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Q&A

Interview with Patti Shih, PhD Candidate, School of
Public Health and Community Medicine, University of
New South Wales
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The Hon. Michael Kirby AC CMG

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The Hon Michael Kirby AC CMG²

I am Michael Kirby. I was a Justice of the High Court of Australia from 1996 to 2009 when I retired, in February 2009. I am now undertaking this interview. I consent to being interviewed. I consent to the use of this data for research purposes. And I am perfectly happy for this interview to be recorded.

Thank you very much. As I mentioned in my email, I would like to ask you about your views on working with the religious community on the global HIV epidemic. It is a very broad topic and there's so much to it. Perhaps I could start with your role with the UN on the Advisory Panel on HIV and Human Rights.

I have been associated with three United Nations bodies relevant to the HIV epidemic, or three main ones. First, I was a member of the World Health Organisation Global Commission on AIDS. This was established in 1988, and I was a member until 1992. It was set up when the epidemic was first discovered. It confronted the epidemic in its very earliest days. Since then I was appointed in 2003 to the UNAIDS Global Reference Panel on HIV and Human Rights. I'm still a member of that Global Reference Panel. It has a general human rights oversight over the work of UNAIDS. UNAIDS is the Joint United Nations Program on HIV/AIDS. Its lead agencies are the World Health Organisation and UNDP (the United Nations Development Program). Thirdly, in 2010 I've been

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appointed to be a Commissioner of the UNDP Global Commission on HIV and the Law. That body had its first meeting in Sao Paulo, Brazil, in October 2010. It is examining the ways which the law can sometimes be an impediment to effective responses to the HIV epidemic. It is in respect of those impediments that I am necessarily put into contact with religious groups, leaders and communities because sometimes the reason for the existence and maintenance of legal provisions is because of religious understandings and instructions in many countries. For example, in about 80 countries of the world (41 countries of the Commonwealth of Nations), there are laws against adult private, consenting same-sex activity. Those provisions are an impediment to successful responses of nations to the AIDS epidemic, because they make it very difficult, in the face of criminalisation, to reach out to people who are at risk, and to ensure that they are alert to their dangers, and the dangers to others. To the need to use condoms. To engage in safer sexual activity. And generally to prevent the spread of HIV/AIDS.

In the general work of either yourself or the United Nations, what has worked with religious leaders and what hasn't?

I addressed this in a report that I wrote early in 2010 on a conference which took place in Den Dolder, in the Netherlands. Have I sent you a copy of that report or have you seen a copy of it? There are two relevant contributions, one is the speech I made to the conference. The other is a retrospective in which I looked back at the conference and reflected on the progress that was made and the progress that was not made.

The fundamental problem is that if you are a believer in a religious order that is derived from scriptural text, then obviously, the way in which you read those texts is going to affect what you think you can do in response to the AIDS epidemic. It's going to, in turn, be affected by tradition, church history, religious conventions, and understandings. All of these tend to lock people into understandings of moral instruction which are derived from earlier times. And because they generally believe that these texts are

inerrant (that is to say, unable to be erroneous), and that they must be accepted unquestionably, the result is that it is often difficult to adjust things that are said in much earlier times and in entirely different social and epidemiological circumstances, for the way in which human beings in this day and age can respond to the AIDS epidemic.

For example, until very recently, indeed until this week, there was a general belief that the instruction of the Roman Catholic denomination of Christianity was totally opposed to any use of condoms by individuals ever, including in response to self-protection and the protection of others, in relation to the spread of HIV. However, in a book interview, which is about to be published, of conversations with Pope Benedict, apparently, His Holiness said something to the effect that in particular circumstances, the use of condoms is acceptable to him. So this is an instance of the problem of what happens when you have religious leaders who take a position, and then subsequently change their position. Ultimately, they generally trace their position back to texts of scripture. But those texts were often written thousands of years ago, certainly hundreds of years ago, in all of the religions. It's a simple principle that I learned very early in my life as a lawyer, that you cannot take words of a text out of context. You have to read a text in the context in which the words were written. That is certainly true of the law when you go to construe the constitution. But its also true, I believe, of religion. When you go to construe religious texts. Scriptural people, and religious people are often very inflexible, and the problem is getting them to understand the need to re-examine their old texts in the light of modern scientific knowledge, and modern challenges to human life in the planet today. Including in relation to the very dangerous presence of HIV, the virus that causes AIDS.

How do you think we could balance religious freedom and public health, with all the evidence for the effectiveness of condoms against those who believe that it's their freedom to wish not to use them?

Generally, because each of those are fundamental human rights, you have to try to reconcile them: The fundamental human right, is to worship God in whatever way is believed by you and chosen by the individual. But worshipping God doesn't confer on those that worship a particular God in a particular way, according to a particular tradition, to impose their beliefs on other people when such an imposition would intrude upon the rights of those other people to have access to have the best available health knowledge and health care. This is the reconciliation that must take place.

In many societies there is a belief that because some people, many people, perhaps most people in the society, have the particular religious conviction, that they can impose their religious beliefs on others. We see instances of this in Australia at the moment in a number of fields. For example, in relation to gay marriage, the notion that because some people are religious, and believe according to *their* religious tradition, that marriage should be confined to a man and a woman, that they can impose on *everyone* else in society that belief, including people who don't share that belief, and maybe have no particular, or any religious belief. We also see it in relation to the teaching of secular moral ethics in public schools. The belief from some religious groups that they can prevent that instruction simply because they believe that children should be forced to sit there and listen to their religious opinions and their religious instruction, or to do nothing if they elect not to attend religious classes. These are the kinds of dilemmas that occur in all societies. However, we have a number of very current and controversial instances of it in contemporary Australia.

The way in which this problem is normally resolved is by acknowledging the differing universal human rights, (the right to religious freedom, the right to access to health care) and seeking to give as much space to each of them as is compatible with their each being able to survive together in a society. In the case of religion and public health, that would normally mean that nothing should be done to force particular instruction or particular marriage forms or particular access to health care upon people who find it offensive to their conscience. But at the same time, not seeking to

force onto others religious instruction that may impact in their rights of access to life-saving health information and healthcare. This is a constant dilemma in every society, its not just a matter of reconciling the right to religious freedom and the right to access to healthcare. It's a matter of reconciling all the other fundamental human rights that exist in the charters and statements of human rights.

For example, between freedom of expression, and freedom to have your honour and reputation protected, and your privacy safeguarded. This is a multifaceted dilemma in most societies where they have charters or bills of rights. The final word on such subjects is assigned to courts of law. Judges have to reconcile how you balance these competing interests. But at the moment in Australia, without a charter or bill of rights, these issues have to be just fought out in the public fora, and in Parliament and reconciled by the political process.

The summit for religious leaders which you attended in the Netherlands earlier this year, were you Australia's representative?

I wasn't really Australia's representative. I was there as a private person. I happen to be an Australian. But I wasn't there representing my country, I was there because I had been asked by the Executive Director of UNAIDS – the Joint United Nations Program on HIV/AIDS, to go along as an expert to contribute from the perspective, mainly a perspective from a legal point of view. However in the course of doing so, I really drew to attention the fact that I came from a country, Australia; the fact that I had a particular sexual orientation, namely gay; and the fact that I had a professional training and upbringing as a lawyer. I sought to bring these different dimensions to my contribution.

I did acknowledge that I respect the difficulty some religious leaders face in reconciling their belief in an inerrant text, with an effective epidemiological response to an extremely dangerous and life threatening virus like HIV. There is no doubt that that puts them

in a very awkward position. When in the 19th century, the research of Charles Darwin revealed the thesis of evolution in the place of a single momentary creation of the world by a divine being, it became necessary, at least to those who accepted the evolution theory of Darwin, to reconcile that theory in some way with the Bible story: the creation of the world in six days, on the seventh of which the Almighty rested. That has been reconciled. It has to be reconciled, because not many people today believe in literal creationism. However there are still some people who believe in the literal truth of the story that is set out in *Genesis*, which is the story accepted by three of the great religious traditions of the world – Judaism, Christianity and Islam.

When you get a clash between a scriptural text and the seeming consequences of science and of human knowledge, there has to be a reconciliation. Normally in that reconciliation, rational people will seek to adjust the religious instruction to the knowledge that we now have about the science. But some people will never adjust. They simply say that the science is wrong. And that science has to bend to religion. Generally speaking in the last two centuries, that has not been what has occurred. Normally religion has to adjust to science. People of religion have to look at apparently inconsistent biblical or other texts and conclude that they are a kind of metaphor or poem, not literally true statements of fact. But this is a very difficult dilemma.

It would be a nice interesting theoretical problem, if it were not so desperately urgent, with so many people exposed to the risk of HIV. Every year about 2.7million people are infected with HIV. Many such people might have been saved from that infection, if there had been a more practical, sensible and science-based approach such as promoting availability of condoms. Until very recently, perhaps still, this has been forbidden to Roman Catholics. Promoting the removal of criminal penalties against same-sex people, legalising or decriminalising commercial sex work, and removing the very serious penalties against injecting drug users. These are the ways in which law, often reflecting religious values,

can become a serious obstacle to effective responses to the AIDS epidemic.

So, going back to what the Pope might have said or might not have said recently, what kind of ramifications do think it would actually have?

Well, today is the 23rd of November 2010. This is the moment in which I am giving this statement to you. The Pope has said what he said in an informal context. It is in a book which is based on an extensive conversation with him by a German expert who apparently at one stage was in training under the Pope's instruction, when the Pope was a German cleric. Because the statement is not made *ex cathedra*, that is to say as an official formal statement of the Pope, it doesn't enjoy the 'infallibility' that is claimed in the Roman Catholic tradition to instructions of the Pope on matters of faiths and morals. However, it is a serious and important statement. It has been generally welcomed by those that are engaged in the struggle against HIV, because the denials of the religious in the Roman Catholic tradition of the effectiveness of condoms, and of the permissibility of the use of condoms by the Roman Catholic faithful, has been an undoubted impediment to protecting Roman Catholic communities from the spread of HIV.

Whilst I certainly welcome the statement from the Pope, if it is a genuine transcript of what he said, it is timely and indeed overdue. The fact that, in a religion, you can have such a turnaround, simply because one human being who is the Pope changes his mind or modifies his previous views is just an indication that human judgement in matters is fallible. And that we have to be careful in giving too much credence to the instruction of religious people because if that instruction is made without the full appreciation of the scientific truths and of the epidemiological consequences, it can mean in many cases, the difference between life and death. To such instruction you have to attach a great deal of scepticism. If it is absolute prohibition until November 2010. Thereafter, qualified permission in certain circumstance. Thereafter a search for other circumstances where the qualifications are equally applicable.

What are your thoughts about the principle of the separation of the church and the state? You mentioned that a lot of criminal laws against homosexuality, for example, have been opposed in the reform process by religious groups.

The constitutional principle of the separation of the church and the state is a very important development in human society. It's not a principle that all religions or religious leaders or all religious faithfuls accept.

If you believe that a rule or law comes from God, and if you believe that the text on which it is based is inerrant, you will not consider that it can be ignored. Indeed you will be more inclined to obey that rule than you will of rules made by human beings, in Parliaments or in courts or elsewhere. This being the case, you have to acknowledge that the church, or religion – because there are important non-church religions, such as Islam – have a very big impact on what people think, and what they believe is a moral requirement that they should obey.

There's never been an absolute separation from the state of the role of the church. Australia's moral values and traditions have been profoundly affected by Christianity which has been the religious belief of the majority of the Australian community. I don't think anybody objects to that morality informing our public debates about beliefs about what is right and what is wrong.

Where it possibly oversteps the mark is when religions become active players in the political arguments and intrude into the politics of society and seek to muscle the politicians into doing their bidding under a threat that if they don't, they will urge their faithful not to vote for them. Australia is now in a very delicate and sensitive political situation, so is the United Kingdom, so is Canada, so is the United States, and other Western democracies. Governments don't seem to be able to secure big majorities. Therefore the views even of a small group, and certainly of a significant group, such as members of a religious belief, can have

an important marginal effect on the outcome of national democratic elections. That is why politicians are often quite fearful of the instruction of religions. It's why they often they turn up at functions that are organised by such religions and quite frequently succumb to the pressure of religious lobby groups. You might say that this is their perfect right in a free society for people to organise themselves into different beliefs, and to put pressure on the government and political parties in order to attain what they think is God's instructions, or what is best for the community or at least for their community. Certainly that is how politics seems to be played in many countries, particularly the United States, and surprisingly, increasingly, in a country such as Australia. We tended, till quite recently, to be a secular society, in which interference by religion in public life was deeply resented by many. However, in recent years, beginning I would say under the Howard Government, and continued under the Rudd and Gillard governments, the influence of the lobby groups such as the Australian Christian Lobby, and of the large religious denominations of Christianity such as Roman Catholicism and Anglicanism, have begun to have quite a significant effect on the political decisions made by the major parties. The Coalition conservative parties and the Labor party presently in government. This is a new development and myself as a secularist, I find it unfortunate.

I've always believed that secularism is one of the most important developments in the English legal tradition and constitutional history. I believe that because secularism emerged at the end of the most bloody period in English history, following deadly denominational conflict between Roman Catholics and Protestants. Secularism was a principle accepted in England long before it was accepted in other countries, simply because so many people had been burnt at the stake. So many people had suffered, that effectively the English leaders came to the view in the 17th century, that they had to find a new principle that allowed everybody to enjoy their religious beliefs, or, if they had none, their lack of religious belief. To find a space in society, where they could live together in peace without killing each other. And it is the principle of secularism that protects everybody of any religion, or of

no religion, that was a really important development of the English constitutional tradition. It was subsequently followed in France and other constitutional traditions. It is written into the first amendment of the United States constitution. But it isn't always played out in all of these countries, in recent times, including in Australia.

The national census in Australia reveals that the biggest growing 'religion' in Australia is no religion. Increasing numbers of people are answering the Australian national census by saying they have no religion. Notwithstanding that, this is running in parallel with the increase in influence and power of the religious lobbies. Because of the fragile and closely divided political scene, they have a very big effect, much bigger than they used to, on political outcomes.

Do you think the religious lobbies have become stronger? And why do you think this has occurred?

I think religious lobbies have become stronger. The answer to your question is complex. It is probably, in part, a consequence of the religious convictions and beliefs of popular leading politicians over the last 20 years. Individual politicians influence such matters. But, in part, it is because of the fact that politics in Australia today, as in United States and elsewhere, is conducted in accordance with 'wedge' issues. That is to say, divisive issues which are vote-changing. And, as well, you now have so many societies such as Australia, the United Kingdom, Canada, the United States, where politics is very finely balanced. A wedge issue such as gay marriage, teaching human rights and secular ethics at school and funding for private schools: these are issues that can make or break a government. So that politicians in a democratic society are going to be very sensitive to such issues.

What do you think might be the agenda, being against gay marriage and to have a stronger religious voice in education... is that the agenda do you think, or do you think there's more to it?

Well I think you'll have to ask the religious people. They will no doubt deny that there is an 'agenda' and simply say that they are standing up for their religious beliefs and their right to religious freedom. But it has not been demonstrated, certainly to rational evidentiary materials, that because somebody is upset on the basis of their religion, at the very notion that two other people, who have nothing to do with them, might be given the civil and legal status of marriage (which is a gift from the law of the state), the fact that it upsets people is not a reason to deny equality of treatment to those people.

The truth of the matter is that, before the 1970s in Australia, many Australians, probably a majority, got upset on religious grounds that there were gay people, and that they were having sex, and that was their way of life, and that it was important to them. But ultimately our community came to the view, generally against a lot of religious opposition, that religious people could maintain their beliefs, and could propound their beliefs and endeavour to persuade others to those beliefs. But they didn't have a right to interfere in the bedrooms of other human beings who didn't share those beliefs. And that is what happened on the issue of criminalisation of human sexuality, between consenting adults in private.

Similar debates are now taking place on the issue of relationship legal protection. According to the *Sydney Morning Herald* on the 22nd November 2010 on page one, a majority of the Australian population polled, now about 60%, are in favour of gay marriage. They are reaching the same view on that subject as earlier they did on the subject of criminalising same-sex activity. Essentially, people have come to the view that this is a matter on which people can have their different religious and moral opinions. But they don't have the right to intrude into the intimate and important lives of others. They've just got to accept that, in a secular and pluralist and multicultural community, they have to adjust to the fact that their being upset isn't a good enough reason to impose criminal and other inequality burdens on other citizens.

Perhaps a final question about religious states, such as Iran or Israel. In an international political environment, say at the UN, from your experience, how do secular states balance their interests?

Most states today say that they are secular. That is a modern evolution of the state. It is an evolution that has come about in order to assure an equal place to every person in the state, citizen or non-citizen. There are theocratic states such as Saudi Arabia and Iran which proclaim themselves to be Islamic states. In such states there is not true equality of religious belief, in that you cannot erect a church to a Christian notion of a deity. And you cannot promote your own different religious views, Hinduism, Judaism, Christianity, in such a state. It is forbidden. It exposes you to extreme severe punishments, even the death penalty.

Some societies are a little bit closer to the secular principle, such as Pakistan and Malaysia, where the predominant religion is Islam. But there are still impediments on other people in those societies. Such impediments include apostasy, that is to say changing one's religion from Islam to Christianity or to no religion. That is often treated as unacceptable and contrary to law. Israel is at another point on the spectrum. Although it is, by its constitution, a land for the Jewish people, it has in its population, and as citizens, many who are not Jewish, and many people who, though Jewish by ethnicity and tradition, are not religiously Jewish. It also has a functioning parliament which is elected, including by non-Jewish citizens. It has a court system which has stood up for, and defended, the rights of the minorities. So in that sense it isn't quite the same as a religious state.

There are also secular states which strongly support and defend the secular principle. I would say the United Kingdom is probably such a place. There are also secular states which formally, constitutionally, protect the secular principle, as United States of America does. But in which religion is a very important social element, and a very important political movement, which profoundly affects the politics of the state. Australia is somewhere

between the United Kingdom and the United States. We used to be more like United Kingdom. We've become more like the United States. But we are unlike the United States because we do not have a constitutional protection, such as exists under the constitution of the United States. We do have a provision in section 116 of the Australian Constitution, which might have been interpreted to give a constitutional protection for the separation of the church and state. However the High Court of Australia, in a series of decisions, read that provision (like others) down so that it has become a very weak protection against the integration of church and state. The result is that we've seen the growth of religious schools and public funding for religious schools. That is something that is continuing.

One of the most unfortunate developments, I believe, that has occurred in recent times in Australia is the spending of very large, and growing, amounts of money on religious chaplains in public schools. The tradition of public education in Australia, as fixed in the 1880s when it was established as a right of all Australian children, was that it would be free, compulsory and secular. However, in recent times, including under promises made by Prime Minister Gillard in the most recent Federal election, the amounts being spent on chaplains in public schools has greatly increased. In my opinion, this is a retrograde step. Religion is a private matter. It should be kept out of the public domain. It should certainly be kept out of public schools, except for the one hour scripture class each week which religious adherents could elect to attend. Public schools should be places that are comfortable for people of all religions and of no religion.

It is in my opinion, also highly desirable that as many Australians as possible should be educated in public schools. If they're educated in public schools, they mix with each other. They learn to respect and love one another. To appreciate that diversity, including the diversity in religion, far from being a weakness, is a strength of society. I can understand that some people attending school now, including public schools, must feel alienated that they don't fit in with the beliefs of the majority simply because they have

a different religious persuasion or none at all. This is a very unfortunate development in our country, Its one against which I will continue to express my views.
