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BOMBAY HIGH COURT SESQUICENTENNIAL CELEBRATION 14 AUGUST 1862 – 14 AUGUST 2012 A TALE OF TWO SESQUICENTENARIES

The Honourable Michael Kirby AC CMG

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THE BOMBAY HIGH COURT

The Bombay High Court was inaugurated on 14 August 1862. It has enjoyed a proud tradition amongst the great courts of the common law world. Rightly, Bench and Bar and other citizens are intensely proud of the magnificent building which houses the court. This was commenced in April 1871 and completed in November 1978, under the supervision of Colonel J.A. Fuller. It is decorated with a magnificent central tower and other octagonal towers, over which preside the statues of Justice and Mercy. I have myself twice enjoyed the privilege of sitting in a motions list in the court and also of delivering there a Seervai Memorial Lecture, named for H.M. Seervai doyen of the Bombay Bar.[1]

More important, by far, than buildings and special occasions, is the work of the Bombay Court, its judges, advocates, officers and clerks. The litigants have put their faith in the justice dispensed there. Truly, the

* Justice of the High Court of Australia (1996-2009); President of the New South Wales Court of Appeal (1984-96); Chairman of the Australian Law Reform Commission (1975-1984). Commissioner of the UNDP Global Commission on HIV and the Law (2010-12). Co-winner of the Gruber Justice Prize, 2010.

[1] M.D. Kirby, H.M. Seervai – His Life, Book and Legacy Indian Journal of Constitutional Law 2009; (2007) 27 *Legal Studio* 361 (Seervai Lecture 2006).

achievement, under the Constitution of India, of parliamentary democracy and rule of law, constitute the great jewels of Indian independence. They are celebrated at home and admired throughout the world.

Originally, the Bombay High Court grew out of the presidency established in Bombay by the East India Company, along with presidencies created in Bengal and Madras. Barry Hooker has described the attempts to establish local laws in Bombay, replacing the mixture of rules and sources that had preceded their creation.[2]

> "By the 1820s Company rule in the three presidencies ... had advanced to the stage where each presidency was subject to locally made laws (called 'Regulations') which have been described as 'an incongruous and indigested mass'. The law applicable to the diverse populations ... in a wide variety of topics was widely recognised to be something of a 'lottery' and, with the proposal to admit the free settlement of people from England ... a rationalisation was required both for legal administration as well as for good government and efficient commerce. Some attempts had been made (e.g. the Elphinstone Code of 1827 for Bombay) but it is was not until 1833, when the Company's charter came up for renewal, that the idea of a comprehensive codification of Indian law became policy'.

[2] In his note on "Thomas Babington Macaulay" in AWB Simpson, (Ed.), *Biographical Dictionary of the Common Law* (Butterworths, 1984), 330

In 1833 the *Charter Act*[3] provided for the creation of a Law Commission to make appropriate recommendations. This led on to important codifications, as will be mentioned.

However, new laws would have been of little consequence if there were not courts, with judges and advocates of undoubted integrity and skill. It was this realisation that led eventually to the creation of the courts of the presidencies, notably the Bombay High Court. It resulted in the appointment to those courts of judges of ability, with the necessary integrity and energy to administer the law in the huge numbers of cases that were soon attracted to the courts. At first, the judges appointed were Englishmen, reflecting the colonial arrangements of the time. However, many of them were jurists whose ability would have won them distinction in Britain. As a reward for their labours, they were entitled to return "home" at the age of 60, to live out the rest of their lives in England, often pining for the warm and exciting circumstances of Bombay. It was in this way that India eventually secured the absurdly young retirement age for judges (62 for High Courts and 65 for the Supreme Court) that obtains to this day.[4]

The situation of Bombay as a major port and centre of commerce, which also survive today, inevitably produced a huge docket of commercial and financial litigation. This, in turn, encouraged the growth of a vibrant profession of advocates and other lawyers. From their number were appointed judges of great distinction, many of whom went on to serve as Chief Justices of other High Courts and as Justices and Chief Justices of the Supreme Court of India.

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[3] 3 and 4 Will IV c85

[4] *Constitution of India,* Art 124(2), Art 217(1)

Once again, from Australia, I send respects and felicitations to the Judiciary and Bar of the Bombay High Court. The creation, out of the royal prerogative and by Royal Charter of the Bombay High Court coincided with similar moves in the Australian colonies beginning in the 1820s, by which like traditions of bench and bar were established which we all can celebrate and honour.

THE INDIAN PENAL CODE

The creation by the *Charter Act* of 1833 of the Law Commission in India afforded a rare opportunity for one of the most remarkable civil servants ever produced by the British Empire. I refer to Thomas Babington Macaulay. He took up his duties as Chairman of the new Commission in May 1835. He was also, at which time, the Law Member in the Council of the Governor–General of India. He was to prove a controversial officer. His insistence on the use of the English language as the *Ingua Franca* in the place of Persian is still contested in some quarters. But there is no denying his high intelligence, enormous energy and dedication to his vision of India. He also made notable and lasting contributions to the unifying potential of law so that it would play an important role in India's eventual unified perception of itself.

Because he was born in October 1800, Macaulay was only 35 when he began his work on the codification of the law in India. Understandably, perhaps, he chose as the first project of the Commission the drafting of an *Indian Penal Code* (IPC). As a young lawyer in England, his sole practical experience in the criminal law had been confined to a

prosecution of a man for 'stealing a parcel of cocks'[5]. This fact made the draft IPC, which was almost entirely his own work and was completed by June 1837, all the more astonishing.

The IPC was not the only law upon which Macaulay laboured. He was also responsible for, or later contributed to, later codifications that helped spread unifying concepts in the law throughout the Sub-continent. The most important examples of these codes were the *Indian Succession Act,* the *Indian Evidence Act*, and the *Indian Contract Code*. It must be acknowledged that the successful adoption of these laws was itself a consequence of the autocratic conditions of government that obtained in the mid 19th Century. Colonial rule spared the rulers the irksome necessity of answering to multitudinous factional interest groups; not to say to democratically elected legislators. Amongst the many innovations of the codes drafted by Macaulay was the inclusion of examples. This was an idea that had been suggested by Jeremy Bentham (a convinced supporter of codification of the common law). Although it failed, along with the idea of codification of criminal law and much else in England, it achieved great success in India. It is a success that continues to this day.

The IPC was enacted in 1860. However, it did not come into force until January 1862. The enacted version contained modifications of Macaulay's original draft. But it immediately attracted favourable notice throughout the Empire[6].

[5] In the note on Macaulay, above n2.

[6] J.D. Heydon "The origins of the Indian Evidence Act" (2010) 9 *Oxford University Commonwealth Law Journal loc.cit*.

> "So far as form is concerned, the code avoids or strips away the complexities of common law, but its substance is English law. It 'reproduces the spirit of the law of England'[7] and, in the words of Sir Henry Maine, 'that admirable Penal Code which was not the least achievement of Lord Macaulay's genius, and which is undoubtedly destined to serve some day as a model for the criminal law of England'. Alas, this did not happen, so that until recently, the Empire rather than Britain had the more advanced criminal law."

The explanation for the success for the IPC lay in Macaulay's skill in distilling the principles of English criminal law that had stood the test of time. He had been well aware of the many serious defects of the common law of crime in England, which he had described, at the age of 18, as "at once to sanguinary and too lenient, half written in blood like Draco's and half undefined and loose, as the common law of a tribe of savages"[8].

Because the IPC like the Bombay High Court came into existence in 1862, it also affords a cause for celebration. Of course, it has been amended on many occasions by the legislature. Defects have been removed and other, no doubt, have been added. Yet the basic structure and content of the IPC remain substantially the same.

The IPC was to prove a significant influence in many lands far from India. Thus, it was one of the sources of inspiration for the redrafted

[7] Note on Macaulay, above n2 331.

[8] Entry on "Sir James Fitzjames Stephen" in AWB Simpson (ed.) above n2 486 at 487. It was Stephen who was mainly responsible for the *Criminal Procedure Code*, the *Indian Evidence Act,* the *Prisons Act,* the *Prisoners Act,* the *Indian Divorce Act*, the *Hindu Wills Act* and the *Punjab Land Revenue Act*.

code prepared by Sir James Fitzjames Stephen, 30 years younger than Macaulay. Stephen was also appointed Legal Member of the Governor General's Council in India in 1869, following in the footsteps of Macaulay and Maine. His redraft of the IPC influenced, in turn, Sir Samuel Griffith (later Chief Justice of the High Court of Australia) when he produced a criminal code of Queensland.[9]

The Bombay High Court has been an ornament to law and legal practice in India. No doubt its human participants sometimes exhibited faults, ill temper and still more serious flaws. But the institution has been strong. And the institutional defects have been mostly confined to humorous stonework left by long forgotten artisans in the court building in Mumbai.

In the IPC, however, there was from the start, a serious flaw. I refer to section 377, contained in Ch XVI titled 'Of Offences Affecting the Human Body'. Within this chapter, s377 is found in a sub-chapter titled 'Of Unnatural Offences'. It is to this provision, and the steps to eliminate or modify it in time for the sesquicentenary year, that I now turn.

SECTION 377 AND ITS BURDEN

Section 377 of the IPC provides:

> 377 Unnatural Offences – whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment for life, or within imprisonment of either description for a term which may extend to 10 years, and shall also be liable to a fine.

[9] A.C. Castles, "Sir Samuel Griffith, in AWB Simpson, *op cit*, n2, 216

> Explanation – penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section'.

The ultimate font and origin of the offence found in s377 of the IPC in English criminal law was a series of provisions in the Old and New Testaments of the *Bible* that were interpreted as forbidding, under pain of death, sexual penetration by a male of another male. The principal and earliest sources of this instruction are to be found in passages in the first book of the Old Testament of the Hebrew Bible, *Genesis,* wherein an account is given of the way the men of Sodom, in ancient Israel, surround the home of Lot, who was sheltering there two mysterious visitors to the city (thought possibly to be angels). The dwellers of Sodom demanded that Lot should bring out his guests in order that they might "know" them[10]. The Hebrew verb 'to know' is '*yd*'. It possesses a number of meanings; just as it does in English. Sometimes they have a sexual connotation. This is how the passage in question has long been interpreted.

The *Book of Leviticus* also the Old Testament contains an extensive 'Holiness Code' designed to control all manner of activity of people in ancient Israel. A specific passage appears which is generally taken as the clearest indication of divine disapproval of what we now describe as male 'homosexual' activity[11]:

> "If a man ... lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon you."

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10 *Genesis* 19:5.

11 *Leviticus* 20:13.

To these passages in the *Old Testament*, can be added a number in the *New Testament* that are said to re-affirm the divine prohibition on sexual activity between members of the same sex, particularly men[12].

Lawyers, who work in the world of interpretation of written texts, many of them old and some of them ancient, are familiar with debates of this kind[13]. In a sense, the arts of theology appear to be quite similar to those of constitutional interpretation. The texts are typically brief, vague, sometimes poetic and often ambiguous. In hermeneutics in respect of the meaning of religious texts[14], it is sobering to read the theological analyses and conclusions and to keep in mind that, upon the basis of such Biblical texts, many human beings over the centuries have been put to death and even more have been oppressed, shamed and punished by the law and shunned by society. Some still are.

The early English law committed the punishment of sodomy to the Ecclesiastical Courts, conducted by the clergy, representing the universal Christian church. A strict separation between Church and State had not developed in England in medieval times. On the Contrary, the Church took upon itself the punishment of those who committed ecclesiastical offences and thereby endangered social peace and 'defiled' the kingdom. A survey of the English laws, published in Latin in 1290, during the reign of Edward I, specifically mentions sodomy[15]. Another description of English criminal laws, written shortly afterwards in Norman French, describes the punishment for the offence as burning

[12] See e.g. *Romans* 1:26-27; 1 *Corinthians* 6:9-10; and 1 *Timothy* 1:8-11.

[13]

[14] Hermeneutics is the art or science of interpretation, especially of Scripture.

[15] Fleta, *Seu Commentarius Juris Angicani* was a survey of English law produced in the Court of Edward I in 1290 (Ed. and trans. H.G. Richardson and G.O. Sayles, London, Quaritch, 1955). See Human Rights Watch report 13.

alive. Being an offence against God's will and a supposed source of social defilement, it attracted the most condign punishments[16].

The foregoing arrangements were altered by Henry VIII's break with the Church of Rome. The trial of ecclesiastical offences had then to be transferred to the Royal Courts for secular disposition. Accordingly, in 1533, a statute was enacted providing for the crime of sodomy under the description of "the detestable and abominable Vice of Buggery committed with mankind or beast". Death was the punishment proscribed for the offence. Unkind commentators suggested that Henry took control of the office to advance his strategy to seize control of the monasteries.

When Henry VIII died and was eventually succeeded by his older daughter, Mary I, his statute was repealed and the crime of sodomy reverted to the Ecclesiastical Courts. However, with the accession of Elizabeth I, the Ecclesiastical Courts were again abolished and the secular offence was re-enacted in 1563[17].

Once the law had followed this tortuous lineage, it was described and lauded by the taxonomists of English law, Edward Coke[18] and William Blackstone[19]. And it was through Blackstone's analytical *Commentaries on the Laws of England* that much of the jurisprudence on the sodomy offence passed into the United States upon the independence of that

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[16] The offence is contained in a work by Britton which is described in H. Brunner, *The Sources of the Law of England* (Trans. Williams Hastie, Edinburgh, T.T. Clark 1888). See also H.L. Carson, "A Plea for the Study of Britton" 23 *Yale Law Journal* 664 (1914).

[17] M. Hyde, *The Love That Dared Not Speak Its Name: A Candid History of Homosexuality in Britain*, Boston, Little Brown, 1970. The *Buggery Act* 1533, after its original repeal, was re-enacted as the *Buggery Act* 1563 during the reign of Elizabeth I.

[18] E. Coke, *The Institutes of the Laws of England* (3rd part), cap. X *Of Buggery, or Sodomy*, 1797, 58.

[19] W. Prest, *Blackstone and His Commentaries: Biography, Law, History*, Hart, Oxford, 2009, 3.

country after the revolution of 1776. Several of the foundation colonies already had enactments of their own, substantially repeating the language of the offence of Henry VIII.

If this was the way the sodomy offence found itself as a key provision of English criminal law. It was substantially by way of Macaulay's Code (the IPC) that it secured its export to the vast empire of Britain that expanded in the seventeenth to twentieth centuries. Nothing made assurance more certain than the mode by which the British colonialists and administrators achieved the export of their criminal laws to the countries brought under allegiance to the British Crown.

The end of the eighteenth century had witnesses a great move in France to reconsider all of the Royal laws and to codify the French common law, so as to make them more accessible, and suitable for, to the people. As part of this process, the sodomy offence in France was abolished by the revolutionary legislature in 1791. This abolition was preserved by the Napoleonic codifiers who drafted the French *Penal Code* of 1810. In consequence of these amendments to the criminal law in Europe, most of the newly emerging nation states of Europe in the nineteenth century followed the French *Penal Code*. In the result, neither they, nor their empires, inherited the old sodomy offence. It was not therefore a general feature of the French Empire, nor of the German, nor the Spanish or Portuguese, nor the Netherlands, Belgium, Scandinavian or Russian Empires. Thus the Netherlands code in what is now Indonesia, never contained such an offence. The sodomy offence was, however, most certainly a feature of the British Empire. Its countries had not secured the benefit of its revolutionary repeal in France.

There were many variations and differences in the implementation of the Macaulay, Stephen and Griffith codes in the many colonies and dominions of the British Crown. However, a common feature of them all was the inclusion of an offence of sodomy. So it was that this offence became a universal feature of all jurisdictions of the Empire, including India and Australia.

LEGISLATIVE REFORM PETERS OUT

In the early nineteenth century, Jeremy Bentham and J.S. Mill in Britain had, with varying degrees of directness, cast doubt on the appropriateness and justification of the sodomy offence, by reference to their concepts of the proper limitations of the criminal law in a humane society. However, it required not lawyers but the writings of early leaders in the discipline of psychology, and research of important scientists such as Alfred Kinsey, to place the acceptability of the sodomy offence on the agenda of law reformers.

Kinsey's influential reports on human sexuality were published in 1948 and 1953[20]. They promoted a great deal of public and media discussion in western countries about the sodomy offence: with the growing recognition of the apparent fact that significant numbers of otherwise lawful citizens were being exposed to prosecution for committing the offence. Eventually, a Commission of Enquiry was established in the United Kingdom, chaired by Sir John Wolfenden, a university Vice-Chancellor. The report of this Commission (the *Wolfenden Report*) proposed repeal of the sodomy offence, so far as it concerned adults,

[20] A. Kinsey et al, *Sexual Behaviour in the Human Male*, (1948); Kinsey et al, *Sexual Behaviour in the Human Female*, (1953).

acting by consent and in private. In language which reflected the earlier approaches of Bentham and Mill, the Wolfenden Committee in 1957 concluded[21]:

> "Unless a deliberate attempt is made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business".

Legislation to give effect to this conclusion was first enacted in England in 1967[22]. Reform followed in Canada (1969)[23], Australia (1974-97), New Zealand (1986), Hong Kong (1990) and the Fiji Islands (2005). It was achieved by a decision of the Constitutional Court, in South Africa in 1988[24]. Also by a constitutional decision, the United States Supreme Court, following a false start in *Bowers v Hardwick*[25], struck down the sodomy offence in *Lawrence v Texas*[26] in 2003.

In the course of the struggle to conclude the repeal of the sodomy offence in Australia, a communication was taken to the Human Rights Committee established under the First Optional Protocol of the *International Covenant on Civil and Political Rights*, a treaty to which Australia is a party. In resolving that communication, the Human Rights Committee found that, by maintaining in Tasmania the sodomy offence, Australia was in breach of its obligations under the treaty[27]. Armed with the precedent of repeal in the country from which the law had initially

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[21] Report of the Committee on Homosexual Offences and Prostitution (Wolfenden Report), CMND247, HMSO, 1957. See also M.D. Kirby, "Lessons From the Wolfenden Report" (2008) 34 *Commonwealth Law Bulletin* 551.

[22] *Sexual Offences Act* 1967 (UK).

[23] *Criminal Law Amendment Act* 1968-69, s7.

[24] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] 3 LRC 648; 1999(1) SA 6 (SACC)

[25] 478 US 186 (1986).

[26] 539 US 558 (2003).

[27] *Toonen v Australia* (1994) 1 *International Human Rights Reports* 97 (No.3).

come; the absence in most countries of the world of any law of a similar kind; the arguments of philosophers; the reports of commissions of enquiry; the common non-prosecution of the offence; and the agitation of informed opinion, it might have been expected that the sodomy offences would quietly and relatively quickly have slipped out of the taxonomies of penal laws in the countries of the Commonwealth of Nations. Not so.

RESISTANCE TO REPEAL AND RESPONSE

In 2006, in Singapore, the Law Society of the city state delivered a report proposing repeal of s377A of the Singapore Penal Code. Repeal seemed assured because the "Minister Mentor" and foundation Prime Minister of Singapore (Lee Kuan Yew) indicated his personal support for reform. However, the Bill to implement the Law Society's recommendations failed in the Singapore Parliament. It was said that it would undermine "social cohesiveness" and "force, homosexuality on a conservative population that is not ready for homosexuality"[28]. The same result loomed in Samoa, a small island state in the Pacific where reform was opposed by Christian churches.

Although reform was achieved in one or two jurisdictions of the Commonwealth (such as The Bahamas) and pressure to introduce the sodomy law was resisted in the newest member of the Commonwealth that had a French penal code background (Rwanda), the process of reform basically ground to a halt. African leaders in Zimbabwe, Kenya, Uganda and Nigeria appeared to compete with each other in the vehemence of their condemnations of Western attempts to persuade them to get rid of the law.

[28] M. Aidil, "Re-Scoping Sec.377A: A Juxtaposition of Views", *Juris Illuminae*, Vol.3, No.3, (January 2007) (Singapore).

This is the situation in which the Commonwealth of Nations now finds itself. Forty-one of the 54 countries of the Commonwealth still criminalise sodomy. A number of these countries (e.g. Sri Lanka and Singapore) have actually extended the offence to apply to women or to remove the application of the offence specifically in the case of heterosexual married couples. Otherwise, far from being repealed, the crimes have actually been expanded. The reform movement seems to have petered out. However, in May 2012 the new President of Malawi (formerly Nyasaland), HE Grace Banda, announced her intention to initiate reform of the criminal law to remove the provisions of the equivalent to section 377. So on a dark landscape there are occasional glimmers of light

It is in this context that additional developments have taken place that need to be noted in the context of this essay of celebrations. One of them is an important decision of the Delhi High Court in India in *Naz Foundation v Delhi & Ors*[29]. That decision upheld a challenge to the constitutional validity of s377 of the *Indian Penal Code,* dealing with the offence of sodomy. The judges of the Delhi High Court (A.P. Shah CJ and Muralidur J) concluded that the provisions of s377 were contrary to the guarantees of civil rights contained in the Indian Constitution: specifically guarantees of privacy, and equality of status of citizens. Chief Justice AP Shah had formerly served as Chief Justice of the Madras High Court. He is a distinguished *alumnus* of the Bench and Bar of the Bombay High Court.

[29] [2009] 4 LRC 835 (Delhi High Court).

The decision in *Naz was* subject to an appeal to the Supreme Court of India. The Government of India did not appeal against the decision of the Delhi High Court. However an appeal was taken by a civil society organisation supported by religious organisations. The outcome of the Indian litigation will be of potential importance for many countries of the Commonwealth of Nations, given that virtually all of them in the new Commonwealth have a provision similar to s377 of the *Indian Penal Code*. Most of them have constitutional provisions on basic rights of individuals similar to those invoked successfully in the Indian Court.

Meantime, three further developments have occurred, which place the spotlight on the still operating sodomy offences in the majority of Commonwealth countries:

- *The Commonwealth EPG report*: The first is a report of the Eminent Persons Group (EPG) on the future of the Commonwealth[30]. I served as a member of the EPG. It decided to tackle the issue of the remaining sodomy offences, but to do so in the context of a special Commonwealth problem involving the HIV/AIDS epidemic. Statistical evidence provided to the EPG by the United Nations Development Programme (UNDP) indicated that levels of HIV in Commonwealth countries are at least twice as high as those in non-Commonwealth countries, including in Africa. A contributor to this worrying statistic is considered to be the state of the law in Commonwealth countries dealing with sex, specifically homosexual conduct and the criminalisation of prostitution (sex workers). The problems of the continuing global financial crisis; the declining funds available for payment for anti-

[30] Commonwealth, Eminent Persons Group, *A Commonwealth of the People: Time for Urgent Reform* (Commonwealth Secretariat, London, 2011). See p98-102.

retroviral drugs; and the ongoing rates of infection in developing countries make it urgent that these Commonwealth countries should address their special problem. At the recent Commonwealth Heads of Government Meeting (CHOGM) in Perth, there was no appropriate sense of urgency on the part of most Commonwealth leaders. The recommendations of the EPG on responses to the AIDS epidemic were postponed to be considered by officials and to be reviewed by Foreign Ministers of the Commonwealth in September 2012. Although it might be hoped that realism and appreciation of the peril to millions of citizens of Commonwealth countries will encourage a sense of urgency, this is by no means assured;

* *The UNDP Global Commission on Law*: Another body on which I serve, the Global Commission on HIV and the Law is preparing a report on the legal impediments to successful strategies necessary to combat the continuing spread of HIV. This report will be addressed to the entire world and not simply to Commonwealth countries. The final meeting of the Global Commission took place in Geneva in December 2011. A report will be delivered to the Secretary-General of the United Nations in July 2012. It may be anticipated that this report too will address specifically legal impediments that include the laws on homosexuals and sex workers; but also on other vulnerable groups, on women's legal disempowerment, on the laws on injecting drug users and the question of the laws of intellectual property that increase the costs of essential treatment. The follow-up to this report in Commonwealth countries will likewise draw attention to the continuing existence and stigmatising effect of the sodomy offence surviving there; and

* *UN and other leaders*: In addition to these initiatives, leaders of the United Nations, from the Secretary-General (Ban Ki-moon) down have been speaking with one voice of the imperative need to repeal the laws that interfere with successful strategies against HIV/AIDS, notably the laws on sexual orientation providing for the sodomy offence. In an address to the Human Rights Council of the United Nations in January 2011, the Secretary-General said[31]:

> "I understand that sexual orientation and gender identity raise sensitive cultural issues. But cultural practice cannot justify any violation of human rights. ... When our fellow human beings are persecuted because of their sexual orientation or gender identity, we must speak out. That is what I am doing here. That is my constant position. Human rights are human rights everywhere, for everyone".

With a growing harmony and strength, leaders of the world community and of individual countries are thus speaking out, calling for the sodomy offence to be repealed and an end to the stigma and oppression of the homosexual minority that is a direct result of the survival of this feature of inherited colonial criminal laws.

THE FUTURE

The appeal to the Supreme Court of India against the decision of the Delhi High Court was granted an oral hearing. It concluded on 11 April 2012 before Justices Singhvi and Mukhopadhyaya. Because the government parties to the hearing below did not appeal, the Court heard argument from representatives of civil and religious organisations

[31] Ban Ki-moon, Secretary General of the United Nations, Remarks to the Human Rights Council, Geneva, 25 January 2011, TSPT.

supporting the appeal. It also heard the respondent foundation and its supporters.

The respondents led off with the submissions made by Senior Advocate Fali Nariman, representing an organisation of parents of lesbian, gay, bisexual and transgender persons. He was followed by Senior Advocate Anand Grover and Mr Shyam Divan. All of the leading advocates for the respondents had strong affiliations with the Bar of the Bombay High Court. All supported the reasoning of the Delhi High Court, based upon the Indian Constitutional principles of privacy protection, non-discrimination and equal treatment of citizens. All supported the application to s377 of the IPC of the doctrine of severability. It was that doctrine that the Delhi High Court invoked to declare the section invalid, in so far as it purported to criminalise consensual sexual act of adults in private.

In supporting this approach, the learned judges of the Delhi High Court relied on the analysis of H.M. Seervai in his monumental text *Constitutional Law of India*[32] as well as the principle stated in the Supreme Court of India in *Chamarbaugwalla v Union of India*[33]. The same principle of severability is regularly applied in constitutional decisions in Australia[34].

At one stage, the Supreme Court asked Counsel if they knew anybody who was gay or lesbian. It is important to indicate that homosexual

[32] Volume 1. See *NAZ Foundation v Delhi Corporation*[2009] 4LRC 838 (Delhi HC) at 893-5 [128].

[33] 1957 SCR 930 cited *ibid* [128]. Also citing *BHIM Singhi v Union of India* (1981) 1SCC 166 and *State of Andhra Pradesh v National Thermal Power Corporation* [2002] 5SCC 203.

[34] *Owners of* SS *Kalibia v Wilson* (1910) 11CLR 689 at 698; *Alexander's* case (1918) 25CLR 434 at 470; *Newcastle and Hunter River SS Co v Attorney-General for the Commonwealth* (1921) 29 CLR 357; *R. v Poole*; ex *parte Henry* (1939) 61CLR 634 at 651-2. The test is applied whether the severance would create an entirely different legislative scheme.

people exist in every culture and country. They are found in positions high and low. I am far from the only homosexual judge in Australia. But in the past, the criminalisation of sexual conduct has driven many good citizens into secrecy and shame. This is the wrong that the *NAZ Foundation* case aims to terminate. Believers in reality, scientific truth and equal justice under law, around the world, are now watching closely the outcome of the appeal in India. Of course, it concerns legal questions. But it also raises issues of human justice, as well as effective responses to the HIV epidemic, as the court *a quo* explained.

At this time of celebrating two important legal anniversaries in India, I pay my respects to the judges and advocates of the Bombay High Court, past and present. I honour their achievements. And above all, the achievement for one hundred and fifty years of bringing equal justice under law to all the people of the world's largest democracy.

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