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DECONSTRUCTING HOMOPHOBIA

United Nations Development Programme

High level dialogue on punitive laws, human rights and HIV
prevention among men who have sex with men in Asia/Pacific

Hong Kong
17 May 2010.

The Hon. Michael Kirby AC CMG

UNITED NATIONS DEVELOPMENT PROGRAMME

HIGH LEVEL DIALOGUE ON PUNITIVE LAWS, HUMAN RIGHTS AND HIV PREVENTION AMONG MEN WHO HAVE SEX WITH MEN IN ASIA/PACIFIC

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INTERNATIONAL DAY AGAINST HOMOPHOBIA

This day, 17 May, is designated World Anti-Homophobia Day. It is a day set aside to help the global community address the problem of fear and stigma targeted at millions of people because of their sexual orientation or gender identity.

The day was designated because it was on this day, more than 30 years ago, that the World Health Assembly resolved to remove homosexuality as such from the World Health Organisation's global list of mental disorders. It was on this day that the international community, acting through the relevant specialised agency of the United Nations, recognised the commonality of variations in sexuality, their frequent appearance in the human species (as indeed in other species) and the fact that, as such, it is not something that requires treatment or alteration; nor something to be ashamed of and thus to keep hidden.

* Justice of the High Court of Australia (1996-2009). Member of the UNDP Global Commission on HIV and the Law. Member of the UNAIDS Reference Panel on HIV and Human Rights.

Of course, it is one thing for informed experts, and the organs of the United Nations, to embrace an enlightened and scientific approach to sexual orientation and gender identity. It is quite another to inform and educate the population of the world about the established features of these characteristics of human beings. Because of stigma and fierce rejection of variations in an unchanging dichotomy between the sexual orientation and gender identify of men and women that a great deal of pain and violence is inflicted on human beings everywhere. Without more, this would be intolerable enough. However, in the context of the rapid spread of the human immuno-deficiency virus (HIV) throughout the world, problems of homophobia have taken on a new and most urgent characteristic. They impede the global effort to help prevent the spread of HIV and the condition of acquired immune deficiency syndrome (AIDS) to which, untreated, the virus will ordinarily progress.

Because there is no safe vaccine yet developed to protect human beings from the risks of acquiring HIV and AIDS, and because there is no cure that rids the body of HIV in those infected, the international community has accepted the urgent need to promote a global strategy of prevention. Only prevention will reduce, and hopefully eliminate the continuing high levels of infection of people with HIV. Currently, infections occur at about 2.7 million persons each year. Although the costs of anti-retroviral drugs, which impede the progress of HIV to AIDS, has been substantially reduced in the past decade, therapy remains a very expensive option. Particularly so in countries of the developing world where there are otherwise extremely low expenditures on public health generally. Especially since the advent of the global financial crisis (GFC), the funds available to ensure that all people living with HIV and AIDS have access to anti-retroviral drugs, have decreased. These

developments have presented the risk that patients, initially provided with such beneficial life-saving drugs, may not be guaranteed to receive them indefinitely into the future.

A realisation that this is so imposes an extremely urgent obligation upon the global community to step up all available means to reduce the risk of the transmission of HIV. But prevention is a very difficult strategy to secure. It depends upon the adoption of strong and brave measures. Those measures include changes that are painful to adopt in many societies. They include:

- * The promotion of widespread public and child education about the risks of HIV and the most effective means of avoidance;
- * The promotion of the availability of male and female condoms to impede the risk of acquiring the virus during sexual intercourse;
- * The removal of criminal and public order penalties upon sex workers (CSWs) and the confiscation of condoms and their use as proof of their involvement in sex work;
- * The introduction of sterile syringe exchanges for injecting drug users (IDUs);
- * The provision of preventative protection to specially vulnerable groups such as prisoners, refugee applicants etc.; and
- * The removal of criminal penalties against men who have sex with men (MSM), together with the introduction of anti-discrimination legislation to promote equality and dignity in the foregoing communities at special risk.

Unfortunately, the foregoing strategies, which country experience demonstrates are necessary for an effective prevention policy, have

many opponents. Some of these opponents are religious leaders, politicians, educators, media personnel and other vocal community groups.

The challenge before the United Nations Development Programme (UNDP), the Joint United Nations on AIDS (UNAIDS) and other United Nations agencies is to secure progress towards prevention policies in circumstance where the need for progress is at once extremely urgent and critical to the lives of millions who are at risk. This is not a time for nit-picking over of policies. It is a time for broad strokes, administered with a high sense of urgency, in a desperate endeavour to reduce the ongoing and still enormous toll of HIV/AIDS throughout the world.

All of the foregoing strategies are difficult for many communities and particular groups within them. However, because the present dialogue occurs on World Anti-Homophobia Day, it is appropriate to concentrate attention on the causes of homophobia. If those causes can be understood, it may be possible for UNDP, UNAIDS and other agencies of the world community to achieve greater success in securing acceptance of the policies necessary for prevention. Combating homophobia and the violence, stigma, discrimination and ignorance that it generates, is desirable of itself. It is a human rights respecting strategy that does not really need additional justification. It is sustained by many contemporary statements about universal human rights¹. However, because of the advent of HIV/AIDS, there is now an added dynamic that enhances the need for urgent action. This has been

¹ See e.g. *Toonen v Australia* (1994) 1 *Int Hum Rts Reports* 97 (No.3).

recognised by world leaders, including, repeatedly, the Secretary-General of the United Nations (Ban Ki-moon)².

The chief object of this contribution is to deconstruct homophobia in order to reveal the impediments that exist against persuading countries, groups and individuals to adopt the policies towards MSM that will diminish the spread of HIV in that vulnerable group. What can we do to combat the feelings of animosity, repugnance and fear that lie at the heart of centuries-old attitudes towards people of minority sexual orientation or gender identity? The first step on this path is to understand how and why these attitudes come about.

SUPERFICIAL CAUSES OF HOMOPHOBIA

Religious doctrine: In many of the world's great religions, scriptural texts contain provisions that appear to (and have been interpreted to) condemn and denounce sexual activity between persons of the same sex. Specifically, the Abrahamic religions (Judaism, Christianity and Islam) have traditionally shared an acceptance that particular biblical texts should be construed to forbid same-sex relations. Thus, passages appear in the Torah (Old Testament)³; in the Christian Bible⁴ (although not the Gospels); and in the Holy Koran of Islam⁵. There are also passages in other holy books, including those of Buddhism.

² Speech by Secretary-General at the International AIDS Conference in Mexico City, 3 August 2008, quoted *UNAIDS, UN Guidance Note on HIV and Sex Work* (2009), Geneva. See also N. Pillay, "Human Rights in the United Nations: Norms, Institutions and Leadership" (2009), EHRLR (Issue 1) 1 at 7.

³ See e.g. *Leviticus* 20, 13.

⁴ St. Paul's *Letter to the Romans*, 1:26, 27.

⁵ *Holy Koran*, 7.81, 7.84, 29.30.

However, there are responses that can be deployed to reliance on such passages:

- * They must be read in the historic and cultural context in which they were written and according to the understandings of human sexuality that existed in their times;
- * They appear with other prohibitions that are not now generally observed (such as on eating crustaceans etc.). Certainly, it is not now acceptable in many societies to impose the punishment of death for their breach (as in the cases of apostasy and adultery);
- * They appear, if taken literally, to be at odds with contemporary scientific research into the causes, features and distribution of variations in sexual orientation revealed both in the human species and other animal species; and
- * They are now contested as to their meanings by many religious scholars within the relevant belief systems or, at least, they are no longer universally regarded as inerrant divine instruction to be literally understood.

Legal doctrine: One feature of the appearance of specific criminal sanctions against MSM is its predominance in countries that were formerly part of the British Empire. By legislative amendment or judicial rulings, the older former dominions of the British Crown have, for the most part, terminated the operation of penal code provisions imposing severe punishment on those convicted of “unnatural offences”, “crimes against the order of nature”, “sodomy” etc. (The United Kingdom, Canada, Australia, New Zealand, Ireland, United States of America and South Africa). Yet many other member states of the Commonwealth of Nations (41 of 54) persist with such criminal provisions inherited from colonial times. Efforts to secure the repeal of such provisions have

either been fiercely resisted (Jamaica, Zimbabwe, Uganda, Malawi) or ignored in recent times (Papua New Guinea, Solomon Islands, Nauru). Attempts have been made to increase the ambit and punishments for such offences (Uganda). An endeavour in 2009 to persuade the legislature of a country which, exceptionally, was admitted to the Commonwealth of Nations in 2009, although not formerly a British colony (Rwanda), to introduce such a law in comity with other African Commonwealth nations, failed. There was ultimately no foothold of support for such an intrusion into the personal space of citizens.

The most significant recent change that has occurred in this respect is to be found in India. In *Naz Foundation v Union of India*⁶, the Delhi High Court upheld a challenge to the constitutional validity of s377 of the *Indian Penal Code* on the grounds of its inconsistency with equality and privacy guarantees in the Indian Constitution. The provision was held invalid in so far as it penalised adult, private consensual conduct. An appeal to the Supreme Court of India has been lodged. However, no appeal has been brought by the Government of India, which has accepted the ruling. I pay tribute to the powerful opinion of the Delhi High Court, then led by Chief Justice A.P. Shah. He is a liberator of millions of MSM in the sub-continent. The opinion which he co-signed with Justice S. Muralidjar is a beacon of hope for justice and law reform, especially in the many countries of the Commonwealth of Nations that trace their penal law to Britain and which share this unlovely leftover from colonial domination.

Approximately half the nations of the world that impose criminal sanctions on MSM are former British colonies. The remainder are

⁶ Sub nom *Naz Foundation v Delhi & Ors.* [2009] 4 LRC 838 (Delhi HC).

mostly Arab and Islamic countries. The majority of countries that trace their law, directly or indirectly, to the civil law codifiers of Napoleonic France, generally have no such penalties in their criminal law. This is because these crimes were abolished when the codifiers revised the criminal laws of Royal France in 1803. Napoleon was correct to assert that, when his geographical conquests were all forgotten, the legacy of his codes would sustain his place in history. Although some defenders of the British penal codes have asserted that they reflect pre-colonial traditions, this is hotly contested. In the case of India, it appears contrary to much historical evidence and many well-known records of pre-British traditional society in India.

Obviously, the existence of religious instruction adverse to MSM and of penal provisions that criminalise that conduct (even when consensual, adult and private) help to explain the animosity towards sexual variations that exists in many societies. Such scriptural and criminal injunctions are bound to enter the minds of young people, as well as to affect the culture, civic discourse and doings of the modern media. Inevitably, they have an effect on common opinions and attitudes. They reinforce social norms and convey them seemingly from generation to generation.

Nevertheless, the religious and penal injunctions do not go to the heart of the causes of homophobia. Such attitudes exist even in societies with strong secular traditions or with religions that have not given emphasis to such prohibitions. They exist outside the former British Empire. They are strangely persistent and difficult to eradicate. It is therefore necessary to dig a little more deeply into human affairs in order to deconstruct the causes of homophobia. Only by doing this will the causes be exposed for reparative therapy.

THE DEEPER CAUSES OF HOMOPHOBIA

Infantile similarities: Any observer of small children will soon become aware of their keen anxieties about difference. Such anxieties can arise in respect of differences occasioned by skin colour, the appearance of a disability, eating different food, speaking a different language, etc. The desire for sameness may be connected with fear of “the other”. Perhaps in primitive times, those outside a community were indeed often a danger to those within. In this sense, the infantile fear of difference in human beings may originally have had a protective value.

However, we recognise today that it can lead to very bad consequences – as in the murderous project against Jews instituted by Nazi Germany. Or the prejudice against blacks instituted under apartheid. Or the discrimination against Aboriginals and Asian migrants taught in the years of White Australia, which lasted in law until 1966. Prejudice against Aboriginals continued even after White Australia had been demolished. It was eventually dealt a blow as a result of important decisions of the High Court of Australia⁷ by legislation⁸ and by the provision of a national apology⁹.

Nations and individuals can grow out of infantile demands for unyielding similarity on the part of all people living in their society. They can recognise differences and even come to appreciate them. Where they do not appreciate them yet, they can at least recognise what science

⁷ *Mabo v Queensland [No.2]* (1992) 175 *Commonwealth Law Reports* 1 at 42; *Wik Peoples v Queensland* (1996) 187 *Commonwealth Law Reports* 1.

⁸ *Native Title Act 1993* (Aust).

⁹ On 13 February 2008, the Prime Minister of Australia (Hon. Kevin Rudd MP) presented an apology to indigenous Australians in the form of a statement to the House of Representatives. The apology was endorsed by the Leader of the Opposition (Dr. Brendan Nelson MP) and, later in the same day, by the Australian Senate acting unanimously.

teaches, namely, that differences between human beings are common in nature. They must be accepted and accommodated if injustice and oppression are to be avoided. Such injustice and oppression diminish all those who live in a society that practises them.

Human orifices: A second reason that may lie at the root of homophobia seems connected with notions of nature and natural law. Sometimes it is attributed to the design of human sexual apparatus. The fact that such apparatus is apt for reproductive coitus may be seen by those who insist upon it as a feature forbidding any ‘misuse’ of that apparatus. Thus, insertion of body parts into non-vaginal orifices is condemned as “unnatural”. This idea lies behind the colonial condemnation of “acts against the order of nature”.

In earlier, pre-scientific days, in the absence of knowledge of empirical data, these notions might have been understandable. However, from at least the mid-20th century¹⁰, the research into the variations of human sexual conduct demonstrated that (as in other animal species) such conduct is in fact highly varied. It responds to pleasure-seeking and to playful activities which are not specifically motivated by procreation. If conducted between consenting adults in private, such activities can reinforce feelings of affection, love and mutuality.

The advent of the contraceptive pill and other protections against conception, as well as the development of *in vitro* fertilisation reduced the connection between sexual intercourse and procreation. In the face

¹⁰ Alfred Kinsey et al, *Sexual Behaviour in the Human Male* (1948) and *Sexual Behaviour in the Human Female* (1953). See also Evelyn Hooker, “Male Homosexuality in the Rorschach”, 22 *Journal Projective Techniques*, 33 (1958) and “Adjustment of the Male Overt Homosexual” 21 *Journal Projective Techniques*, 18 (1957).

of scientific developments, therefore, the design of human anatomy should not sustain the serious punishments and stigma towards a minority for whom procreation might not be a major (or any) motivation for sexual conduct. Recognising the importance of sexual conduct for the happiness of virtually every human being on the planet, at some stage in their lives, constitutes the beginning of a realisation of the injustice and cruelty not only of seeking to deny such activity to a minority who seek it; but also the futility of attempting to do so. Just as earlier religious prohibitions on masturbation (onanism) and left-handedness are not now generally pressed. And the harmless and universal features of those attributes of human existence are commonly accepted.

Aesthetic familiarity: Connected to the foregoing considerations is the community value commonly attached to the normality of majority human sexual relationships. Most human beings are heterosexual, at least predominantly, if not exclusively so. Most human beings continue to be happiest in heterosexual relations, commonly with children. The image of such families is aesthetically pleasing to the majority and indeed to most members of society. Most (including members of sexual minorities) are familiar with such arrangements. Most members of sexual minorities grow up in such families. They see the beauty of them through the generations, including into old age. Such feelings of aesthetic comfort are reinforced by acquaintance which, in turn, is sustained and strengthened by literature, modern media, advertising, and the presentation of the norm as the universal.

Nevertheless, it must now be recognised that the norm is not universal. There are other aesthetics with which society today must come to terms.

These include the existence in society of homosexuals, bisexuals, transsexuals, intersex and other minorities. Because of the developments of *in vitro* fertilisation, it has become physically possible for members of such minorities to secure and rear genetically related children. This is becoming less uncommon in many Western societies. In others, it continues commonly to cause affront and fear. The ordinary is demanded as the compulsory. Yet those who are familiar with other family arrangements will attest (as court decisions do) to the love and support for children that can exist within less common family arrangements. In particular cases, there may be less aesthetic affront in the appearance of children raised by loving same-sex couples than in the case of children raised by a heterosexual parent engaged in serial relationships, especially where these are unstable or abusive. Whilst the aesthetic sense of the norm is perhaps understandable, the changing patterns of marriage in heterosexual and bi-sexual people, presents the realities of families differently composed.

In international human rights law, the family is now often defined to exclude relationships outside monogamous heterosexual ones. However, as such relationships become more familiar, the aesthetic affront of their appearance is diminished. The appearance of Asian or Aboriginal neighbours formerly offended the aesthetic sense of some Australians. As they become more familiar with families that look a little different from their own, observers become more comfortable. They look beyond the initial impression of differences into the commonalities of blood, support and affection that underpin the most precious and intimate of human relationships. Minority arrangements are then seen as unthreatening to those of the majority. The test is mutuality and love.

It is not conforming to a common arrangement oppressively enforced on all by legal norms confined exclusively to the comfort of the majority.

Cultural values: In addition to genetic elements, all human beings are profoundly influenced by their culture and environment. This includes familial, racial, moral and geographic elements. Cultural norms often influence attitudes to sexuality. In some Arab societies, strong feelings about the honour of the family can be reinforced by profound feelings of shame where any family member strays from what is deemed acceptable normal behaviour¹¹. In some traditional societies, a patriarchy exists which diminishes the freedom of action and expression of women. Whilst the cultural traditions of different societies should ordinarily be respected, a line can be drawn where the tradition is seriously oppressive to individuals or groups or denies them the full realisation of their own universal human rights.

In the current age, the assertion (mostly) by older heterosexual men of what younger people (including women, gays and other minorities) may do with their lives and bodies is less unquestioned than once it was. With MSM, it is not uncommon, even for patriarchal societies to permit a space for their existence, but in accordance with a bargain by which they maintain their existence as a secret; avoid confronting others with their actuality; refrain from demanding change in law and society; and go along with the policy: 'Don't ask, don't tell'. Whilst safe spaces in society are obviously to be preferred to violence, members of sexual minorities connive in their own denigration and even oppression by accepting life-long invisibility. If there is no challenge to a binary sexual

¹¹ Brian Whitaker, *Unspeakable Love: Gay and Lesbian Life in the Middle East*, Uni of California Press, Berkeley, 2006, 19-23.

division of the human species and no presentation of the actuality of the spectrum of sexual feelings and experience, the result will often be frustration, unhappiness, hypocrisy, shame and violence.

Children and loneliness: Where members of the sexual majority come to accept the existence of sexual minorities, they may still prefer to discourage any overt expression of minority identities and feelings in a supposed desire to protect the minorities themselves from the suggested loneliness and emptiness of a childless existence. Knowledge of the great joys that children can bring sometimes lies behind the sense of loss and regret at the discovery of a sexual identity that may effectively deny the possibility of children. Yet, whilst such responses are often understandable, they cannot be allowed to sustain the attempt, by the use of criminal law and punishments, to enforce upon individuals, emotions and actions that they are not able (easily or at all) to manifest with honesty. A heterosexual person has only to ask themselves how they would feel if forced, by law or social pressure, to pretend to a life-long relationship undesired and physically uncongenial to them. Not only would this be alien to the person involved. It is a serious and dangerous affront to their partner.

There are many answers to the fears of childlessness and loneliness:

- * New birth technologies have overcome their necessity, at least for those who are persistent and able to afford such treatment;
- * Not all people want children. The world is over-populated. The fact that some people will remain childless has certain social benefits. There is no risk that it will become the norm;
- * At least some childless individuals devote energies, that would otherwise be addressed to a nuclear family and children, towards

the service of a wider community. Amongst avian and other animal species, sexual variation seems sometimes to be explained by service to the flock or the group. The same may be true in some human beings.

In any case, attempts to force people into a binary arrangement that is unnatural to them is cruel, likely to be unsuccessful and prone to cause serious consequences for the individual and others.

The unstable compromise: Some contemporary religious teaching and the penal laws described above aim at forcing members of sexual minorities to remain celibate. If there can be no (lawful/moral) sexual activity except within a marriage and if marriage may not be extended to same-sex couples, the solution offered by those of that view is unstable. It is that sexual minorities may exist (as science teaches they do), but that they must be allowed no physical expression for their sexual feelings.

Sigmund Freud once observed that celibacy was the only truly unnatural sexual inclusion. However it may be adopted in human societies for particular persons with special vocations (and even then imperfectly), it is not a feasible arrangement for the overwhelming majority of ordinary human beings. To try to enforce it upon people, in all of their generality and diversity, is therefore doomed to fail. Yet this is the position now reached by many religious teachers and enforcers of the penal law.

Once the existence of sexual minorities was recognised, the logic of that recognition demands appreciation of the inevitability and naturalness of the expression of sexual feelings, at least so long as those feelings

occur between consenting adults in private. That principle not only reflects a proper limitation upon the intrusion of the criminal law and the power of the state into the lives of individuals. It also recognises a deep psychological need that is conducive to human happiness, social equity and peace. As such, it does not appear to be inimical to the fundamental beliefs of the world's religious traditions that normally share an acceptance of the Golden Rule: to do as we would be done by. In the context of global human rights, and in the particular circumstances of the GFC and of the HIV/AIDS epidemic, there is therefore an urgent need to reflect the foregoing considerations in both legal reform and an epidemiological strategies.

CHANGE AGENTS

Who have been the change agents that have brought about the alteration of attitudes to MSM, notwithstanding the foregoing phenomena that have reinforced homophobia for so long in human history? In my view, they have included at least the following:

- * *Codifiers*: Those who codified the criminal law in France and exported their more modern ideas through the French, Spanish, Portuguese, Netherlands, German, Swiss and Russian colonial traditions. Their work has also extended wherever those traditions were voluntarily accepted by other countries, as for example, in China, Japan, Korea and Vietnam. Thus, in Indonesia (the country with the largest Islamic population in the world), because The Netherlands Penal Code was originally derived from that of France, the Penal Code of the East-Indies never contained a sodomy offence. To this day, Indonesia has no such offence, except that recently, in parts of southern Sumatra, it has been introduced for the first time as an aspect of Shariah law. For the

most part, the enlightenment of the Napoleonic codifiers has been reflected in Indonesia as in the majority of countries of the world. Accidents of colonial history and of the embrace of colonial models, rather than deep well springs of local cultures, explain most of the differences in the legal regimes now applying.

- * *Scientists*: The introduction of scientific exploration of the features and patterns of human sexual behaviour was a distinctive feature of twentieth century science. Researchers such as Havelock Ellis, Sigmund Freud, Alfred Kinsey, Evelyn Hooker and later sexologists helped by providing an increasingly empirical foundation for understanding the varieties of human sexual conduct and the normality (or at least the commonality and certainly the frequency) of what had earlier been condemned as “evil” and “against the order of nature”.

- * *Reformers*: In part stimulated by the advances in the understandings of psychology and psychiatry and because of research into human sexuality, legal reformers appeared from the middle of the twentieth century urging removal of the old criminal penalties. The Wolfenden enquiry in Britain¹² led to the eventual reform of the criminal law of the United Kingdom, with the repeal of the sodomy offence that had earlier occasioned more hangings in London in the 1830s even than for murder¹³. The reform of the criminal law in Britain was quickly followed by amending legislation in Canada, Australia, New Zealand and parts of the United States.

¹² *Homosexual Offences and Prostitution*, CMND 237, HMSO, 1957.

¹³ *Sexual Offences Act 1967* (UK).

Ireland also followed, as did other jurisdictions. South Africa¹⁴, the United States of America¹⁵, and now India¹⁶, have been the beneficiaries of enlightened judicial decisions. More recently, the Fiji Islands¹⁷ has accepted reform, first by a judicial, and then a legislative, course.

- * *Human Rights*: In the case of the United Kingdom in respect of Northern Ireland¹⁸, in the Republic of Ireland¹⁹ and in Cyprus²⁰, legislative reform was itself stimulated by decisions of the European Court of Human Rights. With increasing insistence in recent years, that European Court has demanded the equality in the treatment of sexual orientation and gender identity throughout the entire area subject to its jurisdiction. In March 2010, the European Council of Ministers adopted a recommendation in the most emphatic terms providing for equal treatment of sexual minorities throughout Europe in a comprehensive range of human activities²¹.

The advance of global human rights has also extended the message of equality of treatment to sexual minorities beyond the borders of Europe and the developed countries of North America and Australasia. A specific decision of the United Nations Human

¹⁴ *National Coalition for Gay and Lesbian Equality Case*, 1999 (1) SA 6, (Con Court SA).

¹⁵ *Lawrence v Texas* 539 US 558 (2003).

¹⁶ *Naz Foundation*, above n6.

¹⁷ *McCosker v State* [2005] FJHC 500 (High Court Fiji). See also, e.g., *Ang Ladlad LGBT Party v Commission on Election*, Supreme Court of the Philippines, 8 April 2010, unreported (GR 190582). The Court there unanimously upheld the right of an LGBT political party to be registered for the coming elections, overruling the refusal by the Electoral Commission to do so.

¹⁸ *Dudgeon v United Kingdom* [1981] ECHR 7525.

¹⁹ *Norris v Ireland* [1988] ECHR 10581.

²⁰ *Medinos v Cyprus* [1993] ECHR 15070. See also *Kozak v Poland*, unreported, 2 March 2010.

²¹ Recommendation CM/Rec (2010) 5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (adopted 31 March 2010 at the 1081ST meeting of the Ministers' Deputies).

Rights Committee, established under the *International Covenant on Civil and Political Rights*²², is now supplemented, and reinforced, by the activities of numerous agencies of the United Nations, including the World Health Organisation, UNAIDS, UNDP, the Office of the High Commissioner for Human Rights and by the work of special rapporteurs/representatives of the United Nations.

- * *Religions*: Although, for the most part, religion has not been in the forefront of defending the rights of sexual minorities, there are exceptions. The Church of South India, for example, pronounced itself in favour of the decision of the Delhi High Court in the *Naz Foundation Case*. So did respected leaders of the Hindu belief. In 2009, a representative of the Holy See urged the United Nations to support the removal of criminal sanctions against homosexual acts. This was the more significant because that church has continued to insist both that, morally, homosexuals must not engage in sexual behaviour outside marriage, and that marriage for them is unacceptable and “evil”.

- * *Media and internet*: An important element in securing a change in global attitudes to sexual orientation and gender identity has been the operation and outreach of international media. No longer can the actualities of sexual variation be kept a secret. In today’s world, satellites, global media, the internet and social networking have reduced the barriers to awareness and discovery of sexual variations. The inclusion of characters in popular television programmes, both of documentaries and soap operas, has helped to change human perceptions of this issue. The revelation by

²² *Toonen v Australia*, above n1.

leading citizens that they are homosexual or bisexual has begun the process, at least in many developed countries, of shattering the reinforcement for the binary illusion that previously prevailed because of considerations of silence and shame.

- * *Standing up*: Finally, as increasing numbers of experts and others have spoken out on the injustice and irrationality of previous prohibitions on sexual minorities (especially because of the global predicament of HIV/AIDS), the ability to hold the line on the present laws has become more tenuous. In due course, this development will affect not only the removal of the criminal laws against MSM. It will also impact the reforms of public order legislation on the conduct of gays²³ and, eventually, legislation governing the human relationships of sexual minorities, whether in the form of 'marriage' or of 'civil union/partnership'. Whilst the last-mentioned reform was, not so long ago, regarded as unthinkable and even unarguable²⁴, the tide of more recent judicial decisions, in many diverse jurisdictions has shifted strongly in favour of the provision of civic equality to sexual minorities but within an environment that respects the entitlement of religious groups to be exempt from participation in such relationship recognition if they so wish. That participation may come later when the instability of the present holding compromise is fully appreciated and the need to reach a new plane of rationality and human kindness is accepted.

²³ *Leung TC William Roy v Secretary of Justice* [2005] 3 HKLRD 657; *Secretary for Justice v Yau Yuk Lung Zigo* [2007] 3 HKLRD 903.

²⁴ See e.g. *Quilter v Attorney-General of New Zealand* [1998] 1 NZLR 523.

MOVING THROUGH THE TRANSITION

The result of this analysis is that, a reflection on the law and sexual minorities demonstrates that we are passing through a transition of the law. As scientific knowledge and evident human actuality come to be known to the societies governed by law and opinion, old laws and practices will be abandoned. New laws and practices will be adopted. Recent court decisions in India, the Philippines, Pakistan and Nepal indicate that change is happening in the Asian region. Legislative change is also happening elsewhere, including in Australia where federal statutes were amended in 2008 to sweep aside more than a hundred discriminatory provisions that had previously existed²⁵. Such changes will not occur evenly. But they will occur because the atavistic attitudes that underpinned homophobia are now gradually giving way in many societies to a greater enlightenment and broader knowledge.

The HIV/AIDS epidemic has injected an element of acute urgency into the achievement of legal reform. It is in the clash between established laws and remaining religious and social prejudices that the chief challenge for the international community arises on Anti-Homophobia Day 2010. Its involvement is justified by the role played by the agencies of the United Nations in combating the spread of HIV and in funding the response.

That response must increasingly recognise and reflect the urgency of prevention. In the case of MSM (one of the groups most vulnerable to HIV infection), prevention strategies will not work (certainly will not work efficiently and quickly) whilst stigma, criminalisation and a code of silence prevail in law and in society. Leadership is urgently needed to

²⁵ *Same-sex Entitlements (Reform of Commonwealth Laws) Act 2008 (Aust).*

remove these impediments in the case of MSM and other vulnerable groups. The GFC means that the crisis in global strategies is most urgent. It will become increasingly so. This is why UNDP and UNAIDS are to be congratulated on the initiatives they have taken. The holding of this high level dialogue in Hong Kong and the creation of the new UNDP Global Commission on HIV and the Law are to be welcomed. They are important initiatives that point in the right direction. The world will eventually follow. But will it follow quickly enough to save the lives of those many most at risk?
