



UNDP LAW COMMISSION AND HIV: SEVEN LESSONS FROM BANGKOK

United Nations Development Programme
Global Commission on HIV and the Law

Asia-Pacific Regional Dialogue

16-17 February 2011
Bangkok, Thailand

The Hon. Michael Kirby AC CMG

UNITED NATIONS DEVELOPMENT PROGRAMME

GLOBAL COMMISSION ON HIV AND THE LAW

ASIA-PACIFIC REGIONAL DIALOGUE

**16-17 February 2011
BANGKOK, THAILAND**

**UNDP LAW COMMISSION & HIV: SEVEN LESSONS
FROM BANGKOK**

The Hon. Michael Kirby AC CMG*

FOUR GLOBAL COMMISSIONS

The HIV/AIDS pandemic continues to cause death and suffering throughout the world. The first reports of a new, apparently viral, condition, later described as Acquired Immuno-Deficiency Syndrome (AIDS) occurred in the mid-1980s. The HIV virus, as the causative element, was described soon after. Meanwhile, thousands and then millions of human beings became infected. In 1998, the World Health Organisation (WHO) established the first Global Commission to respond to HIV.

I served on that first Global Commission. It contained leading experts in the scientific, public health, social and legal implications of the epidemic. There were also at least two members living with HIV. Amongst the distinguished members of the Commission were Professors Luc Montignier and Robert Gallo, jointly credited with isolating the virus.

* Commissioner of the UNDP Global Commission on HIV and the Law (2010-); Commissioner, WHO Global Commission on AIDS (1988-92); Member, UNAIDS Reference Group on HIV and Human Rights (2003-); Justice of the High Court of Australia (1996-2009).

They predicted that, within a decade, the world would have a safe and effective vaccine and within two decades, a cure. Sadly, neither of these predictions has proved accurate.

Meanwhile, approximately 2.6 to 2.7 million people become infected with HIV each year. Although anti-retroviral drugs (ARVs), available from the 1990s, substantially palliate the devastating impact of HIV on human beings, their long-term effectiveness is uncertain. A Global Fund has been established to help provide ARVs and other therapies and care to persons who could otherwise not afford them in developing countries.

Following the global financial crisis in 2007-9, the national subventions available for this purpose have fallen below the necessities. The combination of these realities has caused UNAIDS, the Joint United Nations Programme against AIDS, to take new initiatives in concert with other participating agencies. Thus UNAIDS has established a Global Commission on Prevention (2010-). One of the leading participating agencies, the United Nations Development Programme (UNDP), has now established the Global Commission on HIV and the Law. Additionally, international bodies of civil society have created a Global Commission on Drug Policies. The last two bodies are focusing on legal changes that are necessary to promote prevention, care and treatment of people living with HIV and AIDS (PLWHAs).

The UNDP Global Commission, of which I am a member, has resolved to focus attention on legal changes that will help reduce the obstacles to effective strategies to combat the spread of HIV. It has done this on the advice of its Technical Advisory Group (TAG). Its approach has taken

the UNDP Commission into particular areas of vulnerability to infection which it has defined as including:

- * Women and their relevant disempowerment in negotiating activities that expose them to infection;
- * Specially vulnerable groups: including sex workers (CSWs); people who use drugs (IDUs); men who have sex with men (MSM); prisoners, refugees and others;
- * Children and their special vulnerability to the epidemic; and
- * Drug therapies and the particular issues presented for the availability of such drugs to needy populations, including by reason of impediments and expense occasioned by global intellectual property laws.

The UNDP Global Commission had its first meeting in Sao Paulo, Brazil, in October 2010. Its chairman is Fernando Henrique Cardoso, former President of Brazil. The Commission resolved to undertake interactive dialogue meetings in the main regions of the world to gather evidence; secure opinions; encourage participation of government and civil society representatives; and to test common themes. Regional dialogue meetings are shortly to be held in the Caribbean, Eastern Europe, the Arab countries, and Africa.

The first such regional meeting was convened in Bangkok, Thailand, on 16-17 February 2011. It was addressed to governments and civil society in Asia and the Pacific. Four members of the UNDP Global Commission attended the meeting, namely Dame Carol Kidu DBE (Papua New Guinea); Mr. Jon Ungphakorn (Thailand); Mr. Prasada Rao (India – member secretary of the Commission) and myself. In addition, there was participation in the meeting of members of the TAG which UNDP

had established to assist the Global Commission and which had identified the foregoing areas of special focus. Participating members of the TAG included Professor Vitit Muntarbhorn (Thailand) and myself. The leading officials of UNDP with responsibilities to the Global Commission included Dr. Mandeep Dhaliwal and Mr. Vivek Divan. Also taking part were UNDP leaders from the region and well as Ms. Nafis Sadik, United Nations Special Envoy for HIV/AIDS in Asia (UNFPA).

The regional dialogue was preceded by a day's consultation in which Commissioners, UNDP officials and others, participated with government representatives and civil society representatives, meeting separately to refine their submissions in preparation for the regional dialogue. An international press conference was held to draw the existence, and purpose, of the regional dialogue to public attention. These events were followed by the dialogue itself, which was conducted on 17 February 2011, along the lines of a town hall meeting. The participants were greatly assisted by facilitation provided by Nisha Pillai, an experienced global journalist and respected BBC reporter.

The regional dialogue was opened by strong statements provided, in turn, by the Administrator of UNDP (Rt.Hon. Helen Clark), through a recorded message, and the Executive Director of UNAIDS (Dr. Michel Sidibé), attending in person. Each of these agency heads encouraged a dialogue of energetic and candid participation. As a sign of a commitment of UNAIDS to the consultation, Dr. Sidibé was accompanied by senior UNAIDS colleagues, including Mr. Steve Kraus, Ms. Susan Timberlake and Ms. Jane Wilson.

In the following paragraphs appear a number of impressions derived by this reporter. Some of these were expressed towards the close of the dialogue on 17 February 2011. The full record and proceedings will in due course be available. A more detailed report of the dialogue will be provided by Mr. John Godwin (Australia), as Rapporteur. Most of the governments of the region sent representatives who took an active part in discussions. So did the representatives of civil society. The participants reflected the diversity of issues, interests and experience gathered in the dialogue.

The regional dialogue was a success. Packed into the nine intense hours of the interchanges were numerous suggestions, comments, criticisms and ideas. All of these will be collected, analysed and eventually placed with the reports from other regions to provide a unique regional, and ultimately global, perspective on the state of the pandemic; the condition of the relevant laws; the impediments which the laws present to a successful HIV strategy; and the actions that the Global Commission should consider and recommend as a consequence.

There were countless lessons emerging from the Bangkok dialogue. However, seven themes are now expressed which highlight some of the chief lessons that I have derived. Everyone who participated will have his or her own list of issues and ideas. Those that follow are some of mine.

SEVEN LESSONS OF BANGKOK

1. *Need for evidence-based approaches*

Many participants emphasised the need for an evidence-based approach to the particular problem of legal impediments to successful strategies to respond to HIV. Some of those that stand out include:

- * That the UN agencies should co-operate, avoid territorialism and secure integration of the work of the several current global commissions and other bodies (M. Sidibé);
- * That care should be taken not to assume identity, or even commonality, in the problems faced in different countries of the region. For example, punitive laws vary. Strategies must adjust to the diverse issues and laws. Even within a single country, such as Malaysia, differing laws can exist in different states to present different challenges;
- * In some countries, the letter of the law (as in Singapore in s377 of the *Penal Code*) may not necessarily be reflected by active enforcement or prosecutorial practice. Attention only to the letter could therefore be misleading, although the text of laws, even where not enforced, may still promote stigma and discrimination;
- * Different pathways to changing laws and policies were described. Thus, Commissioner Kidu explained the different approaches to secure progress through politics; the law reform agencies; and the judiciary adopted in different jurisdictions;
- * The use of the judiciary has been encouraged by decisions which were recounted including in India (the *Naz Foundation* case¹ concerning MSM), in The Philippines (registration of a GLBT political party), and Pakistan (recognition of transgender rights);

¹ *Naz Foundation v Delhi* [2009] 4 LRC 838 (HC Delhi, India).

- * Particular impediments to legal change were described in some countries, so that, even if (in Malaysia, Pakistan etc) the penal codes were reformed or ruled unconstitutional, Shariah law would remain, to some extent, to reinforce relevant stigma and isolation;
- * Different viewpoints, appropriate to the local environment, were expressed on the priority that should be given to removal of laws against MSM. In New Zealand, such law reform had been seen as the top priority. In Singapore, changes in practice had been achieved, avoiding direct insistence on repeal that might be very difficult to achieve in the short run;
- * Different reports were given on attitudes to transgender citizens ranging from beneficial changes in China to use of police lathis against them in parts of India but accompanied by their separate acknowledgement in the current national census. Although in Pakistan the Supreme Court had ordered the availability of a national identity card to transgender citizens, what it should contain and whether this order will be enforced, was a matter for debate and research;
- * The complexity of the lives of sex workers was explained by reference to differential experience in several countries. Common were the reports of condoms and injecting equipment being cited by police and prosecutors to sustain criminal prosecutions of CSWs, MSM and IDUs in the region;
- * To secure changes in judicial attitudes, several participants recommended study of the course of judicial seminars in India that had preceded the *Naz Foundation* decision. Likewise, the strategies for obtaining changes in attitudes amongst police were the subject of different reports and proposals; and

- * Emphasis was placed on the need to address the differential record of HIV infection before and after legal changes and in countries which had adopted such changes early as compared to those that continued to resist them or adopted them reluctantly and late.

2. *The HIV paradox and rights-based approaches*

In the course of the dialogue, a number of participants addressed the need and utility of rights-based approaches, as well as the intuitive objections to them that continued to surface in government and the community resulting in resistance by law-makers:

- * Vivek Divan explained the HIV paradox and the way in which, paradoxically, protecting the rights of vulnerable groups helped to secure their attention to self-protection, submission to HIV testing and reduction of infections;
- * The particular problem of differential departmental acceptance of the paradox was explained by reference to experience in both Malaysia and India. In the *Naz Foundation* case, opposite submissions were urged on the Delhi High Court by different branches of the Government of India (the Home Department vs. Health Department). The Government of India had elected not to appeal to the Supreme Court, although an appeal had been brought by interveners and is pending;
- * The extent of hostility to the rights-based approach in some Pacific islands was explained. The need to reinforce the utility of this approach should not be assumed but reinforcement was needed by successive generations of leadership;
- * Commissioner Kidu explained the impediments introduced to some Pacific countries by certain (but not all) religious groups and the

fact that these had been absorbed into local “culture”, although they had few links with proved indigenous traditions;

- * Sex worker bodies particularly emphasised the need to protect CSWs and their right to safe working conditions. The differentiation of voluntary adult consenting sex work and human sexual trafficking was repeatedly emphasised, as was the confusion between the strategies being adopted in several countries. The urgent need to remove the use of condoms in proof of illegal sex work was repeatedly addressed; and
- * A Police Inspector-General explained the way police often reflected the intuitive responses of ordinary citizens. He described enlightened strategies that had been adopted in some major centres by police in his country. He suggested that these initiatives might be studied by the Commission as examples of the utility of a rights-based approach and the ways to secure active police support for it.

3. *The economics of HIV and global cost/benefit*

In several submissions, emphasis was laid on the utility of adopting the language of economics rather than human rights. In particular, the adverse economic impact of HIV on younger citizens of working age was stressed. If appeals to human rights were not successful, establishing the potential impact of HIV on the national economy might be more persuasive:

- * Michel Sidibé urged the need for the UNDP Commission and other bodies to adopt a strong, even ‘revolutionary’ approach, given the urgency of the current state of the epidemic and the comparatively limited tools available to respond to it;

- * Several participants referred to the adverse impact of legal impediments upon access to information and services, including HIV testing and ARVs. The consequences of unprotected sex work were potentially devastating in economic terms, not just for the sex workers and their families, but for clients and their economic survival as productive workers in the economy and not as patients in scarce health facilities;
- * One participant, a sex worker, described the embarrassment to which she was subjected in a STD clinic, including questioning, bodily inspections and moralising sermons. She emphasised that such conduct discouraged attendance of sex workers and others at STD clinics, with consequent deleterious effect on the personal responses to HIV; and
- * The importance of securing testing for HIV was widely agreed. However, unless this were done voluntarily, it was likely to be ineffective and only intermittent, with harmful consequences for the overall general strategy.

4. *Legal responses: help or hindrance?*

Many participants recounted the way in which law could be a help, but also a hindrance, to successful HIV strategies:

- * Helen Clark in her opening statement for UNDP explained, by reference to country experience, the way law could sometimes be a help in preventing the spread of HIV. She urged a positive approach and not a negative or pessimistic one;
- * Michel Sidibé strongly repeated his many earlier statements about the urgent need for decriminalisation of laws that stand in the way of effective HIV targeting, especially in relation to CSWs, IDUs and MSM. He referred to the strong support for such strategies given

by the Secretary-General of the United Nations and by the High Commissioner for Human Rights (Navi Pillai, as well as by himself, Helen Clark and other UN leaders and other personalities;

- * Participants described the successful initiatives in legal reform that had been adopted in several countries. The raft of legal changes accepted in New Zealand from the late 1980s was explained; as was the rather more cautious collection of legal changes in The Philippines, some still under consideration after a decade. Participants described the 'bullying tactics' adopted by some religious groups to try to discourage the effectiveness and success of moves to legal reform. The publication on YouTube of a blog 'Things Get Better' had caused large official reactions in response to negative media coverage in several countries;
- * Several participants pointed out that provisions such as s377 of the *Penal Code* did not stand alone. Even if such provisions were repealed or declared unconstitutional, other laws (e.g. laws against pornography or public order laws) might be used, as in Indonesia, to suppress safer sex information;
- * The puzzling problem of securing legal reform in countries heavily influenced by religious beliefs was the subject of much debate and discussion. Studies were recommended of those countries that had secured legal change, despite and frequent opposition of religious groups;
- * Several participants emphasised the justifiability of legal change in laws against MSM, IDUs and CSWs, quite apart from the utility of such laws for the HIV response. However, the Member Secretary of the Commission explained that the mandate of the UNDP Global Commission is confined to the context of the utility of legal change for effective HIV strategies not generally or at large;

- * Several participants described procedures for effective mandatory testing for HIV, including of CSWs. The dangers, inadequacies and adverse consequences of such strategies were referred to by several participants.

5. *The importance of effective communication*

Several participants explained the need for skills in communicating strategies if it were hoped that laws and policies that stand in the way of effective HIV responses would be altered:

- * In Bangladesh, the difficulty of a government party supporting changed policies on vulnerable groups such as CSW, MSM and IDUs, was emphasised by reference to the experience of political opposition to such change;
- * Several speakers emphasised the need to involve and engage with vulnerable groups in discussion of the changes needed, just as New Zealand sex workers were engaged in the discussion about legal reform and Australian gay groups were mobilised to promote behavioural changes on the back of legal reforms;
- * Mr. Sidibé instanced the need to promote harm-reduction policies in Thailand; respond to the up-creep of infections; and the need to make space for civil society organisations to act and to influence government, the media and public opinion;
- * Successful dialogues with key actors was described, e.g. in Quezon City in The Philippines where police had been persuaded to co-operate with AIDS authorities. Such instances might be studied for the lessons they could bring more broadly to the region;
- * The need to sensitise leading judges, police and other officials was suggested by the successful outcome in the Delhi High Court in

Naz Foundation case, in the hands of enlightened and well informed judges who made specific reference to the AIDS implications of the present criminal laws against MSM²;

- * Many participants urged the UNDP Commission to give consideration to the ways in which key decision-makers could meet those most at risk from HIV so as to help alter negative stereotypes and policies based upon them.

6. *Building confidence and securing treatment*

Many participants explained the negative effect of stigma-driven provisions of the law, including new criminal laws and prosecutions for passing HIV in otherwise consensual sexual occasions:

- * Participants emphasised the need to get past stigma so that PLWHAs could acknowledge their status, and be treated as simply another medical condition. The availability of effective ARVs was crucial in this connection;
- * Persuading ‘thought-leaders’ and others in society about where the interests of society truly lay was seen as an urgent priority in responding effectively to the epidemic;
- * Several participants emphasised the particular side effect of ARVs of reducing viral loads and thus reducing the spread of HIV by already infected persons;
- * In the detailed session on intellectual property protections, many speakers drew to the attention of the UNDP Global Commission the very serious combination of events that render the current IP laws specially dangerous for the HIV response. This includes the TRIPS Agreement of the World Trade Organisation; the

² *Naz Foundation v Delhi* [2009] 4 LRC 838 at [18], [63]-[74] per A.P. Shah CJ and Muralidhar J.

widespread negotiation by the European Union and the United States of free trade agreements providing for TRIPS+, including the Anti-Counterfeiting Trade Agreement (ACTA); and the growing evidence of side effects of 'first line therapy' in drugs for which no patent exists or generic substitutes are not available. The growing need to rely on patented 'second line therapy' drugs' was a most urgent problem which should have the highest attention of the Global Commission; and

- * Commissioner Rao emphasised and explained the inter-relationship of human rights respect and effective HIV strategies. He referred to the report of the Commission of AIDS in Asia, *Redefining AIDS in Asia* (OUP, 2008) and the ineffectiveness of expensive and counter-productive strategies involving widespread mandatory testing for HIV. He pointed out that a week after the test, a person could become infected with HIV but be treated as free of the virus because of an immaterial earlier test. Every decade required this point to be reinforced in public and governmental circles of every country.

7. *The need for strategies of hope and confidence*

Finally, many participants urged the need to observe a confident approach to the mandate of the UNDP Global Commission, despite the many obstacles and discouragements that appear to stand in the way of success:

- * It was no use ignoring the obstacles. For example, reliance on constitutional challenges is extremely difficult in countries where those who might challenge are not only subject to psychological pressure to be invisible, but actually susceptible to criminal

prosecution for breaching the law and to violence and stigma by those who would silence them;

- * Similarly, the interface between operating religious law (such as, but not confined to, Shariah law) and civil law makes reform of the one ineffective if the other remains in place. Securing change to religious law in non-secular countries, such as Pakistan, presented special difficulties which the UNDP Global Commission should specifically study;
- * Maintaining a sense of urgency and even a feeling of anger and determination in the face of the oppressive features of legal obstacles could be an effective stimulus to action. Especially in the face of resistance and inaction, there was a continuing need for an energetic and 'revolutionary' approach as urged by Mr. Sidibé;
- * The many stories of serious disrespect towards members of specially vulnerable groups (CSWs, TGs, MSM, IDUs) should act as an encouragement to maintain the pressure of legal and societal change; and
- * The dialogue recognised, and heard stories from, vulnerable groups in the region, not always given priority of attention in the media and even in expert dialogue. These included transgender people, prisoners in incarceration denied access to safe injecting equipment and condoms, as well as sex workers further isolated by 'rescue' raids conducted in the name of anti-trafficking.

A major value of the regional dialogue was seen by many participants as resting on giving an opportunity to the often voiceless, frequently put-down, criminalised, stigmatised and those isolated by patriarchal

attitudes in societies that ignore their right to human dignity, protection against infection and, if infected, access to life-saving ARVs.

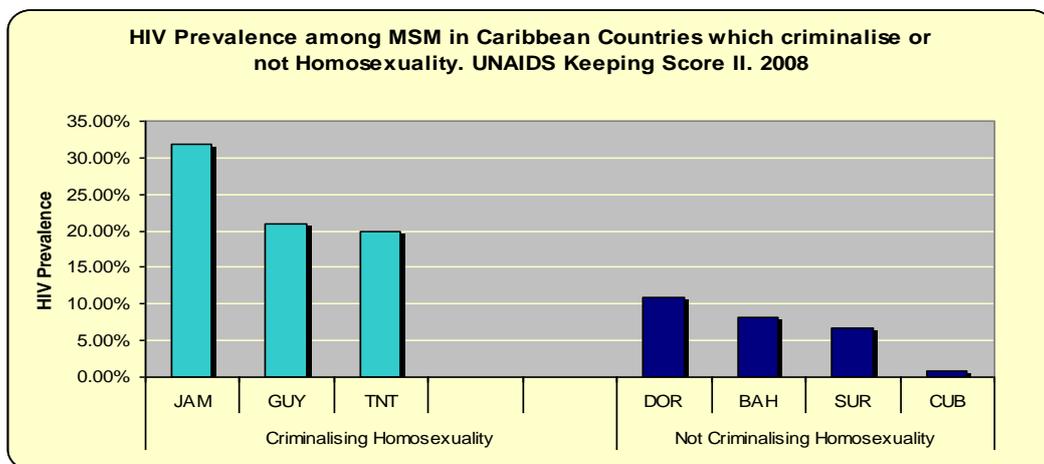
A CALL TO URGENT ACTION AND ACHIEVING CHANGE

The foregoing are only some of the many salient points made by the participants from government and civil society in the Bangkok regional dialogue for Asia and the Pacific for the consideration of the UNDP Global Commission.

Apart from the points collected above, the process of a transparent discussion with key actors in the region is a correct and valuable one. Involving PLWHAs and concerned civil society organisations in the global response to HIV has been a key feature of the United Nations strategy against HIV/AIDS since the beginning, when the Global Programme on AIDS was established by WHO under the late Dr. Jonathan Mann. It was continued by Dr. Peter Piot and strongly endorsed by the present Executive Director of UNAIDS, Michel Sidibé and the head of UNDP, Helen Clark.

Additionally, and exceptionally, the strategies of prevention and legal reform have enjoyed strong support over many years from the Secretary-General of the United Nations, Ban Ki-moon. His repeated, courageous and insistent voice on the need for legal reform has given strength to all United Nations agencies, officers and staff. It gives encouragement to the UNDP Global Commission itself. He is himself from the Asia/Pacific region and is a worthy example and inspiration not only to those in the UN system but also to governments, civil society and ordinary citizens.

As an illustration of the way in which good laws can help reduce levels of HIV in vulnerable populations and bad laws can result in much higher levels of infection, the following graph provided by UNDP to the Global Commission demonstrates, albeit in another region, the importance of the subject matter of the Commission and of the consultation. The same results would exist in the Asia/Pacific region.



In the end, the Global Commission will not, simply by producing a report, be able overnight to change the laws and policies in the Asia/Pacific region and beyond that stand in the way of effective responses to HIV. The laws are too many, too enduring, too strongly supported by special interest groups and sometimes sustained by intuitive responses of ordinary people, formed without knowledge of experiences in countries that have succeeded, and those that have failed, in securing the legal changes necessary to support a successful strategy against HIV/AIDS. As the United Nations Secretary-General has repeatedly said, many of the laws identified in this dialogue are contrary to universal human rights as expressed in the *Universal Declaration of Human Rights*. But they

also make 'no sense' from the viewpoint of public health promotion in the face of the HIV/AIDS pandemic.

The UNDP Global Commission may not succeed overnight in securing the necessary legal changes. But its challenge is to contribute to a change in the thinking of political and other leaders and the people. This will itself require attention to the modes of communication of the messages from events such as the regional dialogue in Bangkok. The fact that the challenge is great, that the risks of failure are large and the consequences of lethargy disastrous, does not exempt any of us from the attempt to achieve and promote change. We know what works. It is our ethical, epidemiological and legal obligation to do what we can to achieve change. The dialogue in Bangkok, and its seven lessons, point us in the right direction.
