



Punitive Laws, Human Rights and HIV prevention among men who have sex with men in Asia Pacific

High Level Dialogue Report

International Day Against Homophobia
May 17, 2010

Hosted by the Centre for Comparative and Public Law
at the Faculty of Law, The University of Hong Kong



Emerging Strategic Research Theme on Diversity Studies
The University of Hong Kong

The content of this Report does not necessarily reflect the views of the United Nations Development Programme, its Executive Board or its Member States, Asia Pacific Coalition on Male Sexual Health (APCOM), and The University of Hong Kong. The purpose of this report is to provide a truthful and accurate account of the presentations and discussions of the "High Level Dialogue - Punitive Laws, Human Rights and HIV prevention among men who have sex with men in Asia Pacific" held on May 17, 2010 in Hong Kong.

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Acknowledgements

This report and accompanying DVD documents the presentations and statements made at the “High Level Dialogue - Punitive laws, human rights and HIV prevention among men who have sex with men in the Asia Pacific Region” held in Hong Kong on May 17, 2010 – the International Day Against Homophobia.

The aim of this publication is to draw high level policy attention of governments, donors, academia, human rights bodies and other stakeholders to the issues associated with the impact of punitive laws and human rights abuses on effective HIV responses among men who have sex with men and transgender persons in Asia Pacific. These issues were highlighted as key findings in the forthcoming UNDP, APCOM report “Legal environments, human rights and HIV responses among MSM and transgender people in Asia and the Pacific: An agenda for action”.

The organization of the High Level Dialogue would not have been possible with the close collaboration of our partners: the Asia Pacific Coalition on Male Sexual Health (APCOM) and the University of Hong Kong’s Centre for Comparative and Public Law (CCPL) at the Faculty of Law, and the Public Health Communications Programme at the Journalism and Media Studies Centre.

We would like to gratefully acknowledge the contribution and dedication of the Dialogue panelists: Hon. Michael Kirby; Hon. Ajit Prakash Shah; Hon. Dame Carol Kidu, Minister for Community Development, Papua New Guinea; Shivananda Khan, OBE, Chairperson, APCOM; Dr. Mandeep Dhaliwal, Team Leader, Human Rights, Gender and Sexual Diversity, HIV Group, Bureau of Development Policy, UNDP, New York, UNDP and John Godwin.

Our thanks and gratitude to Dr. Johannes Chan, SC, Dean, Faculty of Law, The University of Hong Kong for opening the Dialogue, and Thomas Abraham, Director of the Public Health Communications Programme at the Journalism and Media Studies Centre for moderating the event.

The High Level Dialogue and follow-up report was jointly organized by the UNDP Regional HIV Practice Team and the UNDP Bureau of Development Policy, HIV Group - Human Rights, Gender and Sexual Diversity Team. Special thanks to Edmund Settle, Regional HIV Policy Advisor, Asia Pacific Regional Center for conceptualizing and coordinating the Dialogue and media outreach. Pranee Threekul, UNDP Programme Associate provided outstanding logistical support, and Ian Mungall, UNDP Communications Consultant - HIV Team designed the event’s publicity materials, this report and accompanying DVD.

Finally, we would like to recognize the outstanding contribution and local coordination support of the University of Hong Kong’s - Kelley Loper, Assistant Professor, Director, LLM (Human Rights) Programme, Deputy Director, Centre for Comparative and Public Law Faculty of Law; Sharron Fast, Assistant Research Officer; Flora Leung, Secretary; and Raymond Lam, Computer and Audio-Visual Assistant.

The report “Legal environments, human rights and HIV responses among MSM and transgender people in Asia and the Pacific: An agenda for action” will be released at the **XVIII International AIDS Conference, Vienna, at the session on Criminalizing Homosexual Behaviour: Human Rights Violation and Obstacles to Effective HIV/AIDS Prevention, 20 July 2010.**

For more information on this session please visit:

<http://www.aids2010-abstracts.org/planner/sp.php?go=pp&sessID=1759>

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Background

A significant number of men having sex with men in the Asia Pacific region do not have access to HIV prevention and care services as HIV prevalence has reached alarming levels in many countries. If countries fail to address the legal context of the epidemic, this already critical situation is likely to become worse. The implementation of effective, human rights-based national HIV responses requires governments to consider the effect of laws and law enforcement practices on the health of men who have sex with men (MSM) and transgender persons.

This warning came as a key finding in the forthcoming report on “Legal environments, human rights and HIV responses among MSM and transgender people in Asia and the Pacific: An agenda for action”. This report and its key findings were reviewed during the “High Level Dialogue on Punitive laws, Human rights and HIV prevention among men who have sex with men in the Asia Pacific Region” convened by the United Nations Development Programme (UNDP), the Asia Pacific Coalition on Male Sexual Health (APCOM) and the Center for Comparative and Public Law (CCPL) at the Faculty of Law, The University of Hong Kong. This event coincided with the International Day Against Homophobia – May 17th, 2010.

The report’s findings and follow up discussion showed that 19 of 48 countries in the Asia Pacific region criminalize male to male sex, and these laws often taken on the force of vigilantism, often leading to abuse and human rights violations. Even in the absence of criminalization, other provisions of law often violate the rights of MSM and transgender persons along with arbitrary and inappropriate enforcement, thereby obstructing HIV interventions, advocacy and outreach, and service delivery. This very debate was at the heart of the recent landmark ruling by the Delhi High Court that Section 377 of the Indian Penal Code unfairly discriminates against men who have sex with men and consenting adults in general.

Over the course of the discussion, the panelists contended how legislation and law enforcement often lags behind national HIV policies, with the result that the reach and effectiveness of programmes for MSM and transgender persons are undermined. This indicates the need for greater coordination between health and justice sectors within government. There has been growing awareness among national policy makers of the need to identify MSM as a key population to be addressed by national HIV programmes. The panelist emphasized that developing strategic partnerships and alliances between affected communities, the legal profession, human rights bodies, parliamentarians and policy makers is critical.

Finally, the discussion highlighted that there are some recent examples of protective laws, judicial and policy actions to improve the legal environment for MSM and transgender people, including important court judgments in Nepal, India, Pakistan, Philippines, Fiji, South Korea and Hong Kong. However, these are exceptional developments and action is required to improve the legal environment in all countries.

This High Level Dialogue concludes the expert and community consultations which have occurred over the past year to inform and guide the content and recommendations of the study. These consultations included the 9th ICAAP Symposium – Overcoming legal barriers to comprehensive prevention among men who have sex with men and transgender people in Asia and the Pacific and two community consultations in Suva, Fiji and Bangkok, Thailand last December. The UN teams in Papua New Guinea and Sri Lanka also hosted local reviews.

The preliminary findings reviewed at the High Level Dialogue are from a study commissioned by UNDP and APCOM. The study considered published research, legislation, legal cases, grey literature, and drew from the regional consultations with community representatives and legal experts.

Speaker bios



The **Hon. Michael Kirby** was, until February 2009, one of the Judges of the High Court of Australia, Australia's highest constitutional and appellate tribunal. He was also Australia's longest serving judge. Beyond Australia, Justice Kirby served on the inaugural Global Commission on AIDS established by the World Health Organization in 1986, and still serves on the Reference Panel on Human Rights of UNAIDS, the Joint UN Programme on HIV/AIDS. He has also served between 1993-1996 as the Special Representative of the United Nations Secretary-General for Human Rights in Cambodia where he put HIV issues at the forefront of human rights concerns, and on various initiatives of UNDP, UNODC, OHCHR, the Commonwealth Secretariat and OECD. Mr Kirby has been awarded the Companion of the Order of St Michael and St George (CMG) (1983) and Companion of the Order of Australia (AC) (1991).



The **Hon. Ajit Prakash Shah** received his degree of law from Government Law College, Mumbai. After a short span of practice in the District Court at Solapur he shifted to Bombay High Court in 1977 and joined the chambers of the then leading Advocate Justice Shri S.C. Pratap. He then gained experience in civil, constitutional, service and labour matters. He was appointed as an Additional Judge of Bombay High Court on 18th December, 1992 and became permanent Judge of Bombay High Court on 8th April, 1994. He assumed charge of the office of Chief Justice, Madras High Court, on 12th November, 2005 and on transfer took over as Chief Justice, Delhi High Court on 11th May, 2008. In July 2009, Justice Shah delivered the ruling that found India's 150-year-old statute prohibiting homosexual acts as discriminatory and therefore a "violation of fundamental rights." Justice Shah retired in early 2010.



The **Hon. Dame Carol Kidu** is Minister for Community Development in Papua New Guinea and is the only woman member of the 109-member Papua New Guinea Parliament. Dame Kidu was first elected into the PNG Parliament in 1997. Dame Kidu facilitated the establishment of the Parliamentary Committee on HIV and AIDS in 2003 and the establishment of a PNG Parliamentary Group on Population and Development in 2008. Dame Kidu received the Imperial Award of Dame of the British Empire in January 2005 and was awarded International Woman of Courage Award by the Secretary of State of the United States of America in March 2007. She was named Pacific Person of the Year December 2007 and the 2008 Regional Rights Resource Team Pacific Human Rights Award winner for her contribution to promoting the rights of Pacific Islanders. In February 2009 she was honoured with the highest award for a non-citizen by the French Government - the Cross of Knight in the Order of the Legion d'Honneur.



Dr. Mandeep Dhaliwal, Team Leader, Human Rights, Gender and Sexual Diversity, HIV Group, Bureau of Development Policy, UNDP, New York, has extensive experience with organizations such as the International HIV/AIDS Alliance as well as the Lawyers Collective HIV/AIDS Unit in India, where as the founding Coordinator, she established the Unit's legal aid, strategic litigation, legal literacy, capacity building and advocacy work. She holds an M.D. and LLB and has been working with people living with HIV and marginalized communities in India and a number of developing countries in Asia, Africa and Eastern Europe. Prior to her present UNDP assignment, she was a senior advisor to the Royal Tropical Institute's Special Programme on AIDS in the Netherlands.



Shivananda Khan, OBE, formed Shakti, the first South Asian LGBT organization in the UK in 1988, and in 1991 established the first South Asian HIV organization, The Naz Project. In 1996 Mr Khan formed the Naz Foundation International (NFI) focusing on male-male sexualities and HIV in South Asia, which since then has assisted in the development of four national MSM and HIV organizations in the region, as well as helping to establish some 70 MSM community based HIV service providers. He is the Interim Chairperson of the Asia Pacific Coalition on Male Sexual Health (APCOM) and is on the Steering Committee of the Global Forum on MSM and HIV. In 2005 he was awarded the Order of the British Empire (OBE) and the New Year's Honours List of the British Queen for his services in HIV prevention and care with males who have sex with males in South Asia.



John Godwin is an independent consultant based in Sydney, Australia and has an extensive background in HIV, human rights law and development. He has 20 years experience working with civil society, government departments and UN agencies to address HIV-related issues. In the 1990s he practiced as a lawyer in Australia specializing in anti-discrimination law and conducted test cases relating to sexuality and HIV. He co-authored the Australian HIV/AIDS Legal Guide. From 2004-2008 he was the lead HIV adviser to the Australian Government's International Development Agency (AusAID).



Thomas Abraham is Director of the Public Health Communications Programme at the University of Hong Kong's Journalism and Media Studies Centre. He is a former Editor and Deputy Editor of the South China Morning Post in Hong Kong (2000-2002), and has spent more than two decades with the Hindu, one of India's premier English language newspapers. As a foreign correspondent, he was based in London, Geneva, and Colombo, Sri Lanka. When in London, he was regular commentator for BBC World television on South Asian affairs and a panellist for the current affairs programme "Dateline London." He was also vice president of the Foreign Correspondents Association in London, and President of the Foreign Correspondents Association of Sri Lanka. He is the author of "Twenty First Century Plague: The Story of SARS" (Johns Hopkins University Press 2005) and runs a research programme on the reporting and communicating of public health issues, particularly infectious disease. He is also member of a WHO network that is working to develop risk communication principles to be used in the event of an influenza pandemic.



Johannes M M Chan, SC is currently the Dean of the Faculty of Law of The University of Hong Kong. He specializes in human rights, constitutional and administrative law, and has published widely in these fields. His recent works include *Reflections at the Academia* (翰林隨筆：在公義路上的反思), *General Principles of Hong Kong Law* (香港法概論) (with Albert Chen & Others, 2nd ed, 2009), *Hong Kong Human Rights Bibliography* (2006), *Hong Kong's Constitutional Debates* (with Lison Harris, 2005), and *Immigration Law and Policy in Hong Kong: An Inter-Disciplinary Study* (with Bart Rwezaura, 2004). He is also one of the founding editors of *Hong Kong Public Law Reports* and an editor of *Hong Kong Law Reports and Digest* and *Hong Kong Cases*. Professor Chan was called to the Hong Kong Bar in 1982, and was appointed the first Hon Senior Counsel in Hong Kong in 2003. He has served on many government/public and professional bodies, and has worked with many regional and international non-governmental organizations on human rights matters.



Johannes M M Chan, SC

Welcome address

Let me first extend my warmest welcome to everyone joining us this evening. It is also my great pleasure to welcome the very distinguished panel of speakers who join us at this High Level Dialogue, and particularly to Mr Justice Michael Kirby, one of the most respected judges and jurists in the world as well as a great friend of the Faculty.

On 15 January 1980, Mr. John MacLennan, a senior police inspector, was to be arrested for 8 counts of gross indecency. The arrest was supposed to take place at his office in the police station that morning. When Inspector MacLennan did not show up by 10:30 am, the police started to look for him. His phone was not answered. The police decided to seek for him at his residence. When no one answered the call, the police decided to break forcibly into his residence. Apparently no one was there. A brown envelope was left on the table in the dining room. The bedroom was locked. The police broke inside, and found Inspector MacLennan dead with 5 bullet wounds and a service revolver beside him. The envelope on the table contained a note: 'Please tell my parents that it was an accident, and I was a good Police Officer'.

Did Inspector MacLennan commit suicide, or was he murdered as a cover up of homosexual activities among high ranking police officers? The death of Inspector MacLennan has generated widespread public debates in the community, and when the coroner's inquest left many questions unanswered, the Governor, in response to strong public pressure, set up a Commission of Inquiry led by Sir T L Yang, who subsequently became the Chief Justice, to investigate into the cause of death of Inspector MacLennan.

The Inquiry found that it was a suicide, thereby putting to an end any suspicion of Inspector MacLennan being murdered.¹ However, in its 400 page report, it made strong criticism on the way homosexuality was handled in the Police Force.

The death note of Inspector MacLennan remains a strong and powerful accusation. Why should someone's dignity and ability be judged by his or her sexual preference, and why should one's career be determined by other people's prejudice, ignorance and stigmatization?

¹ T L Yang, *Report of the Commission of Inquiry into Inspector MacLennan's Case* (1981).

Speaker statements and presentations

The Inquiry led to a review of the law by the Law Reform Commission, which recommended in 1983 the decriminalization of homosexual conduct in private between two consenting adults.² The Report is interesting in that apart from a comparative jurisprudential study, it also approached the issue from medical and cultural perspectives. It found that homosexual activities were not an evil of the West. They existed and were well documented in classical literature in ancient China back to 3,000 years ago. They were indeed quite open and prevalent in the Tang Dynasty, which was about 1,000 years ago.³ There is nothing foreign about homosexual conduct; instead, it exists in all cultures and societies at all times.

Yet it still took the Government three attempts and a decade before the law was successfully reformed in the mid-nineties of the last century.

Yet decriminalization is only the first step. It does not address prejudice, discrimination, harassment, selective enforcement of law, access to service and justice, protection, and finally, acceptance and recognition.

These are complex issues involving law, religion, morality, dignity and culture. Thanks to the very distinguished panelists for agreeing to participate in this event this evening, it provides us with a valuable and timely opportunity to look at these complex and fascinating issues. Each of their contributions is extremely valuable and very much appreciated.

Credit must be paid to the organizers including the United Nations Development Programme and the Asia Pacific Coalition on Male Sexual Health for supporting the event (specifically, Dr. Mandeep Dhaliwal, Team Leader, Gender, Human Rights and Sexual Diversity Bureau of Development Policy, UNDP, New York), for their thoughtfulness and efforts in putting this conference together.

Finally, I would like to thank my colleague Kelley Loper, Simon Young, and our Centre for Comparative and Public Law as a co-organizer. We have recently initiated an inter-disciplinary research on diversity study which is headed by my colleagues Kelley Loper and Puja Kapai. This event forms part of our efforts to develop this Emerging Strategic Research Theme on Diversity Studies at the University of Hong Kong.

With these remarks, I look forward to a successful and stimulating evening.

² Law Reform Commission, *Report on Laws Governing Homosexual Conduct* (1983). Ch 2 provides a medical perspective on homosexuality, and Ch 3 contains an interesting study on homosexuality in traditional China.

³ The earliest documentation on homosexual conduct could be found in the *Book of Shang* and the *Book of Chou* between 1122 – 500 BC, and the most explicit record was found in *Han Fei Tzu*, written in about 722-481 BC. See Law Reform Commission's *Report on Laws Governing Homosexual Conduct*, above, at pp 14-17.



John Godwin

Laws affecting HIV responses among MSM and transgender people in Asia and the Pacific - Preliminary findings

UNDP - APCOM study

Objectives

- Describe laws affecting HIV responses for MSM & TG in Asia Pacific
- Summarize impact of laws on HIV responses
- Build consensus on recommendations

Method

- Review of legislation, cases, peer review literature, grey literature
- Consultations (Bali ICAAP, Bangkok, Suva, PNG, Colombo)
- Work in progress: HK High Level Dialogue informs final report

Time frame

- Data collection & consultations: Dec. 2009 - May 2010
- Finalization May > July 2010 International AIDS Conference

High levels of HIV among MSM & TG

Alarming HIV prevalence data since 2005: Much higher than in the general population (For sources see discussion draft page 4)

- 42% TG Mumbai
- 34% TG Jakarta

Speaker statements and presentations

- 30% MSM Bangkok, Rangoon
- 13%MSM Kunming
- 4% MSM Hong Kong

Pacific data is lacking

- Most known MSM HIV cases are in French & US territories
- Under-reported elsewhere

MSM are significant to the future of the region's epidemics (Commission on AIDS in Asia 2008)

- Increasing % of total pool of infections
- Up to 30% of new Asian HIV infections will be MSM, unless prevention is intensified

Key points

Punitive laws & law enforcement practices exist in vast majority of countries

Many governments are responding to MSM & TG needs in national AIDS policies...but not in legislation

Punitive laws & lack of protective laws contribute to low coverage of HIV services (<10% MSM)

Very few examples of legislative action on MSM & TG rights

- Nepal a potential leader

Some recent examples of judicial action 2006-2010

- Fiji, HK, India, Nepal, Pakistan, Philippines, South Korea

Punitive laws

Male-to-male sex illegal: 19 of 48 Asia Pacific countries

Countries that criminalize have common law or Sharia traditions

- 16 ex-British colonies: sodomy / unnatural sex
 - Malaysia, Brunei, Myanmar, Singapore
 - Pakistan, Bangladesh, Sri Lanka, Maldives
 - Nauru, PNG, Samoa, Tonga, Kiribati, Solomon Islands, Tuvalu, Cook Islands
 - + 3 countries influenced by common law
- Afghanistan, Bhutan, Palau

Sharia penalties: death (Afghanistan, NW Pakistan), whipping (Afghanistan, Maldives, Malaysia, Brunei, Aceh, NW Pakistan), prison

Sodomy offences rarely enforced... but provide basis for extortion, harassment, violence

Civil law countries have no sodomy offences, but other offences are applied

Punitive police practices

Selective enforcement of public order & prostitution offences

- Many MSM & TG are sex workers, easy targets in crackdowns
- MSM & TG subjected to police abuses, extortion, harassment, assault, detention
- e.g. 70% of 240 South Asian MSM reported police harassment, 42% sexually assaulted by police (NFI, 2005)

Cambodia: Trafficking law

China: Public order, prostitution laws

Fiji: Prostitution offences

India: Immoral Traffic Prevention Act, breach of peace

Indonesia: Public Disturbance Law, prostitution offences

Philippines: Anti-Vagrancy Law, Anti-Trafficking Law

Singapore: Soliciting, Obscenity

Sri Lanka: Vagrants Ordinance

Reported impacts of punitive laws

HIV prevention outreach workers harassed, threatened or detained by police

- India, Nepal, Sri Lanka, Bangladesh, China

Condoms confiscated as evidence of illegality

- Thailand, Malaysia, Mongolia, Bangladesh, India, Nepal, Cambodia, Philippines, PNG

HIV education materials censored

- Singapore, China, India

Police raids on events where HIV education takes place

- Singapore, China

Increases stigma, makes MSM & TG difficult to reach

- Reduced access to appropriate health services,

Contributes to low self-esteem

- MSM & TG fail to protect themselves and their male & female partners

Few resources are invested in MSM & TG services or research

- MSM & TG under-represented in policy and management e.g. CCMs, national AIDS councils

HIV services fail to address MSM & TG needs

- Lends legitimacy to discrimination & unethical practices by health services

Speaker statements and presentations

Lack of legal protections from discrimination in education & employment

- Many MSM & TG turn to illegal sex work, high incidence of violence and HIV

Schools fail to address sexual orientation & gender identity issues

Legal protections

Constitutional protections for sexual minorities (7/48 countries)

- Equality, non-discrimination and privacy protections
- Hong Kong, India, Nepal, Pakistan (TG), Philippines, Pitcairn Ids., South Korea (TG),
- Judiciary have played a key role

Anti-discrimination laws: sexual orientation (7/48), transgender (2/48)

- Hong Kong (public sector)
- Fiji (employment)
- Philippines (police & social work)
- Taiwan (education & employment)
- Timor Leste (employment)
- Australia & NZ (comprehensive, includes TG)

Laws enabling TG to change sex or be recognised as 3rd sex (9/48)

- China, Indonesia, Japan, India, Pakistan, Nepal, South Korea, Australia, NZ

Draft recommendations

Tailor agenda to local cultural contexts

- Solutions need to be locally driven & owned
- Risk of jeopardizing progress if the agenda is seen as too radical / Western

Advocacy

- Support local advocates to generate a social climate supportive of reforms
- Support to networks:
 - Community based organizations
 - Judges
 - Parliamentarians
 - Progressive religious leaders

Engage national & regional human rights institutions

- ASEAN Intergovernmental Human Rights Commission

Law reform options

- Decriminalization of sex between consenting adults
- Anti-discrimination laws
- Protections from vilification & hate crimes
- Constitutional equality & privacy rights
- Legal recognition of gender reassignment & third sex status

Capacity building of police, judges, lawyers

- Training and protocols: address police abuses, sensitize to HIV impacts
- Access to evidence-based information on vulnerabilities of MSM and TG to HIV
- Examples of successes in India, PNG

Legal aid services

Alignment of justice sector with HIV policy

- Include justice sector actions in National AIDS Plans (e.g. Cambodia, Thailand)

Acknowledgements [draft report]

Technical Advisory Panel

Hon. Michael Kirby

Retired Judge of the High Court of Australia (Australia)

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Chief Executive, Naz Foundation International, Regional Office; APCOM Interim Chair



Dr Mandeep Dhaliwal

HIV and Human Rights: Strengthening HIV Responses Among Those Most Vulnerable

I would like to thank our hosts, University of Hong Kong Faculty of Law and the Centre for Comparative and Public Law, and acknowledge our esteemed moderator and eminent panelists. I also like to thank all of you for taking the time to be here with us today.

It is especially a privilege to be here today to speak about HIV and human rights in a jurisdiction which in 1991 decriminalized homosexual acts between adults in private. We have much to learn from the Hong Kong experience.

United Nations

Our mandate:

“We the peoples of the United Nations determined [...] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”

“[...] to promote social progress and better standards of life in larger freedom”

As the United Nations, it is our duty, our obligation to uphold the United Nations Charter which clearly articulates commitments to human rights.

Human rights is central to the AIDS response.

HIV and Human Rights

‘There is an increasing recognition that public health often provides and added and compelling justification for safeguarding human rights, despite the respect, protection and fulfilment which they merit in their own right. In the context of HIV/AIDS, an environment in which human rights are respected ensures that vulnerability to HIV/AIDS is reduced, those infected with and affected by HIV/AIDS live a life of dignity without discrimination and the personal and societal impact of HIV infection is alleviated.’

UNAIDS International Guidelines on HIV and Human Rights 2006

Why are human rights important in the context of HIV?

- important in their own right
- Important for addressing causes and consequences of HIV
- Important for reducing vulnerability
- Important for ensuring dignity and non-discrimination
- Important for mitigating impact

Human Rights and HIV: The AIDS Paradox

“In order to prevent and control the spread of HIV, we must protect and promote the human rights of those most vulnerable, typically marginalized”

30 years on we know that vulnerability to both HIV and TB infection is fueled by a wide range of human rights violations. People living with HIV around the world continue to suffer stigmatization, discrimination and violations of human rights.

In the context of HIV, where human rights are protected and promoted, people are empowered:

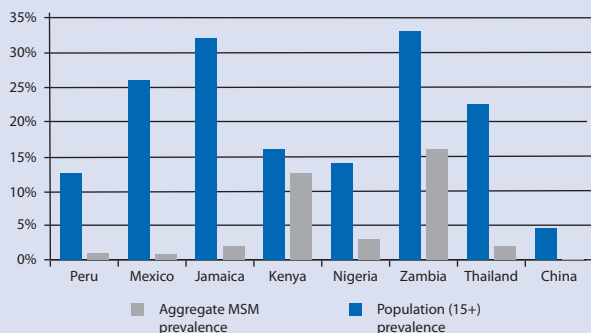
- To access information
- To access non-discriminatory prevention services
- To access life-saving treatment
- To access care and support

...the mainstay of an effective AIDS response

Conversely, where human rights are violated people are driven underground far out the reach of essential information, services and support.

Who are the most vulnerable?

HIV prevalence among MSM and general population (selected settings)



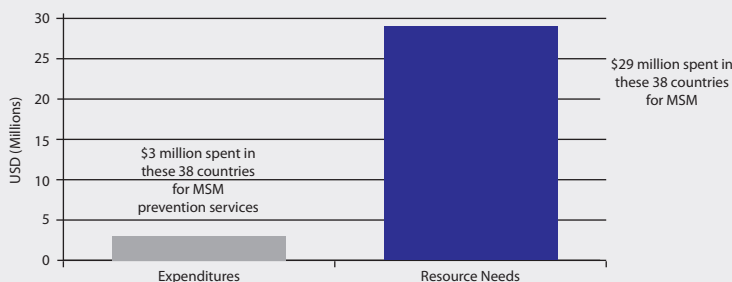
Source: Stefan Baral MD MPH, Center for Public Health and Human Rights, John Hopkins School of Public Health. Powerpoint presentation, *USCA MSM Institute San Francisco, California*, October 29, 2009

Throughout the world, men who have sex with men and transgender people are at higher risk of HIV infection, and continue to lack basic awareness about their potential exposure.

In every region of the world, men who have sex with men and transgender people are experiencing:

- extremely high HIV incidence and prevalence
- low coverage of targeted HIV activities and services,
- barriers, to accessing HIV prevention, treatment and care, and other health services, related to homophobia, transphobia, stigma, discrimination and criminalization

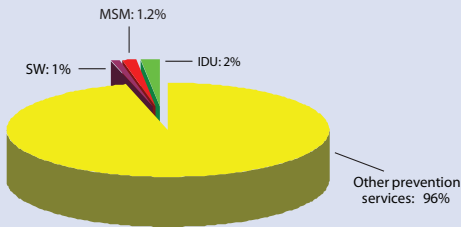
Comparison of AIDS Expenditures and Resource Needs for programs aimed at / involving Men who have sex with Men (38 countries reporting detailed spending and comparison with resource needs estimates for MSM preventive services)



Currently, access to prevention, treatment, care and support services in the most vulnerable populations is limited compared with the share of the burden faced by these populations.

This graph shows how little was spent – as compared to need – on programmes for men who have sex with men in 38 countries (2008).

Expenditures for HIV prevention: UNGASS 2008 Country reporting Data. UNGASS reports from 38 countries

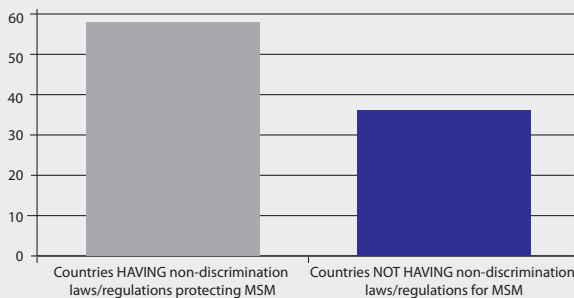


Global estimates indicate that sex between men accounts for between 5 and 10% of HIV infections worldwide, yet only 1.2% of all HIV prevention funding is targeted toward men who have sex with men.

Recent policy guidance as noted in the reports of the Commission on AIDS in Asia and in the Pacific, clearly states that more of our resources must be directed to where risk and vulnerability is the greatest. However, there is still a major gap between policy and practice.

This is especially striking when one compares this to the recent experience of the response to H1N1 in the US, where the response was pretty immediate in terms of allocating resources to those most at risk – i.e.: pregnant women, children and health workers.

Median percentage of MSM reached with HIV prevention services Adapted from UNAIDS 2008 Global Report



Efficiency and effectiveness of HIV programming depends on people being able to seek essential services and support and live their lives free from stigmatization, discrimination, homophobia, transphobia, blackmail, violence, and criminalisation.

The graph shows that where non-discriminatory laws and regulations exist protecting the rights of men have sex with men, a remarkably higher percentage of men who have sex with men can be reached with HIV prevention services.

A rights-based approach can ensure that men who have sex with men, transgender people, and their sexual partners can access essential HIV and health services and social support and exercise their right to health.

2010: The State of the HIV Response

A rights based AIDS response is an effective AIDS response. So what is the state of the AIDS response in 2010 – the year Member States committed that they achieve universal access to HIV prevention, treatment, care and support for all – including men who have sex with men and transgender people?

Some successes and important lessons

- the legal environment (laws, law enforcement and access to justice) has a significant impact on access to HIV prevention, treatment, care and support
- the impact of punitive laws, policies, practices, stigma and discrimination is often most acutely felt by people living with HIV, men who have sex with men, transgender people, people who use drugs
- punitive and discriminatory legal environments limit the capacity of communities to mobilize and thereby limit their ability to claim their rights

On-going challenges:

- Criminalization: HIV transmission and exposure, men who have sex with men and transgender people, sex workers, people who use drugs
- Discrimination – people living with HIV, men who have sex with men, sex workers, people who use drugs, transgender people
- Lack of 'healthy' law enforcement
- Expanding access to justice
- Stigma, homophobia, transphobia
- Violence – including gender based violence

We now have over 4 million people on life-saving treatment. In one year, from 2007 to 2008, coverage of those in need of treatment went from 33% to 42%. Global infection rates have dropped 17% since 2001.

AIDS has demanded the participation of those affected and it has demanded inclusive governance. AIDS has driven down prices of essential medicines and insisted that public health be a consideration in intellectual property law and trade agreements.

Success in the AIDS response has been driven by human rights and AIDS has contributed to advancing the human rights agenda. AIDS has made economic, social and cultural rights justiciable before the courts.

Despite some remarkable successes in the AIDS , a rising tide of punitive laws, policies, and practices that violate human rights is jeopardizing progress and blocking the achievement of the universal access targets and the MDGs.

It is becoming increasingly clear that successes in HIV prevention, treatment and care can only be sustained and scaled up if they are underpinned by legal, regulatory and social environments that advance human rights, gender equality and social justice goals.

Key Lessons

- Stigma and discrimination continue to beset people living with HIV and individuals most at risk of infection — men who have sex with men, injecting drug users and sex workers.
- Social and legal challenges to human rights create significant barriers to an effective national AIDS responses.
- A sustainable response must address punitive laws and the social drivers of the disease.

During the past year, important advances have been made in the promotion and protection of the human rights of men who have sex with men and transgender people either through legislative and judicial action— many of the advances have been in the Asia Pacific region – e.g. India, Nepal, Pakistan, Fiji.

However, human rights violations continue to undermine efforts to prevent people from becoming infected. These are experienced most acutely by typically marginalized populations like men who have sex with men and transgender people. Globally, more than 30 countries have enacted HIV-specific laws that criminalize HIV transmission or exposure, and more than 24 countries have used non-HIV-specific laws to prosecute individuals on similar grounds.

Even as a growing body of data has documented elevated HIV prevalence among men who have sex with men in all regions, a number of countries have undermined effective HIV prevention for them by either enacting or considering legislation to criminalize same-sex sexual conduct. Such punitive measures, which are underpinned by stigma and homophobia, are both counterproductive from a public health perspective and antithetical to the human rights basis of effective AIDS responses.

Conclusions

“We can empower men who have sex with men, sex workers and transgender people to protect themselves from HIV infection and to fully access antiretroviral therapy: by ensuring that men who have sex with men, sex workers and transgender people are empowered to both access and deliver comprehensive and appropriate packages of HIV prevention, treatment, care and support services and by ensuring that law enforcement agencies and the judicial system protect their rights.”

UNAIDS Joint Action for Results 2009 - 2011

The 2010 progress report of the United Nations Secretary General tells us in no uncertain terms that in the fight to prevent new infections, provide care, treatment and support, we all must commit to leaving behind no one, especially - men who have sex with men, transgender people, sex workers and people who inject drugs.

The harms of human rights violations in the AIDS response are clear – harms to those who are typically marginalized by stigma, discrimination, homophobia, transphobia, violence and criminalization. These human rights violations harm all of us.

The benefits of human rights protection and promotion in the HIV response are clear – protecting and promoting the rights of those most vulnerable - improving their access to essential services - benefits those who are marginalized and excluded and consequently benefits communities and countries – benefits us all.

“One of the founding principles of the United Nations is our faith in the dignity and worth of every person, without distinction on the basis of race, colour, sex, language, religion, property, birth or other status. Today, however, on International Human Rights Day, we are reminded that discrimination in all its forms continues to undermine this principle. It rears its head in agriculture, as those with the weakest rights - small farmers and women producers - are forced out of increasingly scarce access to water, or in tackling HIV, where stigmatizing men who have sex with men and refusing to provide harm reduction services for drug users sets back prevention and treatment work”

“At UNDP, we place critical importance on tackling inequality and discrimination. Our work includes helping nations design and institute policies for inclusive growth, supporting the development of non-discrimination laws with effective monitoring and enforcement mechanisms, and strengthening transparent, accountable and responsive governance.”

Helen Clark, UNDP Administrator, Human Rights Day, 10 December 2010

Today - the 17th of May is the International Day against Homophobia. Nineteen years ago, on this same day, the General Assembly of the World Health Organization (WHO) approved the 10th Revision of the International Statistical Classification of Diseases and Related Health Problems (ICD-10). The 10th Revision recognized that “sexual orientation by itself is not to be regarded as a disorder.” Before this date, homosexuality had been classified as a “sexual disorder.”

It is important for us to reflect on this day. It is the day that science and evidence based policy triumphed over the stigma, prejudice and repression that impede the recognition and realization of human rights and effective HIV, health and development responses.

We must never forget that homophobia/transphobia is a severe problem which adversely affects both victims and perpetrators. It damages human relations, fractures families and communities, and inflicts pain and suffering. It is an obstacle to the fulfillment of fundamental freedoms and rights. Stigma, discrimination and violence against homosexual and transgender people will only stop if society works against it.

No one country can achieve the health and development goals set out in universal access commitments in the Millennium Development Goals - if all individuals are not treated with the respect and dignity that is due to each and every human being.

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The Hon. Michael Kirby, AC CMG*

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.

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 efforts 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

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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 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, there is now an added dynamic that enhances the need for urgent action. This has been recognised by world leaders, including, repeatedly, the Secretary-General of the United Nations (Ban Ki-moon)².

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

2 Speech by Secretary-General at the International AIDS Conference in Mexico City, 3 August 2008, quoted UNAIDS, *UN Guidance Note on HIV and*

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.

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.

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.

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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. Muraligjar 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 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 those 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 seamlessly 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 in Nazi Germany. Or the prejudice against blacks taught under apartheid. Or the discrimination against Aboriginals and Asian migrants imposed 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

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

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).

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 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 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 to cause affront and fear. The ordinary is demanded

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.

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).

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as the commonly. 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 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 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 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.

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

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 inclination. 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 powers 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 epidemic, there is therefore an urgent need to reflect the foregoing considerations in both legal reform and in 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 understanding 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. 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, the Republic of Ireland¹⁹ and 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 true 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 Rights Committee, established under the *International Covenant on Civil and Political Rights*²², is now supplemented, and reinforced, by the activities of numerous

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

13 *Sexual Offences Act 1967* (UK).

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 here 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).

22 *Toonen v Australia*, above n1.

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 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 veil 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 governing the conduct of gays²³ and, eventually, legislation on 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.

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 awareness.

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.

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

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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 this International Day Against Homophobia. 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 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?



Hon. Ajit Prakash Shah

India and Section 377

Mr. Thomas Abraham, co-panellists and ladies and gentlemen.

Section 377 of the Indian Penal Code contains anti sodomy law. It speaks of unnatural offences and punishes them with imprisonment for life or imprisonment which may extend to 10 years and fine. On 2nd July, 2009, the Delhi High Court in *Naz Foundation v. Government of NCT of Delhi and others* declared Section 377 as unconstitutional insofar as it criminalizes consensual sexual acts between consenting adults in private. The judgment triggered a euphoric response from the LGBT community as well as from the wider activist community. The instantaneous social impact of the judgment was to actually begin a national conversation. LGBT persons were out of the closet and literally onto the front pages of all Indian papers and news channels. Union of India has decided not to appeal against this judgment. Some religious bodies and individuals have challenged the verdict in the Supreme Court. Most of the challenges allege that homosexuality is associated with rampant promiscuity of the West, which centres hedonism and pleasure that are not apparently a part of Indian cultural make-up.

Even amongst religious groups progressive voices were heard, like Swami Angnivesh, a Hindu rationalist responding to the verdict said, “We should treat the constitution as our Dharam Shastra today”. Asghar Ali Engineer, Islamic Scholar and rights activist, welcomed the verdict since upholding the basic human rights was central to the judgment. Citing verses from the Koran, Dr. Engineer said it was deemed punishable only when it was practised by an entire community and not in individual cases. K.C. Abraham from the Church of South India said that the final goal of all religions was to move towards an inclusive society and not isolate anyone.

The objective of Section 377 has remained unclear and unsubstantiated. The offence was introduced into British India with a presumption of a shared biblical minority. Historians have speculated that “there were concerns that not having wives would encourage the Imperial Army to become ‘replicas of Sodom and Gommorah’ or to pick up ‘special Oriental vices’”. There is enough evidence to show that homosexuality has been prevalent and recognised in all its forms during ancient and medieval Indian history. Temple imagery, sacred narrative and religious scriptures do suggest that homosexual activities – in some form – did exist in ancient India. Kamasutra devotes an entire chapter to Auparistaka – homosexual intercourse. In Hinduism some of the divinities are androgynous and some change gender to participate in homoerotic behaviour. Homosexuality was an age-old practice and even Mughal

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king Babar's diary had references to him being enamoured by young boys in adolescence.

In the post-independence period, Section 377 has been hardly invoked against adult homosexuals. Though police harassment and blackmail is common, only few have been actually prosecuted in court. Government of India sought to justify the retention of Section 377 on the ground that it has been generally invoked in cases of allegations of child sexual abuse and for complementing lacunae in the rape laws and not mere homosexuality. The argument was deceptively simple; since no one is arrested or jailed, no one is seriously injured. In *Bowers v. Hardwick* where the US Supreme Court by 5-4 majority upheld constitutionality of a State sodomy law, Justice Powell explicitly found rationale that the laws were, after all, unenforced.

In a number of recent works, notably that of Professors Janet Halley and Christopher Leslie, the authors argued that such consequences are not purely symbolic and these laws have three direct impacts: damage to the psychological well-being of lesbians and gays, encouragement of anti-gay violence and facilitation of police harassment. In their studies of the social effects of sodomy statutes in South Africa Ryan Goodman and Edwin Cameron demonstrated that even in a climate of non-enforcement, considerable harm still exists. Even when these provisions are not enforced, they reduce gay men and women to what one author has referred to as 'un-apprehended felons'.

What is certain is that Section 377 is wielded as a threat against sexual minorities by the police and others in positions of authority as well as thugs and goons to harass, blackmail, threaten and assault vulnerable men. Section 377 opens opportunities for the abuse of other criminal laws which become excuses for harassment and blackmail by both police and members of the public, and for making arrests. This harassment is all the more effective because most victims have little knowledge of the law and fear the social repercussions of public knowledge about their sexual identity. While the law may not in itself generate homophobia, its very existence moulds beliefs and attitudes, and drives the demeaning and abusive treatment meted out to people of alternative sexualities and those who work with them.

There are documented instances of exploitation, violence, rape and torture suffered by LGBT community in India. The incidents cited relate to different parts of the country and include what have come to be known as "Lucknow incident-2002" wherein police raided on the premises of an NGO working in the area of HIV / AIDS prevention leading to arrest and incarceration of healthcare workers; "Bangalore incident – 2004" wherein a *Hijra* - eunuch - was initially subjected to forced oral / anal sex by miscreants, later arrested by the police to be grossly abused and tortured in custody because of sexual identity and the case of Jayalakshmi relating to a eunuch who was subjected to torture including oral sex by police personnel in custody leading to suicide by immolation. Recently in a tragic case of a senior professor of Aligarh Muslim University three persons allegedly from the media barged into his house and took photographs / video of him and his male partner. The university officials arrived at the scene clearly evidencing that they were in the know of the operation and were complicit to the same. The professor was issued a charge sheet for indulging himself into immoral activities and suspended and asked to vacate the quarters. In a writ petition filed by him, the High Court reinstated him by an interim order but on the next day he was found dead in his quarters. Apparently he committed suicide.

In *Naz Foundation*, the principal argument of the State was that law do not run separately from morality and that law in fact has to reflect the wider morality. The State could, therefore, infringe on fundamental rights to protect the larger legitimate interest of 'public morality'.

The court's reasoning in the *Naz* was that the government may only infringe on core fundamental rights if doing so is necessary to serve a compelling state interest. For example, the state may criminalize private sex between adults and minors because there is a compelling state interest in protecting children against sexual exploitation. Safeguarding public popular morality is not a compelling state interest that can justify limiting the rights of dignity and privacy of LGBT persons.

Drawing from Dr. Ambedkar's speech in the Constituent Assembly, the court held that state interest cannot be governed by public morality but by the morality of the Constitution. Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. The Court said:

"The Constitution of India recognizes, protects and celebrates diversity. To stigmatize or to criminalize homosexuals only on account of their sexual orientation would be against the constitutional morality."

A peculiar feature of the case of Naz was that two wings of the Union of India took completely contradictory positions. While Ministry of Health and Family Welfare insisted that its continuance has hampered HIV/AIDS prevention efforts, the Ministry of Home Affairs justified the retention of Section 377 on the statute book.

Health Ministry's stand was that the stigma attached to sex workers and men who have sex with men by Section 377 presented a serious obstacle to HIV/AIDS prevention efforts. Repeated studies have also shown that the countries that have been most successful in the contentment of HIV and reduction of transmission of HIV have been those that have adopted responses that include the defence of the human rights of those most at risk.

Toeing the line of the Home Ministry, the Additional Solicitor General, however, argued that repeal of Section 377 would lead to a increase in the spread of HIV, which arguments were rejected for the reason that there exist no scientific study or research work by any recognized scientific or medical body, or for that matter any other material, to show any causal connection existing between de-criminalization of homosexuality and the spread of HIV/AIDS.

Safeguarding public health may indeed be a compelling state interest that can justify reasonable limitation on the right to privacy. Compelling state interest, however, the judgment says, "demands that public health measures are strengthened by de-criminalization of such activities, so that they can be identified and better focused upon".

One more facet of the decision in Naz Foundation is that it closely examines "gender entity" and gender based discrimination. It is necessary to highlight this aspect because the terms "sexual orientation" and "gender identity" are often conflated. Since transgender and transsexual people can have any sexual orientation, it is important to distinguish their gender from their sexual activity. During the colonial period in India, *hijras* (eunuchs) were criminalized by virtue of their identity. The Criminal Tribes Act, 1871, was enacted by the British in an effort to police those tribes and communities who 'were addicted to the systematic commission of non-bailable offences'. In 1897, this Act was amended to include eunuchs. According to the amendment, the local government was required to keep a register of the names and residences of all eunuchs who are 'reasonably suspected of kidnapping or castrating children or of committing offences under Section 377 of the Indian Penal Code'. Commenting on the Criminal Tribes Act in a speech made in 1936, Pandit Jawaharlal Nehru said:

"I am aware of the monstrous provisions of the Criminal Tribes Act which constitute a negation of civil liberty... an attempt should be made to have the Act removed from the statute book. No tribe can be classed as criminal as such and the whole principle as such is out of consonance with civilized principles of criminal justice and treatment of offenders..."

While this Act has been repealed, the attachment of criminality to the *hijra* community still continues.

After specifically making a reference to Yogyakarta Principles, a set of international human rights relating to sexual orientation and gender identity, the Court in Naz said:

"The purpose underlying the fundamental right against sex discrimination is to prevent behaviour that treats people differently for reason of not being in conformity with generalizations concerning 'normal' or 'natural' gender roles. Discrimination on the basis of sexual orientation is itself grounded in stereotypical judgments and generalization about the conduct of either sex."

The decision of the Nepal Supreme Court in Sunil Babu Pant and others v. Government of Nepal and others

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stresses equality rights to people of sexual orientations and gender identities. The Court, *inter alia*, directed the Government of Nepal to:

- enact all necessary laws for same-sex partners in a relationship to jointly own property and have inheritance rights;
- enact new laws and amend all existing discriminatory laws so that all individuals with different sexual orientations and gender identities can exercise rights on an equal basis as any other citizen of Nepal;
- form a committee to study same-sex partnership laws in other countries and take initiatives as recommended by that committee;
- not penalize cross-dressing, as to do so infringes freedom of expression;
- ensure equal rights, identity and expression for transgender people regardless of their sex at birth.

In 2009, the Supreme Court of Pakistan issued a series of directions to ensure that eunuch citizens should have equal rights and access to Government benefits. Islamic Jurist Dr. Mohammad Aslam Khaki who researched their conditions discovered them to be the most oppressed and deprived segment of the society and subject it to humiliation and molestation. During the proceedings two transgenders appeared before the court to narrate harrowing details of abuse they receive from society police and gangsters. The Supreme Court directed police to provide protection to transgenders, add their names in electoral rolls and national database.

Since the judgment in Naz has provided horizontal protection i.e. discrimination by private individuals and against indirect harassment and discrimination, this decision has far-reaching impact on those facing discrimination based on gender identity. Persons who are not admitted in hospitals, or who are denied entry into public toilets, denied jobs or admissions in schools and colleges based on their gender identity- whether hijra, kothi, FTM, MTF, intersexed, or transsexual, all have a remedy under the law.

The notion of equality in the Indian Constitution flows from the 'Objectives Resolution' moved by Pandit Jawaharlal Nehru on December 13, 1946. Nehru, in his speech, wished that the Constituent Assembly should consider the Resolution not in a spirit of narrow legal wording, but rather look at the spirit behind it. He said, "Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation's passion. (The Resolution) seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future."

If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of 'inclusiveness'. Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as "deviants" or 'different' are not on that score excluded or ostracised.

Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination. Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. Discrimination is anti-thesis of equality and it is the recognition of equality which only can foster the dignity of every individual.



Hon. Dame Carol Kidu, DBE MP

Parliamentarian efforts to address punitive laws / regulations that criminalize male to male sex, and its potential impacts on rights based responses to HIV in PNG and the Pacific

It is a privilege to participate in this dialogue to mark the 2010 International Day Against Homophobia because dialoguing with experts from our region has re-energised me with a revised resolve in my Parliamentary work seeking the repeal of punitive laws that criminalise sexual behaviour between consenting adults.

This particular legal reform agenda has been a roller-coaster ride for several years with some highs, many lows and a rock bottom low last week that initially tempted me to abandon the journey. It is inspiring to come together briefly with fellow travellers who have been the trail blazers for human rights and justice in the world of sexual diversity.

In their 2008 research into State Sponsored Homophobia, the International Lesbian and Gay Association (ILGA) defined homophobia as “*the fear of, aversion to, or discrimination against homosexuality or homosexuals*” as well as “*the hatred, hostility, or disapproval of homosexual people*”. Any phobia is difficult to address because by nature a phobia is based on irrational and illogical thinking, but with homophobia, the addition of judgemental and moralistic attitudes based on created cultural myths and perceived Christian doctrine adds a dimension that leads to polarised debates - debates that often lead nowhere except increased marginalisation of the issue, thus the people who are stigmatised and victimised choose to remain invisible.

The search for justice through a Parliamentary journey becomes very complex in these circumstances and the desired destination may have to be compromised to make small gains. If the gains are too small, the route may need to change from a Parliamentary journey to a journey through the Judiciary. Papua New Guinea will need to face this choice within the next year. I will talk more about the PNG Parliamentary journey after summarising the legal status for the pacific region.

Ten (10) Nations or Territories in the Pacific do not have punitive laws against men who have sex with men and there are eleven (11) nations in which homosexuality is illegal. Only one (1) Pacific nation, namely Fiji, has a Constitutional prohibition of discrimination based on sexual orientation. (*ILGA Report 2008 et al*). I have not had time to research the historical background regionally but I do note that the former French colonies do not have

punitive laws.

For the situation in Papua New Guinea, our Criminal Code 1974 was inherited verbatim from the Queensland Criminal Code on Independence in 1975. At that time, the Queensland Criminal Code was based on 19th Century British law. Whereas the Queensland Criminal Code has since undergone complete reform, the Papua New Guinea Criminal Code has had minimal review and maintains some archaic, draconian laws that are rarely used directly but quite often abused by rogue law enforcers to intimidate, blackmail or brutalise indigenous gay men and sex workers. This situation has improved as the result of intensive work on police sensitisation under the HIV response strategy.

The reality of abuse has improved somewhat but the criminality of homosexuality has remained in spite of the fact that the technical “criminals” have been major players in Papua New Guinea’s HIV response strategy. The hypocrisy of the situation is not acknowledged.

Papua New Guinea faces an increasing burden of HIV infection with its associated economic, social and human costs. It is estimated that more than 60,000 people are currently living with the virus and the epidemic is spreading in both urban and rural areas but with indications of a levelling off in some urban centres.

The HIV and AIDS Management and Prevention Act 2003, together with the rights and principles set out in the National Constitution, have established a sound legal framework for Papua New Guinea’s response to the HIV epidemic. However the existence of the outdated laws on sex work and male to male sex are in conflict with this framework and are obstructing effective HIV policies and programs.

For the information of participants, the laws of the PNG Criminal Code 1974 relevant to homosexuality are:

Section 210. UNNATURAL OFFENCES.

(1) A person who–

- (a) sexually penetrates any person against the order of nature; or
- (b) sexually penetrates an animal; or
- (c) permits a male person to sexually penetrate him or her against the order of nature,

is guilty of a crime.

Penalty: Imprisonment for a term not exceeding 14 years.

(2) A person who attempts to commit an offence against Subsection (1) is guilty of a crime.

Penalty: imprisonment for a term not exceeding seven years.

Section 212. INDECENT PRACTICES BETWEEN MALES.

(1) A male person who, whether in public or private–

- (a) commits an act of gross indecency with another male person; or
- (b) procures another male person to commit an act of gross indecency with him; or
- (c) attempts to procure the commission of any such act by a male person with himself or with another male person,

is guilty of a misdemeanour.

Penalty: Imprisonment for a term not exceeding three years

It was with the intention of repealing these sections of the Criminal Code that I recently submitted a National Executive Council (NEC or Cabinet) submission to get Government Executive endorsement for the on-going work.

The Criminal Code comes under the Attorney General's Portfolio so technically a Joint submission would be required. However, the then Attorney General had strong moral views on both homo-sexuality and prostitution. In view of this, the submission was basically attempting to have the issue recognised as a social issue and requesting amongst other things that NEC "*directs the Minister For Community Development to take appropriate further action to progress this legislative reform from a social and public health perspective*".

Among other things, the submission argued that:

There is increasing evidence that sex between men occurs in Papua New Guinea in a range of contexts, including traditional practices in some communities, as well as in urban settings and within the trans-gender community. (This evidence, based on anthropological studies and simple reality, contradicts and challenges the constructed myth that same sex intimacy is not Melanesian but has resulted from sinful foreign influence). It was a breakthrough when the Samoan Prime Minister, knowing that it would draw criticism, publicly accepted to be the Patron of the Fafafine Association thus acknowledging that sexual diversity was accepted as part of their traditional society.

The submission points out that without effective measures to ensure safer sexual practices, there is the potential for a rapidly increasing burden of HIV among men who have sex with men as well as their female sexual partners. Given the imperatives of the HIV epidemic, the submission argues that the law requires urgent review.

The submission also points out that existing law on male to male sex is obstructing Papua New Guinea's efforts to reduce the impact of the HIV epidemic because:

- making consensual male to male sex a criminal offence does not stop it from occurring, but means it take place furtively without being publicly acknowledged;
- as a result, men who choose to have sex with men are often hidden; it is difficult to reach out to them and engage them in effective HIV prevention and care programs;
- the criminal law increases their marginalisation and discrimination, making it less likely that they will have the knowledge and power to protect their own health and the health of their sexual partners, both male and female;
- it makes them vulnerable to police brutality, blackmail and harassment, even though criminal charges are rarely laid.

The submission also argued that the review of the criminal law on male to male sex is a necessary part of Papua New Guinea's compliance with the *International Covenant on Civil and Political Rights*, which was ratified by Papua New Guinea in 2008.

The submission acknowledged that many people within Papua New Guinea have strong moral objections to male to male sex, even where it takes place between consenting adults. The submission did not seek to challenge these moral views, nor to undermine the position that Church leaders and others may wish to adopt in relation to male to male sex.

The submission did however point out that removing criminal penalties for both sex work and male to male sex is recognised internationally as an important platform of an effective HIV/AIDS response, and is considered by UNAIDS and other United Nations agencies to represent "best practice" in this area and quoted various references to validate this fact.

The submission also informed that the Vatican has supported the repeal of these criminal laws in the statement of the Holy See Delegation at the 63rd session of the General Assembly of the United Nations on the Declaration on Human Rights, Sexual Orientation and Gender Identity (18 December 2008). It also gave examples of the ruling of

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the High Court of India and the Crime Decree in Fiji which decriminalised consensual male to male sex to replace the Criminal Penal Code which was considered archaic and not in tune with changing times in Fiji.

I felt comfortable with the submission which was prepared by a consulting legal expert provided to me by the Australian Federation of AIDS Organisations (AFAO) and endorsed by the Technical Working Group that have been advising me on this area of legal reform for several years.

The background to the submission was also explained covering the fact that I was approached by members of the medical profession over 10 years ago to bring legislative reform in several areas of sexual and reproductive health from both a public health and a human rights perspective. A multi-sectoral and stakeholder working group was put in place to begin consultation on the issues. Research work for the submission began during the last term of Parliament and considerable consultation with a wide variety of in-country stakeholders has already been undertaken in addition to comparative research and advice from international experience. The consultations have included the Attorney General and his senior officers, the First Legislative Counsel's office, National AIDS Council Secretariat, Police, CIS, relevant NGOs, some church leaders, sex workers and MSM representatives.

More recently, the work has been overseen by a Reference Group convened by Department For Community Development, chaired by the Director of the National AIDS Council Secretariat and comprising relevant government and non-government agencies and stakeholders. The submission also recommended for Cabinet endorsement of this Reference Group and the preparation of a Terms of Reference to continue the work.

So where are we now?

I was feeling comfortable with the submission but was aware that a lot more Parliamentary sensitisation sessions would be needed to clarify areas of discomfort for my fellow legislators. But I was somewhat shocked last week when the submission appeared in our NEC agenda with the notation from the bureaucratic and Ministerial sub-committee meeting that the Committee *"strongly rejected the submission but agreed for the submission to go to NEC for its deliberation"*.

I was shocked because the submission was not asking for repeal of the laws or decriminalisation. It simply seeks Government endorsement that these archaic and punitive laws should be reviewed. I am optimistic that, when I have the opportunity to present the submission in our next NEC meeting, I will succeed in convincing Cabinet in general that reviewing laws is one of the mandated roles of a Parliamentarian – no matter how uncomfortable or publicly contentious it may be.

The Way Forward?

The first challenge is to get the review work endorsed as a Government agenda if possible. If not, it could become a Backbencher's Private Member's Bill because there is support for the reform amongst some Ministers as well as some Backbenchers. However with an election in 18 months time, MPs who intend to stand again may shy away from such contentious issues as homosexuality and prostitution.

If the Parliamentary route becomes too difficult, other possibilities include the appointment of a Commissioner for Laws to do a comprehensive clean up the archaic provisions in the PNG Criminal Code 1974. The need for this has been discussed by Government but not yet actioned. The newly appointed Attorney General may take this discussion forward.

Failing that the Reference Group has discussed the possibility of taking the matter to the Supreme Court for a Constitutional interpretation knowing that there are regional precedents of judicial review.

The journey for justice has not reached a dead-end yet but it certainly needs more fuel to keep the engines rolling.

I am particularly looking forward to the planned visit of the Hon Michael Kirby in the near future to dialogue with our Parliamentarians, our Judiciary and other relevant stakeholders, including church leaders.

In general, people have been forced by the reality of the HIV epidemic out of their comfort zone of denial of sexual diversity but a lot more work needs to be done to make them comfortable in accepting reality.

I have assured some concerned Pastors who went to the media about “the immoral Bill” that I have no intention of changing the Marriage Act to accommodate same sex marriages; I have assured other critics that I have already passed major reforms of the Criminal Code in 2002 in the areas of rape, sexual assault and child sexual exploitation. These reforms cover the areas of non-consent and the sexual protection of children under 18 years of age.

But when people revert to perceptions of sin and Christian doctrine, I can only agree to disagree and suggest that it is time for some Christians to become more Christ-like in their behaviour and thinking.

My best wishes for the International Day Against Homophobia 2010 and I look forward to the time when this day can be celebrated openly in Papua New Guinea. My thanks to UNDP for funding my participation and to all the organisations involved for inspiring me to keep travelling this roller coaster journey for justice for all regardless of their sexual preferences. The HIV epidemic has become a catalyst for action but this must not overshadow the fact that fundamentally homophobia is a human rights issue.

Thank you.

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Shivananda Khan, OBE

International Day Against Homophobia

I am deeply honoured – if not somewhat intimidated - to have been invited to speak here and to be among such distinguished colleagues and guests on behalf of the Asia Pacific Coalition on Male Sexual Health.

Perhaps I can even call this an auspicious day, this International Day Against Homophobia, and the High Level Dialogue we are now engaged with, even though countless thousands of fellow MSM and transgenders are living with HIV, if not dying – or died – from HIV related illnesses.

In the Independent Commission on AIDS in Asia 2008 report, a warning was issued that by 2020, about 50% of all those living with HIV by then would be MSM (of whatever identity they claim) and transgender people. This is a shocking statistic, and – if I may say so - a pointed indictment of the countries in which these human beings are citizens.

But why should this alarming figure exist at all, when we have the knowledge, the understanding, and the expertise, to ensure that such growth need not happen? We know how to prevent the spread of HIV. We have known a long time.

The Commission's report also highlighted why such a situation exists. MSM and transgender people in most countries in the Asia Pacific region are highly stigmatised, discriminated against, and socially excluded, where acts of random violence and abuse are constant threats to their lives. Underlying the vast majority of cases of such abuse, are a range of punitive laws and policies that do not see MSM and transgender people as citizens of their countries and therefore have no legitimate basis to seek health education and services that would reduce their risks and vulnerability to HIV and other sexually transmitted infections. In fact many of these laws and policies actually increase their risks and vulnerabilities to this virus, and because they exist, such individuals cannot access health care services when they are infected, thus leading to their deaths. Is not such a scenario a form of genocide?

But this does not have to be the situation. There is a way forward towards ensuring that all citizens of a country, irrespective of their sexual orientation or gender identity, can access health services to prevent this unnecessary infection. And that is to review, amend and/or repeal existing laws and policies that punish and criminalise people for who they are and impede their access to health education.

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India, Nepal, and even Pakistan, have all demonstrated that, despite very high levels of stigma, discrimination and abuse in these countries, concerted action can bring about effective change. In India, the Delhi High Court ruled in reading down Section 377 of the Indian Penal Code, which had criminalised non-vaginal sex. In Nepal, the Supreme Court ruled on the citizenship rights of sexual minorities, while in Pakistan, the Supreme Court ruled in favour of the rights of transgenders. These were landmark judgements in these countries, but they did not spring out of nowhere in a form of immaculate conception. These rulings had emerged after a considerable amount of engagement with a process that brought a range of stakeholders together.

Key to these successful outcomes was the essential engagement of MSM and transgender networks, groups and organisations in the process, along with a partnership engagement of a number of key stakeholders that included the the judiciary, advocates and lawyers, Human Rights Commissions, parliamentarians, government ministries, the media, along with a range of civil society organisations.

Champions were sought from all these institutions, who could strongly articulate the need for social justice of MSM and transgenders, including health and citizenship rights. Workshops were conducted to sensitise these differing stakeholders. Meetings with media were held to advocate for sensitive coverage. Discussions with health ministries and their colleagues were held to address a country's public health needs. A road much more travelled in these past few years. What a change from 1991, when I first started working on HIV and MSM and transgender people.

I call upon you all here, on behalf of the millions of MSM and transgender people in Asia Pacific to enable compassion and understanding to rule your hearts and minds, not hatred and fear. I ask that we all walk along this road towards social justice for all, together in partnership and mutual concern that we must not reach that 50% figure I mentioned earlier, but rather ensure universal access to health. I humbly ask for your support and encouragement that we work together to avoid a regional genocide arising from ignorance, fear, and misunderstanding.

Thank you.

The May 17, 2010 Hong Kong High Level Dialogue received a tremendous amount of global media coverage through the major news wire services and community blogs. Many of these articles were republished in local newspapers in Thailand, Hong Kong, Philippines, Bangladesh, India, and Papua New Guinea.

AFP - No HIV care for 90% of gay men in Asia Pacific: UN

<http://www.google.com/hostednews/afp/article/ALeqM5jzwyjUCG4RDW6D6BHjxKlqBykg>

BBC - Most gay men in Asia-Pacific region 'denied HIV care'

<http://news.bbc.co.uk/2/hi/health/8687845.stm>

The Lancet – Editorial: Attention to HIV prevention in Asia Pacific (Volume 375, Issue 9729, Page 1846, 29 May 2010)

[http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(10\)60854-9/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(10)60854-9/fulltext)

NDTV (India) Video -International day against homophobia – Interview with Hon. Ajit Prakash Shah

http://www.ndtv.com/news/videos/video_player.php?id=1228231

Reuters - HIV among gay, bisexual men at alarming highs in Asia

<http://www.reuters.com/article/idUSTRE64G2GX20100517>

UN News Service - Discrimination hurts fight against HIV in homosexual men in Asia-Pacific – UN

<http://www.un.org/apps/news/story.asp?NewsID=34725&Cr=hiv&Cr1=>

UNDP - Punitive laws limit access to HIV prevention and care services in Asia Pacific

<http://content.undp.org/go/newsroom/2010/may/punitive-laws-limit-access-to-hiv-prevention-and-care-services-in-asia-pacific.en>

The Community News Services (CNS) authored the following blog articles which received worldwide distribution and cross posting:

CNS - Homophobia Is a Human Rights Issue

<http://www.citizen-news.org/2010/05/homophobia-is-human-rights-issue.html>

CNS - Speak The Unspeakable and Do The Unthinkable

<http://www.citizen-news.org/2010/05/speak-unspeakable-and-do-unthinkable.html>

CNS - Punitive and Discriminatory Laws limit access to HIV prevention and care services for MSM

<http://www.citizen-news.org/2010/05/punitive-and-discriminatory-laws-limit.html>

CNS - International Day Against Homophobia: Protect the right to life with dignity of LGBT community

<http://www.citizen-news.org/2010/05/international-day-against-homophobia.html>

This meeting report and above news articles are also available at:

<http://regionalcentrebangkok.undp.or.th/practices/hivaid/index.html>



UNDP is the UN's global development network, advocating for change and connecting countries to knowledge, experience and resources to help people build a better life.

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