Lawyers Collective HIV / AIDS Unit
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POSITIVE DIALOGUE

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"The strategies of acceptance, prevention and treatment can be combined imaginatively to tackle HIV wherever it threatens people in the world. All three elements in the strategy are indispensable, and each of the three supports the other."

Hon'ble Justice Edwin Cameron
Supreme Court of Appeal, South Africa

TALKING ABOUT HIV/AIDS - SENSITISATION OF THE JUDICIARY & LAWMAKERS

For four years now Justice Michael Kirby of the High Court of Australia and Justice Edwin Cameron of the South African Supreme Court of Appeal, two of the foremost international legal minds on HIV/AIDS, have visited India in order to sensitise, build capacity and influence thought among the Indian judiciary and policymakers on critical legal and human rights issues that arise in the context of HIV/AIDS. The judges consider this visit a pilgrimage and approach it with zeal befitting a most treasured sojourn. Their energy is infectious and inspiring, their knowledge breathtaking in scope and illuminating in depth.

In January 2002, such a programme was undertaken with the Lawyers Collective HIV/AIDS Unit in Bangalore, Kochi, Thiruvananthapuram, Mumbai and Delhi. In the past the judges have interacted with the High Court judiciary in Mumbai, lower court judges in Delhi, policymakers in Hyderabad and Bangalore, and High Court and lower court judges in Ahmedabad and Surat respectively. This year interactions with healthcare workers, people living with HIV/AIDS, the sexual minorities' community and NGOs were also incorporated within the programme. This edition of Positive Dialogue highlights some of the important interactions that took place early in the year.

The main purpose of interactions with the judiciary and policymakers is to sensitise them on the need for human rights based approaches while dealing with HIV/AIDS. This includes raising critical legal issues of consent, confidentiality, discrimination and criminalisation of vulnerable populations. The attempt is to explain how isolationist policies and laws in these areas ultimately prove deleterious to a successful response to HIV/AIDS and are contrary to a sound public health structure. In the absence of statutes, as most law in India on HIV/AIDS is rendered through judgments of the courts (i.e. common law), it is important to interact with the judiciary on these issues.

This year the sojourn began in Bangalore where a meeting was organised with the Chief Minister of Karnataka, Mr. SM Krishna. The Chief Minister's attention was drawn to the recommendations of the National Human Rights Commission on the issues of consent, confidentiality and discrimination wherein a rights-based approach was advocated. The judges expressed the need for strong leadership and progressive policies at the state level to deal effectively with HIV/AIDS much like the brave initiatives taken in nations like Australia. Discussion also took place on the possibility of an ombudsman for HIV in Karnataka, particularly in view of the rampant discrimination that takes place in healthcare settings. The issue of expensive medication and the need for the state to look at public sector production of inexpensive drugs was also raised. The judges also mentioned the scourge of quacks and the need to sensitise law enforcement authorities on HIV/AIDS particularly in the context of vulnerable populations such as MSM, sex workers and intravenous drug users. The Chief Minister appreciated the views expressed by the judges. A similar meeting was also held with Chief Minister of Kerala, Mr. AK Anthony in Thiruvananthapuram a few days later.

The judges also addressed a workshop for the High Court and lower court judiciary and the Karnataka Judicial Academy on 'HIV/AIDS: Law & Ethics' in Bangalore. The workshop was inaugurated by the Chief Justice of Karnataka, Justice NK Jain, who highlighted the need for an effective legal response to deal with HIV/AIDS. Justice Kirby addressed the workshop on the nexus between law and HIV/AIDS and the need for a rights-based approach that empowered instead of isolated persons most affected and susceptible to the epidemic. Justice Kirby explained his famous paradox - that the most effective way to control the epidemic is to empower and protect those already infected and those most vulnerable to it. He said that much like his jurisdiction in Australia, where the courts have seen many HIV/AIDS cases come before them, so too in India will courts see an upsurge in litigation especially if inhumane treatment and policies continue to be used. Justice Kirby also highlighted the need to review laws that criminalise traditionally marginalised groups such as sex workers, drug users, children and men who have sex with men. If such review is not done and courageous measures to decriminalise such groups are

not taken, he said, the nation as a whole was likely to see HIV/AIDS spread unabated. He gave the example of Australia where such brave although unpopular steps were taken, but with the farsighted knowledge that lives would be saved. This led to the epidemic being controlled in Australia.

Justice Cameron then explained the legal issues of consent and confidentiality in the context of HIV/AIDS, highlighting how the issues arose in his own life and discussing important international judgments in this regard. Justice Cameron, who has lived with HIV/AIDS for the last 16 years, through his personal example, elicited responses from his fellow judges on the issues of consent and confidentiality. It was a powerful session that brought home the issues in a manner that no amount of theory and reading could. Justice Kirby concluded the workshop sessions by dealing with the issue of discrimination and highlighted certain key international decisions in this regard, including decisions in the context of public, private and armed forces employment. Although it is difficult to assess the impact of such interactions in any concrete manner, it is hoped that the eloquence, experience and knowledge of the visiting judges have a positive effect on the way the Indian judiciary reacts to HIV/AIDS. It has been seen that such past interactions with the judiciary, in Mumbai for instance, have had an extremely positive impact on the manner in which judicial activism has protected the rights of HIV+ people.

The Unit also organised a similar workshop in Kochi for the Kerala High Court judiciary, which was inaugurated by its Chief Justice, Justice BN Srikrishna. Although the workshop was not as well attended as expected, the judges present had intense interactions with Justice Kirby and Justice Cameron on issues traversed in Bangalore. As in Bangalore, some of the judges were not convinced of the legal approach being enunciated by the visiting judges at the outset. But as the workshop progressed some of their views changed. The isolationist approach was one that most judges instinctively supported, propounding isolation, public notification etc. But Justice Kirby and Justice Cameron continued to emphasise the integrationist response - the need for voluntary testing, non-disclosure and anti-discrimination - firmly and with gusto. It was invigorating to witness the intellectual sparring between the participants and the presenters. By disclosing their homosexual orientation, the visiting judges attempted to break down even more barriers.

Another judicial interaction took place in New Delhi at a colloquium on 'HIV/AIDS: Law & Ethics', which was well attended by judges of the Supreme Court of India, High Court of Delhi and lower courts of Delhi as well as NGOs and other organisations. The Chief Guest was Justice Kirpal of the Supreme Court of India and closing remarks were given by the Attorney General, Soli Sorabjee. Justice Michael Kirby and Justice Edwin Cameron gave the main addresses at the colloquium with power, reason and conviction that were awe-inspiring. Again, the judges highlighted the need for an integrationist legal model to deal with HIV//AIDS and even highlighted the issues of criminalisation of vulnerable groups and the need for access to treatment and medication to be dealt with in a way that protected the interest of all Indians, especially in the context of TRIPS and WTO. It is hoped that these brief but intense interactions help in making the judiciary see the need for human rights based approaches being critical to deal with HIV/AIDS in particular and public health issues in general.

The programme of the visiting judges also took in meetings that were not as high brow, but as, if not more, significant than those described earlier. These were meetings with oppressed peoples - sexual minorities on one hand and persons living with HIV/AIDS on the other. They were held in Mumbai and Delhi and the emotion and power of these meetings is hard to put into words. When Edwin Cameron spoke from the heart about his coping with HIV/AIDS, he spoke in English. But his message and feeling transcended language barriers. This was clear in the way he and the audience of people living with HIV/AIDS connected and were inspired by each other. It was a singularly moving experience to be part of these interactions but also empowering. These meetings created opportunities for several people who had no other manner in which to vent their emotions to do the same without fear and with knowledge that they were being heard and understood. They also gave inspiration to those involved with these issues to work even harder to emancipate themselves and others. Appropriately, these meetings concluded with Michael Kirby calling for a minute of silence in memory and thought of thousands of faceless and nameless persons who continue to be oppressed by the misplaced attitudes and stigma they encounter and for those several people who have suffered and passed on without recognition or acknowledgement. For all of us, who know the prejudice that HIV/AIDS creates, there was no better way to strengthen our resolve.

Aadesh adalat ka: On 19 December 2001, the Kerala High Court restrained TA Majeed, proprietor of Fair Pharma, from manufacturing, marketing, selling and advertising by any mode the drug he claims to have developed for curing AIDS, mental retardation, cholesterol and the like, which requires a license. This was ordered while considering a public interest writ petition filed by the state unit of the People's Union for Civil Liberties. The petition sought to stop TA Majeed from manufacturing, marketing and selling any drug claimed to have been developed by him until it had been clinically tested by expert bodies like the National Institute of Communicable Diseases, New Delhi, the National Institute of Virology, Pune and the Centre for Advanced Research in Virology, Vellore.

A legal challenge to the anti-sodomy law in India

Section 377 of the Indian Penal Code, 1860, an anti-sodomy law and a vestige of the British criminalises acts of oral and anal sex committed either between a man and a man, a man and a woman or a man and an animal. Substantively the act applies equally to homosexuals and heterosexuals and does not differentiate between consensual and coercive sexual activities. Although S.377 does not criminalise homosexuality, it is mostly used as a tool to harass and abuse sexual minorities.

The Naz Foundation (India) Trust, an NGO working on issues of HIV/AIDS with men who have sex with men (MSM) in New Delhi, filed a writ petition, challenging the constitutional validity

of this section, in the Delhi High Court in December 2001 on grounds, inter alia, that:

1. S. 377 is a major impediment to carry out HIV/AIDS intervention work with the MSM community as it drives high risk behaviour in terms of unprotected anal and oral intercourse underground and beyond the reach of safe sex interventions.

2. It violates the fundamental rights to privacy and equality of sexual minorities, guaranteed to every citizen of India under its Constitution.

The respondents to the petition are the Government of Delhi, Union of India, Commissioner of Police, Delhi, the Delhi State AIDS Control Society and National AIDS Control Organisation.

Lawyers Collective HIV/AIDS Unit drafted the petition for Naz India. The petition seeks a reading down of S. 377 to cover only non-consensual sexual activities (thus excluding consensual sexual activities between adults). The petition also seeks interim relief that pending final hearing and disposal, the Delhi police will stay the implementation of S. 377. A division bench of the Delhi High Court has asked the respondents to file their replies and has asked the Attorney General to appear in the matter on the next date of hearing i.e. 23 April 2002.

An update on TRIPS developments....

From 14-19 November 2001 the World Trade Organisation's (WTO) Ministerial Round took place in Doha. The meeting addressed the issue of Public Health and the TRIPS agreement, wherein it reiterated that intellectual property protection is important for the development of new medicines. However, in what can be seen as some progress for those who are concerned with the monopolistic regime that TRIPS will create and the impact that will have on affordability of medicines, the Doha meeting recognized the concerns about TRIPS effect on accessibility to medicines. The ministerial round agreed that the TRIPS Agreement does not and should not prevent member countries from taking measures to protect public health. It affirmed that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all. In this connection, the ministerial round reaffirmed the right of members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

... and the Affordable Medicines & Treatment Campaign (AMTC)

The AMTC (reported in Positive Dialogue #11), a national campaign seeking the full realisation of the right to health, including affordability and accessibility of medicines and treatment, was formally launched on the occasion of World AIDS Day on 1 December 2001 in Mumbai, Delhi and Bangalore. In Mumbai AMTC was launched with a press conference where speakers from various NGOs working on HIV/AIDS, development issues such as TRIPS, people living with HIV/AIDS and doctors expressed their solidarity with the campaign. They explained the need for dialogue with various sectors including government, in order to arrive at a situation where Indians have access to medication necessary for dealing with HIV/AIDS and any other health crises of the future. They also explained the deleterious impact of TRIPS and the need to convince the Indian government to legislate in the interest of its citizens. The press conference also saw the launch of an AMTC leaflet in Marathi, Hindi and English. In Delhi, the AMTC launch was marked by three activities - a public meeting, a march and finally a candle light vigil. Although present and future drug prices in the context of TRIPS are significant issues with respect to the right to treatment, the experiences of speakers at the public meeting, some of whom were HIV-positive, drew attention to discrimination in the public health system and its inaccessibility as being the pressing factors making treatment completely inaccessible. This was followed by a silent march from the venue of the meeting to Jan Path, a crowded, central area of New Delhi. Along the way, AMTC leaflets and pamphlets in Hindi and English were widely distributed to passers-by. The march converged with a candle light vigil at Jan Path. A similar march was held by individuals and organisations in Bangalore to highlight the launch of the AMTC. It is hoped that the AMTC will be a forum that will allow for the expression of public concerns around issues of public health and affordability and accessibility of medicines and also be a movement that will engage with government and other sectors about its concerns.

Preventing mother-to-child transmission (MTCT) in India...

An easy and efficacious drug treatment that prevents mothers from transmitting HIV to their babies and may also help in preventing the spread of the epidemic was discovered in the year 2000. In this therapy a single dose of Nevirapine, administered to a woman just before she delivers, and one dose to the baby soon after birth, reduces the risk of the baby getting infected with HIV from 25% - 30% to 2% - 8%. In a developing country like India, where cost factors play an important part, this treatment can help to save many infants from getting HIV - it costs only Rs. 200 per mother and child. The National AIDS Control Organisation (NACO) and UNICEF held national trials of Nevirapine to see whether MTCT can be brought down. The study started in March 2000 and ended in March 2001. Eleven hospitals were chosen for the study in high prevalence states - Andhra Pradesh, Maharashtra, Tamil Nadu, Karnataka, Manipur and Nagaland. In a much overdue response to the issue of MTCT, the Indian Health Minister Mr. CP Thakur announced that from 1 January 2002 short term Zidovudine and Nevirapine would be provided free of cost to HIV-positive pregnant mothers for prevention of mother to child transmission in all public hospitals. This long awaited announcement needs to be implemented immediately to prevent the further spread of HIV/AIDS.

... and judicial action in South Africa

In South Africa, which has the largest number of people living with HIV/AIDS, HIV-positive people came together under the

umbrella of the Treatment Action Campaign (TAC) to demand Nevirapine treatment for prevention of MTCT. Earlier, the South African government decided to make Nevirapine available at 18 pilot sites, which served only 10% of the population. In July 2001 TAC wrote to the government demanding accessibility to Nevirapine in all public hospitals. But when the South African government did not act on this demand, a class action was instituted in the South African High Court in August 2001 regarding dispensing of Nevirapine to pregnant HIV-positive women who give birth in public health institutions. A declaratory order was sought to make the government obliged to provide Nevirapine to such women where it was medically indicated. Relief was also sought to compel the government to produce and implement an effective national programme to prevent/reduce MTCT of HIV. In a judgment delivered on 14 December 2001, the Court held that the policy in prohibiting the use of Nevirapine outside the pilot sites in the public health sector was unreasonable and an unjustifiable barrier to the realisation of the right to healthcare. It also directed the government to make Nevirapine available to pregnant HIV-positive women delivering in public healthcare facilities and ensure appropriate testing and counselling. The government was also directed to forthwith plan an effective and comprehensive national programme to prevent MTCT of HIV including provision of Nevirapine and formula milk for feeding babies. (For a copy of the judgment go to www.tac.org.)

Contributions: Vivek Divan, Sona Salvi, Nidhi Dubey and Alok Gupta

Monthly Drop-in meeting

Lawyers Collective HIV/AIDS Unit holds monthly drop in meetings on the first Thursday of each month. The meetings start at 3.30 p.m. at the Delhi Office and at 5.00 p.m. at the Mumbai Office. The objective of the meeting is to share experiences, information and discuss issues of concern. We invite your active participation in these meetings.

Lawyers Collective HIV/AIDS Unit provides legal aid and allied services for people affected by HIV/AIDS. The main objective of the Unit is to protect and promote the fundamental rights of persons living with HIV/AIDS, who have been denied their rights in areas such as:

- Health care
- Employment
- Terminal dues like gratuity, pension
- Marital rights relating to maintenance, custody etc
- Housing

The Unit is involved in initiating public interest litigation on issues like the right to marry, confidentiality, access to health care, safe blood supply, quacks, etc. Lawyers Collective HIV/AIDS Unit also conducts workshops on legal and ethical issues relating to HIV/AIDS for people living with HIV/AIDS, lawyers, judges, health care providers, NGOs etc.

Please send your comments and queries to the addresses given below. Those affected by HIV/AIDS seeking legal aid; advice and support are welcome to contact us at:

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