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HOMOSEXUAL LAW REFORM: AN ONGOING BLIND SPOT OF THE COMMONWEALTH OF NATIONS*

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A RESPECTFUL DIALOGUE

I will state my basic proposition at the outset. In forty-one of the fifty-three countries of the Commonwealth of Nation, the criminal code punishes adult, private, consensual homosexual acts. It does so as a legacy of one of three very similar criminal codes (of Macauley, Stephen and Griffith), imposed on colonial people by the Imperial rulers of the British Crown.

Such laws are wrong:

- Wrong in legal principle because they exceed the proper ambit and function of the criminal law in a modern society;
- Wrong because they oppress a minority in the community and target them for an attribute of their nature that they do not choose and cannot change. In this respect they are like other laws of colonial times that disadvantaged people on the ground of their race or sex;
- Wrong because they fly in the face of modern scientific knowledge about the incidence and variety of human sexuality; and

*See earlier papers by the author: "Homosexuality – A Commonwealth Blindspot on Human Rights" *CHRI News*, Winter 2007, p.6; "Discrimination on the Ground of Sexual Orientation: A New Initiative for the Commonwealth of Nations?" *CLA Journal*, 2007, 36; "Lessons from the Wolfenden Report"(2008) 34 *Commonwealth Law Bulletin* 551; "Legal Discrimination Against Homosexuals: A Blindspot of the Commonwealth of Nations" [2009] EHRLR Issue 1, 21.

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- Wrong because they put a cohort of citizens into a position of stigma and shame that makes it hard to reach them with vital messages about safe sexual conduct, essential in the age of HIV/AIDS.

The last Commonwealth Law Conference, held in Nairobi, Kenya in 2007, recognised HIV/AIDS and its human rights implications as a special challenge for the Commonwealth of Nations. This Commonwealth Law Conference should likewise recognise that the failure of most Commonwealth countries to reform their criminal laws against homosexual people is a special Commonwealth problem, demanding a special Commonwealth solution.

Commonwealth lawyers, who are necessarily involved in the administration and enforcement of such laws, have a personal, professional and moral obligation to lift their voices in this conference and at home, to ensure that, belatedly, action is taken to lift the blindfold and to co-operate in replacing these criminal laws. They are a legal legacy that has long since passed its use-by date. In the new Commonwealth, they were imposed without any participation of the people governed by them. They have been uniformly repealed or removed in the older members of the Commonwealth, from whose culture they were exported to the new. On this subject, lawyers, as guardians of justice, should be silent no longer. Commonwealth lawyers, who combined to end racial discrimination, to reduce gender discrimination and to tackle other human rights issues, should now combine to remove this remaining unlovely legacy of the Empire.

Having stated these propositions, it is proper for me to acknowledge the sensitivity that must be displayed in approaching this topic at this venue and this time.

- *Diverse Commonwealth:* First, I must do so with appropriate respect for the diversity and cultural variety of the Commonwealth of Nations, the looseness of its institutional arrangements and the multiplicity of the viewpoints that exist in its fifty-three member states. The new United

Nations High Commissioner for Human Rights, Ms. Navanethem Pillay, a Commonwealth citizen herself and a former judge, in her first exposition of her global mandate, invoked the words of her fellow South African national, Nelson Mandela, who, she declared, “has taught me that keeping an open mind towards other people’s experiences and points of view – no matter how different from one’s own – and open[ing] channels of communication may serve the interests of justice better than strategies that leave no room for negotiation”¹. This is good advice for all proponents of human rights. It comes naturally to lawyers because we are used to hearing the other side;

- *Natural Respect*: Secondly, the days are long gone where speakers with a white face can lay down the law to others in the Commonwealth and expect that what they say will be accepted without question. The independent dignity of each member state of the Commonwealth must be respected. Each one of us loves our native land. None of us likes to come to an international meeting and hear our country and its laws criticised. Where this is done, the criticism must be proffered with respectful tones. They must acknowledge the national institutions and the differing viewpoints of each land, whilst offering ideas based on suggested propositions about universal human rights, informed by modern scientific knowledge;
- *National Failings*: Thirdly, as an Australian, I must acknowledge that my own country, in the past, and sometimes even today, is not a perfect example of respect for fundamental human rights. The injustices towards the Aboriginal people were partly corrected by the work of lawyers and by a decision of the High Court of Australia in the *Mabo* case². This recognised native title, and was influenced by universal principles of human rights³. White Australia was enshrined into our laws

¹ N. Pillay, “Human Rights in the United Nations: Norms, Institutions and Leadership” (2009) EHRLR Issue 1, 1 at 7.

² (1992) 175 CLR 1; [1993] 1 LRC 194 (AusHC)

³ (1992) 175 CLR 1 at 42; [1993] 1 LRC 194 at 230

up to the 1960s. In part, it was the influence of the Commonwealth itself that helped us to see the injustices and wrongfulness of those laws and to repeal them. Women suffered many disadvantages under Australian law, and some remain. The same is true of applicants for refugee status⁴. The laws against homosexuals were slowly removed in Australia between 1972 and 1996. As recently as last December, it took a raft of federal laws, enacted by the Australian Parliament, to remove the financial inequality of homosexual citizens under federal statutes⁵. So we took our time over these subjects and in many ways we have been followers, not leaders, in the initiatives started by others.

- *Journey of Discovery*: Fourthly, I must state that my own journey in addressing these remarks has been a somewhat slow and cautious one. Like every law student of my age, I learned of the sodomy laws in the first year of my university course. Because of my own sexual orientation, I listened quietly to the lecturer at that point because I knew that these were laws that targeted me, personally. They made me a second-class citizen. When, years later, after the Tasmanian Parliament declined to repeal those laws in the last Australian jurisdiction that kept them in place, I cautioned the reformers against their proposal to take Australia to the United Nations Human Rights Committee. There was no way, I declared, that that Committee, speaking for the whole world, would uphold a complaint against Australia for a breach of the *International Covenant on Civil and Political Rights* (ICCPR). I suggested that the complainants were not being actually being prosecuted. They lacked standing. There was no justiciable question. The issue was controversial. Leave it alone, I said. Fortunately, this advice was politely ignored and in *Toonen v. Australia*⁶, the Human Rights Committee of the United Nations upheld the complaint. Most members of the Committee did so on the basis of an unwarranted intrusion of the criminal laws into the privacy guaranteed by the ICCPR to private sexual activity. One member of the Committee added a justification based on notions of sex

⁴ *Al-Kateb v. Godwin* (2004) 219 CLR 562.

⁵ *Same Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* (Cth)

⁶ *Toonen v. Australia* (1994) 1 Int.Hum.Rts Reports 97 (No.3)

discrimination and unequal treatment in the law. Likewise, when in 1998, the New Zealand Court of Appeal in *Quilter v. Attorney-General*⁷, rejected the complaint that the lack of provision for same sex domestic unions, raised an issue of unjust discrimination under the *Bill of Rights Act* of that country, I rejected the dissenting opinion of Justice Ted Thomas. And this was despite the fact that I was myself in such a union that had then lasted 30 years and is still going strong now at 40 years. We all know that lawyers are sometimes blind to injustice. All of us know that enlightenment is a life-long journey. When someone with special reasons to be enlightened is blind to perceptions of injustice and inequality, one can scarcely blame others for failing at first to see the need for change.

In Australia, the big changes that came about in our laws on Aboriginals (including the National Apology given to the Aboriginal people by all sides of politics in Australia in 2008), came about because people with power had come to know Aboriginals and to see the world through their eyes. Likewise, 150 years of fear of Asian and African immigrants began to fall away when we came to know them with all the strengths and faults of any other people, now seen as neighbours and friends. Similarly, with women, with Protestants and Catholics, and most recently with Islamic, Hindu and other citizens of Australia. Likewise, with gay citizens. It is so much harder to hate and fear people whom you know.

One can go on pretending. But there have always been homosexual judges, lawyers, clerks and officials. The pretence begins to melt away only when it becomes safe to do so. Part of the process of challenging stereotypes of changing attitude comes about when people like me stand before people like you and tell it as it is. Not aggressively or rudely. But respectfully and truthfully. And in the knowledge that most intelligent people, informed of the facts and of the science, will come on that journey of enlightenment. They will

⁷ *Quilter v. Attorney-General* (NZ) [1998] 1 NZLR 523; [1998] 3 LRC 119, NZCA

conclude that the time has come to bring an end to the oppression and injustice and irrationality that is involved in punishing homosexual people for private, adult, consensual conduct, that is important to their identity and fulfilment as human beings.

Those in the Commonwealth who have suffered oppression for their race or skin colour; those who have suffered injustice because of their faith; those who have been oppressed because of slavery, poverty or racial intolerance, should be foremost in demanding a change to the Imperial laws that continue to bring stigma and danger to homosexual citizens of the Commonwealth.

How easy it would be for me to move around, at conferences such as this, in the honour of three decades of judicial office. Decorated, elevated, respected. The closet (as the Americans call it) is generally such a safe little place. But it is fundamentally dishonourable. And it is part of the conspiracy of irrationality, that should have no part in a learned profession that is committed to justice, fundamental rights, courage, truth and honesty. It was my 40-year partner, Johan (from The Netherlands, a non-Commonwealth country that since 1803 had not criminalised homosexuals) who insisted that we stand up and do so for younger people in Australia. Today I do so for younger, and not so young, people throughout the Commonwealth of Nations whose voice I am to the judges and lawyers here assembled in Hong Kong.

BUT IS THERE A PROBLEM?

But is there a problem? With the economic meltdown, the burden of poverty, the variety of excuses and the failure to enforce some of these laws, can we conclude this is just not a priority? That it is an awkward subject for some? That many would prefer not to think about it and to turn a blind eye to it? Sadly, it is a big problem. And I mean no disrespect to anybody's nation by giving some examples. I have already accepted that my own nation, in this and other respects, has much to learn from others. So, most countries of the Commonwealth have, I suggest, something to learn from me on this subject.

The statistics tell a story⁸:

“In 2008, no less than 86 member states of the United Nations (UN) still criminalize consensual same sex acts among adults. Of these, nearly 50% (as many as 41) are in the Commonwealth. Within the Commonwealth, 41 out of 53 countries make it 77%. This percentage is much lower within the UN – 86 out of 192 countries makes it 45%. It is even lower in the non-Commonwealth UN, 32%. These statistics show that sodomy laws exist in the larger part of the Commonwealth (77%) than the non-Commonwealth (32%).”

Sadly, in most parts of the Commonwealth, the laws are no dead-letter having a no official backing. Far from being unenforced and no more than an embarrassing legal relic, the criminal laws are used in many lands to sustain prosecutions, police harassment and official denigration and stigmatisation.

In Zimbabwe (presently suspended from the Commonwealth), President Robert Mugabe voiced many attacks on homosexual citizens in the early 1990s, describing them as “un-African” and “worse than dogs and pigs”. Reportedly, he told crowds: “We are against this homosexuality and we as chiefs in Zimbabwe should fight against such Western practices and respect our culture”⁹. At the same time, President Daniel arap Moi of Kenya claimed that homosexuality was “against African tradition and biblical teachings. We will not shy away from warning Kenyans against the danger of this scourge”.

In Zambia, a government spokesman proclaimed in 1998 that it was “un-African and an abomination to society which will cause moral decay”. The

⁸ The South and Southeast Asia Resource Centre on Sexuality, *Human Rights and the Criminalisation of Consensual Same-Sex Sexual Acts in the Commonwealth, South and Southeast Asia*, Bangalore, May 2008, 2 (Sumit Baudh) – (hereafter ‘Baudh’).

⁹ Human Rights Watch. *This Alien Legacy. The Origins of “Sodomy” Laws and British Colonialism* Washington DC, (2008), 9 (Hereafter HRW). Citations omitted from all references to HRW.

Vice-President of Zambia at the time warned that “if anyone promotes gay rights after this statement the law will take its course. We need to protect public morality”¹⁰. The previous President of Nigeria, H.E. Olusegun Obasanjo in 2004, declared that “homosexual practice is clearly un-biblical, unnatural, and definitely un-African”. Taking up the theme, the Nigerian media called for the placement of “barricades against this invading army of cultural and moral renegades before they overwhelm us”¹¹.

Reportedly in the northern Nigerian states of Kano and Zamfara, the criminal laws provide for punishment of 100 lashes for unmarried offenders, and death by stoning for married ones. Lesbian acts get by with up to 50 lashes and six months imprisonment. According to the report of the United Nations Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions, he found in the Kano prison a man awaiting death by stoning for homosexual acts, after a neighbour had reported him to the local Hispah committee – young men patrolling the streets to suppress “immorality”. In September 2006, a Nigerian representative dismissed criticism that execution for homosexual offences was excessive. Reportedly, he said: “What may be seen by some as a disproportional penalty in such serious offences and odious conduct, may be seen by others as appropriate and just punishment”¹². A national newspaper declared that legislation to “put a check on homosexuality” was “progressive”. New laws have been proposed and passed.

In Uganda, an influential pastor, well-known for his campaigns against the use of condoms in response to the HIV/AIDS epidemic, urged that “homosexuals should absolutely not be included in Uganda’s HIV/AIDS framework. It is a crime and when you are trying to stamp out a crime you don’t include it in your programs”. He named “homosexual promoters” on his website, thereby making them a target for violent attacks. In 2007, hundreds marched to threaten punishment for homosexual people calling them “criminal” and

¹⁰ Quoted HRW 9-10

¹¹ Quoted HRW 10

¹² HRW 62

“against the law of nature”. Government ministers reportedly demanded tougher anti-gay measures, one of them declaring that “Satan is having an upper hand in our country”¹³. The President of Uganda, H.E. Yoweri Museveni, instructed the criminal investigation department to “look for homosexuals, lock them up, and charge them”¹⁴. Reportedly, police responded, rejecting the request “let us live in peace”. Mr Buturo, now the Ethics and Integrity Minister, told the BBC that the relevant agencies should “take appropriate action because homosexuality is an offense under the laws of Uganda ... The penal code in no uncertain terms punishes homosexuality and other unnatural offenses”. Reportedly, tabloid media have jumped on the bandwagon, publishing names of allegedly gay men.¹⁵ Even the Queen, Head of the Commonwealth, was drawn into this campaign when she visited Uganda for a CHOGM meeting. The crowd was demonstrating, presumably, against the British government’s initiatives. It met her, protesting against tolerance of gays. As if she could properly do anything to tighten the noose.

In India, although s377 of the *Indian Penal Code* repeats the colonial offence, it is usually invoked only for unconsensual sexual conduct or acts against under-aged persons. Yet its presence of this overreaching law is occasionally the basis of reportedly oppressive police intervention against homosexual people and organisations. In 2001, police in Lucknow raided the office of Naz Foundation International and Bharosa Trust, bringing charges under s377 on the basis of criminal conspiracy and the sale of “obscene materials”. Reportedly, these were standard information for men having sex with men, to help protect them from acquiring the AIDS virus¹⁶. Responding to an enquiry by a Swedish delegate about the retention of s377, an Indian official told a United Nations body that the provision had been imposed on India undemocratically by the British colonial government and reflected “the British Judeo-Christian values of the time”¹⁷. In the Delhi High Court, a case stands for judgment in a constitutional challenge to the validity of s377 under the human

¹³ HRW 4
¹⁴ HRW 58
¹⁵ HRW 59
¹⁶ HRW 54
¹⁷ HRW 1-2

rights provisions of the independence Constitution of India. Interestingly, the Delhi High Court had originally rejected the challenge on the basis that the petitioner had no standing and that the issue was not justiciable. The Supreme Court of India ordered the matter back to that court for determination on the constitutional merits. Conflicting submissions have, reportedly, been advanced before the Court by the Union Ministers for home affairs and health.

In Malaysia, s377 of that country's penal code was invoked in the prosecution of the former Deputy Prime Minister, Anwar Ibrahim. The potential for such laws to be misused is clear. The need for protection of the young and of all persons against unconsensual sexual acts by anyone is equally clear. But the risk of pandering to vigilante attitudes is now a real and present danger in most parts of the Commonwealth.

Recently, the former United Nations AIDS ambassador, Stephen Lewis, urged change of the law in Jamaica. But the Prime Minister, the Hon. Bruce Golding, declared that there was no intention of liberalising the "buggery laws"¹⁸. Mr. Lewis reported investigations, in the AIDS context, of many instances of sheer violence against people in Kingston who were, or were thought to be, homosexual. The popular culture of violent rap music, targeted at gay people, has few effective antidotes in the Caribbean Commonwealth.

In Sri Lanka, which likewise inherited a variation of s.377, the law was changed in 1995, but only to extend the offence from men to women as well. A leader of a gay support group reportedly left the country because of death threats. Tabloid media in Colombo in 2000 published a letter urging that lesbians be raped "so that those wanton and misguided wretches may get a taste of the zest and relish of the real thing"¹⁹. The Press Council rejected a complaint

¹⁸ Statement by Mr. Stephen Lewis, "Jamaican Prime Minister supports outdated laws that fuel AIDS epidemic", issued by AIDS-Free World, 06 March 2009

¹⁹ HRW 56

about this publication. Instead, it imposed a fine on the complainant for daring to complain.

In Singapore, despite a recommendation of an independent committee of the Law Society, urging repeal of the local equivalent of s377, only one reform has succeeded. When the courts held that heterosexual couples in consensual adult sex, would be criminally liable for “unnatural” acts of oral intercourse, they were excused by an amending law. But the legislature declined to reform the law with respect to homosexual people in Singapore. The leading opponent of reform, an associate professor of law (who had been a strong critic of the Malaysian enforcement of religious principles concerning apostasy) spoke in the Singapore Parliament against “the sexual libertine ethos of the wild, wild West”. Although herself a proponent of an American fundamentalist Christian minority beliefs in Singapore, she declared that “religious views are part of our common morality” and that “diversity is not a licence for perversity”. She did not, apparently, see the inconsistency of these propositions with her stance on apostasy. The amendment Bill was defeated in Singapore²⁰. Homosexuals were stereotyped as examples of the “wild, wild West” and “the sexual libertine ethos”, even though they might only have been seeking the lawfulness of a loving, intimate, personal relationship for themselves.

SCIENCE, PROGRESS, RELIGION & UNIVERSAL RIGHTS

There are, of course, other voices within the Commonwealth of Nations and the world. It could scarcely be otherwise be given the enormous changes that have occurred in the past fifty years, relevant to our approach to this area of the law:

- *Science*: First, there is a growing appreciation of the science of sexual diversity. Beginning with the early writings of Havelock Ellis

²⁰ M.D. Kirby “Fundamental Human Rights and Religious Apostasy. The Malaysian Case of *Lina Joy*” (2008) 17 *Griffith Law Review* 151 at 176-178.

and Freud and encouraged by the studies of Alfred Kinsey in the United States and his successors, it became widely known, after 1946, that sexual variation was not uncommon. Both in men and women, there is a small but stable proportion of people who are exclusively sexually attracted to their own gender lifelong. In the case of men, this is approximately 4% or 5% of the population, and women somewhat smaller. The growing power of these scientific investigations led to the decision of the American Psychiatric Association, in 1973, to delete homosexuality from the list of “psychiatric disorders” and to amend the *Diagnostic and Statistical Manual* accordingly. The exact cause or causes of homosexuality have not yet been established in a way that is universally accepted. Some researchers suggest that sexual orientation is probably genetic in origin. Others suggest hormonal changes in pregnancy or early development as causes. But virtually all agree that the sexual imprint exists from the earliest time and cannot be turned on and off according to whim. Any attempt by the law to do so is bound to fail²¹.

- *Progress and reform:* Secondly, the notion that s377 of the *Penal Code* and equivalent provisions are written in stone, expressing universal human values can no longer be accepted by informed people. Most of the world, in the civil law countries, long since threw off any such laws – at least two hundred years ago. Many of those laws derived from provisions enacted under xenophobic pressures to blame minority sexuality in medieval times upon the French or other foreign influences or to promote Henry VIII’s campaign to take over the monasteries²². None of the laws imposed on the British colonies was the product of demands by

²¹ S. Le Vay, “A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men” (1991) 353 *Science* 1034; D.H. Hamer, “A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation” (1993) 261 *Science* 321; J.M. Bailey and R.C. Pillard “A Genetic Study of Male Sexual Orientation” (1991) 48 *Archives of General Psychiatry* 1089

²² HRW 14 ff. See also L. Crompton, *Homosexuality and Civilisation*, (2003) Cambridge MA, Belknap, 362 ff.

the local people. These were the concepts of the Imperial power. As the Indian official correctly stated, they reflected the notions of the Judeo-Christian ethics of Victorian Britain. Usually, or often, there was no equivalent preceding law and certainly none with the highly punitive consequences of the *Penal Code*. So these laws are not of great antiquity. Historically, they are relics of a bygone empire, long since repudiated (in 1969) by the Imperial country itself.

- *Religious diversity*: Thirdly, in case it is said that the laws reflect universal morality and religious rules in the ancient scriptures, it is important to understand that, as with legal texts, such scriptures are hotly contested within religious circles. Amongst Protestant Christians, there are strong views suggesting that there has been a misunderstanding about the instructions in the *Leviticus* Holiness Code²³. And in the Roman Catholic denomination of Christianity, there are similar discordant voices²⁴. Moreover, as recently as December 2008, the Vatican, expressing the views of the Pope, declared specifically that “the Holy See continues to advocate that every sign of unjust discrimination towards homosexual persons should be avoided and urges States to do away with criminal penalties against them”²⁵.
- *Universal human rights*: Fourthly, exactly coinciding with these scientific, social and religious developments, has been the growth of the universal principles of human rights as the foundation of the United Nations Organisation itself and as an important

²³ A.A. Brash, *Facing our Differences – The Churches and their Gay and Lesbian Members* (1995), Geneva, World Council of Churches Publications

²⁴ See e.g. Sebastian Moore, *The Contagion of Jesus* (Darton, 2007) Ch. 9; “*Love, Sexuality and the Church*”, 142

²⁵ Holy See, “Response to Declaration on Sexual Orientation”: http://212.77.1.245/news_services/press/vis/dinamiche/d2_en.htm (accessed 19.12.2008). See also Vatican Radio website <http://radiovaticana.org/en1/Articolo.asp?c=249433>

background for the Commonwealth of Nations. Human Rights Commissioner Pillay, supporting the call for a universal statement by the United Nations to abolish the criminal offences, said in December 2008: “Ironically many of these laws, like apartheid laws that criminalised sexual relations between consenting adults of different races, are relics of the colonial era and are increasingly recognised as anachronistic and as inconsistent both with international law and with traditional values of dignity, inclusion and respect for all”²⁶. In the enjoyment of universal human rights, citizens of the Commonwealth of Nations are not second class in the world. Whilst respect must be paid to different voices, the violence of the mob, or even the violence of the organised state, should give way to the quiet, insistent voice of international human rights law with its demand for respect for the dignity of members of sexual minorities. Human history sadly teaches that small minorities are often singled out for violence and cruelty. This is part of the infantile character of human prejudice. When it exists, it behoves civilised people, and especially lawyers, to raise their voices and cry “enough”.

WISE COMMONWEALTH VOICES

Wise voices have begun to be heard throughout the Commonwealth of Nations. In Commonwealth cases involving the United Kingdom²⁷, Cyprus²⁸ and Australia²⁹, the European Court of Human Rights and the United Nations Human Rights Committee have successively upheld the need to reform the laws criminalising adult private sexual activity. So have many national courts of great distinction, acting under their own constitutional mandates³⁰. Nor is

²⁶ N. Pillay, cited “Homosexual Punishments Unacceptable: United Nations”, *Sydney Star Observer*, 30 December 2008, 3.

²⁷ *Dudgeon v. United Kingdom* (1981) 4 EHRR 149. See also later *Norris v. Republic of Ireland* (1988) 13 EHRR 186.

²⁸ *Modinos v. Cyprus* (1993) 16 EHRR 485.

²⁹ *Toonen v. Australia* (1994) 1 *Int.Hum.Rts Reports* 97 (No.3)

³⁰ *National Coalition for Gay and Lesbian Equality v. The Minister of Justice*, 1999 (1) SA 6 (South Africa); *McCoskar v. The State* [2005] FJHC 500 (Fiji Islands); see also *Lawrence v. Texas* 539 US 102 (2003) (U.S.A.);

this a movement that is confined only to courts in Western countries. In December 2007, the Supreme Court of Nepal delivered a very important decision upholding the rights to equal civic treatment of homosexual citizens of that country³¹.

In South Africa, Nelson Mandela, steering his nation to an end to the denial of human rights for any group, told a gathering of Southern African leaders that homosexuality was not “un-African” but “just another form of sexuality that has been suppressed for years ... Homosexuality is something we are living with”³².

In India, an open public letter signed by Nobel Laureate Amartya Sen, former Attorney-General Soli Sorabjee and many other leaders, demanded, in 2006, an end to s377³³. South African Archbishop Desmond Tutu called for an end to the African oppression of homosexuals, stating that he could not bear to see apartheid replaced by such a similar exclusion³⁴. Former Singapore Prime Minister Lee Kuan Yew likewise, in April 2007, suggested that the law should be changed and that it could not now be justified³⁵. Live and let live was the inclination of the present Singapore Prime Minister, but the persistence of the old law, and the defeat of legislative reform, means that the law remains in place to authorise inequality, injustice and stigma.

In Hong Kong, the laws on this subject were changed shortly before the end of British rule, in keeping with a belated attempt to delete a form of oppression which (except for a very short period) had never been part of the criminal law

Commonwealth of Kentucky v. Jeffrey Wasson 842 SW 2d 487 (Ky 1992); contra *Banana v. The State* (2000) 4 LRC 621 (ZSC); *Utjiwa Kanane v. The State*, Criminal Appeal No.9 of 2003, unreported. All of the above cases are cited and discussed in Baudh, above n.8, 11-19.

³¹ Rulings on the Writ by Blue Diamond Society (Writ No.917 of 2064 (BS) (2007 AD)). Unofficial translation: <http://www.pinknews.co.uk/news/articles/2005-9597.html> (accessed 12.01.09)

³² Quoted HRW, 10, citing Gift Siro Cipho and Barrack Otieno, “United Against Homosexuality”.

³³ <http://mrzine.monthly.org.india.16.09.06.html> (accessed 18.08.08).

³⁴ Address to the Anglican Conference of Africa, Nairobi, Kenya, 12 January 2007.

³⁵ Reported *The Age* (Melbourne), 24 April 2007.

of China, as such. The result has been to create an important haven of safety and equality in Asia, almost entirely missing from the other Asian countries once marked red on the map. In a recent decision of the Hong Kong Court of Appeal, the Court observed:³⁶

“Denying persons of a minority class the right to sexual expression in the only way available them, even if that way is denied to all, remains discriminatory when persons of a minority class are permitted the right to sexual expression in the way natural to them. ... It is, I think, an apt description [to call it ‘disguised discrimination’]. It is ... founded on a single base: sexual orientation”.

Like voices are sometimes raised by informed Commonwealth leaders. Thus, the Deputy Prime Minister of Samoa, the Hon. Misa Telefoni, at a conference on AIDS in New Zealand, declared that the only effective way of tackling that epidemic was “the human rights approach”. He said: “Ensuring the emancipation of women and protection of their rights is an important priority ... Working with sex workers and other marginalised groups such as gays and transsexuals works ... Working successfully with marginalised groups means dealing with them at their level and never showing any prejudice against them³⁷.”

Whilst issues of principle and the fundamental policy of the criminal law are at stake, and these must not be confused with utilitarian reasons concerning national responses to AIDS, the fact remains that the current approaches, particularly in Commonwealth countries in Africa, Asia and the Caribbean, place an impediment in the way of effectively tackling this major epidemic. Criminalise people and you cannot reach out to their minds and effectively influence their conduct. Apart from everything else, that message is now one of great importance for the Commonwealth of Nations where AIDS is definitely a priority issue.

³⁶ *Leung T.C. William Roy v. Secretary of Justice* (HK) [2006] HKCA 106 at 48

³⁷ M. Telefoni, “HIV/AIDS and the law: Pacifika at the Crossroads”, closing address, UNDP Conference, Auckland, New Zealand, unpublished, 13 April 2003

The Secretary General of the United Nations, Ban Ki Moon, in an address to the International Aids Conference in Mexico City on 3 August 2008, was similarly plain speaking. He said³⁸:

“ ... In most countries, discrimination remains legal against women, men who have sex with men, sex workers, drug users and ethnic minorities. This must change. ... [I]n countries with legal protection and protection of human rights for these people ..., there are fewer deaths. Not only is it unethical not to protect these groups: it makes no sense from a public health perspective. It hurts us all.”

THE NEED FOR ACTION

All of these words have been said before. They have been said to national leaders. They have been urged on politicians who waive them aside or blame the “conservatism” of populist opinion in their own countries. These things have been said for at least ten years to successive leaders of the Commonwealth of Nations. Most respectfully, I urged the outgoing Secretary-General, Don McKinnon, before he left office, to take an initiative to put in place a committee of wise Commonwealth leaders to encourage dialogue, conversation and action on this special Commonwealth problem. Such an initiative might not succeed everywhere or quickly. But to the extent that it succeeded, it would be important on many fronts. Alas, nothing has been done. The result is that many Commonwealth citizens today continue to suffer the apartheid of sexuality.

At the last Commonwealth Law Conference, in company with that fine South African judge, Edwin Cameron, now of the Constitutional Court of South Africa, I attended a reception in Nairobi to which representatives of the gay, lesbian,

³⁸ See UNAIDS, UN Guidance Note on *HIV and Sex Work* (2009, Geneva) See also International Commission of Jurists, *Sexual Orientation and Gender Identity in Human Rights Law* (References to jurisprudence and doctrine of the United Nations human rights system), Geneva, 2007 (3rd updated edition).

transgender and other minorities were invited by him. I went along expecting 100, perhaps 50, at least 30 to attend. In the end, there were only two. James and Judith. They told me that their friends were frightened of judges, lawyers and officials. Frightened of us. They recounted very sad events of misuse of official power and of stigma. I am now their voice at this conference.

The Commonwealth once was a great organisation in which we could all rally together against discrimination on the grounds of race. I myself went to anti-apartheid demonstrations in Australia. As a young lawyer, I defended Australian university students who protested at football matches and elsewhere and who put the issue on the world stage. Who now puts the issue of sexual apartheid before the Commonwealth and the world?

True, the numbers affected by sexuality, discrimination and violence are small, by comparison. True, those affected can often hide their supposed "flaw". They can pretend to be something other than God or nature made them. In other parts of the world and of the Commonwealth change has come about. But our community of nations is strangely resistant, silent. It is indifferent and immobile. Nothing is happening.

I hope that, from Hong Kong, which is not itself even a member of the Commonwealth, a message can go to the Jameses and Judiths of this world, that some of us care. That judges and lawyers of the Commonwealth are friends to universal rights, not people to be feared as part of the problem. That we will express our opinions, quietly but insistently. And that, just as 30 years ago, apartheid looked impregnable in fortress South Africa, so in due time, the seemingly unbeatable resistance to law reform of the criminal laws against homosexual people will be removed. The blind spot will be lifted. The dignity and equality of all Commonwealth citizens will be respected. The futile attempt by criminal law to force people to be different from their nature will be abandoned. And the alien legacy of the Imperial criminal codes against homosexuals will be discarded.

On his coming into office as President of the United States of America, Barak Obama faced many challenges. But one thing he quickly changed, altering the decisions of the Bush administration. On 19 March 2009, he announced that the United States would now participate in the statement, presently before the General Assembly of the United Nations, calling for an end to the criminal laws against homosexuals. So far, that Statement has gathered only 67 countries of the 192 countries in the Assembly³⁹. Even South Africa has not yet signed on despite the strong provisions of its freedom Constitution and the enlightened decisions of its highest courts. Only three African nations have so far done so, and only one of these (Mauritius) is a member of the Commonwealth.

A world that can conquer space, map the genome, split the atom, create the internet, heal the sick, abolish slavery, conquer polio and overcome apartheid can tackle this further challenge. And we, the lawyers and judges of the Commonwealth have a primary duty to make sure that this is done, and done soon.

³⁹ Brazil, for example, together with Canada, has played a leading role in raising equality and sexual orientation issues at the United Nations. Brazil has also succeeded in persuading Mercosur states to treat sexual orientation discrimination as a human rights issue. Argentina, Brazil and Uruguay sponsored the launch of the Yogyakarta principles on Sexuality and Human Rights (available www.yogjakartaprinciples.org at the United Nations. Many of the United Nations special rapporteurs have placed this issue at the forefront of their reports between 2003-2008, notably the Special Rapporteur on Extra-judicial, Summary and Arbitrary Executions, Ms. Asma Jahangir of Pakistan, a Commonwealth citizen. Likewise the Special Representative on Human Rights Defenders, Hina Jilani, also of Pakistan, the Special Rapporteur on Torture (Sir Nigel Rodley, UK) and the Special Rapporteur on the Right to Health (Mr. Paul Hunt, New Zealand).