

The use of equality and anti-discrimination law in advancing LGBT rights

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1. Towards a strategy of equality

The rights of LGBT persons are increasingly interpreted in the light of the universality of human rights. Among human rights advocates it is now understood that while single-identity causes and identity politics have historically been instrumental in empowering the most disadvantaged identity groups, they have limitations, including in the case of advancing LGBT rights. The position of Human Rights Watch in respect of LGBT rights in the Middle East is relevant in a broader context:

In a few places, like Egypt and Morocco, sexual orientation and gender identity issues have begun to enter the agendas of some mainstream human rights movements. Now, unlike in earlier years, there are lawyers to defend people when they are arrested, and voices to speak up in the press. These vital developments were not won through identity politics. Those have misfired disastrously as a way of claiming rights in much of the Middle East; the urge of some western LGBT activists to unearth and foster 'gay' politics in the region is potentially deeply counterproductive. Rather, the mainstreaming was won largely by framing the situations of LGBT (or otherwise-identified) people in terms of the rights violations, and protections, that existing human rights movements understand. (Human Rights Watch 2009, p. 18)

In Commonwealth countries, too, the challenge that exists at a strategic level is to bring LGBT rights into the mainstream human rights agenda.

The rights to equality and non-discrimination are integral to the notion of universality of rights, and are indispensable cross-cutting rights in the international human rights system. Therefore, a holistic approach to equality

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and human rights is needed to promote LGBT rights, both in terms of conceptual legal consistency and political solidarity.

Several UN and regional bodies and jurisdictions have applied a holistic approach to equality and human rights to benefit LGBT persons, including the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights, among others. In a parallel process, cultural and religious justifications for persisting homophobic legislation increasingly meet with opposition from non-LGBT human rights advocates, on the basis of the universality of human rights and the ensuing need for comprehensiveness and consistency of equality legislation.

This chapter seeks to contribute to debates on existing and potential advocacy approaches to advancing LGBT rights, particularly in countries of the Commonwealth that are still ridden by strong cultural, legal, political or religious opposition to sexual minority rights. It focuses on the potential of equality and anti-discrimination law as tools in the struggle for decriminalisation of homosexuality. Its central claim is that the unified framework of equality, as expressed in particular in the 2008 Declaration of Principles on Equality (Equal Rights Trust 2008a), provides a solid strategic direction in advancing LGBT rights, including through the decriminalisation of homosexuality.² The chapter addresses the following questions:

1. What are the barriers, expressed in terms of violations of equal rights, that legal challenges and advocacy seek to remove?
2. How have legal principles related to equality been instrumental in defending the rights of LGBT persons?
3. What can LGBT advocates in the Commonwealth learn from the jurisprudence in which equality is invoked in arguments related to LGBT issues?
4. On the basis of the unified conception of equality, what are the possible legal strategies and claims that can be aimed at decriminalising same sex conduct and advancing LGBT rights?

Developments regarding LGBT issues at national and international levels – both positive and negative – make this an interesting and relevant time to examine these questions. In December 2008, in a statement to the UN General Assembly, 66 states called for an end to discrimination based on sexual orientation and gender identity. The statement went beyond simply declaring that LGBT persons should be tolerated, insisting that protecting the right

2 Strictly speaking, the term ‘decriminalisation’ may be problematic: as will be shown in this analysis, one potentially powerful legal strategy includes claiming that homosexuality is not *de jure* a criminal offence in existing domestic law, because provisions containing certain expressions (for example prohibiting ‘carnal knowledge against the order of nature’) should not apply to homosexual conduct among consenting adults.

to equality and dignity of people of different sexual orientations and gender identities is of paramount concern:

We reaffirm the principle of universality of human rights, as enshrined in the *Universal Declaration of Human Rights* whose 60th anniversary is celebrated this year, Article 1 of which proclaims that 'all human beings are born free and equal in dignity and rights' [...] We reaffirm the principle of non-discrimination which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity. (Statement to the UN General Assembly, A/63/635, 22 December 2008)

This positive step has been accompanied by important legal victories at the national level which have sought to end the criminalisation of homosexuality (see, for example, *Naz Foundation v. Government of NCT of Delhi and Others* 2001) and regional initiatives condemning all forms of discrimination on grounds of sexual orientation and gender identity (see, for example, Council of Europe's Committee of Ministers 2010). Simultaneously to these developments fierce opposition to progress in affirming LGBT rights has been gathering pace. The day after the 66 states made their statement on human rights, sexual orientation and gender identity, the Syrian Arab Republic read a counterstatement on behalf of a large group of states contending that 'rights based on sexual orientation and gender identity [...] have no legal foundation in any international human rights instrument' (Statement to the UN General Assembly, A/63/635, 22 December 2008). The infamous Anti-Homosexuality Bill in Uganda and persecution of gay men in Malawi illustrate the resistance to progressive implementation of universal rights in respect of LGBT persons.

Within the Commonwealth of Nations, the struggle to advance LGBT rights is evolving against the backdrop of a variety of political, cultural and religious contexts. But this diversity notwithstanding, what many Commonwealth countries have in common is the legacy of colonial sodomy laws and the ironic ways in which the persistence of such laws functions as a gesture of affirming independence from former colonial powers (Blake and Dayle, this volume; see also Human Rights Watch 2008). In these countries with sodomy laws, the public acceptance of general principles on equality exists to some degree, and is strong among civil society, while public opposition to the criminalisation of homosexuality is weak and inarticulate. If this is so, the specific case for decriminalisation should benefit from being construed as part of the general case for equality, whereby equality is understood in a unified human rights framework as a right equally applicable to people of a different sexual orientation or gender identity.

The unified framework on equality is also a good common platform for addressing the key challenges within civil society in order to promote effective human rights and equality outcomes for LGBT persons. In most countries of the Commonwealth, a number of human rights groups are unwilling to

support LGBT issues due to prejudice or because of fear of reprisal from the authorities. This has left many LGBT organisations and their issues isolated from the mainstream human rights agenda. It has also cultivated reluctance among LGBT groups to work with previously uncooperative mainstream human rights organisations. Increasing collaboration between LGBT groups and other human rights groups is crucial, as is increasing support for LGBT organisations so that they can effectively advocate for their constituencies.³

2. Criminalisation and its impact on LGBT rights

At the time of writing, 43 countries of the Commonwealth still have laws in force criminalising homosexuality. The criminalisation of homosexuality or same-sex sexual conduct constitutes a serious violation of basic rights. At the same time, it is a key driver and a source of legitimisation to discrimination and all other human rights violations suffered by LGBT persons in these countries. Sodomy laws, usually introduced by British colonial authorities – whether persisting in their original form, modified or re-created in post-independence penal codes – are frequently used to justify the ongoing human rights abuses suffered by LGBT persons. The Hon. Michael Kirby, speaking about these laws in Commonwealth countries, has stated that:

Sadly, in most parts of the Commonwealth, the laws [criminalising homosexual acts] are no dead-letter having no official backing. Far from being unenforced and no more than an embarrassing legal relic, the criminal laws are used in many lands to sustain prosecutions, police harassment and official denigration and stigmatisation. (Kirby 2009)

Sodomy laws, in addition to being the major barrier to realising LGBT rights, have an extremely damaging impact on the protection of the LGBT community, even when not enforced. The presence of such provisions on the statute books creates an underlying condition which legitimises and reinforces the broader discrimination against the LGBT community, denying people of a different sexual orientation or gender identity their fundamental rights to freedom of expression, association and assembly, equality in healthcare, criminal justice, education, employment and other spheres of political and social life. The Ugandan Anti-Homosexuality Bill, brought before parliament in October

3 The Equal Rights Trust (ERT) currently works in a number of countries, including in the Commonwealth (for example Guyana, Kenya, and Malaysia) on promoting equality from a unified perspective, building capacity of civil society actors to combat discrimination on a number of grounds including sexual orientation and gender identity. Among the challenges identified through this work has been the relative isolation of LGBT activists from other civil society groups, and the non-inclusion or only marginal inclusion of sexual orientation and gender identity issues in work aimed at eliminating discrimination and strengthening the legal and policy frameworks related to equality. ERT has a policy of insisting on the participation of LGBT activists and inclusion of LGBT issues in its activities.

2009, is an example of how broader strategies to criminalise homosexual conduct can potentially entrench systematic discrimination for LGBT persons. It gave explicitly legal expression of the discriminatory consequences that in other countries are tacitly drawn from the existing prohibition of homosexuality.⁴ Some of the patterns of discrimination buttressed by criminalisation are briefly outlined below.

Discrimination in criminal justice: The arbitrary arrest and imprisonment of LGBT persons has been well documented by human rights organisations in many countries of the Commonwealth. In Malawi, on 28 December 2009, Tiwonge Chimbalanga and Stephen Monjeza were arrested on multiple charges of ‘unnatural practises’ and ‘gross indecency’, following Malawi’s first openly same-sex engagement celebration on 28 December 2009 (AllAfrica.com 2010; see also Mwakasungula, this volume). In Tanzania, in June 2009, well-known gay activists Zuberi Juma and Ibrahim Ramadhani were arrested and charged with debauchery. In September 2009, 39 gay and lesbian activists were arrested in the Buguruni area of Dar es Salaam. Following reports of lawlessness in the area, police singled out the gay activists as ‘prostitutes’ and ‘vagrants’ and charged them with operating as commercial sex workers under Section 176(a) of the Penal Code.

Human rights organisations have also reported that in Cameroon laws which make same-sex consensual relations a criminal offence have been used to arrest and convict people due to suspected homosexual conduct. In May 2005, 11 men were arrested in a bar believed to have a gay clientele, and sent to prison where they spent more than a year. A further six men were arrested on 19 July 2007, after a young man who had been arrested on theft charges was coerced by police into naming associates who were presumed to be homosexual (Working Group on Arbitrary Detention 2006; Human Rights Committee 2007; Johnson 2007).

Discrimination in healthcare: Healthcare is a key area where discrimination against LGBT persons frequently occurs in Commonwealth countries that criminalise homosexuality. In February 2009, it was reported that a Rwandan lesbian woman was subjected to multiple rounds of questioning and degrading

4 The Bill proposed several new offences within Ugandan criminal law. These include: i) ‘The offence of homosexuality’ which under Article 2 criminalises same-sex sexual conduct (including ‘touching with the intention to commit the act of homosexuality’) and carries a penalty of life imprisonment; ii) ‘Aggravated homosexuality’ under Article 3 which imposes the death penalty on persons who are found guilty of committing ‘homosexuality’ in a range of ‘aggravated’ circumstances including ‘committing homosexuality’ with persons under the age of 18, and ‘committing homosexuality’ where the offender is living with HIV; and iii) ‘Same-sex marriage’ which under Article 12 provides that people who contract a marriage with a person of the same sex are liable on conviction to life imprisonment (see also Jiuuko, this volume).

treatment based on her sexual orientation during a medical examination in a hospital in Kigali (Global Rights and the International Gay and Lesbian Human Rights Commission 2009a). In June 2009, the first openly transgender woman in Tanzania suffered degrading treatment due to the conduct and comments of doctors during treatment for possible poisoning and meningitis (Global Rights and the International Gay and Lesbian Human Rights Commission 2009b). Similarly, a 2008 joint submission – to the UN Universal Periodic Review by Global Rights and the International Gay and Lesbian Human Rights Commission on Zambia’s human rights record – noted that the National AIDS Control Programme fails to mention men who have sex with men. In addition human rights organisations have reported that there are no programmes – government-sponsored or privately funded – that respond to the HIV-related needs of same-sex practising men in Zambia (Global Rights and the International Gay and Lesbian Human Rights Commission 2007). Human rights defenders have stressed that if the Ugandan anti-homosexuality bill is passed it will have far-reaching consequences, leading to setbacks in the implementation of the healthcare policies aimed at combating the spread of HIV/AIDS and treating victims of the disease that have to date been successful (Tamale 2009). In Kenya, in December 2010, The Equal Rights Trust documented cases of discrimination against homosexuals in allowing access to HIV/AIDS treatment. This led to tuberculosis and other opportunistic infections. These individual cases reflect the broader health discrimination patterns that exist in many Commonwealth countries.

Discrimination in education and employment: Numerous cases of discrimination against LGBT persons in education and employment have been reported by human rights groups in countries criminalising homosexuality. Patterns of discrimination include denial of access to education for LGBT persons, dismissal of homosexual teachers, harassment of students and various forms of less favourable treatment in the work place.

Discriminatory denial of fundamental freedoms: The persisting criminalisation of homosexuality results in discriminatory denial of freedom of expression, association and assembly for LGBT persons. The Human Rights Watch 2009 report *Together, Apart* stated that there is an ‘ever-looming possibility of backlash’ and that almost every time LGBT activists in sub-Saharan Africa have first gained public visibility, a crackdown followed: ‘Virtually any move LGBT groups make, from renting an apartment to holding a press conference, can feed a violent moral panic, where media, religious figures, and government collude’ (Human Rights Watch 2009, p. 10). It has been reported that the Zambian government has threatened to arrest anyone attempting to officially register a group which aims to support LGBT rights. The offence of ‘promotion of homosexuality’ within the Ugandan Anti-Homosexuality Bill specifically targets actions aimed at forming associations in support of LGBT rights, for example, where individuals or organisations participate in the

production, procuring, marketing, broadcasting, or disseminating materials for purposes of 'promoting homosexuality', or where they offer premises and other related fixed or movable assets for purposes of homosexuality or 'promoting homosexuality' (Anti-Homosexuality Bill 2009).

Hate speech: In addition, political, religious and cultural leaders in Commonwealth countries, seeking political dividends, have occasionally made inflammatory homophobic statements. For example, on 28 November 2010, Kenyan Prime Minister Raila Odinga stated that any person engaging in homosexual conduct should be arrested. Following protests by human rights and LGBT activists, he partially withdrew his comments, but stopped short of either an apology or a statement reaffirming equal rights for homosexuals.

3. LGBT rights jurisprudence applying equality principles and concepts of anti-discrimination law

International and regional law: International human rights law instruments provide a sufficient basis to maintain that discrimination on grounds of sexual orientation or gender identity is prohibited under international human rights law. This observation reflects a broad range of international human rights standards which relate to equality and discrimination.

Sexual orientation and gender identity are not explicitly mentioned in Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR), Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), or Article 26 of the ICCPR.⁵ However, the Human Rights Committee (HRC) has stated that discrimination on grounds of sexual orientation is prohibited under the ICCPR (Human Rights Committee 1994; 2003). In 1994, in the landmark decision of *Toonen v. Australia* the HRC rejected the argument of the Australian government that laws criminalising homosexual acts were an issue of public morality and thus purely a matter of domestic concern. In this case, the HRC, finding a violation of Article 17 (privacy), did not consider whether the specific non-discrimination article of the Covenant (Art. 26) was also violated. Since then, however, the HRC has referred to Article 26 on numerous occasions when expressing concern about discrimination on the grounds of sexual orientation (see, for example, Human Rights Committee 1997; 1998; 1999; 2002; 2004; 2005a; 2005b).

The UN Committee on Economic, Social and Cultural Rights (CESCR) has expressed concern over discrimination on grounds of sexual orientation

5 Article 26 ICCPR states: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

in a number of general comments (UN Committee on Economic, Social and Cultural Rights 2000a; 2002a; 2006) and concluding observations (UN Committee on Economic, Social and Cultural Rights 2000b; 2001; 2002b). More significantly, CESCR has recently provided an authoritative interpretation of Article 2(2) of the ICESCR in General Comment No. 20 where it has explicitly stated that discrimination on the grounds of sexual orientation and gender identity are covered by the 'other status' clause of Article 2(2):

Sexual orientation and gender identity: 'Other status' as recognized in Article 2(2) includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realising Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the work place. (UN Committee on Economic, Social and Cultural Rights 2009, para. 32)

As the criminalisation of homosexual conduct is incompatible with the states parties' obligation to protect the human rights of all persons, including those of a different sexual orientation and gender identity, in a non-discriminatory manner, by inference they are also under an obligation to repeal any legislation that might criminalise or discriminate against people on the basis of their sexual orientation.

In General Comment No. 4, the Committee on the Rights of the Child has asserted that Article 2 of the Convention of the Rights of the Child⁶ covers sexual orientation and health status:

State parties have the obligation to ensure that all human beings below 18 enjoy all the rights set forth in the Convention without discrimination (art. 2) including with regard to 'race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. These grounds also cover adolescents' sexual orientation and health status (including HIV/AIDS and mental health). (UN Committee on the Rights of the Child 2003, para. 6)

The UN Committee against Torture has also explained in General Comment No. 2 that laws in relation to fulfilling obligations under the UN Convention against Torture must be:

- 6 Article 2 provides: '1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.'

[A]ppplied to all persons, regardless of [...] sexual orientation, transgender identity [...] States parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection, including but not limited to those outlined above. (UN Committee against Torture 2008, para. 21)

General Comment No. 2 also calls to attention the importance of combating torture that is a result of multiple or intersectional discrimination:

State reports frequently lack specific and sufficient information on the implementation of the Convention with respect to women. The Committee emphasizes that gender is a key factor. Being female intersects with other identifying characteristics or status of the person such as race, nationality, religion, sexual orientation, age, immigrant status etc. to determine the ways that women and girls are subject to or at risk of torture or ill-treatment and the consequences thereof. (ibid.)

All regional human rights instruments also guarantee equality and should be interpreted as prohibiting discrimination on grounds of sexual orientation under their 'other status' clauses. For example, the right to equality and non-discrimination is guaranteed by Article 2 of the African Charter on Human and Peoples' Rights which provides:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

Case law: This chapter will now turn to claims brought in domestic and international courts where courts have relied on equality and non-discrimination provisions in deciding issues of criminalisation of homosexuality or various types of discrimination against LGBT persons.

At the national level, courts in Canada, South Africa and other countries have used the autonomous right to equality within their respective constitutions to assert equal rights for persons of a different sexual orientation and to decriminalise homosexual behaviour. These cases constitute best practice examples of how the interrelated rights to equality and non-discrimination should be used at the national level to defend and promote LGBT rights in all areas of activity (employment, education, health and so on).

Section 15(1) of the Canadian Charter of Rights and Freedoms, which does not explicitly prohibit discrimination on grounds of sexual orientation,⁷ has

7 Section 15(1) of the Canadian Charter of Rights and Freedoms states: 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without

been interpreted as also prohibiting discrimination based on sexual orientation in the landmark 1995 case of *Egan v. Canada*. The Canadian Supreme Court followed a purposive interpretation approach to the question of the prohibited grounds of discrimination. While dismissing Egan's claim that the definition of 'spouse' in the Old Age Security Act – as being of the opposite sex – violated section 15 of the Canadian Charter, the Supreme Court unanimously held that sexual orientation was a prohibited ground of discrimination (*Egan v. Canada* 1995). In the later case of *Vriend v. Alberta* the Supreme Court ruled that sexual orientation was analogous to other grounds contained in section 15(1) and invoked the disadvantage suffered by persons of a different sexual orientation as a justification for this position.

In *Egan*, it was held, on the basis of 'historical social, political and economic disadvantage suffered by homosexuals' and the emerging consensus among legislatures (at para. 176), as well as previous judicial decisions (at para. 177), that sexual orientation is a ground analogous to those listed in s. 15(1). (*Vriend v. Alberta* (1998) 1 S.C.R. 493, per Cory J., Para. 90)

On the basis of this approach, it is well established in Canadian jurisprudence that what prohibited grounds of discrimination have in common 'is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity' (*Corbière v. Canada* [1999] 2 S.C.R. 203, Para. 13).

In Canada the struggle to fully defend LGBT rights has been a lengthy judicial process requiring strong judicial and legal activism. Former Justice of the Supreme Court and ardent defender of LGBT rights Claire L'Heureux-Dubé, commenting on the evolution of this approach, explained that discrimination on grounds of sexual orientation was one of the most challenging equality issues the Supreme Court faced; she was proud of the fact that most of her dissents in the past (in which she favoured LGBT rights) in those areas are now the law (Equal Rights Trust 2010).

In 1998, in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, the South African Constitutional Court struck down sodomy laws finding that their existence violated the constitutional right to equality (section 9).⁸ Acknowledging the disadvantaging and negative impact that sodomy laws

discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'.

8 Section 9 of the South African Constitution states: '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law; (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken; (3) The state may not unfairly discriminate directly or indirectly

have had on gay men, Justice Ackerman wrote:

I turn now to consider the impact which the common law offence of sodomy has on gay men in the light of the approach developed by this Court [...] (a) The discrimination is on a specified ground. Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate. (*National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1998)

The Court in *National Coalition for Gay and Lesbian Equality* ruled that as with all other grounds, discrimination on grounds of sexual orientation degrades and violates dignity in an intolerable way in contravention of the dignity clause of the South African Constitution.

Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 [Human Dignity] of the Constitution. (ibid. p. 30)

By drawing parallels with other vulnerable groups and other grounds of discrimination, the South African Constitutional Court made it plain that while LGBT persons are a vulnerable and marginalised group in South African society, it is the explicit purpose of the right to equality and the right to dignity to end such cycles of vulnerability and marginalisation. This emphasis – that the purpose of a substantive right to equality is to end cycles of discrimination and oppression suffered by socially vulnerable groups – is inherent to the right to equality understood in a holistic framework of indivisibility of human rights.

The substantive right to equality set by the Constitutional Court in *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (1998) has been applied in subsequent South African cases, which have further entrenched the prohibition of discrimination on grounds of sexual orientation and made them applicable to issues such as adoption (*Du Toit and Another v. Minister of Welfare and Population Development and Others* 2002), healthcare (*J and Another v. Director General, Department of Home Affairs and Others* 2003) and marriage (*Minister of Home Affairs and Another v Fourie and Another* 2005).

against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination; (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’

Another landmark case in the struggle to strike down sodomy laws (albeit outside the Commonwealth), which relied on the constitutional protection of equality, must be mentioned here due to its strong impact on LGBT rights: the case *Lawrence v. Texas* during which in 2003 the US Supreme Court found in a 6–3 ruling that sodomy laws still in force in Texas violated the Fourteenth Amendment of the Constitution guaranteeing equal protection of the law (*Lawrence v. Texas* 2003). In 2005, the High Court of Hong Kong in *Leung v. Secretary for Justice* also ruled that ‘When a group of people, such as gays, are marked with perversity by the law then their right to equality before the law is undermined’ (*Leung TC William Roy v. Secretary for Justice* 2005 para. 115).

In June 2009, the Delhi High Court, benefiting from South African and Canadian jurisprudence, as well as the Declaration of Principles on Equality and the Yogyakarta Principles, ‘read down’ section 377 of the Indian Penal Code, which had been previously interpreted as criminalising homosexuality, and declared that it did not apply to consenting same-sex adults. In the case of *Naz Foundation v. Government of NCT of Delhi and Others*, the Court held that the discrimination perpetuated by section 377 severely affected the rights and interests of homosexuals and deeply impaired their dignity.⁹ It found that the inevitable conclusion was that the discrimination caused to the gay community was unfair, unreasonable and in breach of Article 14 (right to equality) of the Constitution of India.¹⁰ The High Court also found that section 377 violated Article 15 (right to non-discrimination) of the Constitution and concluded ‘that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15’ (*Naz Foundation v. Government of NCT of Delhi and Others* 2001, para. 104).

A key strategy employed by the Naz Foundation in bringing this case was to emphasise the damaging effects that section 377 has on LGBT persons’ access to medical treatment – in particular HIV/AIDS testing and treatment. This strategy contextualised the egregious nature of the criminalisation provision and clearly demonstrated its damaging and even life-threatening effect.

In a number of judgements the European Court of Human Rights has found that infringements of Convention rights of LGBT persons violate the non-discrimination provision (Art. 14) of the European Convention on Human Rights (ECHR). In 1999, in the case of *Salgueiro da Silva Mouta v. Portugal*, the Court stated that ‘sexual orientation’ was ‘a concept which is undoubtedly covered by Article 14 of the Convention. The Court reiterates

9 It should be noted that Section 377 is a variant of the colonial laws introduced in the second half of the 19th century across the British Empire, and for this reason it bears a resemblance to equivalent sections in a number of Commonwealth penal codes.

10 Article 14 of the Constitution of India states: ‘The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India’.

in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words “any grounds such as” (in French *notamment*)’ (*Salgueiro da Silva Mouta v. Portugal* 1999, Para. 28). More recently, on 22 January 2008, the Court held that France had violated Article 14 (right to non-discrimination) in conjunction with Article 8 (right to private and family life) of the ECHR in refusing the adoption application of a lesbian woman. The case of *E.B. v. France* was filed in the Strasbourg Court in 2002 following the rejection of a number of national appeals to overturn the decision of an adoption board to reject the adoption application of the applicant. The Court made it clear that ‘[w]here sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8’ (*E.B. v. France* 2008). On 2 March 2010, in the case of *Kozak v. Poland*, the Court found that a same-sex partner should be able to succeed to a tenancy held by their deceased partner. The Court held that the Polish authorities’ exclusion of same-sex couples from succession could not be justified as necessary for the legitimate purpose of protection of the family and was a violation of the right to non-discrimination under Article 14 of the ECHR (*Kozak v. Poland* 2010). On 21 October 2010, in the case of *Alekseyev v. Russia*, the Court found that freedom of peaceful assembly should be guaranteed without discrimination on the basis of sexual orientation, irrespective of the moral and religious beliefs of the majority of society. The Court held that the banning of gay pride marches due to the anticipated violent reaction and threat to public order could not be justified as necessary in a democratic society and was therefore a violation of both Articles 11 (assembly) and 14 (non-discrimination) of the ECHR. Referring to the earlier case of *Kozak v. Poland*, it reiterated that sexual orientation is a concept covered by Article 14, stating that:

Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow, and in such situations the principle of proportionality does not merely require the measure chosen to be suitable in general for realising the aim sought; it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant’s sexual orientation, this would amount to discrimination under the Convention. (*Alekseyev v. Russia* 2010)

National and sub-national courts around the world have also recently handed down decisions finding discrimination against LGBT persons, based either on constitutional claims or on claims under anti-discrimination laws. Examples include the decision of the Supreme Court of Nepal of 21 December 2007 to issue directive orders to the Government of Nepal to end discrimination against people of different sexual orientation or gender identity (Equal Rights Trust 2008b). The case leading up to the issuing of the directive orders was initiated on 18 April 2007 by a petition, filed by the Blue Diamond

Society in the Supreme Court, seeking non-discrimination provisions for people of different sexual orientation or gender identity, the nullification of discriminatory laws and the introduction of protective legislation.

In one example out of dozens of recent cases from within European Union member state jurisdictions, on 2 July 2009, the Constitutional Court of Slovenia held that Article 22 of the Registration of Same Sex Partnerships Act (RSSPA) violated the right to non-discrimination under Article 14 of the Constitution on the ground of sexual orientation. The applicants challenged Article 22, which sets out the inheritance regulations for same-sex partnerships, on the basis that it regulated inheritance for same-sex partners differently, and less favourably, than the Inheritance Act regulated inheritance for opposite sex partners (*Blažič and Kern v. Slovenia* 2009).

4. Legal strategies for decriminalisation and advancement of LGBT rights

4.1. The unified framework of equality

Building on progressive international, regional and domestic jurisprudence that supports an integrated approach to equality, two civil society initiatives have sought to provide progressive conceptual frameworks for defending LGBT rights: the 2007 Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity and the 2008 Declaration of Principles on Equality. These standard-setting initiatives can be built upon to mainstream LGBT concerns into human rights agendas, but they can also be helpful as a conceptual basis of legal strategies aimed at challenging the criminalisation, discrimination and oppression experienced by LGBT people.

This section comments on the Declaration of Principles on Equality and its role as a conceptual basis for litigating LGBT rights.¹¹ The unified (integrated, unitary) framework on equality is a holistic approach which, while keeping in view the specificities of the different strands of equality and the different types of discrimination, seeks more effective implementation of the right to equality through seeing each separate case in a broader context. The unified framework brings together: i) the types of inequalities based on different grounds, such as race, gender, religion, nationality, disability, sexual orientation and gender identity, among others; and ii) the types of inequalities in different areas of life, such as the administration of justice, employment, education, provision of goods and services and so on. The unified framework of equality is enshrined in the Declaration of Principles

11 Regarding the role of the Yogyakarta Principles, see the commentary by Michael O'Flaherty and John Fisher (2008).

on Equality, a document reflecting a new international understanding on equality principles among human rights and equality advocates and experts from all regions of the world.

The Declaration of Principles on Equality has integrated the fragments of the struggle for equality in four significant ways:

- First, the unified conception fuses the approaches to discrimination developed within international human rights law and equality law, with the result of strengthening equality and non-discrimination as autonomous human rights that are central to the international human rights system;
- Second, the unified conception departs from the concept of formal equality, provides legal definitions reflecting the notion of substantive equality, and interprets positive action (affirmative action) as inherent in substantive equality rather than as an exception or a temporary special measure;
- Third, it deletes the bright lines that have historically been drawn between civil and political rights, on one hand, and economic, social and cultural rights, on the other. Furthermore, it creates a basis, at the level of legal principle, for integrating the two historically segregated notions of equality: identity-based equality (on the basis of sex, race, religion, disability, sexual orientation and so on) and socio-economic equality.
- Fourth, it ensures consistency and comprehensiveness in dealing with different types of discrimination – enabling stakeholders to enshrine the right to equality in a way that eliminates the gaps, inconsistencies and hierarchies of current equality regulations.

On the basis of this conceptual framework, the Declaration of Principles on Equality – elaborated and endorsed by 128 experts from 46 countries – was launched in October 2008 (Equal Rights Trust 2008). The Declaration has begun to influence the interpretation of international human rights law and serve as a reference point for equality law and policy reform in several national contexts. In July 2009, it formed part of the basis for the decision of the Delhi High Court in the case of *Naz Foundation v. Government of NCT of Delhi and Others* which decriminalised homosexual conduct. The Court relied on the legal definitions in the Declaration, describing it as ‘the current international understanding of Principles on Equality ... [which] ... reflects a moral and professional consensus among human rights and equality experts’ (*Naz Foundation v. Government of NCT of Delhi and Others* 2001, para. 83).

The Declaration of Principles on Equality addresses the complex and complementary relationship between different types of discrimination, and seeks to advance and level up the exercise of equal rights for those groups that have weaker protection from discrimination in international and/or national

settings. By constructing both legal argumentation and political solidarity around LGBT rights, it brings conceptual and practical advantages for the LGBT movement. The conceptual advantages that can be utilised when developing litigation strategies to promote LGBT rights are derived from: i) an integrated legal definition of discrimination and the right to equality; ii) the specific approach to the question of grounds (open list versus closed list and in-between solutions); iii) the requirement for levelling-up protection against discrimination to the levels afforded to the best protected groups; iv) the concepts of multiple discrimination, additive (aggravated) discrimination and intersectionality; v) the approach to the issue of discriminatory violence motivated by prohibited grounds ('hate crime'; homophobia as aggravating circumstance in criminal justice); and vi) solutions offered by the unified framework regarding scope, evidence, standard and burden of proof, remedy, positive obligations and so on.

The Declaration of Principles on Equality is intended to assist efforts of legislators, the judiciary, civil society organisations (CSOs) and anyone else involved in combating discrimination and promoting equality by serving as a compass for securing equality in law, policy and practice. When used as a basis for developing litigation strategies to challenge criminalisation of homosexuality and discrimination of LGBT persons, a statement of a universal autonomous right to equality would be a very important starting point. In the Declaration, the right to equality is defined as:

[T]he right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and benefit of the law. (The Equal Rights Trust 2008, p. 5)

This definition departs from the traditional approach of formal equality. Instead it adopts a notion of substantive equality derived from international human rights law. The content of the right to equality includes the following aspects: i) the right to recognition of the equal worth and equal dignity of each human being; ii) the right to equality before the law; iii) the right to equal protection and benefit of the law; iv) the right to be treated with the same respect and consideration as all others; and v) the right to participate on an equal basis with others in any area of economic, social, political, cultural or civil life (Petrova 2008; see also Hepple 2008). This is a richer notion than equality before the law and equality of opportunity, requiring that individuals are recognised for their inherent and equal dignity in all fields of life, including economic, social, political, cultural and civil life.

Central to the right to equality is the right to non-discrimination which is 'a free-standing, fundamental right, subsumed in the right to equality' (Equal Rights Trust 2008, Principle 4). It is important to note that the Declaration's

right to non-discrimination is not contingent on the violation of any other human right. The right to non-discrimination, as reflected in Principle 4, is freestanding. The right to equality and the right to non-discrimination can thus be freely applied and upheld in all spheres of life, even if no legal rights are recognised in some of these spheres, making the reliance on the rights to equality and non-discrimination a strong approach in defending LGBT rights.

Principle 5 of the Declaration formulates a comprehensive and multilayered legal definition of discrimination, deriving from the fusion of the best approaches manifested in equality law and in international human rights law, and due to its importance should be quoted here:

Discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds.

Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.

Discrimination must also be prohibited when it is on the ground of the association of a person with other persons to whom a prohibited ground applies or the perception, whether accurate or otherwise, of a person as having a characteristic associated with a prohibited ground.

Discrimination may be direct or indirect.

Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.

Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

Harassment constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

An act of discrimination may be committed intentionally or unintentionally. (Equal Rights Trust 2008a, Principle 5)

Principle 6 of the Declaration provides: 'Legislation must provide for equal protection from discrimination regardless of the ground or combination of grounds concerned'.

One critical issue related to the definition of discrimination, which can give one or other direction to claims related to sexual orientation, is the approach to the question of 'prohibited grounds'. Most countries have adopted a variant of one of two broad approaches when setting the scope of the prohibition of discrimination. The first is 'the closed-list approach'. It narrowly construes the right to equality to apply to a limited range of protected grounds, or classes, and respective personal characteristics, such as race, sex or disability that are set out in a written or codified list. The basis for this is that these characteristics have historically resulted in discrimination and victimisation against individuals who have them.¹² Through specifying that the right to equality applies only to certain characteristics, a closed-list approach is seen by some to have the advantage of guaranteeing that the scope of protection from discrimination is not inflated. It also ensures that the right to equality is not misused by preventing legitimate distinctions from being made or by allowing spurious claims of discrimination. While the closed-list approach permits greater legal certainty, it is often too restrictive and non-flexible in its application. The impossibility of seeking protection from discrimination based on a new

12 The United Kingdom and until recently European Union legislation have followed this approach. In the European Union in particular, the limitation to only six grounds of discrimination on which binding directives establishing minimum standards can be adopted – sex, race (including ethnic origin), religion or belief, sexual orientation, disability and age – was based on Article 13 of the Treaty of the European Union, now Article 19 of the consolidated version of the Treaty on the Functioning of the European Union. However, the recent enforcement of the EU Charter on Fundamental Rights extended the protection against discrimination to grounds beyond the above and, through the phrase 'such as', introduced an open list of protected grounds. The Charter devotes Title III to 'Equality'. Its Article 21 'Non-discrimination' states in paragraph 1 that 'Any discrimination on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'. The Charter is 'addressed to institutions, bodies, offices and agencies of the union with due regard for the principle of subsidiarity, and to the Member States only when they are implementing Union law' (Article 51).

or emerging ground undermines the object and purpose of the constitutional guarantees of equality and of national equality legislation. Consequently, many legitimate claims of discrimination would fall because they cannot be argued with respect to an explicitly prohibited ground.

The second approach – that of the ‘open-list’ – also usually explicitly lists grounds of discrimination but in addition, opens up the list through the expressions ‘such as’, ‘other status’, or ‘any status such as ...’ which enables new grounds of discrimination to be prohibited by law. This approach recognises that the grounds on which discrimination manifests itself are subject to historical change and that individuals are often victims of discrimination on emerging and new grounds. It therefore allows courts and other judicial bodies to expand the list of prohibited grounds of discrimination to analogous cases in which individuals can experience similar unjust discrimination. International human rights instruments elaborated in the framework of the United Nations in the wake of the 1948 Universal Declaration of Human Rights follow the open-list approach, established first by Article 2 of that Declaration. Making use of the open list (the ‘other status’ provision), international human rights treaty bodies, including the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights have determined that discrimination on grounds of sexual orientation is covered by the provisions of the respective Covenants they oversee because it is analogous to the explicitly proscribed grounds of discrimination.¹³ Yet many legal systems avoid the open-list approach, believing that it allows an overly broad and flexible interpretation of the right to equality in which potentially any distinction, regardless of its triviality could become the basis of a claim of discrimination.

In response to the difficulties arising from both the open-list and closed-list approaches to grounds of discrimination, Principle 5 of the Declaration of Principles on Equality establishes a different solution that retains the flexibility and inclusiveness of the open-list approach, but encases it within a strict legal test to ensure that the protection against discrimination is not extended to spurious or illegitimate claims. Applying the test set out in the Declaration, in order for sexual orientation to constitute a prohibited ground of discrimination, it must be shown in the course of the litigation that either:

- a) Discrimination on the grounds of sexual orientation or gender identity causes or perpetuates systematic disadvantage; or
- b) Discrimination on the grounds of sexual orientation or gender identity undermines human dignity; or
- c) Discrimination on the grounds of sexual orientation adversely

13 This test – the analogy with the explicitly listed characteristics – is also adopted in Article 1 (xxii)(b) of the South African Protection of Equality and Prevention of Unfair Discrimination Act 2000.

affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds.

The test contained in Principle 5 provides three independent criteria; only one criterion needs to be satisfied in order for a new ground to receive protection.¹⁴

4.2. Possible legal claims in challenging criminalisation by utilising the unified framework on equality

Despite the commonalities in the legal cultures, strategies of challenging criminalisation in the courts of Commonwealth countries will differ from place to place, depending on peculiarities of the legal system and the existing national constitutional jurisprudence, as well as the agendas of political, religious and civil society actors. Globally, an important distinction to be made is whether homosexuality is prohibited through religious or secular law. In several Muslim countries around the world the prohibition of homosexual conduct falls into the remit of Sharia law. Within the Commonwealth, this applies for example to states of northern Nigeria. In 2006 the UN Special Rapporteur on Extrajudicial Executions documented the persecution of individuals accused under Sharia law of engaging in homosexual acts in northern Nigeria:

In December 2005 the Katsina Sharia Court acquitted two other men charged with the capital offence of sodomy, because there were no witnesses. They had nevertheless spent six months in prison on remand which the judge reportedly said should remind them 'to be of firm character and desist from any form of immorality'. Regardless of the circumstances of the individual case, however, the incident serves to highlight several major problems. They are the use of stoning to death as a punishment, and the prescription of the death penalty for private sexual conduct. (UN Special Rapporteur on Extrajudicial Executions 2006)

While it seems unlikely that directly confronting Sharia law solely through equality principles and international human rights will be fruitful, there may be strategic advantages in opening legal debate and dialogue in order to reconsider the authenticity of the interpretations of Sharia law used in these countries. Efforts should also focus on assisting Muslim jurists and LGBT activists to research and develop Islamic jurisprudence, building upon interpretations of Islam which encompass the promotion of diversity, tolerance, non-compulsion and the principle that all people are equal before

14 The approach to this issue is based on the South African Protection of Equality and Prevention of Unfair Discrimination Act 2000. Experts from diverse jurisdictions participating in the development of the Declaration of Principles on Equality agreed that the South African approach represents the best practice on this issue.

God (*Taqwa*), and on this basis argue that LGBT persons should be tolerated and not subjected to criminal sanctions. Advocating for decriminalisation in the Sharia settings requires long-term strategies which focus both on developing progressive justifications within Islam and on holding such countries to account in respect of their international human rights obligations (see also Shah, this volume).

A number of Commonwealth countries, including Cameroon, Gambia, Kenya, Malawi, Tanzania, Uganda and Zambia, criminalise homosexuality through the application of secular sodomy laws. In spite of the strong religious and cultural influences that stigmatise the LGBT community in these countries, the laws which prohibit homosexual conduct have no link to religious doctrine, either in the formulation of the criminal act or in the prescribed punishment. In such countries strategic possibilities exist to push for decriminalisation through promoting equality principles and international human rights law. As shown in the previous sections, secular penal codes criminalising homosexuality also create substantial gaps in protection from discrimination through categorising LGBT persons as criminals, effectively converting the penalisation of a conduct into a penalisation of a status. Consequently, the risk of discrimination is greater in all areas of life. Hence, lawyers could rely on the strategic advantages presented by advocating for decriminalisation, using equality and non-discrimination norms as an entry point.

Invoking equality clauses in constitutions: Few countries in the Commonwealth, as well as globally, explicitly prohibit discrimination on grounds of sexual orientation and gender identity in legislation. Yet most constitutions do provide general guarantees to the right to equality and non-discrimination.

It is important, in developing legal arguments to combat laws that criminalise sexual orientation, that progressive national constitutional jurisprudence is – as much as possible – taken as the source of interpretation, rather than relying exclusively on international law. To ignore national jurisprudence would lead to charges of colonialism that have often been used to undermine the work of international human rights lawyers and organisations. Furthermore, using progressive national jurisprudence is a genuine opportunity to develop national law from the ground up and illustrate how national legal systems can be used in challenging serious societal problems.

Two separate legal situations present themselves within the equality clauses of constitutions: i) constitutions with an open-list of prohibited grounds of discrimination in the context of a constitutional right to equality; and ii) constitutions with a closed list of prohibited grounds. In countries with open-list provisions, such as the Gambia, strategies to defend LGBT rights through equality should focus on challenging the criminal provision on the basis that it

violates the constitutional right to equality.¹⁵ In such countries the constitutional right to equality permits ‘other grounds’ of discrimination to be read into the right to equality. Open-list equality guarantees technically apply to any ground of discrimination that meets a certain threshold: consequently strong litigation initiatives could be developed to argue that laws which egregiously discriminate against LGBT persons violate the constitutional right to equality. On this basis, the ERT incorporated progressive decisions from the Ugandan constitutional court into its submission to the president of Uganda, urging the rejection of the Anti-Homosexuality Bill 2009 and the repeal of Section 145 of the Penal Code (Equal Rights Trust 2009). Similarly, in working to support the legal team defending Tiwonge Chimbalanga and Stephen Monjeza in Malawi, ERT relied on the Malawi case of *Marinbo v. SGS (Blantyre) Pvt Limited* (2003) to demonstrate that a Malawian court had found that ‘any type’ of discrimination is prohibited (see also Mwakasungula, this volume).

In member states of the African Union, an open-list claim can be supported by reference to the African Charter on Human and Peoples’ Rights which imposes obligations on states parties to protect the rights of every individual, both on the basis of specified grounds and on analogous grounds. Advocates could argue that these obligations cannot be negated by claiming that LGBT rights do not fall within the scope of the Charter, because under Article 2 the explicitly proscribed grounds are illustrative and the Charter recognises the rights and freedoms of everyone ‘without distinction of *any kind*’ (emphasis added).

For countries with closed-list guarantees, such as Zambia,¹⁶ gains can be

15 Article 33 of the Gambian Constitution states that: ‘(1) All persons shall be equal before the law [...] (3) Subject to the provisions of subsection (5), no person shall be treated in a discriminatory manner by any person acting by virtue of any law or in the performance of the functions of any public office or any public authority; (4) In this section, the expression ‘discrimination’ means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject, or are accorded privilege or advantages which are not accorded to persons of another such description’ (emphasis added). Article 17(2) of the Gambian Constitution states: ‘Every person in The Gambia, whatever his or her race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status, shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter, but subject to respect for the rights and freedoms of others and for the public interest.’

16 Article 23(3) of the Constitution of Zambia states: ‘In this Article the expression “discriminatory” means affording different treatment to different persons attributable, wholly or mainly, to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons

made through arguing that discrimination on grounds of sex (which most of these countries do prohibit) includes or is directly equivalent to discrimination on grounds of sexual orientation or gender identity. In addition to the application of this approach by the HRC in *Toonen* discussed above, it has been endorsed in respect to gender identity by the European Court of Justice (ECJ), in the 1996 case of *P v. S and Cornwall County Council* (1996). The ECJ ruled that the prohibition of discrimination on grounds of sex for the purposes of the Equal Treatment Directive (Council Directive no. 76/207/EEC, 9 February 1976) included a prohibition of discrimination on grounds of transgender identity. Yet sexual orientation was held by the ECJ not to come within the protection of sex discrimination under the Equal Treatment Directive in the 1998 case of *Grant v. South-West Trains* (1998). The ECJ in *Grant* based its reasoning on the fact that the European Community, despite declarations by the European Parliament that it deplored all forms of discrimination based on an individual's sexual orientation, had not (at that time) specifically prohibited discrimination on this ground.

Reading down sodomy laws as 'not applying': In a number of penal codes within the Commonwealth, anti-homosexuality provisions are expressed in terms that are arguably too broad, vague and ambiguous, such as 'unnatural offences' and 'carnal knowledge of any person against the order of nature'. When secular laws use such language, it may be strategically advantageous to claim that the provisions do not in fact criminalise homosexual conduct of consenting adults. The judgment of the Delhi High Court in *Naz* creates an excellent precedent for seeking such a result in litigation. Advocates could challenge actions of law enforcement officials or other actors (preferably state actors) who are applying these 'neutral' laws to gays and lesbians, and seek findings of direct or indirect discrimination.

Arguing violations of the equal enjoyment of other rights as a result of criminalisation: An important lesson which must be drawn out from *Naz* is that emphasising the practical implications of criminalisation (for example, the effects that discrimination in healthcare has on health outcomes) could be a key replicable strategy to end criminalisation. In India, the approach of emphasising the social disadvantage and discrimination, caused by the secular law, circumvented much public criticism of homosexual conduct and overcame a wave of political opposition against the striking down of section 377 of the Penal Code.

The argument could include the following elements: the autonomous right to equality enshrined in international law (as synthesised in the Declaration of Principles on Equality) has important implications. First, laws which criminalise

of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.'

homosexuality perpetuate an ideology that LGBT persons are unnatural, immoral and a threat to society. This fundamentally violates the dignity of all LGBT persons and encourages a system in which their stigmatisation and humiliation is acceptable and mandated by law. Second, by enforcing criminal sanctions for engaging in private consensual activities such laws denigrate LGBT persons as the lowest possible 'class' of their respective societies and send a blanket message that these people should be treated with the lowest possible respect and consideration. Third, subjecting a person to discrimination because of a characteristic which is innate to them not only violates the human dignity of the individual but it also institutionalises a system whereby these people will experience severe restrictions in terms of access to healthcare, employment and the provision of goods and services.

Claiming violation, resulting from the criminalisation of homosexuality, of the equal enjoyment of the right to be free from torture and other cruel, inhuman or degrading treatment or punishment: On the basis of the definitions and case law of the HRC, UN Committee against Torture and other jurisdictions, it can be argued that the application and implementation of laws which discriminate on grounds of sexual orientation or gender identity treat every person who engages in same-sex conduct in a degrading way. Such laws distinguish the sexual conduct of LGBT and heterosexual people and mark the former out for severely detrimental treatment. The abuse and punishment – imprisonment and civil fines – as well as harassment of people who engage in consensual homosexual conduct is unreasonable, unjustifiable and is of such severity that it clearly infringes the non-discriminative application of the right to be free from degrading treatment required by Article 7 in conjunction with Article 26 of the ICCPR.

Claiming indirect discrimination through application of 'neutral' provisions referring to 'obscenity' and similar offences: The well-established understanding in international law is that both direct and indirect discrimination are prohibited. Protecting against indirect discrimination on grounds of sexual orientation or gender identity is also extremely important. First, many laws which presumptively criminalise homosexual acts are often framed in neutral terms which do not expressly mention homosexual acts. Many anti-homosexuality legal provisions which are a legacy of colonial laws also often use more ambiguous language such as 'unnatural offences' and 'indecent acts'. It is through the application of these legal provisions that courts and law enforcement officials target persons of a different sexual orientation. Consequently, even in the event that authorities argue that they are not targeting a particular 'class' of people, but instead are targeting a particular 'act', a challenge can be brought on the basis of the indirect discrimination analysis. Only by looking past the legal language, and indeed past the intention of the legislator, and understanding the particular ways in which these provisions disadvantage persons of a different sexual orientation, will full and effective

equality become a possibility for them. The concept of indirect discrimination is a powerful legal instrument in combating legal provisions which on their face are neutral but which in application discriminate against the LGBT community.

Claiming harassment as a result of criminalisation: Persons of a different sexual orientation in countries criminalising homosexuality routinely face harassment from law enforcement as well as from other state and non-state actors. In Principle 5 of the Declaration of Principles on Equality, as in a number of jurisdictions, harassment is defined as a form of discrimination. The workplace, schools, universities and hospitals are all areas where LGBT persons are likely to be harassed as a result of prejudice and stigma, legitimised by anti-homosexuality laws. Bringing claims of harassment has the benefit of drawing from rich jurisprudence from countries with well-developed anti-discrimination protections.

Conclusion

The movement aimed at universal decriminalisation of homosexuality could benefit from relying on a unified equality framework for building a strategy. This would mean presenting the demand for decriminalisation as an indispensable, essential first step to ensuring equal respect, equal treatment and equal opportunity to all persons regardless of their sexual orientation. Criminalisation of same-sex conduct can and should be attacked as a form of discrimination. In this strategy, advocates could first seek to express the barriers faced by homosexuals in the terms of violations of equal rights, using the conceptual frameworks of equality law. In this context, advocates can draw from the existing judicial practice, invoking cases where legal principles related to equality have been instrumental in defending the rights of LGBT persons. Criminalisation can be challenged through many possible scenarios based on different claims. The choice of claim and how it could be argued – which should be made by taking into account the specific local circumstances – is central to successful strategic litigation.

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