

## Sexuality

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Recently, I visited Kenya. A huge legal conference held in the Jomo Kenyatta Conference Centre in the middle of Nairobi. The meeting gathered lawyers from all parts of the Commonwealth of Nations. This is the club of nations all but one of which were once ruled by Britain. Queen Elizabeth II is the symbolic Head of the Commonwealth. It is usually a pretty friendly association. So it was to prove in Kenya.

Now, some people criticise the Commonwealth as a mere “talk shop” where the “wealth” is definitely not shared in “common” and where actions often speak more softly than words. Yet the great thing about this club is that its members share bonds of history; the links of the world’s premier trans-continental language (English); similar professed ideals about democratic government and independent courts; and expressed devotion to the rule of law and upholding individual human rights. There is also the little matter of sporting rivalries. But I won’t go there.

Scurrying from one session of the conference to another, I found that I could take in debates about the role of women in the law in many Commonwealth countries; the position of indigenous people in the aftermath of Empire; technical topics such as taxation and patent laws; and a session in which I delivered my own paper, concerning AIDS and HIV. For the citizens, and lawyers, living in Kenya (indeed most parts of Africa) this topic was far from technical and certainly not theoretical. Millions in Africa have already died from AIDS. Millions are living with HIV, the virus that causes AIDS. My challenge was to describe the steps

that we had taken in Australia in the early days of the AIDS epidemic, to promote behaviour modification; to encourage frank discussion and law reform; and to reduce the spread of infections. This was a big ask. In Africa, as I was to discover, no-one wants to talk openly about sex. Yet it is through sexual activity that most of the cases of HIV infection come about. Silence, as the T-shirt declares, is death. Ignorance is the feeding ground of needless suffering.

However, the highlight of the Nairobi meeting for me was not the moment when I delivered my talk and answered the earnest questions concerning what the law could do to contribute to stemming this cruel epidemic. My message, I knew, was important. But was anyone listening, at least anyone who could make a difference in that part of the world? Would the lawyers of Kenya and of that part of Africa accept the need to tackle this epidemic in the strong and brave and imaginative ways that we had embraced in Australia in the 1980s? By removing many of the criminal penalties applied to adult prostitution so as to empower sex workers to insist on the use of condoms by their clients? By providing for syringe exchange so as to reduce the spread of HIV infections amongst injecting drug users? By promoting education about these sensitive topics in schools and colleges and by informing young people of the terrible dangers they now face? By removing the old colonial criminal laws that punish men who have sex with men, although they are consenting adults acting in private?

Even if I could persuade the lawyers that, paradoxically, these brave steps were necessary to capture the minds and win the trust of those in the front line of AIDS, whose conduct had to be changed if the infections were to fall, could the lawyers persuade the politicians and lawmakers to translate these ideas into action? Would this be possible in societies where moralising and judgmentalism are rampant? Above all, where sexual minorities, especially gays, are targeted with abuse, discrimination, violence and criminal punishment. Things are certainly worse in Africa than in Australia, where often they are bad enough.

Feeling a little discouraged about the seeming hopelessness of the challenge I had set myself, I was relieved when a judicial friend from South Africa, Edwin Cameron (like me an openly gay man) invited me to join him in meeting some representatives of the “gay community” in Kenya. He promised to turn on a little party at his hotel. His hotel was the Nairobi Hilton. I thought I should go. He said he would offer some local food and drink. Australians are always ready for a party — especially when far from home and at the end of a hard day at a conference.

In my mind’s eye, I imagined that we would meet in a large room with soft lights, muzak and tasty African snacks. I expected that fifty, maybe a hundred, activists would turn up and that we would all listen to Edwin Cameron tell the noble story of the changes in the laws of South Africa that now provide constitutional protections from discrimination on the basis of sexual orientation, energetically carried into effect by the courts of the new rainbow nation — a first in Africa.

Instead, when I arrived at the party, I found that there were just three activists. They were Judith, David and Peter. Yet what they lacked in numbers they made up with heart and with courage. They are the heroes of my story.

We sat together for an hour. They told us of the problems faced by young gay and lesbian people in Kenya. The old British laws for punishing adult consensual sexual acts are still firmly in place. Police use these laws to harass anyone who tries to hold a meeting, arrange a debate or press for reforms in the anti-gay laws and hostile attitudes. Police raids on the few places in Nairobi where gay people can meet are common. Sometimes the raids descend into violence. Just as frequently, arrests occur followed by hints that the suspects can be released if they pay a “fine”. Everyone knows that this will be pocketed by the police themselves: no questions asked. Don’t expect a receipt. The going rate was said to be about 3000 Kenya shillings. This is less than \$50. But for poor students and out of work vulnerable people, it is effectively a discriminatory “morality” tax. It makes life difficult and painful. Stigma is the name of this game.

As I listened to the quiet stories that the three young guests told us, my mind travelled back in time to my own childhood in faraway Sydney. I thought again of what it was like growing up gay in 1950s Australia. There was no way I would have “come out” in those days. No way I could have met visiting judges in a city hotel or anywhere else. Just being open to myself and others was almost impossible. So although they were few, I recognised the courage and determination that the three young Kenyans had shown. They wanted to learn how progress had been made in South Africa and Australia. They wanted to make sure that the same progress would be achieved in Kenya and other parts of Africa where being gay is still a cause for violence and harassment.

So how did we begin the process of changing things? In South Africa, the story was more revolutionary. Several of the leaders in the fight to overthrow apartheid were gay activists. If they were “white”, they learned from the discrimination meted out to them of what it was like to suffer discrimination on the basis of race and skin colour — the ultimate foundations of the apartheid state. It was because of the common struggle of these gay freedom fighters that Nelson Mandela and the other leaders of the South African liberation insisted, after apartheid, that there would be no more discrimination against gays. No-one in the new dispensation would be punished or suffer for an indelible feature of their nature, which they did not choose and could not change.

The alteration in the laws and in community attitudes in South Africa was truly remarkable. It has now far overtaken the progress made by gays in Australia. The Constitutional Court of South Africa in 2005 declared that the country’s *Marriage Act* offended the constitutional prohibition against discrimination on the basis of sexual orientation by confining the availability of marriage to heterosexual couples. That decision was quickly accepted by the Government of South Africa. New laws were drafted to ensure that the status of marriage would be available to all citizens, black or white, straight or gay. At the very same time that those changes were happening in South Africa, the Australian

Parliament, with near unanimity, amended the *Marriage Act* to forbid the availability of marriage to same-sex couples or the recognition in Australia of same-sex marriages entered into abroad in states that now permit that to happen.

To the three young agents of change, quietly talking about the problems in Kenya, changes of the kind accomplished in South Africa seemed a distant dream. Come to think of it, some of the South African achievements seemed a remote possibility for us in Australia as well.

Nevertheless, I was able to tell the three eager listeners that in Australia we too had made some progress. In the way these things sometimes happen in countries of the Commonwealth of Nations, the changes for Australia first came about when we copied reform of the laws first adopted in Britain. The year 2007 is the fiftieth anniversary of the publication in Britain of the Wolfenden report. That report was named after the chairman of the investigating committee, Sir John Wolfenden. In September 1957, he and his colleagues had recommended the repeal of the old criminal laws in England that punished gay people for consenting adult sexual conduct, thereby exposing them to police harassment, violence, stigma, shame, discrimination and blackmail.

After the Wolfenden report, it took 10 years for the changes in the law to pass through the British Parliament. "So how did this happen?", the three young Kenyans demanded, their shy eyes searching ours for answers. It happened because people like them in Britain in the 1950s had gathered together in committees and stared down their enemies. It happened because these earlier heroes invited participation from their families and friends. They stood up for their own human dignity and rights. As in Kenya today, it was not easy. Yet gradually a momentum gathered. It attracted public attention, newspaper reports, television interviews, university lectures, persuasion, debates, countless boring meetings and ultimate political and legal action.

Much the same was the story of the Australian reforms to get rid of the criminal laws against same-sex adult activities. The process began in South Australia in 1975, on the initiative by the

Labor Premier Don Dunstan. Yet it was not confined to the Labor side of politics. In New South Wales, John Dowd and in the Australian Capital Territory, Bob Ellicott, both members of the Liberal Party, took the initiatives that began the process of repealing the old criminal laws.

One by one the States and Territories of Australia removed the legacy of the old British criminal penalties on gay people. Only Tasmania hung out against the change. However, by the 1990s, AIDS had arrived in Australia. It was now specially urgent to remove the impediments to reaching out to all people to bring safer sex messages and lessons in protective behaviour change. The United Nations Human Rights Committee in Geneva found that the Tasmanian anti-gay laws were contrary to the international law of human rights. The Australian Parliament, with bipartisan support, enacted a federal law overriding the offending Tasmanian statute. In the end, the Tasmanian Parliament repealed the criminal provisions. No such provisions now exist anywhere in Australia.

These changes do not mean that all of the problems faced by sexual minorities have been solved. Gay people may not now be subject to criminal punishment for their adult consenting sexual acts. Yet they are still subject to many disadvantages in the law and society. In Australia, the Human Rights and Equal Opportunity Commission in 2007 produced a report listing 57 federal laws that contain provisions that discriminate against gays. The Commission recommended that the laws be amended. In September 2007, the Prime Minister of Australia, Mr John Howard, announced that acting on the Commission's report was "not a priority" of his government.

One of the reasons advanced for this decision highlights the fact that getting legal change, hard though it may sometimes be, is only part of the challenge. Getting social change, and alteration of attitudes, is even more difficult. Mr Howard explained that he and other members of his Government had been "deluged" with messages from "Christian groups", arguing against alteration in the discriminatory laws identified by the Human Rights Commission. These "Christian groups", and people of other religions, with

similar views, have their counterparts in Kenya and in Zimbabwe. Indeed, throughout Africa and elsewhere — wherever the missionaries took their religious texts.

One of the chief causes that led to changes in the laws and social attitudes in Australia was the widespread publicity about scientific research that investigated the incidence and causes of human sexual variety. Why are some people gay? How many manifest this variation? Is it a mental illness? Can it be changed with therapy or willpower?

Research into these subjects began early in the 20th century. In the investigations of Dr Alfred Kinsey in the United States in the 1940s and 1950s, it emerged that a sizeable proportion of people, at some time in their lives, have same-sex experiences. A smaller proportion, about 4% of males, are exclusively oriented to attraction to their own sex. The causes of this variation in the species are still a matter for debate. More recent research tends to suggest that, in many cases at least, sexual orientation is either genetic in origin or a consequence of hormonal changes in the mother's body during pregnancy or in the child in early infancy. Few informed people now believe that gay identity is wickedly chosen to challenge social norms. Expert professional bodies now accept that it is not a mental illness. They caution about attempts to change a person's sexual orientation. Once established, it seems, sexual orientation is indelible and unchangeable.

In this respect, a person's sexual orientation is rather like their race and skin colour, their gender. Like Aboriginality, height and left-handedness, it is just part of the person's makeup. This is why Bishop Tutu told a church meeting, also held in Nairobi earlier in 2007, that he "could not imagine" discriminating against people on the basis of their sexual orientation. He likened such discrimination to racial discrimination. And in South Africa he had experienced plenty of this. He knew how unkind and unjust it could be. So he realised what he was talking about.

Sitting there in the Nairobi Hilton, we reflected together on the words of Bishop Tutu. Just five of us thinking of that fine spiritual man. It was tragic that it took apartheid to enlighten a

Christian bishop about the wrong-headedness of hating people who were just a little different from others and discriminating against them and showing violence to them on that ground. However, it is a blessing for Africa and the world that Bishop Tutu learned the lesson that he now teaches throughout Africa and beyond where homophobia, discrimination and violence against gays are so common.

Desmond Tutu's message as a "black" African speaking to his brothers and sisters was an inspiring vision of hope equally for the three young activists and their two visiting friends. Far more valuable, I suspect, than anything that the "white" judges could tell them. Science was on their side. Scripture was not against them. Misunderstandings of religious texts would need to be corrected. Love and acceptance would ultimately conquer ignorance and hatred. It would take time. Perhaps 50 years. Perhaps more. But in the end, change would come. Human beings are genetically programmed to embrace rational argument and scientific truth.

We descended the hotel's spiral staircase. It looked like an American movie set and we joked about making our Hollywood exits and entrances. We left the hotel and pushed into the busy streets of Nairobi. Our young companions guided us along the bustling footpaths to the Norfolk Hotel where the Chief Justice of Kenya was hosting a dinner for the visiting judges. Unlike the Hilton, the Norfolk was a relic of British colonial rule in Kenya. In that sense, it was a little like the criminal laws that the British had left behind in Africa. It was a trifle run-down and had seen better days. As we parted from these three brave young Kenyans, we embraced them and expressed our admiration for them.

Great journeys in an important cause always begin with single steps. They take courage because ignorance and prejudice is everywhere. An African band was belting out a breathless tune for the soberly dressed judges and their partners. Then, and often since, I have thought of Judith, David and Peter. They have embarked on their journey. They are standing up for themselves. They are asserting their human rights and human dignity. The tide

of history is on their side. We must support them. We must help them end the senseless pain.



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