

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

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

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

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

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

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

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

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

## 1. The modern Commonwealth

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

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

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

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

and minority rule but also because it was associated with the general struggle for liberty from colonial oppression (Campbell and Penna 1998). The 1971 Singapore Declaration espoused shared values of equality before the law and democracy, and committed states to the struggle. South Africa had withdrawn from the Commonwealth in 1961 following a lengthy dispute with the Commonwealth on a number of matters including its insistence on formally establishing apartheid. The progression of states signing up to human rights treaties and conventions in the early 1990s (see section 2 below) was linked to states redefining their sense of sovereignty in the post-Cold War world and beginning, for a variety of reasons, to regard human rights as an important component of their sovereignty and an important mechanism in legitimating their government to the wider international community (Viljoen 2007). A number of states ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights around this time and there was what was termed a 'rights revival' within the Commonwealth and the international community at large (Heynes and Viljoen 2002). Nonetheless, there remained a sense of political solidarity between member states in the face of criticism over human rights issues. The suspension of Zimbabwe from the Commonwealth in 2002 saw an increase of anti-imperialist rhetoric in some southern African states that threatened Commonwealth solidarity (Phimister and Raftopoulos 2004).

The Commonwealth has a relatively informal internal structure compared to other international organisations. After 1965 the Commonwealth Secretariat took over the administrative and political functions of the Commonwealth, removing it from the control of the British Foreign and Commonwealth Office. This arguably made the Commonwealth closer to an international organisation with the Secretariat in charge of the managerial functions of the organisation and the various meetings of state representatives providing the deliberative assemblies. The 80 or more professional and civil society associations, which form part of the 'peoples' Commonwealth, are independent from the control or influence of the Secretariat (Mayall 1998). The biennial Commonwealth Heads of Government Meeting (CHOGM) is the principal forum of Commonwealth assembly and is the occasion at which the Secretariat's mandates are formed. The meeting is subject to normal diplomatic protocol, and human rights activists have often criticised the lack of transparency surrounding its deliberations and processes. Alongside this, the apparent impunity that governments responsible for human rights abuses enjoy at the conference has been heavily criticised. Tom Porteous, the then London Director of Human Rights Watch, described the 2009 CHOGM in Port of Spain as 'a jamboree of human rights abusers' (2009). The agendas of the CHOGMs are largely shaped by meetings of Commonwealth foreign ministers who conduct a meeting prior to each CHOGM, which is known as the Committee of the Whole (COW). This meeting is considered vital for forming common consensus and building a Commonwealth agenda.

There are also Ministerial meetings of law ministers, finance ministers, business ministers, ministers for women and other national ministers and officials that help set and influence Commonwealth agendas. These meetings take place at regular intervals and set the agendas and workloads of individual units at the Commonwealth Secretariat. At the time of writing, the Commonwealth structures were undergoing a review led by an Eminent Persons Group (EPG), which has recommended enhancing the role of the Commonwealth Ministerial Action Group (CMAG), the body charged with investigating and responding to systematic violations of the Harare Declaration. The EPG, established at the 2009 CHOGM, consists of members acting in an individual, rather than governmental, capacity who are representative of the Commonwealth. Their goal is to sharpen the impact and raise the profile of the Commonwealth. Declarations, Communiqués and Statements from Commonwealth meetings are the primary instruments for the establishment and announcement of Commonwealth norms.

## **2. Searching for the principles of equality in Commonwealth Declarations, Communiqués and Statements**

There are references to equality in both the Harare Declaration and the Port of Spain Affirmation of Commonwealth Values but these are largely aspirational political statements and do not bind member states to specific courses of action. Article 4 of the Harare Declaration states that all signatories believe in ‘equal rights for all citizens’ — however, this is more a statement of procedural values than a declaration of substantive equality. Paragraph 5 of the Port of Spain ‘Affirmation’ states that a core Commonwealth value is the ‘protection and promotion of civil, political, economic, social and cultural rights for all without discrimination on any grounds’ and while this goes further than the Harare Declaration, it is still not as firm as other commitments in the overall corpus of Commonwealth values.

Specific types of equality have featured in Commonwealth declarations and there have been specific commitments made in the fields of gender equality, reduction of poverty and the eradication of racial discrimination. The 1994 Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women was the Commonwealth’s first substantive declaration on gender. It was the first Commonwealth statement to address equality and the concept of ownership of human rights – as the declaration stated that human rights ‘are perceived to be owned, only or largely, by men.’ The Commonwealth gender programme has tried to advance gender equality and the rule of law, both through the work of the Secretariat, and through summit Communiqués and Declarations. The Commonwealth Plan of Action for Gender Equality 2005–15 identified a number of areas to be addressed over the ten year period, including ‘enforcing laws for the achievement of gender equality’. The 2009

Port of Spain Affirmation of Commonwealth Values and Principles also formally commit states to protecting the poorest and most vulnerable and requires them to 'strengthen the linkages between research and policy making and mainstream issues of gender and gender equality.'

The Commonwealth's stance against apartheid led to the development of a coherent principle of racial equality. The 1971 Singapore Declaration stated that Commonwealth states were committed to a belief in 'equal rights for all citizens regardless of race, creed or political belief' and Article 7 of the Declaration was a statement of Commonwealth opposition to all forms of racial prejudice. Whilst the Singapore Declaration clarified the Commonwealth's position with respect to apartheid, the 1979 Lusaka Declaration went further on the issue of racial discrimination, stating that:

peoples of the Commonwealth have the right to live freely in dignity and equality, without any distinction or exclusion based on race, colour, sex, descent, or national or ethnic origin.

This presumes a substantive right to equality but the overall text of the Declaration refers primarily to the 'eradication of the infamous policy of apartheid'. The Declaration does also refer to the elimination of discrimination against indigenous peoples and immigrant communities, suggesting a more inclusive picture of anti-racism that goes beyond resisting apartheid.

Neither the Singapore nor the Lusaka Declarations are explicitly framed as 'closed list' declarations, and on a strict textual reading it is possible to infer a wider principle of equality into both. Using a formal equality framework it is possible to do a straight substitution of different concepts of discrimination (Hunter 2000; Levit 2000). Examples from the United States practically illustrate how this process works. Some US court rulings on gay marriage applied the judgment of *Loving v Virginia*, a landmark case in which racially discriminatory marriage laws in Virginia were struck down, and simply replacing the word 'race' with 'sex' to strike down laws that discriminate against the LGBT community. Laws that treated people differently on grounds of 'sex' were directly analogous to laws that treated people differently on grounds of 'race', and therefore both should be struck down. The logic of formal equality was later applied by the Supreme Court in *Lawrence v Texas*, which held that anti sodomy laws, and not just their application, were discriminatory.

Whilst not a 'closed list' system, it is important to acknowledge that Commonwealth declarations are unlikely to be applied within a broad interpretive framework of this sort. Firstly, all Commonwealth declarations are political instruments and, in the view of member states at least, are not intended to have the legally binding power of treaties. As Duxbury (1997) notes:

it is important to remember that, as these instruments were entered into after the formation of the Commonwealth, unlike the Charter of the United Nations they do not amount to a formal constitution and were never conceived of as such by the members.

Commonwealth declarations are conceptually closer to 'soft' rather than 'hard' law in that they are not binding on states as international legal obligations and are only effective so long as the states in question remain members of the Commonwealth. The Commonwealth is also at best a 'special case' in relation to other international organisations in that it is not founded on a treaty that imposes international obligations and lacks international legal personality (Chan 1992). This means that the obligation of states to follow the provisions of Commonwealth declarations is chiefly political. Only a 'rule based' system of enforcement (i.e. the membership rules of the Commonwealth) exists to enforce them, and this method of enforcement is only applicable as long as a state chooses to remain a member of the Commonwealth. This also means that Commonwealth declarations are non-justiciable in domestic and international tribunals and the interpretation of declarations is limited to intergovernmental meetings and the comparatively limited remit of CMAG.

Commonwealth declarations reflect aspirational values and the intention of states to act in the future. As Shaw (2003) argues, the 'epistemic community' of the Commonwealth that was formed in the 1980s was principally motivated by the collective opposition to apartheid. This conceptually differentiated the new progressive sphere of the Commonwealth from its historical identity as an association of former British colonies. This also situated the 'epistemic community' of the Commonwealth within a broader political movement based on third world political solidarity that advocated a variety of causes including the promotion of economic development and anti-imperialism.

As Srinivasan (1997) argues the emphasis that the Singapore and Harare Declarations place on democracy and human rights are rooted within the context of contemporary international relations. The Harare Declaration's focus on democracy within countries, as opposed to democracy as an abstract international ideal, was a result of the post-Cold War international climate and the ensuing prioritisation of democratic government over sovereignty (Franck 1992; Srinivasan 1997). The emphasis of the rights contained in these documents is, however, on the state and the system of government, rather than the individual and the protection of individual liberties. This is not say that Commonwealth values are incompatible with individualistic concerns but rather that the documents that set out Commonwealth human rights norms are primarily concerned with the construction of state institutions, rather than providing positive rights to individuals.

### **3. International human rights law: a cautionary tale**

The protection of human rights was a key part of the Harare Declaration and the repositioning of human rights as a core component of Commonwealth values led to an increase in the number of Commonwealth states signing up to the ICCPR and other human rights treaties over the course of the 1990s.

To date, 42 out of the 54 Commonwealth states have ratified the ICCPR, the Convention on the Rights of the Child (CRC) enjoys universal ratification and ratification of the Convention on Elimination Discrimination against Women (CEDAW) is near universal (Commonwealth Secretariat 2010). The 2009 CHOGM communiqué urged all member states ‘to consider acceding to and implementing all major international human rights instruments’ (Port of Spain Communiqué 2009, para. 40). While this progress is welcome, the Commonwealth does not possess a human rights enforcement mechanism, nor does it have the capacity to monitor human rights abuses. Commonwealth forums have also resisted scrutinising the actions of individual states with regards to human rights standards and the work of CMAG has focused almost exclusively on democratic transfers of power, whilst ignoring other widespread human rights abuses.

The Yogyakarta Principles are principles relating to human rights, sexual orientation and gender identity, formulated by human rights experts and influential at the UN. The preamble to the principles state:

Human rights violations targeted toward persons because of their actual or perceived sexual orientation or gender identity constitute a global and entrenched pattern of serious concern ... these violations are often compounded by experiences of other forms of violence.

These principles identify the provisions of international human rights treaties that can protect the LGBT community and can broadly assist political and legal movements that aim to decriminalise sexual orientation. For example, Principle 6, affirming the right to privacy, draws on the decision of the Human Rights Committee (HRC), the treaty review body of the ICCPR, in *Toonen v Australia* to state that legislation criminalising homosexual relations between consenting adults is ‘a violation of the right to privacy.’ The principles are both interpretative and normative, in that they provide a set of guidelines for interpreting international human rights law to protect the LGBT community, and also aim to generate normative assumptions about the necessity of decriminalising same-sex sexual practices.

Since the ruling in *Toonen v Australia* there have been some significant developments within international human rights law that have helped afford the LGBT community protection. It is worth noting, however, that there have been two forms of resistance within international human rights forums to the promulgation of certain human rights norms. Firstly, there has been a tendency to frame the debate surrounding LGBT rights within a framework of reactionary post-colonial relativism. Secondly, there has been a tendency to see LGBT issues as an attempt by supranational organisations and bodies to impose norms on states, which violate the sovereign prerogative in determining the substance of their legal system.

Relativism, in modern human rights discourse, has been progressively reconsidered and relocated away from polarising debates focusing on the clash



between universalism and relativism (Penna and Campbell 1998; Dembour 2007). In the 1990s, cultural relativism was rejected as grounds for defending systemic human rights abuses and at the 1993 Vienna World Conference on Human Rights, the then US Secretary of State, Warren Christopher, declared 'we cannot let cultural relativism become the last refuge of repression' (Lau 2003, pp. 1689). At the same time, however, it was recognised by many human rights theorists that a cultural margin of appreciation was necessary for the practical realisation of human rights (Donnelly 2003; 2007). Relativism has been used defensively by states to protect the operation of their domestic legal system or to defend against the suspected imposition of 'moral universalism.' Universalism, in the sense of defining moral norms, is often associated with the west or a western ontological framework, which in contemporary human rights discourse usually refers to the global North (Brems 2001).

The reaction to the Brazilian proposal at the 2003 United Nations Human Rights Commission was an interesting combination of 'classic' relativism and the more contemporary claims of LGBT rights being an exclusively 'Western' concern. Since 2001 Brazil has been at the forefront of efforts to include the language of sexual orientation into international human rights law and in 2002 and 2003 the Commission debated the inclusion of language on sexual orientation into resolutions on extra-judicial, arbitrary and summary executions. In 2003, with the support of the European Union and other states, Brazil submitted a resolution on human rights and sexual orientation to the Commission. The draft resolution intended to ban all discrimination on the grounds of sexual orientation, and simply stated that sexual diversity 'is an integral part of Universal Human Rights' (UN Human Rights Commission 2003). The resolution was defeated by 24 to 22 votes and a number of nations, including Pakistan and Malaysia, actively lobbied to have the phrase 'sexual orientation' removed from the declaration. When Pakistan's delegate was questioned about why they were voting against the resolution, she replied that the resolution was 'sponsored by militant gays from the west' and that the issue 'was not a concern of South based countries, but a Northern concern' (Narain 2005).

The imposition of human rights norms formulated at the international or supranational level is often resisted by states from the global South, especially if those human rights are perceived as imposing limitations on a state's autonomy and ability to legislate. States in the global North also resist any perceived interference in their sovereign law making and the 2011 debate over voting rights for prisoners in the UK is a good example of how states are often strongly opposed to an international court's ruling when it is perceived as restricting their power as sovereign law makers.<sup>4</sup> In the global south there is often an

4 The European Court of Human Rights (ECHR) ruled in *Hirst v the United Kingdom (No 2)* [2005] ECHR 681 that the blanket ban that the UK imposed on prisoners

added dimension to this resistance as the composition and history of human rights institutions is often intertwined with the history of colonisation and of economic dominance by the global north (Wright 2001; Mutua 2001).

In his study of the death penalty in the Caribbean, Helfer (2002) warned that it is possible to 'over-legalise' international human rights, causing governments to retreat from their human rights obligations. The countries in question were liberal democracies that maintained and protected the rule of law and had all been willing signatories of international human rights treaties. The death penalty in the Commonwealth Caribbean is a particularly sensitive domestic issue and all twelve states in the region retain the death penalty, although several have a moratorium on executions. During the 1990s, following the decision of the UK Privy Council in *Pratt and Morgan v Jamaica* and a series of judgements by appellate and human rights courts, in particular the Inter-American Court of Human Rights, significantly restricted a state's capacity to carry out executions. In 1997, Jamaica withdrew from the First Optional Protocol to the International Covenant on Civil and Political Rights ending the right of individual petition to the HRC. In May 1998, Trinidad and Tobago announced its withdrawal from the same Optional Protocol as well the American Convention on Human Rights (McGrory 2001). The government immediately re-acceded to the First Optional Protocol but this time entered a resolution specifically excluding the right of individual petition for prisoners on death row. Guyana followed a similar pattern. The creation of the Caribbean Court of Justice, a regional appellate tribunal with a more favourable death penalty stance, is often interpreted as being a direct consequence of the developments during this period.<sup>5</sup> In his argument Helfer outlines that there is no single set of variables at play that can conclusively demonstrate the threshold that an international human rights institution would have to cross in order to trigger an adverse reaction from its member states. Within the framework of existing human rights treaty systems there remains considerable scope for backlash and resistance to the creation of norms that run contrary to the principles of domestic legal systems or that are politically untenable within the state at large.

Whilst supranational human rights organisations and treaty review bodies represent a significant opportunity to advance human rights causes and

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voting was contrary to the European Convention on Human Rights. Members of the UK Parliament subsequently debated whether or not accept the ruling and overwhelming voted against prisoners being given the right to vote.

- 5 It is debatable whether the Caribbean Court of Justice actually is pro-death penalty in its operation and its judgments have not shown any pro-death penalty bias. Nevertheless the political context of the Courts formation and the political rhetoric surrounding the Court's operation has been very pro-death penalty. See O'Brien D. (2007) 'Attorney General of Barbados v Joseph and Boyce: The Caribbean Court of Justice Answers its Critics?' *Public Law*, Summer 2007, p. 189–97.

disseminate norms for the protection of human rights, governmental resistance is often justified by the legal principle of non-intervention in domestic affairs as enshrined in the Charter of the United Nations. Thus, certain issues can be ring-fenced as private and off-limits to international human rights observers, for example, issues pertaining to women, marriage and the family. It is this distinction that has led numerous countries to register reservations to Articles 2 and 16 of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) – provisions considered to be core to the document – on the grounds that such personal laws should remain beyond the scrutiny of the international community, or are incompatible with culturally or religiously influenced domestic legislation. It is also important to note that such supranational institutions are often caught within a post-colonial paradigm due to their formation, composition or history, making action on human rights difficult. The UN and the UN Human Rights Commission, for example, was often accused of engaging in neo-imperialist behaviour in the 1970s when it criticised the human rights records of states in Africa and Asia (Burke 2009). In modern human rights discourse the terminology of post-colonialism has been supplanted by the terminology of the north-south divide but the underlying principle and outcome of such arguments is still the same.

The above cases are as much to do with agency as they are to do with the substance of the right being resisted. The motivations of international human rights institutions are often regarded with suspicion by some states that perceive international human rights as an attempt to ‘interfere’ in issues regarded as belonging strictly to the domestic legal sphere or in the case of states in the global South believe that international human rights norms constitute an assault on ‘culture’ and cultural values. Whilst there has been some progress on LGBT rights at the Human Rights Council during the course of the 2011 including a resolution on human rights, sexual orientation and gender identity (UNHCR, 2011) and the Universal Periodic Review process leading both Sao Tome and Mozambique to decriminalise same sex conduct, there is still no general agreement in international human rights law advocating decriminalisation in principle.

#### **4. Commonwealth forums and LGBT decriminalisation**

Issues similar to those outlined above in section 3 arose when the decriminalisation of homosexuality was discussed at the 2010 Commonwealth Senior Officials of Law Ministers Meeting (SOLM). This was the first ever discussion about LGBT rights in an official Commonwealth forum. At the 2007 CHOGM in Kampala, anti-gay activists in Uganda had urged the Ugandan government to use their platform as the meeting’s hosts to speak out against gay rights (PinkNews 2007). LGBT rights were not on the agenda at the Kampala CHOGM but the incident was representative of the growing influence of non-

governmental organisations (NGOs) and Civil Society Organisations (CSOs) on Commonwealth processes.

In the communiqué from the 1999 CHOGM in Durban the heads of government recognised the threat of HIV/AIDS describing it as ‘a Global Emergency’ (Commonwealth 1999, p. 55). The Commonwealth HIV/AIDS Action Group (CHAAG), a multidisciplinary group of Commonwealth Associations and civil society organisations, was established to promote and monitor the implementation of paragraph 55 of the 1999 CHOGM communiqué. CHAAG has had some considerable success in relation to focusing Commonwealth resources on HIV/AIDS and helping with the coordination of strategic planning. Recently the group has begun to focus on laws which criminalise same-sex sexual activity due to the discriminatory impact of such laws on the treatment and prevention of HIV/AIDS and in a recent letter to members, CHAAG Chair, Anton Kerr, stated that there was a need to ‘change legislation that undermines the human rights of the marginalized’ (Kerr 2010).

In the run up to the 2009 CHOGM the then UK Secretary of State for the Commonwealth, Chris Bryant, stated that the UK government was going to advocate for decriminalisation of laws criminalising same-sex sexual activity at the forthcoming CHOGM (Guardian 2009). This continues to be a key component of the British government’s foreign policy. At the Port of Spain CHOGM in 2009, no specific reference was made to decriminalisation of these laws or to LGBT rights, although there was considerable controversy surrounding the proposed Bahati Bill in Uganda, and the role of President Museveni as chair of the Commonwealth given the domestic developments in Uganda. LGBT rights were raised in connection with the terms of gender equality provisions at the Commonwealth Women’s Affairs Meeting in Barbados in June 2010, but the reaction to the idea was described as ‘lukewarm’ by one observer and no mention of the issue was made in the final communiqué.

In the run up to SOLM, the Commonwealth Lawyers Association (CLA) prepared a paper on the decriminalisation of laws criminalising homosexuality for the meeting which serves as forerunner to the Commonwealth Law Ministers Meeting. This paper was presented by Timothy Otty QC, a specialist human rights barrister and a member of Doughty Street Chambers, London, as an information paper for the delegates urging the decriminalisation of homosexuality. In his presentation to the delegates Mr Otty stated that the criminalisation of homosexuality is wrong in principle because it exceeds the normal boundaries of the criminal law. It seeks to blur the distinction between public and private life and legitimises state interference, making what is essentially a private matter, a public one. After his presentation the issue was discussed by the delegates.

The divisions between the delegates was interesting as the two issues that had at the time excited much concern from the international community

about gay rights in the Commonwealth — the Bahati bill in Uganda and the Malawian gay marriage ceremony — were at the forefront of some of the delegates minds. The delegate from Malawi outlined at length the reason why his government was opposed to the decriminalisation of homosexuality. He stated that Malawi was a ‘Christian nation’ and any acknowledgement of homosexuality being made legal ‘would not go down well.’ He also stated that Tiwonge Chimbalanga and Steven Monjeza, the two men who were arrested in December 2009 after participating in a marriage ceremony, were ‘criminals’ who had been ‘put up to’ participating in the ceremony by Amnesty International. Other African delegates also stated that the reason for retaining legislation criminalising same-sex sexual conduct was that there was no popular appetite for decriminalisation.<sup>6</sup>

Several states spoke out in favour of the paper’s decriminalisation proposals. One delegate was of the opinion that countries that have not decriminalised homosexuality do not take their international obligations seriously. This delegate noted that several states that continue to criminalise homosexuality were parties to the ICCPR and had not entered specific reservations to the articles relating to non-discrimination and procedural rights. The Canadian delegate was also of the view that this was an area where the criminal law should not operate and went on to describe the positive experiences Canada had had since it had repealed its laws in 1969.

There were also some states that were not actively opposed to decriminalisation but nevertheless took a more moderate stance. The Indian delegate noted that there were difficult domestic circumstances in many states but decriminalisation was necessary in order to allow individuals who were from the LGBT community access to basic rights such as healthcare. He also outlined the constitutional ‘read down’ that had taken place in the Delhi High Court in the *Naz Foundation* case.<sup>7</sup> Some other delegates also noted that whilst the domestic climate was often hostile to the repeal of laws that criminalise same-sex sexual activity, the judicial process appeared to be a manageable way of improving human rights in this area.

The SOLM communiqué notes that the delegates ‘took note of the paper’ (SOLM Communiqué 2010, para. 23(c)) but the issue was not referred to the law ministers for their consideration. In November 2010, the Third Committee of the UN General Assembly voted to remove a reference to sexual orientation from a resolution on extrajudicial, summary or arbitrary executions, weakening the investigative capacity of the UN Special Rapporteur on Extrajudicial

6 Malawi has subsequently committed itself to repeal laws criminalising same sex conduct. See Pomy (2012) ‘Malawi president vows to decriminalize homosexuality’, *Jurist*, 19 May .

7 *Naz Foundation (India) Trust v. Government of NCT Delhi* (2009) read down section 377 of India’s penal code and found incompatible with the right to privacy and substantive equality.

Killings to investigate murders of the LGBT community (IGLHRC 2010). The majority of Commonwealth states voted in favour of removing references to sexual orientation from the resolution. After the death of David Kato, the Ugandan LGBT rights activist, in January 2011, Kamalesh Sharma, the Commonwealth Secretary General, issued a statement condemning the murder and stated that 'the vilification and targeting of gay and lesbian people runs counter to the fundamental values of the Commonwealth, which include non-discrimination on any grounds' (ComSec News, January 2011). In a speech in Delhi in February 2011 the Secretary General praised the judgment of Delhi high court in the *Naz Foundation* and went on to state that

many Commonwealth countries are challenged with reconciling Commonwealth principles of dignity and equality and non-discrimination as well as the fundamental Commonwealth value of respect for fundamental human rights on one hand, with issues of unjust criminalisation found in inherited current domestic legislation in this area, on the other. (ComSec News February 2011)

This statement represented a considerable change in attitude of the Secretariat and the Secretary General's office and although it was still relatively non-committal in tone and substance it added considerable weight to the view that criminalisation of individuals on the grounds of sexual orientation was incompatible with Commonwealth values. This was reinforced by his address to the 2011 Law Ministers Meeting in Sydney in July when he stated that 'vilification and targeting' by the law 'on grounds of sexual orientation is at odds with the fundamental values of the Commonwealth' (Commonwealth Secretariat, July 2011). At the 2011 Commonwealth Peoples forum Civil Society Organisations urged the Heads of Government to work towards 'repealing all laws' that impede an effective response to HIV/AIDS and ensure 'that all citizens have equal rights and protection, regardless of sexual orientation' (Commonwealth Peoples Forum 2011). But in spite of considerable pressure from Australian and British government the final communiqué did not expressly refer to LGBT rights or the issue of decriminalisation.

## Conclusion

This is a somewhat pessimistic overview of the terrain and options available for human rights advocates working on LGBT Rights within the Commonwealth. It is nevertheless intended not to be conservative, but instead to serve as a cautionary overview. Initially, there is room for little but pessimism: the situation appears intractable. The Commonwealth at present could be described as a three shade map on the issue of LGBT rights with vocal pro-LGBT rights countries distinguishing themselves from states with a more ambivalent position. The 'ambivalent' states appear to favour a less politicised approach, preferring legal challenges, akin to the *Naz Foundation* case in

India. However, the states who actively oppose the decriminalisation of laws criminalising same-sex sexual conduct at present are the numerical majority in the Commonwealth. This is likely to continue processes of resistance within multilateral Commonwealth forums on the issue of LGBT rights and lead to total inertia from the organisation when it comes to action on the decriminalisation of same-sex sexual conduct.

The *Naz Foundation* case and other grass roots orientated activist litigation within individual jurisdictions has shown that localised initiatives can be highly successful on a country by country, case by case basis. The increasing willingness of the Commonwealth Secretariat to take a more proactive stance with respect to domestic initiatives such as the *Naz Foundation* judgement is also promising as this could lead to a wider dissemination of the norms surrounding decriminalisation throughout the organisation. This, however, will be an evolutionary process and it is unlikely that much progress will be made through some of the existing Commonwealth mechanisms for monitoring good government and the rule of law. The shift in favour of a more pro-active and vocal stance on LGBT rights which occurred at Commonwealth meetings over the course of 2011 has yet to translate into a commitment from the Heads of Government for action. Given that the Heads of Government remain the power brokers in the Commonwealth, any institutional progress on LGBT rights will be marginal in the absence of their support.

The international politicisation of LGBT rights holds many pitfalls and the formation of a declaration in favour of decriminalisation is likely to result in an anti-LGBT rights backlash by some states. The framework of the Commonwealth also means that such a backlash will not be a backlash of substance but rather a reaction that takes place within the context of a 'global North' versus 'global South' debate on legitimacy of imposing human rights norms. Given that anti-racism is very much written into the Commonwealth's DNA there is the potential for human rights advocates, using a formal equality framework, to gradually build a consensus in favour decriminalisation. One thing is certain: this process will be difficult and lengthy.

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