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COMMONWEALTH LAW BULLETIN

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PACIFIC – REGARDING OTHERS AS OURSELVES

The Hon. Michael Kirby AC CMG

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ABSTRACT

In this article, first delivered as a memorial lecture in Fiji, the author traces the life of Sir Moti Tikaram, a distinguished judge and public officeholder. Drawing on Sir Moti's lifetime struggle against discrimination on the grounds of race, the author examines analogous issues raised by discrimination on the grounds of sexual orientation and gender identity. He traces the growing concern over these issues in a number of international bodies. He then examines moves for law reform in the Pacific and South Asia. The obstacles and impediments are explained as are the fitful moves forward. Terminating discrimination on the basis of indelible features of nature is still a significant challenge in many Commonwealth countries. Sir Moti Tikaram's dream is as yet unfulfilled.

SIR MOTI REMEMBERED

Moti Tikaram was an outstanding citizen of Fiji. He was born a British subject in colonial times; and became a long time Commonwealth citizen. He also served a wider world. He advanced the principles of universal human rights, justice and the rule of law. His life was an

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** Justice of the High Court of Australia (1996-2009); Commissioner (1985-94) and President (1995-8), International Commission of Jurists; Laureate, Leo Nevas Prize for Human Rights 2014. The author acknowledges the assistance of Dr Paula Gerber (Castan Centre, Monash University and Mr Raymond Roca (Kaleidoscope Human Rights Foundation) on the state of Pacific laws.

example to us. We should not forget its milestones for they helped to shape his values and they explain his motive forces.¹

He was born in Fiji on 18 March 1925. We shared the same day of birth. His parents had arrived in Fiji in 1912. They were victims of the system of indentured labour. They traced their original ethnicity to India, via the Caribbean. They came to Fiji on the *MV Ganges*. As a mature man, Sir Moti was to re-establish his family's links with India, and he was proud of those links.

He was educated at the Sama Bula Indian School, at the Methodist Mission School and the Marist Brothers' High School, Fiji. In the 1940s he undertook study at the Auckland University College. He selected journalism, probably because he knew, at a young age, that he had a gift with words. In 1952 he switched to the law course at Victoria University. He returned to Fiji with legal qualifications and, in 1955, set up in private practice in Suva. His practice took him into many fields of Fijian law. He also attracted clients from Tonga. At about this time, he married Satya, with whom he was to raise three children: Savita, Anil and Sunil, all still living. Lady Tikaram predeceased him in 1981; but this was after he had received the honour of knighthood.

In 1959, Moti Tikaram received the first of many acting judicial appointments. He was later to remark ruefully that he deserved an Oscar for his repeated successes in acting. Originally his temporary appointments were the product of racial discrimination. He was appointed because he was able and useful. But the colonial authorities held back from permanent assignments. His first acting judicial post was

¹ Details of the life of Sir Moti Tikaram appear in chronological biodata provided to the author by Professor Julian Moti QC, CSI.

in 1959 when he assumed duties as a temporary stipendiary magistrate. At the same time, he was admitted as the first 'non-white' member of the Fiji Club in Suva. As a serving magistrate, they could hardly slam the door on him.

Such was his professional skill that in 1961 he was confirmed as a full-time permanent magistrate. And at this time he made the first of many visits to India.

In 1967, Moti Tikaram was appointed an acting judge of the Supreme Court of Fiji. Once again, he was the first local lawyer to receive such an appointment. He served in it with a distinction marked, in 1970, by the award of the Fiji Independence Medal. In 1972 he was seconded to serve as Fiji's Ombudsman. This was an office he retained until 1987. He was later celebrated as the longest serving ombudsman in the world. He busied himself in the international organisation of ombudsmen and attended their international conferences where he began to gather a wide circle of admirers.

In 1979 he was appointed to chair a Royal Commission on Punishment of Offenders. His able discharge of so many diverse public duties in Fiji was recognised by the Queen in 1980 when he was created a Knight Commander of the Order of the British Empire (KBE). His citation recorded that he had:

“... discharged the duties of his office with distinction and honour and... made an outstanding contribution to public life in Fiji.”

In 1985, he was elected by the International Commission of Jurists (ICJ) to be the first Commissioner chosen from Fiji. As my election to the ICJ from Australia quickly followed, it was this organisation that first brought us together. We began to attend the international meetings of the ICJ. His circle of influence spread further beyond Fiji.

In 1988, Sir Moti was elevated to be the first full time resident Judge of Appeal on the Fiji Court of Appeal. At about the same time (1984), I was appointed President of the New South Wales Court of Appeal. When, in 1993, he became Acting President of the Fiji Court of Appeal and served as Acting Chief Justice of Fiji on many occasions, he and I were swimming in the same professional waters. I would meet him at legal conferences in Australia, Fiji, New Zealand and further afield. His wider interests continued to expand. They extended to Rugby Union football; cricket; libraries and education. In all such activities he was a leader in the moves, within Fiji, to assure equality of opportunity to people of every race. Truly, he was colour blind. When he urged the closure of a body created for Indian citizens of Fiji who wished to play football, he explained that he did so in order to assert a wholly race-free attitude to sporting participation. He told his children that he undertook such efforts in order that they could join every civil association, and not be held back in any way by their racial identity. He was strong and principled.

In 2000, at the age of 75, he retired as President of the Fiji Court of Appeal. However, he was soon appointed to the Supreme Court of Fiji: the pinnacle of the national judiciary. Upon his eventual retirement from judicial life, he became a notary public and his service to the law was honoured within Fiji and in India. The Fiji Law Society made him its first honorary life member. The Government of India conferred on him the

Hind Rattan Award and, in January 2007, the President of India conferred the *Parvasi Bharatiya Samman Award*. Other honours from Fiji and India ensued. But Sir Moti simply carried on being the same modest and engaging man. He had a beautiful smile and a lovely temperament. Still, beneath the amity, was a steely resolve. He was abstemious in his personal habits. He was devoid of discrimination. On many occasions when he visited Australia, we met together. Our conversation was never about the ‘good old days’. It was about the better days that were yet to come.

In 2012, I was warned that he was seriously ill. On our mutual birthday, 18 March 2012, I telephoned him with words of encouragement. His voice was weak; but as always cheerful and positive. He died on 17 May 2012. This lecture series in his honour was inaugurated soon after by the University of Fiji. The first lecture in the series was given by Professor Julian Moti QC, Dean of the Law School and a member of Sir Moti’s family.² In his lecture, Dean Moti explored both the universal principles of constitutionalism and the singular autochthonous features of Fijian constitutionalism. This theme is a suitable platform from which I will seek to investigate a special lesson that we can derive from the life from Sir Moti Tikaram. This is the need to overcome infantile and unscientific prejudice against fellow citizens by reason of features of their lives and natures which are indelible. Features that they do not choose and cannot change. I will seek to expand the lessons that Sir Moti taught, as himself sometimes a victim of discrimination based on race, for the ongoing disadvantages that people suffer in our world and in the Pacific Region, by virtue of their sexual orientation and gender

² J.R. Moti, “Making our Constitution Our Own: A Genealogy of Fijian Constituent Power” (Inaugural Sir Moti Tikaram Memorial Lecture, 6 November 2013, Suva, Fiji): (204) 1 *University of Fiji Law Journal* 1.

identity. On these subjects too, I believe Sir Moti Tikaram would have spoken with a strong and principled voice.

CONCEIVING THE OTHER: SEXUALITY

It is usually easy to conceive the other, in terms of people who are different from oneself. People of different skin colour will usually be immediately identifiable. Unless one is very wealthy, like Michael Jackson, no amount of cosmetic surgery, and no quantity of skin whitener or hair straightener, can change the basic features of one's appearance. They stand out. And they can cause discrimination. Sir Moti Tikaram experienced this in his lifetime. Yet he lived long enough to see the global struggle against racial discrimination: the end of "White Australia" in the Australian Commonwealth³; and the overthrow of Apartheid in South Africa, with the creation of the new constitution promising equal justice to people of all races. He also saw the same issues played out in his own country, Fiji. By his work and example, he contributed to a resolution of those issues, conformably with universal human rights.

It is normally also difficult for a person to disguise their sex or gender. Features of their physiognomy, body shape, size and vocal and other characteristics tend to mark the difference. Interestingly, according to experience, many transsexual persons (TGP), even those who wish to undergo gender reassignment surgery (GRS), assert that cosmetic surgery designed to soften facial features can be as important as any

³ The White Australia Policy was enforced in Australia for more than a century after the Victorian Colonial Parliament enacted an anti-Chinese law in 1855. Under that law, the number of Chinese immigrants was restricted and a poll tax was imposed. When an inter-colonial conference of 1896 concluded that the same laws should apply to all non-white races, the Colonial Office in London objected. The Secretary of State for the Colonies (UK) suggested adoption of a "dictation test" instead. This became the basis of Australian immigration law until 1958. See *Pacific Island Labourers Act 1901* (Cth). After 1958, a non-racial immigration policy was gradually introduced. P.E. Nygh and P. Butt (eds.) *Australian Legal Dictionary* (Butterworths, Sydney, 1997), 1267. See also *R v Carter; ex parte Kisch* (1934) 52 CLR 221; *R v Wilson, ex parte Kisch* (1934) 52 CLR 234.

surgery altering the genital organs. Dress and physical presentation can make sexual differences stand out or fade away.

There are other physical attributes that differentiate human beings. Ordinarily, humans do not choose, and cannot change, such attributes. They derive from the hard wiring of in our DNA. Hostility to elements of race, skin colour, aboriginality, sex and gender commonly derive from a feature of human behaviour and attitudes that are common in infant schools. This is an expression of hostility towards anyone who appears different from oneself. Such people are regarded as 'other'. They are 'strangers'.

A deep atavistic animosity sometimes gives rise to stigma and discrimination against 'others'. Occasionally, social, political and even religious organisations encourage such stigma and hostility. They emphasise a patriarchal preference for males and patriotic preference for people who are similar to the dominant 'ideal' type, lauded by society. The Apartheid system of South Africa (and to a lesser extent the 'White Australia' policy in Australia) originated out of a belief that 'white' societies were found at a superior level of civilisation, power and beauty. Such attitudes gave rise to harsh laws on immigration, employment, education and housing.⁴ It was against such laws that Moti Tikaram dedicated his life and gave his example. Racial discrimination had no support in scientific principle. It was based on false stereotypes, derived from notions of racial superiority. Sadly, there are other sources of infantile feelings of hostility and superiority. Fortunately, the world is beginning to address these.

⁴ John Darwin, *Unfinished Empire: The Global Expansion of Britain*, Penguin, London, 2012 at 273-5, 271-9; 397-9.

In five international bodies, in recent times, I have witnessed (and contributed to) the attempt to terminate such stereotypes: this time on the basis of sexual orientation and gender identity:

- * In the *International Commission of Jurists* (ICJ), in 1993, I served as chair of the Executive Committee. On behalf of the ICJ, that Committee addressed itself to the future challenges for human rights that should be included in the agenda of the ICJ. I proposed a number of such topics. They included deprivation of human rights on the grounds of HIV status and also on the grounds of sexual orientation. Most of my proposals were accepted by my colleagues. However, one of them, relating to sexual orientation, was contested. A distinguished African colleague declared that there were no cases of homosexual people in his country. Any who existed were regarded as 'deviants', deserving the full force of the criminal law. I argued against this attitude. Eventually, my view prevailed. Sexual orientation was adopted as a program objective of the ICJ. Thereafter, the ICJ performed extremely important work, in Geneva and elsewhere. It has helped to place the topic of sexual orientation on the agenda for the United Nations, in that city and beyond. Although, in 1988, this subject was controversial and contested. As the years have gone by, leaders of the United Nations and institutions within that Organisation have adopted increasingly strong positions. After many false starts, the United Nations Human Rights Council, in November 2014, by a strong vote, adopted a resolution on the human rights of lesbian, gay,

bisexual, transgender, intersex people (LGBTI).⁵ The ICJ has contributed to this process of enlightenment and change. Its initiatives encouraged others and this, in turn, encouraged the ICJ;

- * In 2009, I contributed a plenary address to a conference of the Commonwealth Lawyers' Association (CLA) held in Hong Kong⁶. This conference was followed by a strong recommendation by the CLA, calling for the removal of punitive laws addressed to MSM in the countries of the Commonwealth that retain such laws;

- * Between 2010-11, I served on an *Eminent Persons Group* (EPG) of the Commonwealth of Nations. The EPG addressed future challenges faced by the Commonwealth of Nations. Although Fiji is not at this time a member of the Commonwealth of Nations, many hope (as I do) that, following the recent democratic elections, Fiji will be readmitted to the Commonwealth and again play its part in its future. Among the challenges considered by the EPG, were two of those that I had raised in the ICJ in 1988: the rights of people living with, or exposed to, HIV/AIDS and the rights of sexual minorities, discriminated against by reason of their sexual orientation or gender identity. Of the 53 member countries of the Commonwealth, 42 retain laws that criminalise adult, private, consensual sexual conduct involving persons of the same sex. Laws also discriminate against transgender persons (TGP)

⁵ John Fisher (ARC International) "The Resolution that Almost Wasn't" (2 November 2014, available online ARC International). This refers to HRC, Resolution on Human Rights, Sexual Orientation and Gender Identity (A/HRC/RES/17/19 and A/HRC/RES/19/41: report of United Nations Commissioner for Human Rights on Discriminatory Laws And Practices And Acts Of Violence Against Individuals Based On Their Sexual Orientation And Gender Identity (2014). The office of the High Commissioner for Human Rights is expected to produce a report for consideration by the HRC at its 29th session in June 2015.

⁶ M.D. Kirby "Homosexual Law Reform: An Ongoing Blind Spot of the Commonwealth of Nations" [2009] *European Human Rights Law Review* 21 cited in *Naz Foundation v Delhi* [2009] 4 LRC 838 at 879 [85].

and commercial sex workers (CSW). In its report of October 2011, for the Perth Heads of Government meeting (CHOGM), the EPG recommended that:

“Heads of Government should take steps to encourage the repeal of discriminatory laws that impede the effective response of Commonwealth countries to the HIV/AIDS epidemic, and to commit to programmes of education that would help a process of repeal of such laws.”⁷

HIV/AIDS was identified, in terms, as an urgent Commonwealth priority. Centres of the epidemic are found in Africa, Asia and the Caribbean where there are many Commonwealth nations. Removal of the criminal laws against Commonwealth citizens who are members of the lesbian, gay, bisexual, transgender and intersex (LGBTI) minorities was strongly recommended by the unanimous voice of the EPG.⁸ The EPG took a pragmatic stance:

“Repeal of such laws facilitates the outreach to individuals and groups at heightened risk of infection. The importance of addressing this matter has received global attention through the United Nations. It is one of concern to the Commonwealth not only because of the particular legal context but because it can call into question the commitment of member states to the Commonwealth’s fundamental values and principles involving fundamental human rights and non-discrimination.”⁹

⁷ Commonwealth of Nations, Eminent Persons Group, Report of the EPG to the Commonwealth Heads of Government, *A Commonwealth of the People: Time for Urgent Reform*. Commonwealth Secretariat, London, October 2011 (hereafter “EPG Report”) 168 (Rec R60).

⁸ Ibid, 100.

⁹ Id, 100.

Although the Perth CHOGM accepted the EPG's proposal for a *Charter* of Commonwealth values, it did not adopt the recommendation for the appointment of a Commissioner to give effect to the *Charter*. Moreover, it left it to national officials to define what was "discrimination". Sadly, those officials have not so far followed up on the EPG recommendations concerning discrimination on the grounds of sexual orientation and gender identity. These remain a significant source of discrimination and violence in Commonwealth countries, notably in Uganda, Nigeria, Gambia, Kenya, Cameroon, Jamaica and elsewhere;

- * Between 2010-12, I served on the United Nations Development Programme (UNDP) *Global Commission on HIV and the Law*. In the report of that Commission, *Risks, Rights & Health*,¹⁰ recommendations were made by the Commissioners, unanimously, that reflected those earlier made by the Commonwealth EPG. Of course, in the UNDP, they were addressed to a wider world community. Necessarily, this included countries of the Pacific, including Commonwealth countries and Fiji. Firm proposals were made to all countries concerned to repeal all laws that criminalise consensual sexual conduct between adults of the same-sex and/or laws that punish homosexual or transgendered identity.¹¹ The recommendations called for the enactment of anti-discrimination laws and for the promotion of measures to prevent violence, particularly against men who have sex with men (MSM). Further recommendations were made on

¹⁰ United Nations Development Programme (UNDP), *Global Commission on HIV and the Law, Risks, Rights and Health* (UNDP, New York, July 2012) (Hereafter UNDP Report).

¹¹ UNDP Report, 50 (Rec 3.3.1).

reform of the law on TGP. An affirmation of the identity and privacy of TGP was emphasised.¹² The UNDP Commission called for removal of all laws that punish cross dressing and ensuring that people should be able to have their affirmed gender recognised in identification documents. And they should be able to do so without the need for prior medical procedures, such as sterilisation, sex reassignment surgery or hormonal therapy;¹³ and

- * Finally, in 2013-14, I participated in the deliberations of the Council of the Human Rights Institute (HRI) of the *International Bar Association* (IBA) on this topic. The IBA recognised, and asserted, the support of lawyers worldwide for the removal of criminal laws against LGBTI people, based on their sexual orientation. The IBA concluded that these laws need to be changed. Lawyers have a particular obligation to lead on this subject because it is lawyers who are called upon to enforce such laws in the countries where they remain in force.¹⁴ The IBA resolutions, adopted by the Council of that organisation, have been widely discussed and affirmed, including during a recent IBA conference in Tokyo, Japan (October 2014).

I have not collected these engagements to boast of them or to overstate my own role. Far from it. But they show the diversity and breadth of the international involvement in the reform of the laws concerning LGBTI rights. And the distance still to be travelled.

¹² Ibid, 54 [Rec 3.4.3].

¹³ Ibid, 54 [Rec 3.4.5].

¹⁴ International Bar Association, Resolution on Criminal Laws – Repeal of criminal laws that impose penalties relating to Certain Sexual Conduct (June 2014) available <http://www.ibanet.org/AbouttheIBA/IBAINstruments.aspx>.

SEXUALITY IN THE PACIFIC

Unfortunately, in many countries of our world, including Commonwealth states in the Pacific region, the advances in the legal rights of LGBTI people in the past decade have often been disappointing. At most, they have been patchy. In many parts of the world, geographically speaking, LGBTI people are definitely regarded as the 'other'. They are viewed as a kind of hostile community, wilfully indulging a horrible 'lifestyle' or obdurately challenging divine law, as laid down by law and Scripture.

In the past decade in Africa, although progress has been made on LGBTI rights in the Republic of South Africa and to some extent by resistance to the introduction of adverse laws in Rwanda, most of the continent remains oppressive territory. Indeed, in Uganda, Nigeria, Cameroon, Gambia and Kenya, new hostile laws have been adopted or proposed. The attitude voiced by my African colleague in the ICJ in 1988 still seems to prevail.

By contrast, in Latin America, progress has been intermittent. In North America and Western Europe significant change in the law has happened. In Eastern Europe progress is slow and sometimes apparently reluctant. In the Russian Federation, laws and policies have been increasingly adverse. On the Asian mainland, little change has occurred. In South Asia, the hopes for change in the modern society of Singapore were dashed on 29 October 2014 by a decision of the Singapore Court of Appeal, rejecting a contention that section 377A of the *Singapore Penal Code*, was unconstitutional, on the ground of the Singapore's Bill of Rights.¹⁵ The coincidence in time of the Singapore

¹⁵ *Lim Meng Suang v Attorney General (Singapore)* (CA54/2013); *Tan Eng Hong v Attorney-General* (Singapore), (CA125/2013), decision of Singapore Court of Appeal, 29 October 2014 per Andrew Phang J, Belinda Ang J, and Wo Bih Li J.

decision and this lecture helps focus attention on the challenge that is presented for LGBTI rights in the Pacific region of the world.

In the Pacific, an excellent analysis of the law on LGBTI rights is published by the Castan Centre within the Monash University Law School in Australia. Associate Professor Paula Gerber has offered a thoughtful article on the theme: “Why the Pacific Islands are not a gay paradise”.¹⁶ Even the two largest island groupings (Australia and New Zealand) have mixed records on the subjects of LGBTI law reform. In April 2014, by a vote of 77 to 44, the unicameral Chamber of the New Zealand Parliament approved a Bill to amend the *Marriage Act*, so as to extend marriage to persons of the same sex. The Bill had been introduced by an opposition Labour MP (Louisa Wall). Yet it was supported by many members of the Government, including the National Party Prime Minister (Rt. Hon. John Key). In most countries where marriage equality has been introduced, it has been achieved by legislative change. In some countries (Canada and South Africa) the courts have played a crucial role in upholding constitutional principles of equality, privacy and dignity.

Still, in the Asia/Pacific region of the world, the focus of attention in addressing human dignity as it affects LGBTI people, has concerned not the potentially controversial questions of marriage, child adoption or even TGP citizens and their rights.¹⁷ Most of the attention in the Pacific has been focused on overcoming the colonial inheritance of criminal laws that impose penal sanctions (often substantial imprisonment) as a

¹⁶ <http://castancentre.com/2014/05/16idaho-day-post-y-the-pacific-islands-r-no-gay-paradise>.

¹⁷ *W v Registrar of Marriages* [2013] 3 HKLRD 90 (CFA). Discussed in S. Winter, “Identity Recognition Without the Knife: Towards a Gender Recognition Ordinance for Hong Kong’s Transsexual People” [2014] HKLJ 115 at 116-117. See also M.D. Kirby, “Transgender Law Reform: Ten Commandments of Hong Kong”, unpublished, UNDP, Hong Kong, 2 October 2014.

punishment for, and deterrent against, adult, private, consensual sexual activity. On the whole, the progress in Asia has been fitful. The progress in the Pacific, little better.

The one bright light in Asia arose in 2009 in a decision of the Delhi High Court in *Naz Foundation v Delhi*.¹⁸ However, that light was unexpectedly snuffed out in December 2013 when that decision was overturned by the Supreme Court of India in *Koushal v Naz Foundation*.¹⁹ Although a number of countries on the Asian mainland retain the laws against LGBTI people, received in British colonial times, none has so far moved to repeal the laws by legislative initiative. In 2007, the Parliament of Singapore considered a proposal to repeal s. 377A of its *Penal Code*. However, after a debate lasting over 2 days in the Parliament, self-declared “born-again Christians” united with ethnic Chinese “social conservatives” to defeat the measure. The provisions that had made heterosexual oral and anal sex a crime were repealed in Singapore. But the laws against MSM were retained.

The recent court decision in Singapore shows, for the time being, that neither the legislative nor judicial process will provide relief from the criminalisation of adult, private sexual conduct. As the EPG and UNDP (above) pointed out, laws of this kind stigmatise particular people, as such. They make them feel inferior and at risk. They present obstacles to effective strategies to reduce sexually transmitted diseases, especially HIV/AIDS. In the case of Singapore, the Court of Appeal remarked:²⁰

¹⁸ [2009] 4LRC 825 (Del HC).

¹⁹ *Suresh Kumar Koushal v Naz Foundation*, 2013 (15) SCALE 55: (2014) 1SCC 1 Supreme Court of India, 11 December 2013.

²⁰ Andrea Tan, “Singapore’s Ban on Gay Male Sex is Upheld by Top Court”, Bloomberg, October 30, 2014.

“Whilst we understand the deeply held personal feelings of the appellants, there is nothing this court can do to assist them. Their remedy lies, if at all, in the legislative sphere.”

Those words “if at all” appear ominous. They postulate the real possibility that reform will not, and cannot, be achieved. Just imagine if that verdict had been expressed today in the context of race, gender or indigenous status. The supposed re-assurance, sometimes mentioned, is that the law is not usually enforced in cases of adult, private, consenting sexual acts. However, the mere fact that the criminal laws remain in place affects social attitudes towards LGBTI persons. It is wrong in principle as making enforcement of the law depend in the discretion of the Executive. It subjects the targets to risks of blackmail. It impedes consequential conduct, including access to information on and treatment for, HIV/AIDS. It involves a serious overreach of the criminal law. It drives many of its victims to leave their native land.

The pain of the decision of the Singapore Court of Appeal was partly assuaged by another decision, made shortly after, by the Courts of Malaysia on the rights of TGP in that country. In their decision, the Malaysian judges invalidated a law (defended on the basis of *Sharia* law) criminalising cross-dressing. This decision on TGP in Malaysia joins a number of others in Pakistan, India, Hong Kong and Nepal, upholding the rights of TGP.²¹

If regard is had to the position of LGBTI rights in Pacific countries, the position now reached is that 8 out of 14 nations still criminalise same-sex sexual activity; 12 out of 14 do not have any anti-discrimination laws

²¹ V. Angalagan, “Negri religious law violates rights of transgender Muslim, rules Court of Appeal” *Malaysian Insider*, 7 November 2014.

that include sexual orientation and gender identity as protected grounds; and 14 out of 14 provide no recognition for the personal relationships of same-sex couples.

In the past 10 years, 5 of the 14 states of the Pacific have decriminalised same-sex sexual activities (Fiji, Marshall Islands, Niue, Palau and Vanuatu). Of the 12 Pacific states that are United Nations members, 8 of the 12 supported a joint statement on ending acts of violence and related human rights violations based on sexual orientation and gender identity (2011).²² But translating that support into substantive law is much harder to achieve.

In the case of Fiji, the country's sodomy law was declared unconstitutional under the then *Fiji Constitution* in the decision of the High Court of Fiji in *McCoskar v The State*.²³ That decision was allowed to stand and not overturned by the subsequent adoption of a new constitution. Indeed, when the *Crimes Decree 2009* (Fiji) entered into force on 1 February 2010, the statutory provision on sodomy law was deleted from the crimes of the Republic of Fiji. And, by the *Constitution of Fiji of 2013*, discrimination (relevantly) on the basis of "sexual orientation, gender identity and gender expression" was prohibited. The earlier *Fiji Constitution* of 1997 had also prohibited discrimination; but it was limited to discrimination on the grounds of "sexual orientation". At the time of the adoption of the *Fiji Constitution* of 1997, only one other nation in the world had expressly included such a prohibition in its constitutional law: namely the Republic of South Africa. It was this

²² A/HRC/RES/17/19 Resolution on Human rights, Sexual Orientation and Gender Identity. See also A/HRC/19/41.

²³ *McCoskar v The State* (also cited as *DPP v Nadan and McCoskar*) [2005] FJHC 500 (26 August 2005), High Court of Fiji. See also R. Gibson "Trouble in Paradise", *Victorian Bar News*, News and Views (19 June 2006), 31.

express prohibition that provided the foothold for the High Court's earlier decision in *McCoskar*.

In March 2011, Fiji supported the United Nations joint statement of 2011. As one who has attended many international conferences on HIV/AIDS (including the 20th World AIDS Conference held in Melbourne in 2014), it is appropriate to record the appreciation of the international HIV/AIDS community for the regular participation in such conferences of the President of Fiji. Not only his participation, but his support for the approach of the EPG and UNDP, and for law reform in Fiji. Fiji has provided an example, sorely needed in the Pacific region because of the failure of other Pacific nations to take the recommended course of action. However, Fiji too needs to do more in terms of antidiscrimination law, relationship recognition and reform of the colonial laws on sex work, subjects also referred to expressly in the UNDP report.²⁴

There is some good news appearing on the horizon concerning the repeal of criminal laws against LGBTI people in the Pacific. Thus, the Cook Islands, a nation in free association with New Zealand, the local *Crimes Act* 1969 contained offences relating both to "sodomy" and "indecent between males". A new amended *Crimes Act* has been prepared, although not yet enacted. This deletes all explicit criminal prohibitions against same-sex sexual activity. It confines applications of sanctions in such cases to the same circumstances that would apply to non-LGBTI people.

Additionally, the new *Criminal Code* 2014 (Palau) which entered into force on 23 July 2014, decriminalised adult, private, same-sex sexual

²⁴ UNDP Report *ibid*, 37 [Rec 3.2.1].

activity. In Samoa, the *Crimes Act 2013* criminalises “sodomy”. The previous *Crimes Ordinance 1961* (Samoa) also criminalised “indecenty between males”. The latter provision has now been removed by the *Crimes Act 2013* (Samoa) which entered into force on 1 August 2013. The same statute of 2013 removed the previous offence of a “male impersonating a woman”. That provision would sometimes be used to target TGP and sex/gender-diverse persons in Samoa.

Save for these changes, moves in the directions urged by the EPG and UNDP and by ICJ, CLA and IBA, have been almost non-existent in the Pacific. A number of the most important countries of the Pacific present the most obstinate and hostile face to the cause of law reform. Thus, Papua New Guinea still applies the *Criminal Code 1974* (PNG), inherited from the earlier Australian colonial regime.²⁵ That statute, which copied the then provisions of the *Queensland [Griffith] Criminal Code* originally drafted by the Australian jurist Sir Samuel Griffith, imposes sanctions on “sexual penetration against the order of nature” and “indecent practices between males”. Attempts by Dame Carol Kidu, then a member of the PNG legislature and Commissioner of the UNDP Commission, to secure support for decriminalisation in Papua New Guinea fell on deaf ears. In its 2011 Universal Periodic Review before the Human Rights Council of the United Nations, Papua New Guinea rejected recommendations put to it to decriminalise same-sex sexual activity and to introduce anti-discrimination law on the basis of sexual orientation and gender identity. Despite having a serious HIV epidemic and although relying heavily on overseas donors to meet the crisis in their own country, political leaders in Papua New Guinea (sometimes encouraged by Christian missions) have obdurately refused to implement any change.

²⁵ Cf. A Kelly-Hanku, S. Watson, I. Peni and C. Ketepa, “It’s Not Business As Usual: What Should PNG’s HIV Response Be and Is There a Place for Human Rights?” (2014) *Human Rights Defender* #2 29.

The urgency of securing law reform on these topics arises out of the fact that funding for the Pacific struggle against HIV and for treatment of those infected has substantially evaporated, and certainly diminished. HIV/AIDS is not the priority it once was for foreign aid partners, including Australia. The strong embrace of religion in many Pacific (and Asian) countries presents a challenge to securing change. On the other hand, the personal is increasingly invading the public and the public is invading the personal. Citizens are increasingly standing up for their own dignity and rights. They are demanding rights of acceptance and full equality. Some of those citizens were (and in some places still are) highly stigmatised: TGP, sex workers, MSM. It is likely that many of them, with legal help, may seek to harness human rights provisions in their national constitutions which provide that all citizens are equal before the law.²⁶ Legal initiatives will increasingly supplement political and bureaucratic.

What has happened in Papua New Guinea has also occurred in Solomon Islands, where both Professor Moti and I earlier served: I as President of the Court of Appeal and he as Attorney-General. The penal law of Solomon Islands criminalises “buggery” and “indecent practices between persons of the same-sex”. There are no relevant anti-discrimination laws. At its 2011 United Nations Universal Periodic Review of human rights, Solomon Islands also rejected HRC recommendations to decriminalise same-sex sexual activity and to introduce anti-discrimination laws on the basis of sexual orientation and gender identity. It contributes to the log-jam facing human rights progress in the region.

²⁶ Kelly-Hanku, Watson, Peni and Ketepa (above).

Other countries of the Pacific that have refused to accept United Nations recommendations for the repeal of criminal laws against MSM and LGBTI people, include Tonga and Tuvalu. Whilst Tonga in its 2013 Universal Periodic Review, formally rejected recommendations to decriminalise same-sex sexual activity, it did state that this was an issue which it “wishes to consider further” and to consult upon. Similarly, Tuvalu, whilst rejecting the recommendation for decriminalisation, indicated that the issue was “open to discussion”.²⁷

Given that we now know that sexual orientation and transgender status are not “lifestyles”, wilfully adopted by minorities to challenge divine and local law, but inbuilt features of human beings (and other mammalian species), the imposition of criminal punishments and the withdrawal of protection from discrimination, constitute unscientific responses to the characteristics of the persons concerned at odds with rejection of racial and gender discrimination. If, as appears, these minority features are as inborn as skin colour, racial features, aboriginality and sex/gender and that their objects are not ‘witches’ or ‘scolds’, it is as contrary to universal human rights to impose unequal laws (especially criminal laws) as it was in earlier times to impose such laws on people by reason of their race, aboriginality, ethnicity, nationality and sex/gender.

Occasionally, the source and justification of such laws is said to be divine scripture. In Singapore, the attempt of local LGBTI citizens to organise rallies in support of their rights, wearing *pink* insignia, produced retaliatory demonstrations of religious groups (Muslim and Christian) wearing *white* insignia (supposedly to evidence their sexual ‘purity’).

²⁷ The foregoing review of laws and policies in Pacific countries appears in: <http://antigaylaws.wordpress.com/regional/pacificoceania>. The website is maintained by Dr Paul Gerber of Castan Centre, Monash University, Melbourne, Australia.

Sexual ‘purity’ for LGBTI people involves the same search for love, support and companionship as heterosexual citizens expect. The evidence of today’s world suggests that this demand will not die out or go away. It will increase in vigour and insistence. It will also continue to gather supporters from the broader community because of the irrationality and severe unkindness of this type of law and its effect on the peace and wellbeing of citizens and on their communities and families, particularly as they struggle against blood borne diseases, especially HIV, an effort impeded by such discriminatory laws.

There are, I believe, lessons for securing progress on law reform in the Pacific from the progress made in the recent resolutions in the United Nations. According to John Fisher, a New Zealand lawyer engaged for many years in human rights negotiations in Geneva, the way to secure progress is to observe patience, mutual respect, dialogue, non-confrontation, non-triumphalism (where there is success); and non-hostility (where there is set back).²⁸

SIR MOTI’S INSTRUCTION & EXAMPLE

Sir Moti Tikaram did not grapple expressly (so as far as I am aware) with the issues of diversity presented by sexual orientation and gender diversity. But he did show us the way by his lifelong opposition to racial discrimination and hostility. He saw the consequential inequalities as irrational, unscientific and impermissible in a world of universal human rights. The logic of that stance applies equally to hostility and discrimination on the basis of sexual orientation and gender identity.

²⁸ John Fisher, above n.4 (November 2014).

Fiji is a welcoming society to many tourists and other visitors from diverse backgrounds. It has its own cultures and strong religious traditions. But, in my experience, it is a community mostly made up of kindly people who live by the proposition of: Live and let live. The decision of the Fiji courts in *McCoskar* and the subsequent amendments to the *Fiji Constitution* demonstrate this truth. So do the other changes that have been adopted. So does the leadership given by Fiji to the Pacific Region in the matter of the 'other' that I have here addressed.

I can still remember Sir Moti Tikaram's gentle, soft voice when I telephoned him on his last birthday. He was self-deprecating when I congratulated him his many achievements, including the example he gave to confront and overcome the prejudice that had existed in his youth against people simply because of their race, skin colour and ethnicity. I have felt a like obligation to raise my voice in respect of hostility and discrimination on the ground of sexual orientation. The same principle also applies to hostility and discrimination on the basis of transgender identity and status.

Eventually, human beings will create a world that removes from the minds human societies the medieval hobgoblins and unscientific presuppositions that have caused so much hatred, pain and violence against sexual minorities. We will not do so by looking the other way. Or by ignoring the log-jam. Or by appealing to 'divine judgment' (which could be no more in favour of this form of discrimination for elements of nature than any others). The world needs leaders like Sir Moti Tikaram to shine the light on the way forward. The way forward will invoke the Golden Rule that is a feature of all of the world's great religions. To do

unto others as we would wish them to do unto ourselves.²⁹ Sir Moti Tikaram lived by the Golden Rule. So should we. So should our countries. So should our laws. We should be advocates for this principle. It lies behind the universal rules of human rights and the international law that sustains those rules.

If Sir Moti Tikaram were alive today, I believe that he would endorse these sentiments. He would say to those in doubt: I am doing and saying this for your benefit. So that you will inherit a world that is free from unjust hostility, discrimination and violence. Such is the world that we must build everywhere. Particularly in the beautiful region of our planet that bears the marvellous description and commitment: "Pacific".

²⁹ *Leviticus* 19:18, *Matthew* 7:12; *Luke* 6:31, 10:25-28; *Galatians* 5:114. *Holy Qur'an* (Surah 24, "The Light" v.22).