Dark Side of the Moon: The Legacy of British Sexual Offences Laws in the Commonwealth
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I would like to speak briefly about the legacy of British colonial sexual offences laws in the Commonwealth and the continuing impact, often very pernicious, that those colonial laws are still having in many parts of the world. I'll demonstrate this firstly by providing various examples of these laws and then illustrating their prevalence and significance with some statistics.

Sexual offences provisions in much of the Commonwealth still use their original colonial formulations. For example, rape provisions are still commonly formulated along the following lines:

> *"Any person who has unlawful sexual intercourse with a woman or a girl"* – (sometimes adding *"who is not his wife")* – "*without her consent, or … by force or … threats or intimidation … or fear of bodily harm, or … false representations … or in the case of a married woman, by personating her husband, is guilty of rape."*

There is then a maximum punishment set, which is often life imprisonment.

I want to draw particular attention to the words *"with a woman or girl"*. These are sex-specific rape provisions, meaning that they only apply where the victim of rape is female. In some cases, there are express exemptions for husbands, and I'll come back to that shortly.

There is also commonly a provision on *"defilement of girls"* under a certain age, along the lines of the following:

> *"Any person who has unlawful sexual intercourse with any girl under the age of thirteen years is guilty of a felony, and shall be liable to [maximum sentence]."*

Then there is a third category of offence called indecent assaults, which covers acts that fall short of rape:

> *"Any person who unlawfully and indecently assaults any woman or girl commits a felony and is liable to imprisonment for XX years"*

Another category of offence, sometimes incorporated within the indecent assault provision, is known as insults to modesty, and again these typically apply only to females:

> *"Any person who, intending to insult the modesty of any woman or girl, utters any word, makes any sound or gesture or exhibits any object … or intrudes upon the privacy of such woman or girl commits a misdemeanour and is liable to [maximum sentence]."*

These were all crafted as sex-specific offences that in effect create a divide between the types of offences that can be committed against females and those that can be committed against males. We'll see in a moment that these Victorian-era formulations still exist in much of the Commonwealth despite subsequent changes here in Britain to make them gender neutral, albeit even that didn't occur until 2003. I'll come to the sexual offences that can be committed against males a bit later.

But first, another aspect of the British colonial legacy is that prosecutions for sexual offences against females under English law often focused on the character and sexual history of the victim; the woman's character often ended up on trial rather than or more so than the alleged perpetrator. There was need for clear proof of physical resistance and for a prompt complaint, with adverse presumptions being drawn if a prompt complaint was not made. There was a corroboration rule that survived until quite recently, even here, which required that juries be warned of the dangers of convicting someone of a sexual offence in the absence of evidence corroborating that of the complainant – which of course in rape and sexual assault cases is difficult if not impossible to obtain. It was based on the patronising notion that women's testimonies were inherently unreliable and prone to fabrication, and should not be accepted without corroborating evidence.[1] That rule was finally abolished in *R v Gilbert* [2002], when the Privy Council held that a corroboration warning in sexual offences cases is a matter of discretion for the judge.

All of these rules and presumptions have undermined women's integrity, dignity and equality around the Commonwealth. Today, fortunately, most of these have been abolished in the majority of Commonwealth countries, although some are still being applied.

Another dimension of the British Empire's legacy of sexual offences laws is that there was no such concept as rape in marriage. The notion of matrimonial sexual entitlement was captured in the statement by Sir Matthew Hale in 1736 that:

> *"the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract".*

The idea that a man might rape his wife was simply an impossibility.

That concept survived even in English law right up until 1991 when it was finally overturned by the House of Lords in *R v R* [1992] 1 A.C. 599. However, the concept remains in several penal codes around the Commonwealth. In jurisdictions that inherited the *Indian Penal Code* of 1860 – the first British expansion of Victorian era criminal laws – husbands are expressly exempted from prosecution. The *Indian Penal Code* provides:

> *"Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."*

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[1] See *R v Henry* (1968) 53 Cr App Rep 150 at 153: *"…human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all."*

Elsewhere, it is expressed through the elaboration of extremely limited circumstances in which a husband may be guilty of sexual assault against his wife:

> *"A husband commits the offence of sexual assault when he has sexual intercourse with his wife without her consent by force or fear, where there is in existence in relation to them –*
>
> *(i) a decree nisi of divorce;*
> *(ii) a decree of judicial separation;*
> *(iii) a separation agreement; or*
> *(iv) an order for the husband not to molest his wife or have sexual intercourse with her."*

In other words, it is only where the contract to which Sir Matthew Hale referred has effectively been withdrawn, through a judicial process, that the wife has any autonomy over her own body.

Thus, as long as a woman is married, sex by force or fear by her husband is perfectly lawful.

This concept derives in turn from the legal doctrine of *coverture* under which a woman's legal rights were subsumed under that of her husband. Women were in effect part of the matrimonial property and rape was conceived of as a property crime against a husband (or before marriage a father), not as a crime against the woman or girl in her own right. Hence, marital rape would by definition be an impossibility: the very fact of marriage supplied the deemed consent of the wife so it was impossible in the minds of the British patriarchy that there could be any absence of consent to make out a case of rape.

Another colonial sexual offence law that continues to persist in the Commonwealth comes under the title of "unnatural offences". Provisions along these lines still exist in many Commonwealth countries:

> *"Any person who commits buggery with another person or with an animal and any person who permits a male person to commit buggery is guilty of a felony."*

These laws originate from the 1861 *Offences Against the Persons Act* that was in place in England at the time of the colonial project.

I will come back to the terms of imprisonment, but it is relatively common that the maximum term of imprisonment is ten to 15 years. We can see that there is no element of non-consent or force as in the rape provision, no reference to the age of the parties as in defilement, and no reference to whether it is a public or a private act.

Similarly there are colonial provisions that continue to exist on 'indecent practices', usually just between males. (Some countries have tried to equalise their laws by applying these to same-sex acts between females as well, though that is not the version of equality that we particularly want to have.) The provision criminalises:

> *"Any male person who, whether in public or private, commits any act of gross indecency with another male person." .*

That provision – which again is silent on consent or age of the parties – was originally enacted in England by the 1885 *Criminal Law Amendment Act* and was intended to capture forms of sexual intimacy between males that amounted to something less than penetrative sex, so any sort of sexual intimacy.

How do all of these different sexual offences legacies of Empire actually play out across the Commonwealth today?

In only 45 per cent of the Commonwealth, or 24 countries, is it a crime for a husband to rape his wife, even if it is by force. The British embedded this principle of lawful male ownership of women's bodies throughout the Commonwealth, and we still see cases where it is applied by the courts, not to mention the inumerable cases of marital rape that go unreported. As recently as May 2014 an Indian judge ruled that sexual intercourse between a husband and wife, even if forcible, is not rape.

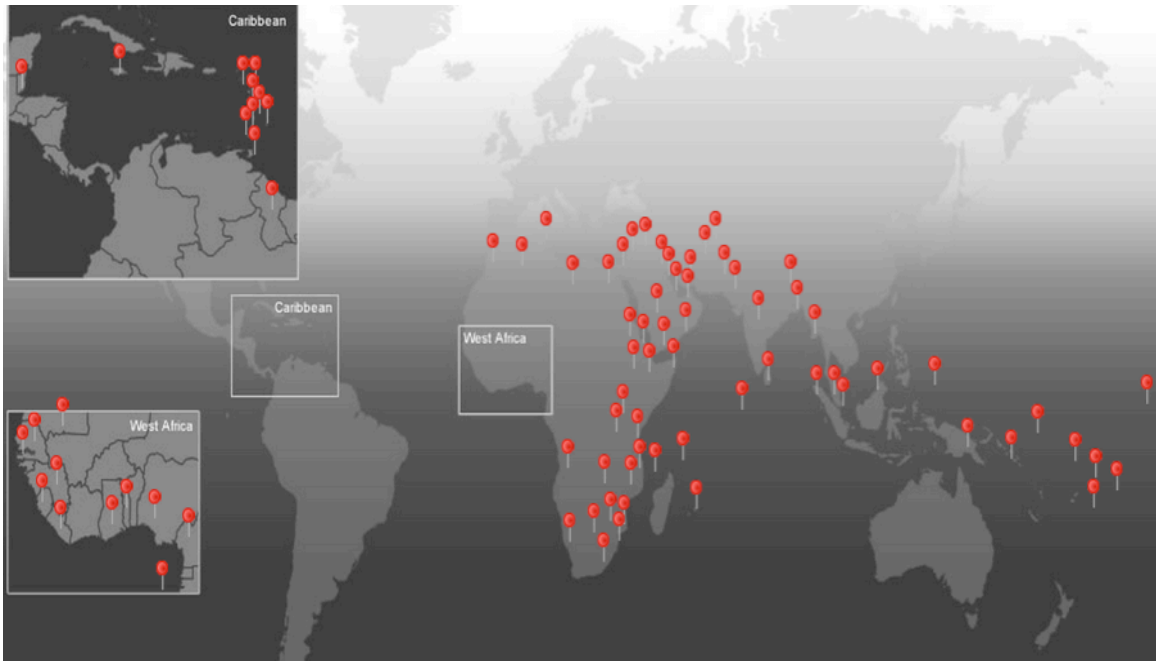
Rape still applies only to female victims in 26 out of 53 Commonwealth countries, so half of the Commonwealth still retains the British colonial forumlation of rape as a crime that can only be committed against females. Nineteen of the 53 countries or 36 per cent have non gender-neutral sexual assault laws, so those indecent assaults that amount to something less than rape.

In 41 out of 53 Commonwealth countries anal intercourse is criminalised regardless of consent or location or age of the parties. This is variously called "the abominable crime of buggery" or "carnal knowledge against the order of nature" or "carnal intercourse against the order of nature". Almost 80 per cent of the Commonwealth still retains these colonial legacy laws.

One result of the buggery laws and the gender-specific rape laws is that there remains in most Commonwealth countries a conflation of consensual and non consensual intercourse between men. A male victim of rape in jurisdictions that retain these colonial laws falls to be vindicated under the buggery law rather than the rape law, and a loving male couple can be convicted and sentenced in exactly the same way as the male rapist. The focus at the time these laws were enacted was on the perceived immorality of non-procreative sex and sex outside of marriage. The idea of loving, consensual intimacy between adult males was wholly incompatible with both of these Victorian norms. It was the act itself that caused offence, such that the intent of the parties was irrelevant.

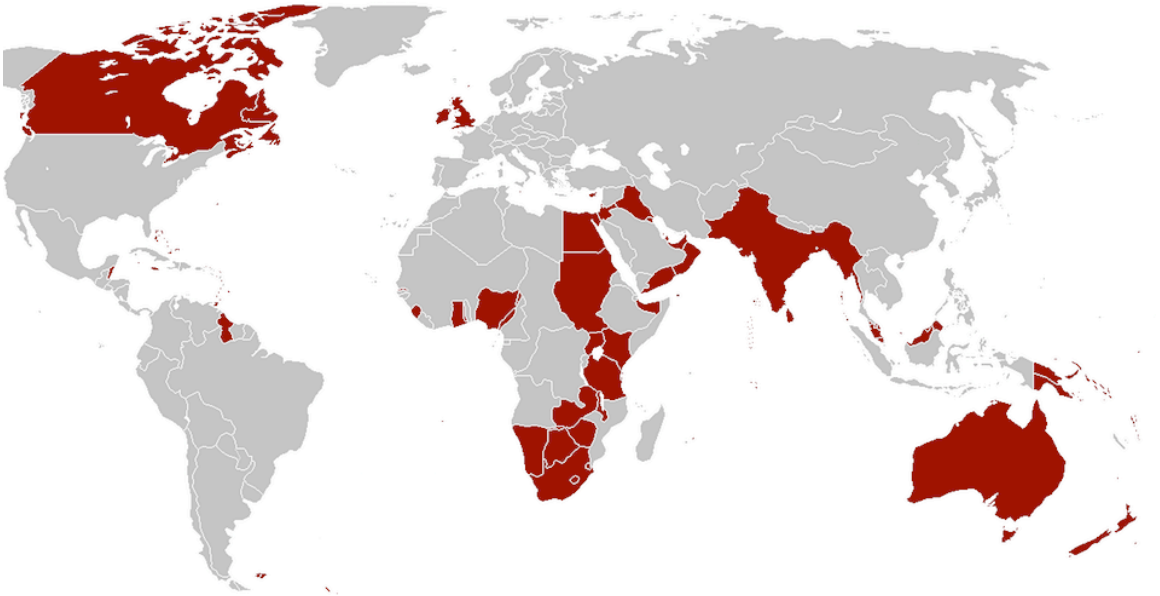
If we come back to the sentencing elements, another result is that rape of a female and rape of a male carry different maximum punishments. We saw that the maximum sentence for rape is often life, whereas for non-consensual buggery, or male rape, it is more likely to be in the order of 10-15 years. In 21 out of the 26 countries that have gender-specific rape laws the punishments are different for rapists depending on whether their victim is male or female.

This map provides a snapshot of all countries in the world that criminalise homosexual conduct today. The 53 Commonwealth countries represent just over 25 per cent of all countries in the world, yet they count among them over 50 per cent of the jurisdictions that criminalise homosexuality.



Source: Human Dignity Trust, www.humandignitytrust.org

If we look at a map of the British Empire in 1921 when it was at its height, we will notice quite a bit of similarity with the map of criminalisation. The overlaps bring us down through eastern and southern Africa, into certain parts of West Africa and then down through the Indian subcontinent, the Pacific Islands and certain parts of the Caribbean – all strongholds of the British Empire. A few of the formerly criminalising Commonwealth countries are now off the first map, having since decriminalised, for example Canada and Australia, though they both have vestiges of discrimination by virtue of differential ages of consent for heterosexual and homosexual conduct in certain parts of each country.



If we juxtapose this against the other European empires, where Napoleon's French Penal Code of 1810 informed the relevant legal systems, we see rather quite a different picture. Most of the countries within or influenced by those empires either never criminalised homosexuality or long ago abolished criminalisation. This includes the Netherlands,

Belgium, Spain, Portugal, Scandinavia, Germany, Russia, China and Japan and their respective colonies and dependencies – none of which are represented in the map of criminalisation today.

This puts in stark contrast the uniquely devastating legacy of the British empire for the lesbian, gay, bisexual and trans (LGBT) communities, and a comparative analysis region by region highlights this even further.

In South America, both of the two former British colonies, Guyana and Belize, criminalise homosexual relations whereas none of the 13 countries colonised by the other European powers do. In the Caribbean, all but one of the former British colonies criminalise whilst none of the other former European colonies do. All of the countries in Africa that were primarily British colonies criminalise, compared with 46 per cent of Africa's other former European colonies. Similarly, all but one of the former British colonies in Asia retain criminalisation compared with less than a third of those colonised by other European powers. And in the Pacific eight out of the nine countries that criminalise are former British colonies.

There is thus a very clear link between a country's colonial history and its current status of criminalsing LGBT sexual identity.

It is important to note a few key things about the implications of all of the above British legacy laws. They all perpetuate stigma, discrimination, persecution and a lack of access to justice. They foster and encourage violence against women and LGBT people. And they damage public health and impede enjoyment of the rights of women and LGBT people to the highest attainable standard of physical and mental health. Rape whether inside or outside marriage is a direct affront to the right to health, personal security and freedom from gender-based violence. It is widely recognised that HIV prevention and treatment services for men who have sex with men are hampered by anti-homosexuality laws. The Commonwealth is certainly implicated in the global HIV crisis: it has 30 per cent of the world's population yet 60 per cent of persons living with HIV. For example, one in 15 men who have sex with men is HIV positive in non-Commonwealth Caribbean countries (which do not criminalise homosexuality), compmared with one in four in Commonwealth Caribbean countries, virtually all of which criminalise.

Various actions are being taken around the world in an effort to dismantle these British colonial legacy laws, either through repeal or through the courts, which happily have the benefit of the Magna Carta-inspired post-independence constitutions of which Lord Judge spoke this morning. The bills of rights in those Constitutions, of course, apply to all, including women and LGBT people.

Thank you.