

2079

THE CHINA LAW CENTER, YALE LAW SCHOOL

SCHOOL OF SOCIAL DEVELOPMENT AND PUBLIC POLICY

FUDAN UNIVERSITY, SHANGHAI, CHINA

DIVERSITY, EQUALITY AND HARMONY: INTERNATIONAL
WORKSHOP ON SEXUALITY, POLICY AND LAW

CHINA - SEXUALITY, DIVERSITY & HIV/AIDS

The Hon Michael Kirby AC CMG

THE CHINA LAW CENTER, YALE LAW SCHOOL
SCHOOL OF SOCIAL DEVELOPMENT AND PUBLIC POLICY
FUDAN UNIVERSITY, SHANGHAI, CHINA
DIVERSITY, EQUALITY AND HARMONY: INTERNATIONAL
WORKSHOP ON SEXUALITY, POLICY AND LAW

CHINA - SEXUALITY, DIVERSITY & HIV/AIDS

The Hon Michael Kirby *

PERSPECTIVES OF SEXUALITY

In awe of China: To be in China is to be in awe of humanity in all of its diversity. It is to be aware of the march of civilisation that constantly pushes us forward to higher levels of knowledge and justice and rational thought. It is as if China is the centre of the world: a chief focus of the genetics of the human species that propel us, through evolution, to greater enlightenment and understanding of the universe and everything in it.

* Justice of the High Court of Australia; former member of the World Health Organisation Global Commission on AIDS; Member of the UNAIDS Global Panel on AIDS and Human Rights.

The march of civilisation was brought home to me in a vivid way on this, my first visit to Shanghai. Before the workshop began, I visited the museum in Shanghai that collects some of China's finest artefacts. Works of porcelain, stone, bronze, silver and gold reward the visitor. But my favourite room was one containing treasures of jade - a soft yellow light creating an eerie feeling of peace and tranquillity.

The first item that I examined was a decoration - a disk of translucent material, once worn as an ornament or decoration. To my astonishment, the inscription beside this beautiful object disclosed that it was dated to about 30,000 years BC. My imagination tried to conjure up the artisan who created this thing of beauty. And to imagine the society, the homes, the children, the toys and the people before whom it was first displayed.

Coming from Australia, which dates its modern national history to a foundation little more than 200 years ago, the thought of a society 32,000 years ago is specially difficult to conceive. What was particularly amazing was that the jade object had no utilitarian value. None at all. It was not connected with food, shelter, protection or procreation. It was just an object of beauty, created by the maker and presented to the wearer so long ago. It indicated that, even in such ancient times, in China, human beings enjoyed non-utilitarian feelings. They manifested a developed spiritual and

aesthetic sense. They tried to make their lives happier and richer in feelings as well as in possessions.

With excitement, I telephoned my partner, Johan, in Australia to tell him of my jade discovery. To share with him my sense of humility and wonder. To come to China, with such a long civilisation, to contribute to new thinking about diversity, equality and harmony in the matter of sexuality, might seem a presumption. To come from a much younger country to one so ancient and long established, might seem overly ambitious.

My partner encouraged me to stay the course. The self-same quest for beauty, and spiritual feelings illustrated by the ancient disc of jade can now be invoked to help in an understanding that humanity is always exploring its feelings for love and beauty. Human beings are more than their means of survival. They are complex creatures in an ever-continuing process of evolution. They are rich in diversity. To virtually all of them, love for self, for family, for special friends and for nature is important - a constant source of exploration and yearning.

So I overcome my feelings of inadequacy. I offer my thoughts on the subjects of this workshop. I do so from a perspective of a lawyer, a judge in an independent court, a person who has been involved in the international development of human rights and more recently in the struggle against HIV/AIDS. But above all, as a human

being with inalienable human rights and dignity. And one who is homosexual in sexual orientation and thus able to speak to the workshop directly, from personal experience, which I am ready to share.

Infantile regressions: Observation of children in their earliest years suggests that many of them, perhaps most, have a fear, or dislike, of those who are different from themselves. This is, indeed, an infantile disorder. Most of those who have the blessing of education grow out of this disorder. They come to accept the diversity of human beings and of other forms of life on the planet. But some never do.

The sources of infantile discrimination against those who are different, the strangers, are many and varied. Sexual orientation is only one such source of difference. In countries influenced by Judeo-Christian-Islamic religious traditions, scriptural texts may be found to suggest, in the revealed religion, that people who "choose" a sexual orientation other than that of the majority heterosexual one, are evil-doers, alien to God's love and to the very purpose of sexual feelings as they exist in the natural order of things: the procreation of the species, the birth of new generations and the furtherance of natural evolution.

China is not, for the most part, greatly influenced by such religious dogmas. True, there are such religions in China. However,

the overwhelming majority of the people of China are not adherents to such beliefs. To this extent, China seems to an outsider a country susceptible to scientific and rational arguments about revealed variations in human sexuality. Where God or religion are thought to reject such variations, the job of the scientist, sociologist and lawyer, seeking to secure changes of attitudes and institutions, is much more difficult.

However, China, although not religious in this sense, has strong traditions - especially of the family and of the importance of marriage, of begetting children and continuing the family name. Such considerations make it difficult to achieve acceptance of the existence and rights of sexual minorities - of exclusively gay and lesbian people; bisexuals; transgender and intersex minorities. Such people appear to defy the binary assumptions of past cultural norms, including in China: that all humanity is neatly divided into heterosexual men and heterosexual women, leaving no space for those whose desires, physical and psychic needs and sexual orientation are different.

Some of the chief differentiating considerations that give rise to the infantile disorder of fear of difference include sex or gender. But they also include race and ethnicity, skin colour and culture, religion and political philosophy, disability, HIV status, mental impairment and so on.

Traditional discrimination: Between 1993 and 1996, I served as Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia. My task, in the aftermath of the genocide that had afflicted that country, was to encourage respect for diversity on all of the foregoing grounds and to promote protection of the fundamental rights and dignity of everyone.

In performing my functions, I found that there were distinct racial tensions in Khmer society. To put it somewhat crudely, many Khmer disliked the members of the Vietnamese minority who lived in their midst. This taught me that racial discrimination, and feelings of alienation or racial superiority, are not confined to people of European ethnicity. This is a world-wide phenomenon. Doubtless it exists in China, as everywhere else on the planet.

I was determined to get to the bottom of Khmer antipathy for the Vietnamese migrants. I asked a respected human rights worker of Khmer ethnicity to explain the reasons for the feelings. I expected a discourse on history. Instead, I was given an explanation in homely and personal terms. The reason for the antipathy, it was explained, could be traced to the Khmer distaste for the smell of Vietnamese cooking. For the noise which Vietnamese neighbours made in their homes at night, disturbing the peace of the surroundings. And the fact that Vietnamese were coming to Cambodia and taking the best jobs from the local citizens. When these excuses were explained, I realised how similar these feelings

were to the same feelings about strangers that exist in many people in Australia.

When I was young in Australia, we had a national policy of "White Australia". It was reinforced by the law. People of non-European ethnicity found it extremely hard to enter Australia, still less to become citizens and to live there. At the time, the policy was supported on economic grounds as well as because feelings of racial and cultural superiority. Fresh from my visit to the Shanghai Museum and the disc of jade, it is difficult to explain this. But it was the reality of Australia in the years before 1966.

In those days, many Australians looked down on Chinese people. They even described them as "uncivilised". They gave the same excuses for resisting their admission to Australian society. There was fear of the so-called "Yellow Peril". Different appearances, different food, different languages, religions and traditions made Chinese people, in those days, unwelcome. This has changed radically. But it was the reality when I was growing up.

Eventually, education, changes in the law, greater exposure to Chinese families and individuals and opportunities to appreciate the shared features of diverse lives, combined to effect a change. However, the change of attitude only came about when Australians of European ethnicity began to meet, know, trust and appreciate people of Chinese ethnicity. Then, at last, the feelings of superiority

began to melt away. The fear of difference was tempered by acquaintance and knowledge. Respect for peaceful, good and often high achieving Chinese immigrants resulted in a change of national attitude and outlook. Yet this largely occurred because the separation of the past gave way to acquaintance, familiarity and knowledge. Fear was stilled. It was replaced by knowledge and mutual respect.

Sexuality discrimination: So it is with sexuality. In the past (and in most parts of the world even today) people in the sexual minorities have been programmed to lie low. To disguise their true feelings. To pretend to be heterosexual, and to feel shame about their most intimate, self-defining emotions. Many (perhaps most) gay people can successfully pass themselves off as "straight". I did so, I think, for many years. Australia, like most countries, generally practised the principle: "Don't ask; don't tell". That principle was reinforced by legal considerations. Until the past twenty years or so, sexual activity between men was a serious criminal offence in Australia. This was so although the men involved were adults, consenting and acting in private. Police were engaged in Australia to entrap gay men. Their victims were then prosecuted, shamed and sentenced to long periods of imprisonment, if caught. Moreover, self-denial was reinforced by repeated religious instruction; by parental and family expectations; and by economic self-interest.

Thirty years ago virtually no one who was homosexual in Australia was open about it. Everyone went along with the pretence. To this day, many people, including some in high positions, maintain the denial. In truth, they are sometimes encouraged to do so by homophobes and fanatics, some of them in high office. But gradually the old pack of cards has begun to collapse. We are now witnessing the consequences of this change. It has not yet been fully accomplished. Laws still exist that discriminate against sexual minorities on the grounds of sexual orientation. But the old criminal laws have been swept away throughout Australia. New protections against discrimination have been introduced. And most important of all, increasing numbers of homosexual citizens are throwing off the pretence and seeking, or demanding, acceptance by their fellow citizens - of their equality, human dignity and self-respect.

Reasons for change: Why has this change in respect of sexual orientation come about at this point in history? Why does it happen that the Netherlands, Belgium, Massachusetts, Spain, Canada and South Africa have moved towards equality, for example, in marriage rights for homosexual citizens? Why have many other countries enacted laws providing for civil unions between same-sex partners enjoying official recognition? Why have so many lands in such a short time of human history repealed criminal laws punishing sexual acts between consenting adults in private? And why have courts in several countries struck such laws down as breaching fundamental

constitutional norms? Why have communities of sexual minorities sprung up in even more lands, with celebration of diversity, of shared economic interests, of publications and civil society organisations to reinforce the increasing number of people who acknowledge sexual feelings towards members of their own sex and refuse any longer to be ashamed of that fact, which is a fact natural to them?

The reasons for such changes are complex. Some proponents of equality for sexual minorities contest that it is even necessary to explain and justify the developments. They assert that, in principle, it is no business of the State or the community to discriminate amongst citizens in basic civil rights on the footing of what those citizens do sexually in their relations with other adults or in the bonds that they form with other human beings. For them, these are private matters. The organised community has no right to interfere. It has a duty to treat all persons with equality because that is a feature inherent in the human dignity of all of us.

Given that in many (perhaps most) countries of the world laws, religion, social stigma and other impediments still exist to true openness about sexual orientation, outside the majority norm, the widespread changes that have occurred in the past few decades are remarkable. It is worth collecting some of the causes. They include:

- (1) The advance of understanding of human psychology and the research performed during the twentieth century into features of sexual attraction. The writings of Sigmund Freud, Alfred Kinsey, Evelyn Hooker and others helped to demonstrate, empirically, the variety of sexual expression amongst human beings and the imperfections of the strict binary assumption upon which earlier moral attitudes, in part at least, had rested;

- (2) The mass media and the powerful influence of films, television, radio and now the internet, bring knowledge about sexual matters, in unprecedented detail and variety, to virtually every corner of the world. Because of the human fascination with sex and the huge market that serves this fascination, knowledge of the variety of human sexual inclinations has now become widespread. This knowledge has undermined the foundation of religious and other teachings that sought to portray minority human sexual expression as something deliberately and wickedly chosen to defy "the order of nature". Increasingly, we now know of, and therefore increasingly accept, that nature manifests itself in sexual matters in a variety of forms, rendering such condemnations less common and less acceptable to growing numbers of people. In increasing familiarity and knowledge, lie the seeds of growing acceptance;

- (3) In many countries of Europe and Australasia, the decline of the power and influence of organised religion, which has often been in the forefront of stigmatisation of sexual minorities, has resulted in questioning of the teachings belittling of such minorities and their lives. The growth of religious scepticism in most western societies has led, at least to some degree, to a consequent falling away of the power of religious teaching that has often been (and sometimes still is) a source of the hatred against and oppression of homosexual minorities. Ironically, in many developing countries (and in the United States of America) the growth of religious fundamentalism, has moved in a contrary direction. Thus, whereas great progress has been made in the Council of Europe, in Australasia and elsewhere, in the protection of the legal rights of sexual minorities, in Africa, parts of southern Asia, sections of Latin America and the United States, anti-gay propaganda, frequently propounded by conservative religious leaders, has led to an increase in violence, inequality and stigmatization at the very time when elsewhere things were improving;
- (4) The general global advance of respect for individual human rights, and of appreciation of the importance of upholding the fundamental human dignity of the individual, has been a result of tireless work in the United Nations since 1945. The adoption of important international human rights treaties; the ratification of many of them by diverse countries, including

China; the growth of global scrutiny of human rights and fundamental freedoms; and the coverage of such issues in the world media stimulate an expectation of improvements in the conditions of human freedom. Whilst significant debates continue in many countries concerning the balance between rights and duties, the individual and the community, economic progress and personal freedoms, large advances have undoubtedly been made in expectations of individual self-expression, including as between adults in matters of sexuality. In a sense, economic progress flourishes best in creative societies. The inevitable counterpart to economic progress is a demand for progress in the field of ideas and in the respect for rights and the willingness to submit to co-equal duties;

- (5) Against the background of these changes, universities and institutes of learning throughout the world, including in China, have begun studying the genetic, hormonal and societal features of sexual variation in human beings and in other species. No longer are these the subjects of secrecy and denial. They are a legitimate focus of intellectual curiosity, research and discovery. This workshop in Shanghai is an illustration of the growing scientific and empirical scrutiny of sexuality in institutions of high learning in all parts of the world. If it is part of our humanity (indeed of nature more generally) it is, as Dr Kinsey declared, the proper subject of

study, research and revelation. It is not alien to the human species - it is an aspect of it;

- (6) Partially in consequence of the foregoing, issues of sexuality are now more openly presented in the media. They are portrayed and discussed and increasingly in a thoughtful, reflective and informative way - not just through stereotypes of hatred. Films which examine human feelings between same-sex couples have become part of the popular culture, at least in advanced Western countries. The current prize-winning film *Brokeback Mountain* is an illustration. However, there are many such instances. They exist in all parts of the planet. The veil that has hitherto covered this aspect of human existence has been gently lifted in recent decades until now, in many lands, it has been cast aside. In Australia, in the late 1960s, one of the most effective vehicles for changing social attitudes towards homosexuals was a television soap-opera *Number 96*. It portrayed the routine ordinariness of the life of a gay man viewed in the setting of the Australian society he lived in. No longer was he demonised and presented as perverted, dirty, an object of ridicule or fear. In my own case, my relationship with Johan, my partner of thirty-seven years, is profoundly ordinary. The fact that people in all walks of life, who are members of sexual minorities, are now coming out of the shadows of the past helps young people, discovering today about their sexuality, to do the

same: to be open and contemptuous of the demand for pretence about their human reality. The fears and stigmas of earlier generations are thus giving way to the light of science, knowledge and truth. There are some who would wish to push the genie back into the bottle and to reverse this process. But scientific research, and human knowledge that is its product, can rarely be put into reverse.

But there is one further reason for change that has contributed an element of urgency in adapting contemporary attitudes to the variety of human sexuality. I refer to the advent of the HIV/AIDS pandemic. In fact it presents a separate topic. Yet it is related to sexuality and so cannot be ignored. This brings me to the last part of my contribution.

THE URGENCY OF HIV/AIDS

The HIV/AIDS pandemic: More than 40 million people today live with HIV/AIDS. Every year, more than 3 million people die of AIDS. It is a devastation that afflicts every country on earth. However, its burdens fall most heavily on people in developing countries. They are personal, economic and social burdens. These are not just medical statistics.

From the first signs of the HIV/AIDS pandemic in the early 1980s, the world has come to recognise the huge challenge

presented by the HIV virus. In the early days, it was predicted that a safe vaccine would be available within a decade. This has not eventuated. Securing an effective vaccine still appears to be far away. Although there have been advances in therapy for people living with HIV and AIDS (most especially the development of the triple combination drug therapies) these are expensive, even when available in the form of generic drugs. The United Nations 3x5 programme (ie 3 million people in developing countries receiving antiretroviral treatment by 2005) has fallen behind its targets. The objective of radically increasing access to tests that will reveal HIV status in conjunction with counselling and privacy, has also fallen short of its targets. In many countries of the world, stigma still surrounds exposure to HIV. In part, this has been because death has been the common consequence of infection. But in part, it has been because of traditional attitudes to the common modes of transmission of the virus: sexual intercourse, injecting drug use and prostitution.

In the early years of the epidemic, in developed countries such as Australia and the United States, a large proportion of persons diagnosed as HIV positive were gay men. This has never been a characteristic of the epidemic in developing countries. It has not to date been a feature of the epidemic in China. Nevertheless, the presentation of a large cohort of homosexual patients with HIV, together with the absence of a vaccine and the early unavailability of

effective therapies, produced a consequence that is relevant to social responses to human sexuality.

The HIV/AIDS paradox: Faced with an epidemic affecting already vulnerable groups in society, insusceptible to easy medical solutions, the early days of the HIV/AIDS pandemic were very difficult. Yet they produced a response that involved addressing a paradox. Paradoxically, the most effective way to reduce the spread of HIV was by protecting the rights of those already infected or those chiefly at risk of infection. This was a paradox because, in the past, faced with epidemics, the normal response of society had been quarantine. By the time the magnitude of HIV was recognised, the possibility of quarantine had passed. In any case, given the slow development of HIV in many humans, effective quarantine would have been a disproportionate and ineffective response.

Recognising the need for paradoxical initiatives, countries such as Australia began taking steps to afford legal and other protections for persons at risk. These steps included:

- * Introduction of major public health information campaigns discussing sexual subjects openly in ways that were unprecedented;
- * Establishment of a national needle exchange programme for injecting drug users;

- * Legalisation or decriminalisation of prostitution (commercial sex work);
- * Passage of anti-discrimination laws; and
- * The decriminalisation of laws against sexual minorities.

In consequence of these initially radical, and paradoxical, measures, the early rapid growth of infections with HIV was turned around in countries that adopted these bold measures. The number of sero-conversions quickly fell. Although there is some evidence of a rise in recent years (usually attributed to the difficulty of maintaining vigilance and self-protection over long periods within new generations), the general effectiveness of the non-medical responses has been widely acknowledged. To a significant extent, the countries that have taken the paradoxical measures have witnessed a fall in sero-conversions. Those that have continued to promote, or permit, stigma; to criminalise adult sexual conduct in private; and to stigmatize minority groups have witnessed a continuing rise in HIV infections.

In most parts of the world, access to confidential testing, counselling and expensive therapies is still a long way off. Stigma continues to impede effective strategies against HIV/AIDS. Those strategies still depend heavily on behaviour modification. Such modification relies on awareness, self-perception and the capacity of self-protection.

Relevance for China: A report in the *Financial Times* of London¹ on the eve of the workshop quotes Wu Zunyou, an official with the Chinese Centre for Disease Control and Prevention as saying that there is an "alarming number of new HIV cases [in China], predominantly among intravenous drug addicts and sex workers". Mr Wu reportedly considers: "We have not been able to control it. If you have seen some of the worst hit areas with your own eyes ... you cannot help but cry".

Reportedly, the southern provinces of China are the areas most affected by the recent spread of HIV. Injecting drug use and sexual relations account for about 97% of the new cases. The early phase of the epidemic, involving contaminated blood products, has been substantially reversed and solved. But the "two behaviours" involved in injecting drug use and commercial sex in particular are "both hidden". The number of HIV cases in China is not certain. However, UNAIDS has predicted that China might have 10 million infections by 2010. Radical steps are necessary to reduce and contain that figure².

¹ 5 January 2006, p 3.

² R Y Zhao, "An editorial overview: HIV/AIDS in China" in *Cell Research* 15 (11-12): 821/822, Nov-Dec 2005; cf Xia Cuomei *HIVAIDS in China*, Foreign Languages press, Beijing, 2005, 122ff.

The protective steps for China will involve accepting the HIV/AIDS paradox. This includes in the cohort of Chinese people who are at risk of infection through sexual contact. In turn, this includes men who have sex with men (MSM). They may, or may not, identify themselves in China as members of a sexual minority. But several features render them specially vulnerable. They tend to be socially stigmatized. They live in a world where their sexual conduct is typically secret and hidden, even from their own families and friends. Their existence is often denied or stereotyped and mocked by the media. Often, they do not have effective community organisations, professional help or political support to spread messages of prevention and therapy so as to provide self-protection and so to slow the spread of the virus.

The danger of invoking the HIV/AIDS epidemic to promote measures to protect sexual minorities (especially gay, bisexual and transsexual persons) is obvious. Linking already stigmatized minorities to an epidemic that is the source of ignorance and fear, may only add to the burden of stigma. Nevertheless, the existence of this cohort of people at risk demands initiatives specifically addressed to their risk³. Such initiatives will, to the extent that it is relevant and possible in China, draw upon the experience of other

³ Bei Chuan Zhang and Quan Sheng Chu, "MSM and HIV/AIDS in China" in *Cell Research*, 15 (11-12) : 858-864, Nov-Dec 2005.

countries. It will require legal initiatives, affording legal protections that accept the HIV/AIDS paradox.

In the countries where initiatives have been successful, they have relevantly mobilised gay representative groups to spread knowledge about HIV and the modes of its transmission; provided information campaigns targeted at such groups; educated police and other officials so as to reduce the harassment and alienation of this cohort; promoted and adopted laws and policies affording protection and redress against discrimination, inequality of treatment and violence; and accepted strategies to encourage a more rational and informed public awareness of the existence of sexual minorities and an understanding of their human needs, which are substantially the same as those of other citizens.

Mixed messages: Despite the dangers of mixing the messages of sexual equality and HIV prevention and care, the advent of HIV does require of all societies in the world a more rational and informed approach towards the real world of human sexual diversity.

This may be uncomfortable for traditionalists. It will be opposed by some religionists, in the name of divine revelation. However, certainly in the current state of vaccine and therapeutic developments and availability, no other strategy is likely in practice to reduce the spread of HIV and lessen the enormous burden of the epidemic. That burden is individual and social. It is economic and

threatens to rob many developing countries of the fruits of hard-earned economic progress. Important choices have to be made by political leaders. So much is cold reality. It is the role of universities to provide those leaders with scientific data on the extent of the epidemic; on its potential costs; and on the crucial decisions that have to be made to contain it and reduce its impact: personal, social, national and global.

Among the hard decisions that are required are those addressed to the needs and rights of men who have sex with men and of other sexual minorities. The adoption of new laws and public policies that address the realities of sexual diversity has therefore taken on a new urgency because of the advent of HIV/AIDS. The adoption of new laws and policies can be justified on scientific grounds and by reference to human values. But the advent of HIV/AIDS provides a new element of urgency because of the needs for effective prevention and containment. Including in China.

Thirty millennia ago, out of the feelings of human beings, came things of beauty to demonstrate that we are a species that feels and cares and have an inner life of perception that goes beyond own brute needs for mere existence. We must reach into that inner world. It is there that will be found respect for the needs and feelings of other fellow human beings, including those within sexual minorities that may be different from our own. Perceiving in those others a reflection of the existence of ourselves and those we love,

we need to mobilise ourselves to respond to the dangers of ignorance, cruelty and incompetence as we address the different, yet interconnected, realities of human sexuality and human disease. It is a big need of our time. It is urgent.