various openings. For example Botswana's *Employment (Amendment) Act 2010* addressing health discrimination including HIV provided an opportunity for lobbyists to include sexual orientation⁴⁹.

Regarding hate crimes, there are only five states in the Commonwealth where sexual orientation is defined as an aggravating factor.⁵⁰ Incitement to hatred with respect to sexual orientation is outlawed in South Africa (2000), Canada (2004) the UK (2004-2010), Cyprus (2011) and Malta (2012), plus some states within Australia.⁵¹

⁴⁵ ILGA and Aengus Carroll, *State-Sponsored Homophobia: A World Survey of Sexual Orientation Laws – Criminalisation, Protection and Recognition*, 11th edition (Geneva: International Lesbian, Gay, Bisexual Trans and Intersex Association, 2016) 38-39. Other equalizations have included in Malta (1973), New Zealand (1986), United Kingdom (2001), Cyprus (2002), South Africa (2007), Vanuatu (2007), Fiji Islands (2010), Lesotho (2010), Seychelles (2016) and Nauru (2016). Contrary to the 2016 ILGA report, the age of consent in Northern Ireland was first equalized at 17 by the United Kingdom's Sexual Offences (Amendment) Act 2000, in effect from 2001. The 2017 report does not have a section on age of consent.

⁴⁶ Gail Burke 'Queensland government lowers age of consent for anal sex to 16', ABC, <http://www.abc.net.au/news/2016-09-15/queensland-standardises-age-of-consent-laws-anal-sex/7850112> (accessed 26 May 2018).

⁴⁷ Global Resources and Information Directory, *Mozambique*, accessed 13 December, 2015, accessed April 15, 2017, <http://www.fosigrid.org/africa/mozambique>.

⁴⁸ These are: Australia (1983-2002), New Zealand (1994), Canada (1996), South Africa (1996), United Kingdom (2003), Cyprus (2004), Malta (2004), Seychelles (2006), Fiji Islands (2007), Mozambique (2007), Mauritius (2008), Botswana (2010), Samoa (2013), Vanuatu (2013) and Kiribati (2015). ILGA, *State-Sponsored Homophobia*, 2017, 48-53.

⁴⁹ Sunday Standard 'New Employment Act Recognises Sexual Orientation', 11 April 2016, <http://www.sundaystandard.info/new-employment-act-recognises-sexual-orientation> (accessed 26 May 2018).

⁵⁰ These are: Canada (1996), New Zealand (2002), the United Kingdom (2004-2010), Malta (2012), and Samoa (2016). ILGA, *State-Sponsored Homophobia*, 2017, 60-63.

⁵¹ Ibid, 63-66.

Turning finally to laws recognizing same-sex partnerships and adoption, among Commonwealth states, marriage equality has been achieved in Canada (2005), South Africa (2006), New Zealand (2013) and most of the United Kingdom (2014) – with the exception of Northern Ireland, despite legal and political challenges. Marriage equality was most recently achieved in Australia in late 2017; and same-sex partnership laws also exist in Malta (2014).⁵² By way of comparison, by July 2018 there are 26 states worldwide with same-sex marriage,⁵³ among 193 member states of the United Nations, and 28 states with same-sex partnership laws, so Commonwealth states compare poorly to all global states.

There is joint adoption by same-sex couples in the Commonwealth states of South Africa (2002), the United Kingdom (2005-2013), Canada (1996-2009), Australia (2002-2017, except Northern Territory), New Zealand (2013) and Malta (2014). These six states compares to 26 states with joint adoption globally, so again the Commonwealth states suffer by comparison ⁵⁴

In sum, the Commonwealth Member States perform poorly relative to all states globally when it comes to formal legal equality and other rights for LGB persons.⁵⁵ This can be attributed in part to British colonial legacies but is also rooted in contemporary political, social and cultural norms and contestations, which have informed law making.

3. Commonwealth Engagement on LGB rights

To understand the development of LGB rights activism in the Commonwealth, it is first necessary to understand that human rights were not initially a central

⁵² Ibid, 68-72. Paul Karp 'Marriage equality law passes Australia's parliament in landslide vote', The Guardian, 7 December 2017. <https://www.theguardian.com/australia-news/2017/dec/07/marriage-equality-law-passes-australias-parliament-in-landslide-vote> accessed 26 May 2018.

⁵³ See <https://www.sbs.com.au/news/same-sex-marriage-around-the-world-how-many-countries-have-legalised-it> accessed 5 July 2018.

⁵⁴ Ibid, 73-77.

⁵⁵ Lennox and Waites, 'Human rights, sexual orientation and gender identity in the Commonwealth'.

part of the organization. Reference to 'equal rights for all citizens regardless of race, colour, creed or political belief' began in the Singapore Declaration of Commonwealth Principles (1971),⁵⁶ with reference to 'fundamental human rights' only following in the Harare Declaration of 1991.⁵⁷ It was only in 2013, that a Charter of the Commonwealth made human rights central.⁵⁸ This latest Charter does not expressly mention sexual orientation, but it does adopt a broader prohibition of discrimination for all 'on any grounds', further emphasizing that human rights 'cannot be implemented selectively. We are implacably opposed to all forms of discrimination, whether rooted in gender, race, colour, creed, political belief or other grounds'.⁵⁹ This wording gives scope for inclusion of protections against discrimination in relation to sexual orientation.

The political declarations of the Commonwealth guide the activities of the Commonwealth Secretariat, which have generally been weak when it comes to sexual orientation and gender identity (SOGI) rights initiatives. The current Strategic Plan of the Secretariat makes no explicit mention of LGBTI issues.⁶⁰ The Plan focuses on three goals, built on the pillars of 'development' and 'democracy' that shape the Commonwealth's cooperation agenda:

1. Strong democracy, rule of law, promotion and protection of human rights and respect for diversity;
2. Inclusive growth and sustainable development; and
3. A well-connected and networked Commonwealth.

⁵⁶ Commonwealth Heads of Government, *Singapore Declaration of Commonwealth Principles 1971*, accessed December 13, 2015, accessed April 15, 2018, <http://thecommonwealth.org/sites/default/files/history-items/documents/Singapore%20Declaration.pdf>.

⁵⁷ Commonwealth Heads of Government, *Harare Commonwealth Declaration* (London: Commonwealth Secretariat, 1991), accessed April 15, 2018, www.thecommonwealth.org/shared_asp_files/uploaded_files/{7F83FE73-6E7D-45FB-BFBC-FA519E255E72}_Harare%20Declaration.pdf.

⁵⁸ Commonwealth, *Charter of the Commonwealth*, accessed April 15 2018, <http://thecommonwealth.org/our-charter>.

⁵⁹ Ibid.

⁶⁰ Commonwealth Secretariat, *Commonwealth Secretariat Strategic Plan, 2017/18 – 2020/21*, London: The Commonwealth, 1 June 2017, accessed April 15, 2018, http://thecommonwealth.org/sites/default/files/inline/CommonwealthSecretariatStrategic_Plan_17_21.pdf.

Goal 1 and possibly goal 2 could readily incorporate attention to LGB concerns but the absence of any overt commitment in this regard is typical of Commonwealth texts, which create some opportunities for action but exhibit no consensus on recognition of LGB rights.

This vagueness gives scope for the Head of the Commonwealth Secretariat, the Secretary-General, to gently guide the organization towards a more progressive stance. The Secretary-General from 2008-2016, Kamallesh Sharma, whose tenure covered most of the period of the emergence of LGB activism in Commonwealth institutions, was highly reserved in his approach. A prominent advisor to the Commonwealth, who is himself gay, summed up the position well: 'The Secretary-General [Sharma], to his credit, has given rather cautious, and sometimes rather tepid, support on this issue. He's said the right things on occasion. But it hasn't been a whole-hearted, energetic push'.⁶¹ There have been select occasions where he clearly stated his support,⁶² but in the most politicized settings, he often reverted to the general language of endorsing 'equality and non-discrimination' without naming sexual orientation or directly encouraging states to decriminalize or adopt other policies to protect the rights of LGB people. It was anticipated that the current Secretary-General, Baroness Patricia Scotland, would take a fresh approach, but this has been muted with the notable exception that she pledged, in her opening press conference, to make LGBTI rights a priority of her tenure; she

⁶¹ Commonwealth Oral Histories, *Interview with Michael Kirby*, Sydney, Australia: 28 March 2014, accessed April 15, 2018, <http://www.commonwealthoralhistories.org/2015/interview-with-michael-kirby/>.

⁶² A key example was Secretary-General Sharma's opening statement to the 2011 Commonwealth People's Forum ahead of the Perth CHOGM, where he is quoted as saying 'We recall the 2009 Affirmation of Commonwealth Values and Principles, which includes a clear commitment to tolerance, respect and understanding. This means we embrace difference, and that includes sexual identity. Discrimination and criminalisation on grounds of sexual orientation is at odds with our values and I have had occasion to refer to this in the context of our law-related conferences'. See Peter Tatchell, 'Breakthrough: Commonwealth chief backs LGBT rights', *Peter Tatchell Foundation*, October 25, 2011, accessed April 15, 2018, <http://www.petertatchellfoundation.org/breakthrough-commonwealth-chief-backs-lgbt-rights/>. See also examples of Secretary-General Sharma's supportive statements in Frederick Cowell, 'LGBT rights in Commonwealth forums: politics, pitfalls and progress?' in Corinne Lennox and Matthew Waites eds., *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change* (London: School of Advanced Study, 2013): p. 138.

also included this issue in her first speech to the UN Human Rights Council in February 2017.⁶³

The main section of the Commonwealth Secretariat with responsibility for human rights, the Human Rights Unit, was created only in 1990. The Unit undertakes mostly technical cooperation work at the invitation of Member States, with activities centered around building justice sector capacity, training for National Human Rights Institutions (NHRIs) and supporting participation in the UN's Universal Periodic Review (UPR). The Unit has been chronically under-funded and its remit has been limited. Its work on rights related to SOGI has principally been through diplomacy, with various Unit Directors (such as Purna Sen and more recently Karen McKenzie) speaking publicly in favor of attention to such issues by the Commonwealth.

Work on human rights is complemented somewhat by the Commonwealth Ministerial Action Group (CMAG) and the Eminent Persons Group (EPG), the former comprised of state delegates⁶⁴ and the latter by independent experts,⁶⁵ which have both guided the Commonwealth on particularly challenging human

⁶³ Baroness Scotland is a dual citizen of Dominica and the UK and previously worked for the UK government. She took office on 1 April 2016. Mark Leftly, "Baroness Scotland uses new role as secretary-general of the Commonwealth to call for LGBT rights", *The Independent*, 28 November 2015, [online], accessed April 15, 2018, <http://www.independent.co.uk/news/uk/home-news/baroness-scotland-uses-new-role-as-secretary-general-of-the-commonwealth-to-call-for-lgbt-rights-a6752966.html>. The Commonwealth, *Secretary-General to address Human Rights Council*, accessed April 15 2018, <http://thecommonwealth.org/media/event/secretary-general-address-human-rights-council>.

⁶⁴ Situations concerning serious or persistent violations of the Harare Declaration are to be assessed by the Commonwealth Ministerial Action Group (CMAG), comprised of a rotating group of eight Commonwealth foreign ministers, reconstituted at each CHOGM.

⁶⁵ The Eminent Persons Group was appointed in 2009, pursuant to the Affirmation of Commonwealth Values and Principles issued by Commonwealth Heads of Government, Port-of-Spain, November 2009. The EPG was charged with advising on the reform of the organisation and met 5 times between 2010 and 2011, issuing a final report with 106 recommendations in 2011. A key outcome of this work was the adoption of the Charter of the Commonwealth in 2013. The appointed EPG experts were as follows: Tun Abdullah Ahmad Badawi (Malaysia/Chairperson), Dr Emmanuel Akwetey (Ghana), Ms Patricia Francis (Jamaica), Dr Asma Jahangir (Pakistan), Mr Samuel Kavuma (Uganda/Commonwealth Youth Caucus), The Hon Michael Kirby (Australia), Rt Hon Sir Malcolm Rifkind (UK), Sir Ronald Sanders (Guyana), Senator Hugh Segal (Canada), and Sir Ieremia Tabai (Kiribati). See EPG, *A Commonwealth of the People: Time for Urgent Reform. The Report of the Eminent Persons Group to Commonwealth Heads of Government*, Perth, October 2011; London: Commonwealth Secretariat, 2011.

rights issues, such as expelling Member States for gross human rights violations (as recommended by CMAG) or advising on institutional reform (including on human rights (EPG)). CMAG and EPG action on LGB rights has been constrained by the political nature of their appointments. The only exception was the attempt by the EPG to raise the impact of criminal laws on same-sex sexual relations on the disproportionately high rates of HIV/AIDS in the Commonwealth. As the Honourable Michael Kirby, EPG member, outlined, the EPG's final report in 2011 pointed to the need to redress criminal laws that were likely to impede the efforts of Commonwealth Member States to combat HIV/AIDS, by driving those highly vulnerable away from health services, for fear of persecution.⁶⁶

Given these institutional limitations, advocacy on LGB issues within Commonwealth institutions has concentrated especially on the biennial CHOGMs and the People's Forum and Youth Forum for civil society that precede the inter-state summit.⁶⁷ Accredited civil society organizations (usually NGOs or associations with Commonwealth links)⁶⁸ can attend some of the peripheral events of the CHOGM but most of the discussions are held in closed sessions open to state representatives only. This limits the extent to which civil society can influence the CHOGM outcome documents (principally, The Communiqué) agreed by Member States.

The outcome document of the People's Forum and Youth Forum, in contrast, is drafted and decided by civil society participants. This document is

⁶⁶ The final report of the EPG makes this recommendation: 'Heads of Government should take steps to encourage the repeal of discriminatory laws that impede the effective response of Commonwealth countries to the HIV/AIDS epidemic, and commit to programmes of education that would help a process of repeal of such laws.' (R60). See EPG, *A Commonwealth of the People: Time for Urgent Reform. The Report of the Eminent Persons Group to Commonwealth Heads of Government*, Perth, October 2011; London: Commonwealth Secretariat, 2011. See also Michael Kirby, 'The sodomy offence: England's least lovely criminal law export?', in Corinne Lennox and Matthew Waites eds., *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change* (London: School of Advanced Study, 2013) p. 78.

⁶⁷ There is also a Commonwealth Business Forum and, since 2015, a Commonwealth Women's Forum that both precede the CHOGMs.

⁶⁸ For a list of accredited organisations, see: The Commonwealth, *Directory of accredited organisations*, accessed April 30, 2018, <http://thecommonwealth.org/organisation-directory>.

subsequently presented to Member States through a Foreign Ministers' Roundtable dialogue, to which a selection of Forum participants are invited. This accounts for the differences in recognition of SOGI issues in declarations issued by these fora. Importantly, accreditation to the People's Forum and Youth Forum is overseen by the CHOGM host state, enabling NGOs working on relevant issues that have been blocked by states in other Inter-governmental organizations, such as the UN or the African Commission on Human and Peoples' Rights (ACHPR), access to the discussions. This has greatly enhanced the visibility of LGB groups and issues in Commonwealth-centered activism.

It should be emphasized, that such activism commenced not with Northern interventions but with the actions of Sexual Minorities Uganda and others including the Gay and Lesbian Coalition of Kenya. These groups sought to establish a presence in the People's Forum of the CHOGM in Kampala, Uganda in 2007. Despite the action being met with hostility and some activists being ejected, the People's Forum statement for the first time called for attention to 'minority rights, such as [...] the rights of [...] gay and lesbian people'.⁶⁹ There was also a preceding noteworthy effort in the Youth Forum to name 'sexual orientation' among the protected characteristics for non-discrimination at the Commonwealth Youth Forum held in Malta in 2005.⁷⁰

In 2009, there was further engagement at the CHOGM in Port of Spain, Trinidad and Tobago, with a notable focus on HIV-prevention by Robert Carr of Caribbean Vulnerable Communities Coalition and Stephen Lewis, Co-Director of AIDS-Free World, who condemned Uganda's Anti-Homosexuality Bill as having 'the taste of fascism'.⁷¹ Acting alongside British activist Peter

⁶⁹ Commonwealth Foundation, *Realising People's Potential: 2007 Commonwealth People's Forum* (London: Commonwealth Foundation, 2007), accessed April 14, 2018, http://www.ituc-csi.org/IMG/pdf/CPF_Summary_Report_Final_Version.pdf, 20.

⁷⁰ Commonwealth Youth Forum, 2005. *Final Communiqué*. CYEC 2006. (para 2.1.4), as cited by Lewis Brooks and Alistair Stewart, *Collaboration and Consensus: Building a Constructive Commonwealth Approach to LGBT Rights*, London: Royal Commonwealth Society and Kaleidoscope Trust, March 2015: p. 6.

⁷¹ Stephen Lewis, Remarks by Stephen Lewis, Co-Director of AIDS-Free

Tatchell, the then Head of the Human Rights Unit in the Commonwealth Secretariat, Purna Sen, managed to get agreement from the Heads of Government for a non-specific statement against discrimination of all kinds.⁷² This was a very significant achievement and precedent. Sexual orientation and gender identity were also again briefly mentioned in the People's Forum statement preceding the 2009 CHOGM.⁷³

In 2011, the Perth summit in Australia was notable for conflict over wider moves towards human rights, following the final report on Commonwealth reform by an Eminent Persons Group. Prior to the summit, the Commonwealth Human Rights Initiative (2011) formulated a *Civil Society Statement of Action on the Decriminalisation of Same Sex Conduct in the Commonwealth*⁷⁴ from 26 organizations, which although disproportionately signed by UK-based NGOs also demonstrated international concern from groups including Pan-Africa ILGA and J-Flag in Jamaica. At the summit, then UK Prime Minister David Cameron and former Australian Foreign Minister Kevin Rudd, were among those to raise LGBT human rights issues, but this tended to highlight rather than move beyond North/South divisions.⁷⁵

The 2013 CHOGM in Sri Lanka, offered little progress for LGB rights. The NGO Equal Ground reported that they were forced underground by a government crackdown ahead of the CHOGM, and this led international LGBTI groups to stay away.⁷⁶ The gross human rights violations committed

World delivered at the Commonwealth People's Forum on the eve of the Commonwealth Heads of Government Meeting (CHGOM) in 2009, accessed November 4, 2011, www.commonwealthfoundation.com/LinkClick.aspx?leticket=Ea3HU1msi4I%3D&tabid=264.

⁷² Purna Sen, *LGBTI Human Rights in the Commonwealth*, Keynote Address, University of Glasgow, July 18, 2014 'LGBTI Human Rights in the Commonwealth Part 1: Welcome and Keynote Address', video, accessed 25 May 2018, <https://www.gla.ac.uk/research/az/glasgowhumanrightsnetwork/events/pastevents/conferences/lgbtihrc/conferencevideos/#d.en.378378>.

⁷³ Lennox and Waites, 'Human rights, sexual orientation and gender identity in the Commonwealth,' 34-35.

⁷⁴ Commonwealth Human Rights Initiative, *Civil Society Statement of Action on the Decriminalisation of Adult Same Sex Conduct in the Commonwealth*, 15 August 2011.

⁷⁵ Lennox and Waites, 'Human rights, sexual orientation and gender identity in the Commonwealth,' 36-38.

⁷⁶ Jasmine Dawson 'Glimmers of Hope Among Sri Lanka's Poor Human Rights Record', Star Observer, 25 November 2015, accessed April 19, 2018

during the civil war were the dominant focus of attention despite the Sri Lankan government's concerted effort to steer away from all discussions on human rights. No mention was given to SOGI rights in the CHOGM outcome documents but the People's Forum did call on Commonwealth states to 'Recognise, protect and promote the universal, inherent, indivisible, inalienable rights of all people of sexual orientation and gender identities based on shared Commonwealth and Yogyakarta Principles'.⁷⁷

In contrast, the CHOGM in Malta in November 2015, became a highly significant opportunity for LGBTI groups to address the Commonwealth.⁷⁸ Following its election in 2013, the Labour Party government of Malta passed a wide range of laws to remove discrimination relating to sexual orientation, and adopted the groundbreaking *Gender Identity, Gender Expression and Sex Characteristics Act* (2015). Hence, in stark contrast to the previous CHOGM in Sri Lanka, there was a sympathetic host government.

For the first time LGBTI-themed sessions emerged in the program of the People's Forum. One was titled 'LGBTI Policy Dialogue. Resilient Societies: Security of all people in their diversity'; the other was 'Commonwealth LGBTI Perspectives. Resilient societies are inclusive societies celebrating diversity'.⁷⁹ Consequently the Malta Declaration on Governance for Resilience, which emerged from the People's Forum, included a section on 'LGBTI and Resilient Societies: Resilience is Security for all People in all of their Diversity'.⁸⁰ This Declaration had considerably more LGBTI-related content than any previous CHOGM, including valuable references to intersectionality. However the Heads of Government Meeting itself did not

<http://www.starobserver.com.au/news/international-news-news/glimmers-of-hope-among-sri-lankas-poor-human-rights-record/143173>.

⁷⁷ *Commonwealth People's Forum 2013 Outcome Document*, Hikkaduwa, Sri Lanka 10-14 November 2013, accessed April 19, 2018, <http://thecommonwealth.org/media/news/commonwealth-peoples-forum-2013-outcome-document#sthash.NnORoynZ.dpuf>.

⁷⁸ CHOGM Malta 2015, accessed April 29, 2018, <https://chogm2015.mt/>.

⁷⁹ Commonwealth Foundation, *CPF Malta 2015 Programme*, accessed April 29, 2018, <http://cpf.commonwealthfoundation.com/programme-what-makes-societies-resilient/>.

⁸⁰ Commonwealth People's Forum Malta, *Malta Declaration of Governance for Resilience*, November 25, 2015, accessed April 29, 2018, <http://cpf.commonwealthfoundation.com/wp-content/uploads/2015/11/Malta-Declaration-on-Governance-for-Resilience.pdf>, 33-35.

have sexual orientation on its agenda and continued to evade this subject. Activists nevertheless pointed to the CHOGM Communiqué's references to preventing violence against vulnerable groups and supporting privacy laws, alongside general human rights proclamations, as evidence that they had influenced the agenda in a manner that could support future engagement on LGB rights.⁸¹

The most recent CHOGM was held in London, in the United Kingdom in April 2018. Early discussions on the CHOGM planning by civil society and within the UK parliament indicated that the UK government was under pressure to ensure that LGB rights were a key focus. This was referenced by several peers in the UK House of Lords during a session held in March 2017, to debate the focus of the forthcoming CHOGM. Several peers spoke strongly in favor of the CHOGM and Forums giving significant attention to the issue of LGBTI rights, by providing support to civil society organizations and to states where decriminalization has occurred, to enable them to share their experiences.⁸²

This suggests that a key variable in determining the prospects of successful advocacy on LGB issues at a CHOGM is the attitude of the host government to these interests. This is also illustrated in the Malta example (positive support) and the Sri Lanka example (no support). This sits alongside the attitude of the Secretary-General, who has some opportunity through his/her leadership to shape the CHOGM agenda, if not to decide on its outcome. The challenge for the Secretary-General, Baroness Scotland, was to convince delegates that she was taking an independent stance on rights, rather than

⁸¹ Kaleidoscope Trust, '2015 CHOGM Communiqué includes language that can advance the rights of LGBT people', *Kaleidoscope Trust*, December 4, 2015, accessed April 29, 2018, <http://kaleidoscopetrust.com/news/98>

⁸² See House of Lords Hansard, Commonwealth, 16 March 2017, Volume 779, accessed 30 April 2018, <https://hansard.parliament.uk/lords/2017-03-16/debates/E9678A92-E2C0-4FE9-8228-0DE7CCC56029/Commonwealth>.

following the UK lead; her ties to the British government were an issue in her election, when she stressed especially her Caribbean and African heritage.⁸³

The formation of The Commonwealth Equality Network (TCEN) was particularly important for coordinating the London CHOGM advocacy.⁸⁴ TCEN was initially an email list for international LGBTI activists called 'Commonwealth LGBTI Association', created in 2014, by Kaleidoscope Trust, with the Royal Commonwealth Society, and later becoming a formalized association of national LGBTI NGOs from Commonwealth states.⁸⁵ This new network is not open to all LGBTI activists, unlike other email networks such as the global SOGI list, or the Euro-Queer list; membership is for organizations as decided by TCEN. Hence this entails a subtle re-structuring of global LGBTI activist networking, with Kaleidoscope in London central in the leadership, particularly in practical organization and resourcing — including from the UK and other northern Commonwealth governments. TCEN has thus been shaped through reference to imperial mappings, even while using some anti-colonial framings.⁸⁶ Notably, TCEN was granted accreditation by the Commonwealth in June 2017, making it the first LGBTI organization to be so accredited and affording increased access to the CHOGM and engagement with Commonwealth initiatives.⁸⁷

The participation of civil society groups such as TCEN appears to have had a positive influence on the outputs of CHOGM 2018. While there was a lack of

⁸³ Eva Namusoke, 'Baroness Patricia Scotland: The Sixth Secretary General of the Commonwealth', *Commonwealth Oral Histories*, 2 December 2015, accessed April 29, 2018, available at: http://www.commonwealthoralthistories.org/2015/baroness-patricia-scotland-the-sixth-secretary-general-of-the-commonwealth/#_ftn1.

⁸⁴ The Commonwealth Equality Network, *The Commonwealth Equality Network*, accessed 30 April, 2018, <http://www.commonwealthequality.org/>.

⁸⁵ Waites, 'LGBTI organisations navigating imperial contexts'.

⁸⁶ Razmig Keucheyan, *The Left Hemisphere: Mapping Critical Theory Today* (London: Verso, 2013); Waites, 'LGBTI organisations navigating imperial contexts'.

⁸⁷ The Commonwealth Equality Network, *Big Step Forward for Human Rights as Commonwealth Officially Accredits First LGBTI Organisation*, 20 June 2017, accessed April 25, 2018, <http://www.commonwealthequality.org/news/19/>.

specific mention to LGB persons in the official 2018 CHOGM Communiqué, there are useful elements for activists to employ.⁸⁸ The communiqué recognizes the need for ‘full social, economic and political participation’ irrespective of many characteristics, including ‘other status’ which can, and often is in international fora, interpreted to include sexual orientation.⁸⁹ Meanwhile, in the 2018 CHOGM Youth Forum Declaration LGBTQI persons were twice mentioned. First, under the theme of ‘inclusion and equity’, the communiqué states that young people in the Commonwealth may call upon ‘Member states to acknowledge that discrimination and violence against girls, women, the LGBTI community...’⁹⁰ Under the theme of creating ‘a Fairer Future’, the Youth Forum also emphasizes the ‘need for comprehensive solutions to: address inequality; promote equity and equality of opportunity for all; achieve gender parity and respect for gender identities...’⁹¹

Despite these incremental changes, the central problem that emerges for queer politics in relation to the Commonwealth is that the institutional frame of the Commonwealth itself is not innocent, but rather takes much of its form from the history of imperialism, and has meanings attributed in relation to this. This dynamic is reflected well in the comments of UK-Ghanaian LGBTI activist Phyll Opoku-Gyimah, co-founder of UK Black Pride and a trustee of Stonewall, on the occasion of refusing her award of ‘Member of the British Empire’ (MBE), which would have been conferred ceremoniously by Queen Elizabeth II in recognition of her work:

I’m honoured and grateful, but I have to say no thank you. [...] I don’t believe in empire. I don’t believe in, and actively resist, colonialism and its toxic and enduring legacy in the Commonwealth, where — among many other injustices — LGBTQI people are still being persecuted,

⁸⁸ Commonwealth Heads of Government Meeting Communiqué, “Commonwealth Heads of Government Meeting Communiqué “Towards a Common Future”, 18th April 2018, <https://www.chogm2018.org.uk/sites/default/files/CHOGM%202018%20Communique.pdf>.

⁸⁹ Ibid, par. 2.

⁹⁰ Commonwealth Youth Forum of London, *11th Commonwealth Youth Forum Declaration: “Powering Our Common Future”*, 18th April 2018, <http://sdg.iisd.org/news/commonwealth-youth-forum-calls-for-policies-to-implement-and-achieve-sdgs/>, par. 51.

⁹¹ Ibid, 19.

tortured and even killed because of sodomy laws, including in Ghana, where I am from, that were put in place by British imperialists.⁹²

Hence victories in claiming human rights related to sexual orientation in the Commonwealth may, particularly given limits in wider human rights work by the Commonwealth, become perceived as a transnational version of what Puar has termed 'homonationalism'.⁹³ In such a conception, many privileged states have selectively deployed aspects of human rights discourse in constituting nationalist projects. With the signs of persistent core/periphery dynamics in governmental relations within the Commonwealth, there is a need for activists to more strategically seek to create and promote North/South governmental partnerships, in order to generate a transnational public narrative that decriminalization is not simply a Northern agenda.

In many ways TCEN sought to rise to this challenge, with leadership particularly from Chair Rosanna Flamer-Caldera of the Equal Ground NGO in Sri Lanka (an originator of TCEN);⁹⁴ and from Paul Dillane of Kaleidoscope Trust. Following prior planning meetings including in South Africa, more southern activists attended the CHOGM forums than previously; and individuals such as Qasim Iqbal from the NGO NAZ in Pakistan were prominent in videos creating the online presence of TCEN.⁹⁵

One intriguing proposal tabled by some civil society activists ahead of the London CHOGM was that the British government issue a formal apology for the promulgation of sodomy laws under colonialism. In the words of one UK House of Lords peer, "I believe that the most important way to ensure a way forward for other [Commonwealth] member states is by an apology from our Government for imposing laws through colonialism which criminalised LGBT

⁹² Matt Broomfield, 'Black lesbian activist Phyll Opoku-Gyimah turns down MBE in protest at LGBT persecution by 'colonial regimes'', *The Independent*, January 5, 2016, accessed April 29, 2018, <http://www.independent.co.uk/news/people/black-lesbian-activist-phyll-opoku-gyimah-turns-down-mbe-in-protest-at-lgbt-persecution-by-colonial-a6796916.html>.

⁹³ Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham: Duke University Press, 2007).

people and led to wider discriminatory laws and practices”.⁹⁶ This raised questions as to whether such an apology would be cost-free for the UK, omitting reparations and other forms of justice. Could it also re-center the UK rather than foregrounding new South-North alliances, and absolve other states? In the event UK Prime Minister Theresa May made a statement of deep ‘regret’ that stopped short of an ‘apology’, thus avoiding the wider politics of apologies. The statement was followed by an announcement of over £5 million UK funding for work by the new ‘Equality and Justice Alliance’, including Kaleidoscope Trust, Sisters for Change, and The Human Dignity Trust to support decriminalizations.⁹⁷ However while these seemed positive shifts in UK government policy, and forums repeated previous civil society views, the Commonwealth Heads of Government remained silent on the issues of LGB rights in their communiqué. There was no sign of overcoming previous divisions on SOGI human rights among Commonwealth state leaders.

The deficiencies of the Commonwealth institutions are brought further into focus when considering some sample initiatives from other regions that work with Member States. The African Commission on Human and Peoples' Rights (ACHPR), for example, has been important for recognition of LGB rights even when facing African Union Member State opposition. The ACHPR adopted resolution #275 on the Protection Against Violence and Other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation and Gender Identity, at the 55th session in Luanda, Angola in May 2014.⁹⁸ Although not legally enforceable against states, resolution #275 acknowledged and condemned continuing incidents of violence and discrimination against LGBT people and urged state members to take

⁹⁶ Statement made by Lord Cashman (Labour). House of Lords Hansard, Commonwealth, 16 March 2017, Volume 779, accessed 30 April 2018, <https://hansard.parliament.uk/lords/2017-03-16/debates/E9678A92-E2C0-4FE9-8228-0DE7CCC56029/Commonwealth>.

⁹⁷ Kaleidoscope Trust, ‘New Equality and Justice Alliance to Lead £5.6 Million Commonwealth Programme to reform Discriminatory Laws’, 27 April 2018, <https://kaleidoscopetrust.com/news/142> (accessed 26 May 2018).

⁹⁸ African Commission on Human and Peoples' Rights, 275: *Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity*, accessed April 6, 2018, www.achpr.org/sessions/55th/resolutions/275/.

immediate steps to address them and bring the perpetrators to justice. The ACHPR has also granted observer status to the Coalition of African Lesbians (CAL), in April 2015, following previous rejections.⁹⁹ This signaled the beginning of a new era where LGBT organizations are able to legitimately engage with the African human rights body in the pursuance of equality for all.

In the Asian region, the network ASEAN Sexual Orientation, Gender Identity and Gender Expression Caucus (ASEAN SOGIE) has been lobbying to secure participation in the regional ASEAN human rights mechanisms.¹⁰⁰ The Asia Pacific Forum of National Human Rights Institutions (NHRIs) has been leading a regional program to build the capacity of NHRIs on SOGI human rights concerns, drawing engagement from NHRIs in Bangladesh, India and Sri Lanka, for example.¹⁰¹

These comparative examples highlight the structural limitations of the Commonwealth but also its unwillingness to be bold. There is no permanent mechanism of independent experts on human rights under the auspices of the Commonwealth, which have proven to be useful tools for contentious politics in other regional organizations populated by Commonwealth Member States. In contrast, cooperation with NHRIs is reputed to be the bread and butter of the Commonwealth Secretariat, yet the example from Asia shows much more opportunity to work on sexual orientation issues than is presently foreseen in the Secretariat's Strategic Plan.

Looking at the regions also demonstrates that states remain recalcitrant and even belligerent in their anti-homosexuality stances, which is not unique to the Commonwealth. The African Union has threatened the ACHPR following the

⁹⁹ The Coalition of African Lesbians (CAL), is a feminist, pan African organization. It was the first NGO that worked on issues related to sexual orientation and gender identity to apply for observer status in 2008. This status was denied in 2010 on the basis that CAL did not advance any of the rights recognized by the African Charter.

¹⁰⁰ For more information see: ASEAN SOGIE, <https://aseansogiecaucus.org/about>. See also: Chapter 3 in Volume 3 of this series.

¹⁰¹ Asia Pacific Forum of National Human Rights Institutions, *New Partnerships Forged for LGBTI Rights*, January 5, 2017, accessed April 29, 2018, <http://www.asiapacificforum.net/news/new-partnerships-forged-lgbti-rights/>.

granting of observer status to CAL.¹⁰² At a regional summit on human rights for Commonwealth MPs in February 2016, held in Sri Lanka, the Kotte Declaration was issued as the concluding statement but made no mention of sexual orientation.¹⁰³ On an inter-state level, therefore, advancing LGB rights remains precarious, making the Commonwealth's troubles seem typical rather than exceptional.

4. Transnational civil society mobilization towards the Commonwealth

A key alternative pathway to change, via the Commonwealth, is through transnational mobilization by civil society organizations that use the Commonwealth as an instrumental frame for networking and as a political opportunity structure for advocacy.¹⁰⁴ The Commonwealth Equality Network (TCEN), introduced above, is exemplary of this approach. TCEN was preceded by the emergence of new UK-based NGOs working on international LGBT human rights issues from 2011, particularly the Kaleidoscope Trust,¹⁰⁵ that led to an increasing focus on the Commonwealth. Following earlier interventions addressed to the Commonwealth by British activist Peter

¹⁰² African Union Executive Council meeting in Addis Ababa, Ethiopia ordered the ACHPR to consider revoking this observer status and change the criteria for accreditation. At the 25th session of the AU Summit during the consideration of the report of the ACHPR, the Executive Council of the African Union made the following decision: "*REQUESTS the ACHPR to take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values; in this regard, REQUESTS the ACHPR to review its criteria for granting Observer Status to NGOs and to withdraw the observer status granted to the Organization called CAL, in line with those African Values*". DOC.EX.CL/Dec 887 (XXVII) Decision on the Thirty-Eighth Activity Report of the African Commission on Human and Peoples' Rights.

¹⁰³ Commonwealth Parliamentary Association, *Kotte Declaration, Commitment to a set of actions by the participating Commonwealth Asia Region Parliamentarians to promote and protect human rights*, accessed April 6, 2018, http://www.cpahq.org/CPAHQ/Main/Document_Library/Human_Rights/Kotte_Declaration_Feb_2016.aspx.

¹⁰⁴ Matthew Waites, 'LGBTI organisations navigating imperial contexts: the Kaleidoscope Trust, the Commonwealth and the need for a decolonizing, intersectional politics', *The Sociological Review*, (2016), pp.2,5. DOI: 10.1111/1467-954X.12424

¹⁰⁵ Matthew Waites, 'The New Trans-National Politics of LGBT Human Rights in the Commonwealth: What Can UK NGOs Learn from the Global South?', in *Sexuality, Citizenship and Belonging: Trans-National and Intersection Perspectives*, eds. F. Stella, Y. Taylor, T. Reynolds and A. Rogers (New York: Routledge, 2016), 73-96.

Tatchell, including in 2011,¹⁰⁶ Kaleidoscope adopted ‘framing’ strategies that ‘articulated’ human rights together with the Commonwealth and LGBTI concerns,¹⁰⁷ notably in the report *Speaking Out: The Rights of LGBTI People Across the Commonwealth* first published in 2014, then updated in 2015.¹⁰⁸ For an initially small organization seeking to address issues across many states, the Commonwealth held the prospect of wide influence. The Glasgow 2014 Commonwealth Games were used as a focus by Kaleidoscope Trust, partnering with Equality Network, Glasgow Human Rights Network and Pride Glasgow to host the LGBTI Human Rights in the Commonwealth conference.¹⁰⁹

There are also several professional associations based around the Commonwealth identity that have been used by civil society to raise LGB rights issues. The Commonwealth Lawyers Association (CLA) has supported the review of criminal laws and has tried to stimulate spaces for free debate among representatives of Commonwealth Law Ministries.¹¹⁰ The CLA was also an interested party in the case pursued by Caleb Orozco against Belize. The Royal Commonwealth Society has a dedicated campaign on LGBT rights,¹¹¹ which has included working with the Kaleidoscope Trust and TCEN on a major report on *A Commonwealth Toolkit for Policy Progress on LGBT Rights*.¹¹² The Commonwealth Trade Union Association also reports that it

¹⁰⁶ Lennox and Waites, ‘Human rights, sexual orientation and gender identity in the Commonwealth,’ 35.

¹⁰⁷ Waites, ‘The New Trans-National Politics of LGBT Human Rights’.

¹⁰⁸ Kaleidoscope Trust, *Speaking Out: The Rights of LGBTI People Across the Commonwealth* (London: Kaleidoscope Trust, 2015).

¹⁰⁹ University of Glasgow, ‘LGBTI Human Rights in the Commonwealth,’ July 18, 2014, conference videos, accessed April 14, 2018, <http://www.gla.ac.uk/research/az/glasgowhumanrightsnetwork/events/pastevents/conferences/lgbtihrc/conferencevideos/#d.en.378378>.

¹¹⁰ Frederick Cowell, ‘LGBT rights in Commonwealth forums: politics, pitfalls and progress?’ in Corinne Lennox and Matthew Waites eds., *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change* (London: School of Advanced Study, 2013): pp. 136-138.

¹¹¹ The Royal Commonwealth Society, *LGBT Rights*, accessed April 30, 2018, <https://www.thercs.org/our-work/campaigns/lgbt-rights/>.

¹¹² Lewis Brooks and Felicity Daly, *A Commonwealth Toolkit for Policy Progress on LGBT Rights*, London: Royal Commonwealth Society, Kaleidoscope Trust and Commonwealth Equality Network, April 2016, accessed April 30, 2018, <https://www.thercs.org/assets/Research-/A-Commonwealth-Toolkit-for-Policy-Progress-on-LGBT-Rights.pdf>.

raises LGBTI non-discrimination rights in its lobbying of states.¹¹³ Thus the Commonwealth networks have functioned to bring interested civil society together to concentrate attention on the bulk of states that criminalize same-sex sexual acts and share the Commonwealth link.

5. Conclusion

This chapter has reviewed the current practice in Commonwealth Member States concerning the criminalization of same-sex sexual behavior and related equality rights for LGB persons. Criminal laws remain in place in 36 of the 53 Commonwealth Member States. Several other legal equality measures, such as protection against discrimination in employment and rights in marriage and family life, fail to give equal protection on the basis of sexual orientation. For the most part, the criminal legal provisions have their roots in British colonial *Penal Codes*, although several states have further developed these laws to create broader and more punitive restrictions on same-sex sexual behavior, in addition to enforcing *de jure* or *de facto* limitations on rights such as freedom of expression and freedom of association for LGB persons.

This chapter illustrated how the Commonwealth has served as a mobilization frame for civil society organizations seeking to resist these violations of their human rights, either by creating new Commonwealth-framed networks or using existing Commonwealth-focused networks to advocate for reforms in law and policy. However, while transnational networks clearly involve southern-based national LGBTI NGOs or national chapters of Commonwealth associations, there remains a question of whether UK-based civil society actors have a particularly significant agenda-setting role in such networks that might lead to under-development of intersectional and decolonial strategies.

¹¹³ Debbie Ransom, 'Commonwealth professionals campaign for rights and development', Commonwealth Journalists Association, 11 December 2016, accessed April 15, 2018, <http://commonwealthjournalists.org/commonwealth-professionals-campaign-for-rights-and-development/>.

The Commonwealth's political institutions largely have been absent or inutile in this activism. Advances primarily have been made through grassroots, national or regional level advocacy rather than through the limited mechanisms afforded by the Commonwealth *per se*. Nevertheless, the colonial legacy within the Commonwealth is undeniably relevant to contemporary LGB struggles and the Commonwealth has served as a focal point for some activism, as evidenced particularly in the CHOGMs.

A change in leadership at the Commonwealth Secretariat with the arrival of Baroness Scotland as Secretary-General has opened up possibilities for this platform to mediate transnational dialogue on legal reform and safeguards for civil society. Signs are that general frames such as human rights, good governance and addressing gender violence will be central in any Commonwealth moves to address the issues, rather than a distinct focus on LGB issues – since this can enable linkages and incremental change. The Commonwealth, however, is an organization of Member States and it is states that will set much of the agenda. For the foreseeable future the Commonwealth as an institution will remain structured in relation to wider global structures of inequality. The fact that the next CHOGM in 2020 is going to be in Rwanda raises questions about how a space for discussion of sexual orientation, gender identity and human rights might be created in Africa, in one of the rare African Commonwealth states that does not criminalize same-sex sexual acts. Much will depend on the presence and leadership of civil society from Commonwealth Member States of the global South and to what extent they wish to invest in the Commonwealth as a tool for change.