Contagion Politics: Queer Rights Claims, Biopower and the “Public Health” Rationale for the Repeal of Sodomy Laws

Neil Cobb*

This paper explores the increasing use of “public health” rationales in advocacy for the repeal of national sodomy laws, which justify decriminalisation in terms of managing the global AIDS pandemic and in particular reducing the onward sexual transmission of HIV. The paper frames these rationales as an illustration of the influence of biopower on human responses to the pandemic, or power directed towards the advancement of the health and welfare of bodies and populations. The paper acknowledges the strategic value of the public health rationales, especially in the face of resistance by many conservative nation states to traditional liberal human rights arguments for repeal. However, the paper then proceeds to highlight the potential dangers of over-reliance on the rationales by questioning whether they can offer a sufficiently inclusive, sustainable and progressive basis for contemporary queer rights claims.

In October 2011, the city of Perth, Australia, played host to the fortieth Commonwealth Heads of Government Meeting.¹ Two years earlier, in Trinidad and Tobago, the Heads of Government had agreed in an Affirmation of Commonwealth Values and Principles to establish an Eminent Persons Group made up of experts drawn from the member states with a mandate “to undertake an examination of options for reform in order to bring the Commonwealth's many institutions into a stronger and more effective framework of co-operation and partnership.”² The Eminent

* Lecturer in Law, School of Law, Durham University, England and co-convenor, Research Centre on Gender & Law at Durham (GLAD) <n.a.cobb@durham.ac.uk>. Thanks go to Professor Aoife Nolan and Professor Carl Stychin, to the two anonymous referees, and to the Editors-in-Chief of the Jindal Global Law Review, for their helpful comments and suggestions on an earlier draft.


Persons Group submitted its final report in Perth, the Foreword to which summarised the main challenge faced by the organisation: “a growing perception that the Commonwealth has become indifferent because it fails to stand up for the values that it has declared as fundamental to its existence.” The report proposed primarily in response the need for a new Charter of the Commonwealth and for the appointment of a Commonwealth Commissioner for Human Rights, Democracy and the Rule of Law. However, several of its recommendations also offered advice on the joint approach the Commonwealth might take to tackle the high prevalence of HIV/AIDS across its member states.

In a section of the report entitled “Advocacy on HIV/AIDS: A Commonwealth Health and Economic Development Priority,” the authors drew attention, among other problems associated with the response to HIV/AIDS, to “criminal laws in many Commonwealth countries that penalise adult consensual private sexual conduct including between people of the same sex.” The report continued:

> These laws are a particular historical feature of British colonial rule. They have remained unchanged in many developing countries of the Commonwealth despite evidence that other Commonwealth countries have been successful in reducing cases of HIV infection by including repeal of such laws in their measures to combat the disease. Repeal of such laws facilitates the outreach to individuals and groups at heightened risk of infection.7

In the section’s closing paragraphs, the authors proceeded to recommend that “Heads of Government should take steps to encourage the repeal of discriminatory laws that impede the effective response of Commonwealth countries to the HIV/AIDS epidemic.”

The report received a frosty reception when it was submitted formally to the Heads of Government in Perth, especially its proposal to appoint a Human Rights Commissioner who would have been empowered to investigate human rights abuses by individual states. Consequently, some nations, including India, took steps to suppress the report’s findings by preventing its publication.9 The report was eventually released but many

4. Id. at 14.
5. Id. at 98–102.
6. Id. at 99.
7. Id. at 100.
8. Id. at 102.
of the recommendations were nevertheless rejected outright or put on hold. While the specific recommendation to repeal national sodomy laws had been strongly supported by the Commonwealth Secretary-General, Kamalesh Sharma, and state representatives including the UK’s Foreign Secretary and Member of Parliament William Hague in earlier speeches to the Commonwealth People’s Forum, the recommendation was referred by the Heads of Government to a Task Force of Ministers for more detailed advice which will be presented to Commonwealth foreign ministers for further discussion at their next summit in September 2012.

The Eminent Persons Group report’s criticism of sodomy laws across the Commonwealth reflects the positioning of these laws increasingly as sites of contestation in local and global forums. Not only do many state penal codes still retain and enforce sodomy laws (most often laws introduced to postcolonial states by earlier imperial powers) but conservative backlash in several countries has led to the more recent imposition of new or strengthened criminal sanctions against homosexuality. Uganda is the most well-known (though certainly not the only) recent example. In 2009, the Ugandan Parliament debated an Anti-Homosexuality Bill which would have strengthened offences against homosexual sex, including the death penalty for “aggravated homosexuality.” The Bill was dropped after international condemnation but has been recently laid down again for debate.

13. COMMONWEALTH SECRETARIAT, supra note 10.
14. “Sodomy law” for the purpose of this paper is used as shorthand for all forms of criminal liability used to regulate consensual adult sexual activity between people of the same sex. Repeal of sodomy laws may not end discrimination against queer subjects under criminal law. Even when countries decriminalise private same-sex sexual acts they can continue to impose higher ages of consent for those acts. Also, the decriminalisation of consensual same-sex acts between adults in private often leaves in place other ancillary offences that can be used by the state to continue to police gay sex aggressively in public spaces.
That the Commonwealth has been forced by the report to confront the problem of sodomy laws across its member states is both understandable and welcome. No less than 46 out of the 76 countries that presently impose outright bans on homosexuality (including Uganda) are Commonwealth member states and the vast majority of these offences were introduced to national penal codes under British colonial rule.\textsuperscript{17} The Commonwealth’s muted response to the punitive treatment of queer subjects by member states has led previously to accusations that it remains “a bastion of homophobia.”\textsuperscript{18} The specific recommendation on sodomy laws in the Eminent Persons Group report suggests that, to an extent at least, criticisms of this kind are beginning to be taken seriously. Moreover, while the Heads of Government may have failed to reach agreement on the proposal in Perth, this has not stopped some member states from taking unilateral action in defence of its aims. Shortly after the 2011 Heads of Government Meeting, for instance, UK Prime Minister David Cameron threatened (controversially) to withdraw aid unilaterally from recalcitrant Commonwealth countries with poor gay rights records.\textsuperscript{19}

What remains most interesting about the Eminent Persons Group recommendation on sodomy laws, however, is the primary justification it proposes for decriminalisation across member states. Historically, struggles to repeal these laws have drawn on the liberal political and civil rights of privacy, equality and dignity for support.\textsuperscript{20} There exists now a canon of decisions by political and judicial bodies in which sodomy laws have been challenged successfully on these constitutional or human rights grounds.\textsuperscript{21} Conversely, the Eminent Persons Group report is


significant because it develops a mode of reasoning – found increasingly in both international and national legal and political norms – that ties the justificatory basis for the repeal of sodomy laws to tackling HIV/AIDS and, in particular, the aim of reducing the onward transmission of HIV. Moreover, India is no stranger to this form of argument; perhaps the most striking and significant example of the “public health” rationale for decriminalisation is the litigation that led in July 2009 to the judgement of the Delhi High Court in Naz Foundation, in which Section 377 of the Indian Penal Code (another British colonial export) was read down to decriminalise consensual sexual activity between adults of the same sex in private after the High Court accepted that the offence infringed several fundamental rights guaranteed by the Indian Constitution.22 I return to the approach in Naz Foundation in more detail below.23

More generally, this paper considers the wider implications of the public health rationale as a basis for advocacy, with particular focus on the repeal of national sodomy laws. While acknowledging the obvious strategic potential of the rationale in effecting material change, I admit to some ambivalence about its growing influence and I question whether recourse to the rationale can provide a suitably inclusive, sustainable and progressive basis for contemporary queer rights claims.

In the first part, the paper traces the public health rationale from its origins in the early human rights and health movement to its present position as official policy in the advocacy strategies of the UN Joint Programme on HIV and AIDS (UNAIDS) and its co-sponsors, and now as the basis for queer rights claims within the Commonwealth. Subsequently, it proposes that the public health rationale illustrates what Foucault described as biopower directed towards the advancement of the health and welfare of populations and the governmentality of the state that this advancement demands. It will be shown how biopower operates through global public health norms. These norms, legitimised by expert knowledge, now encourage nation-states to dismantle repressive

---

22. Naz Foundation v Delhi and Others, 2009 4 L.R.C. 838 (Del.).
23. See generally 2 (q) Nuss L. Rev. (2009) for useful explanations in this special edition of how the judgement in Naz Foundation v Delhi and Others has developed the scope of Indian constitutional law.).
sovereign systems of criminal justice in order to facilitate the more subtle, productive forms of disciplinary/governmental interventions by public health experts which under these conditions of biopower govern over and through bodies and populations judged to be at heightened risk of HIV infection.

In the second part, the paper raises three concerns with the public health rationale. First, it argues that the rationale depends for its political (bio)power on the exploitation of the state’s fear of contagion by the queer subject and the exclusionary logic of securitisation, as opposed to citizenship, that this provokes. As such, even if the rationale persuades states to repeal their sodomy laws, it does so by (re)constituting queer subjects implicitly as anti-citizens or the enemy within, positioned in opposition to the heteronormative family and nation. In addition, by marking queer subjects as risks to be managed, the rationale may simply further reinforce the state’s urge to criminalise, given that sodomy laws continue to be entrenched and indeed strengthened by states in part on public health grounds. Finally, by inducing the state’s fear of contagion, the rationale works to silence those queer subjects, most notably lesbian women, who are unlikely to be understood as sufficiently threatening to require legal protection on public health grounds. In turn, the paper concludes that while the rationale may have short-term strategic potential, to avoid these pitfalls it must be framed as far as possible by representations of the queer subject conceived not simply as a threat to be securitised, but rather as a source of value or, in the words of Geeta Patel, as “a life lived differently; as a sustainable life.”

II. THE PUBLIC HEALTH RATIONALE IN GLOBAL AND LOCAL FORUMS

Advocacy Around Sexual Orientation and Gender Identity before the UN

In June 2011, just a few months before the Commonwealth Heads of Government Meeting, the UN Human Rights Council passed a resolution, proposed by South Africa, which instructed the UN Commissioner for Human Rights to prepare a report on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity in all regions of the world. This resolution, and

---


the report that followed in November 2011, are the culmination of a period of significant developments in advocacy relating to sexual orientation and gender identity within the political bodies of the UN since the early years of the twenty-first century. Beginning in 2005, a succession of joint statements have been read out on behalf of signatory states before the Human Rights Council and the General Assembly, condemning state discrimination on grounds of sexual orientation and gender identity. Support for these statements has grown over time; the last was delivered by Colombia to the Human Rights Council in March 2011, on behalf of 85 states; the first, delivered by New Zealand to the Commission on Human Rights, was signed by just 32.

Mobilisation at this supranational level has also influenced a shift in activism in (primarily Western) municipal settings towards global queer concerns, as the UK illustrates. Two new UK NGOs were founded with much fanfare in 2011 with remits to promote gay rights internationally. One NGO, the Human Dignity Trust, was set up specifically to challenge existing state sodomy laws in national and international courts. Since then, Stonewall, the most influential gay rights NGO in the UK at present, has announced it will be expanding its own remit for the first time to include lobbying for gay people abroad. This increasingly


global approach to queer rights activism among Western NGOs is to be
welcomed especially in light of recent research that has drawn attention
to how activists and NGOs in the Global South often face chronic under
funding, isolation and persecution.  

While the joint statements indicate the commitment of an increasing
number of member states to global advocacy around issues of sexual
orientation and gender identity, it is perhaps unsurprising that it has been
more difficult to secure the formal agreement of the UN's political bodies
to address these issues. The Yogyakarta Principles provide a model for a
future comprehensive international human rights framework for queer
subjects. However, the moral and religious conservatism of many states
means that, predictably, they have regarded with suspicion and resisted
aggressively any attempt to challenge hegemonic sexual or gender
norms through formal UN resolutions, usually asserting that cultural
sensitivities around issues of sexual orientation and gender identity
must be respected in an effort to challenge the universality of human
rights in relation to queer subjects. There has been some progress in
specific areas. For instance, since 2000 the biennial resolutions of the
Commission on Human Rights condemning extra judicial, summary
or arbitrary executions referred explicitly to sexual orientation (but not
gender identity), although it was only after considerable wrangling that
sexual orientation was included in the first such resolution passed by
the General Assembly in 2010. At this point in time, however, no UN
political body has resolved to challenge specifically the systematic state
persecution of queer subjects legitimised by the existence of national sodomy
laws.

It has been left instead to the joint statements to demand that
states “take all the necessary measures, in particular legislative or
administrative, to ensure that sexual orientation or gender identity may

under no circumstances be the basis for criminal penalties, in particular executions, arrests or detention.” In this respect (as is so often the case), the UN political bodies continue to lag some way behind the decisions of the UN’s expert treaty institutions. In fact, the basis for repeal of sodomy laws under international human rights law was established almost two decades ago by the Human Rights Committee in Toonen v Australia, in which the Committee found that sodomy laws then still in place in the Australian state of Tasmania breached the right to privacy and the right to non-discrimination guaranteed by the International Covenant on Civil and Political Rights.40

Moreover, what also remains significant about the opinion of the Human Rights Committee in Toonen is the attention the Committee paid in its reasoning to the relationship between sodomy laws and global efforts to address HIV/AIDS. The Tasmanian government had argued that the retention of its sodomy laws “was partly motivated by a concern to protect Tasmania from HIV/AIDS.”41 The Committee roundly rejected this submission, noting the opposing view of the Australian government that criminalisation actually undermined the goals of public health “by driving underground many of the people at the risk of infection,” before concluding that sodomy laws ran “counter to the implementation of effective education programmes in respect of HIV/AIDS prevention.”42

Implicitly at least, the resolutions by the General Assembly relating specifically to the global response to HIV/AIDS lend further support to the public health rationale for the repeal of sodomy laws. The Millennium Development Goals in 2000 refocused the UN’s attention on tackling HIV/AIDS and the General Assembly went on to issue several declarations relating to the pandemic over the course of the following decade. Its first Political Declaration on HIV/AIDS in 2001 reaffirmed the health and human rights approach to HIV/AIDS, “that the full realisation of all human rights and fundamental freedoms for all is an essential element in the global response to the HIV/AIDS pandemic,”43 before acknowledging


41. Id. ¶ 6.5.

42. Id. ¶ 8.5.

the need “to eliminate all forms of discrimination against, and to ensure
the full enjoyment of all human rights and fundamental freedoms by
people living with HIV/ AIDS and members of vulnerable groups.”44
Similar statements were included in later resolutions by the General
Assembly in 2006,45 and most recently in 2011.46 The 2011 Declaration
also referred for the first time explicitly to men who have sex with
men, or MSM, as a statistically vulnerable group, requiring particular
surveillance and intervention by member states.47

However, none of the Declarations have endorsed explicitly the
public health rationale for the repeal of sodomy laws. It has been left
instead to the UNAIDS and its co-sponsors to make the case for repeal.
The International Guidelines on HIV/AIDS and Human Rights, issued jointly
by Office for the High Commissioner on Human Rights and UNAIDS
in 1998, and consolidated in 2006, reiterate that sodomy laws “not only
[interfere] with the right to privacy but [...] also [impede] HIV/AIDS
education and prevention work,” and include repeal as one of their
recommendations to national governments.48 UNAIDS has also paid
close attention to MSM as a specific risk population and has consistently
noted that prevention work within this group is especially affected by
these laws.49 More recently still, it has identified transgender people,
specifically those who are male-to-female transgender (MtF), as a risk
population, which does not necessarily identify with the population
MSM but which is also at heightened risk of infection with HIV and
in relation to which HIV prevention efforts are set back similarly by
sodomy laws.50

44. Id. ¶ 58.
45. G.A. Res. 60/252, U.N. Doc. A/RES/60/252, 15 June 2006, ¶ 29 (Political Declaration on
47. Id. ¶ 29; See also Saiz, supra note 36, at 58 (Proposed references to MSM in the first
Declaration on HIV/ AIDS in 2001 were removed during debate, demonstrating the
significance of inclusion of MSM in 2011.).
48. Office for the UN High Commissioner on Human Rights & UNAIDS, International Guidelines on
50. UNAIDS, Action Framework on Universal Access for Men who have Sex with Men and
Importantly, the public health rationale promulgated by UNAIDS supports other queer rights claims in addition to the repeal of sodomy laws. The UN General Assembly’s *Political Declarations on HIV/AIDS* have reiterated the need “to eliminate all forms of discrimination against [...] vulnerable groups.” In turn, UNAIDS has focused not merely on the effect of the criminalisation of sexual activity on the global response to HIV/AIDS but also the wider role that municipal law reform can play in addressing the stigma and discrimination faced by these groups in all aspects of their lives. For instance, the *International Guidelines* recommend that states should enact anti-discrimination laws designed to protect not only those people living with HIV/AIDS, but “groups made more vulnerable to HIV/AIDS due to the discrimination they face.”51 The *Guidelines* also advocate specific measures to protect MSM using the public health rationale, including “penalties for vilification of people who engage in same-sex relationships,” granting “legal recognition to same-sex marriages and/or relationships,” ensuring that “[t]he age of consent to sex and marriage [is] consistent for heterosexual and homosexual relationships,” and reviewing “[l]aws and police practices relating to assaults against men who have sex with men [...] to ensure that adequate legal protection is given in these situations.”52 The Guidelines contend that without doing so the stigma and discrimination against MSM will continue to reduce their capacity to manage their greater risk of infection and onward transmission.

By 2010, in its *Strategy for 2011-15*, UNAIDS had identified the repeal of sodomy laws for the first time as a “priority area,” and committed itself to halving by 2015 the countries that criminalise consensual sexual activity between adults of the same sex.53 This commitment marks the high point in global advocacy by UNAIDS in support of decriminalisation. Such advocacy draws for support on successive agreements by the General Assembly reaffirming the need to address stigma and discrimination against vulnerable groups to tackle HIV/AIDS and illustrates the growing significance of the public health rationale in these global forums. The rationale was supported again most recently in the 2010 Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health which made the public health case for the global repeal of sodomy laws but on the

51. *OHCHR & UNAIDS, supra* note 48 ¶ 22 (a).
52. Id. ¶ 22 (b).
additional ground that such laws infringe the right to health enshrined under Article 12 of the Covenant on Economic, Social and Cultural Rights.\textsuperscript{54}

It was against this backdrop of UN advocacy deploying the public health rationale that the Commonwealth Eminent Persons Group was moved to use the rationale in its own arguments in favour of repealing sodomy laws across the Commonwealth, which it presented to the Perth Heads of Government Meeting in 2011. After explaining that national sodomy laws were undermining efforts to tackle HIV/ AIDS, it added that "the importance of addressing this matter has received global attention through the United Nations."\textsuperscript{55} Moreover, there is also evidence of the influence of the public health rationale developed within these UN institutions in more local settings. In particular, the rationale played a decisive role in the litigation that led the Delhi High Court in July 2009 to read down Section 377 of the Indian Penal Code, criminalising "unnatural offences," to permit sexual activity between consenting adults of the same sex in private with apparent effect across India.\textsuperscript{56} It is the judgement in \textit{Naz Foundation}, and the socio-political context that shaped it to which I now turn.

\textit{Naz Foundation: India and the Public Health Rationale}

The reading down of India's sodomy law by the Delhi High Court occurred at a significant moment in India's own queer history.\textsuperscript{57} Despite Section 377's British colonial origins,\textsuperscript{58} and the evidence


\textsuperscript{55} \textit{Commonwealth Secretariat}, infra note 2, at 100.

\textsuperscript{56} Jasmine Joseph, \textit{Divided Laws in a Unified Nation: Territorial Application of High Court Decisions} 2 (3) \textit{NUJS L. Rev.} 471 (2009) (explaining that while it has been assumed by most commentators that the judgement now has territorial effect across India this is not unequivocally clear.).


of greater acceptance in pre-colonial Indian society of a diversity of indigenous sexual and gender identities, meanings and practices,\textsuperscript{59} India today remains a site of entrenched homophobia and transphobia, compounded by a re-emergent right-wing nationalist Hindu politics, which presents non-heteronormative sexualities and genders as the products of imported Western decadence. However, since the last part of the twentieth century, as several authors have begun to trace, queer lives have become increasingly visible in India, although not without attracting controversy and sometimes violent reaction.\textsuperscript{60} As Narrain and Bhan suggest:

\begin{quote}
[\text{there is a sense of freedom in the lives of many queer people in India today. It is a hesitant freedom for none of us can afford to forget how fragile the few accepting spaces we inhabit are, of how few of us have access to them.}\textsuperscript{61}
\end{quote}

More importantly, these authors also recognise that queer visibility has been primarily "mediated through globalisation" after the liberalisation of the Indian economy in the early 1990s.\textsuperscript{62} Globalisation also acted as a catalyst for the emergence of an incipient queer rights activism, although in a form different from that typically found in the West, grounded as it has been in the work of international AIDS-related NGOs.\textsuperscript{63} At the time of the \textit{Naz Foundation} litigation "there was as yet no community of people of alternative sexualities. Many of the activist groups were still at an embryonic stage of development having arrived on the scene after Naz initiated its work on the petition."\textsuperscript{64} Instead, as Kole observes, queer activism was rather "intimately linked to HIV/AIDS funding,"\textsuperscript{65} which fuelled the rapid growth of AIDS-related NGOs following the liberalisation of the Indian economy. As an indication of their influence in India today, between the 1990s and 2005, international investment in AIDS-related NGOs grew from 19 million to an astonishing 608 million US dollars.\textsuperscript{66} Kotiswaran explains that:

\begin{quote}
\end{quote}

\textsuperscript{59.} Queering India: Same-sex Love and Eroticism in Indian Culture and Society (Ruth Vanita ed., 2002); Same-sex Love in India: Readings from Literature and History (Ruth Vanita & Saleem Kidwai eds., 2000).
\textsuperscript{61.} Arvind Narrain & Gautam Bhan, Introduction, in Because I Have a Voice: Queer Politics in India 1 (Arvind Narrain & Gautam Bhan eds., 2005).
\textsuperscript{63.} Id.
\textsuperscript{64.} Ramasubhan, supra note 57, at 102.
\textsuperscript{65.} Kole, supra note 62, at 9.
international efforts to prevent the spread of HIV/AIDS have led to the increased circulation of services and capital and to the establishment of a nation-state/foreign donor/civil society complex. This complex is remarkable for its innovation of public-private partnerships, so that there is a blurring of boundaries between the state and civil society.67

As such, queer rights activism in India in effect “came into existence piggy-backing on the AIDS crisis.”68 It is unsurprising therefore that both the litigant in the successful public interest challenge against Section 377, and the litigant that filed an earlier petition in 1994,69 were AIDS-related NGOs.

The successful litigant, Naz Foundation, was founded in London, but opened its first Indian office in Delhi in 1994, with a specific mandate to improve HIV prevention among MSM. As Narrain notes, while Section 377 “[had] been rarely used” to prosecute cases of sex between MSM it “[provided] the legitimacy for the police to arrest, blackmail, sexually abuse, and 'out' any individual they [considered] to be violating [the law].”70 The specific impetus for Naz Foundation’s challenge to Section 377 was the 2001 Lucknow incident, in which the offices of Naz Foundation and another NGO in Uttar Pradesh were raided by the police and safer sex material for prevention work with MSM and transgender people was confiscated on suspicion of facilitating offences under the provision.71 The incident highlighted dramatically the impact of India’s sodomy law on the HIV prevention work of Naz Foundation and other AIDS-related NGOs. This was not the only example of Section 377’s chilling effect on prevention work. An earlier unsuccessful petition against Section 377 by AIDS Bhedbhav Virodhi Andolan in 1994 had focused on the refusal of Delhi’s Tihar Jail to distribute condoms to prisoners to prevent the spread of HIV on the ground that it would amount to encouraging offences under Section 377.72

---

66. Id. at 6.
70. Id. at 151.
71. Id. at 152-154.
72. Id. at 155.
Following the Lucknow incident, Naz Foundation began proceedings before the Delhi High Court, with the support of the coalition “Voices against 377” and the HIV/AIDS Unit of the Delhi-based Lawyers’ Collective. While the brief in *Naz Foundation* was couched in the language of fundamental rights guaranteed by the Indian Constitution, the litigation was shaped more broadly by the public health rationale for the repeal of sodomy laws, which proved to be a powerful strategic ground for challenge to Section 377. The Ministry for Home Affairs reiterated throughout the course of the litigation that its defence of Section 377 reflected Indian morality and sexual mores. However, in an affidavit submitted by the National AIDS Control Organisation (NACO), on behalf of the Ministry for the Family and Home Affairs, the Union of India supported the reading down of Section 377 on public health grounds.

NACO had faced criticism in the past for implementing repressive policies to address the HIV epidemic in India but in more recent years it had increasingly integrated itself into the global health and human rights framework applied to HIV/AIDS by UNAIDS. Indeed, in 2006, NACO agreed to host the UNAIDS International Consultation on MSM and HIV, at which the Director of UNAIDS openly criticised the criminalisation of same-sex sexual behaviour in India. Soon after, the Prime Minister of India in a public speech voiced his own support for reforming Section 377 to address the Indian epidemic.

In its 2009 judgement, handed down eight years after the litigation began, the Delhi High Court developed the fundamental rights to privacy, equality, and dignity to find that Section 377 was unconstitutional. It supported its decision with reference to the canon of national and supranational judicial and quasi-judicial decisions in other jurisdictions in which sodomy laws had been declared unlawful or otherwise contrary to human rights norms, including Europe, the United States, South Africa, Fiji, Nepal, and by the UN Human Rights Committee. However, the

---


74. *Naz Foundation v Delhi and Others* 2009 4 L.R.C. 838 (Del.), ¶ 15.

75. Id. ¶ 66.


77. *Naz Foundation v Delhi and Others* 2009 4 L.R.C. 838 (Del.), ¶ 66.

public health rationale was also integrated into the Court's reasoning throughout the judgement. For instance, in response to the claim by the Ministry for Home Affairs that Section 377's interference with fundamental rights was justified by the compelling state aim of enforcing public morality, the High Court concluded that: "[t]he compelling state interest rather demands that public health measures are strengthened by decriminalisation of such activity, so that they can be identified and better focused upon." In addition, by finding that Section 377 infringed not only the civil and political rights of privacy, equality and dignity guaranteed by the Constitution but also the Constitution's nascent right to health, the High Court located the public health rationale as the basis for its own independent rights claim.80

The success of Naz Foundation demonstrates the potential of the public health rationale for queer rights claims aimed at overturning remaining state sodomy laws. The rationale was well-suited to the cultural, political and legal landscape in India. It seems to have helped overcome the entrenched moral objections to queer subjects in some parts of Indian culture. It also built on the relative status and resources of Indian AIDS-related NGOs and their considerable influence in the incipient queer activism that has developed in India since the 1990s and exploited the growing responsiveness of the state to global public health norms relating to HIV/AIDS. The rationale enjoyed particular legitimacy in light of the right to health derived from the right to life guaranteed by the Constitution. Immediately after the judgement was handed down by the Delhi High Court, an appeal was lodged before the Indian Supreme Court by petitioners from the Hindu Right.81 Hearings took place in late February 2012, including submissions against the judgement on behalf of the Delhi Commission for Protection of Child Rights.82 Nevertheless, the public health rationale's initial success before the Delhi High Court has focused global attention on its potential as an advocacy tool. Indeed, the Commonwealth Eminent Persons Group's own support for the rationale was undoubtedly influenced, in part at least, by the rationale's success in the Commonwealth's most populous nation-state.

79. Naz Foundation v Delhi and Others 2009 4 L.R.C. 838 (Del.) ¶ 86.
80. Id. ¶ 61-74.
III. RETHINKING THE PUBLIC HEALTH RATIONALE

Public Health, Biopower and 'Sovereign' Criminal Law

The public health rationale for the repeal of sodomy laws advocated by UNAIDS has gained ever greater prominence in global and local forums, illustrated most clearly and recently by its application and success before the Delhi High Court and its reiteration subsequently by the Commonwealth Expert Persons Group in its report to the Heads of Government Meeting in Perth in October 2011.

This section sets out to rethink the wider implications of the rationale for contemporary queer rights advocacy and queer subjects themselves. Before that, however, it seems important to think more critically about the rationale and in particular the relations of power and knowledge that have shaped its development. In this respect, Foucault's work on regimes of biopower as a form of political rule provides a useful framework for analysis. In his later work, Foucault drew attention to what he saw as a shift in forms of political rule in advanced liberal societies from control over territory to concern with the management of the health and welfare of populations. Foucault described this as a triangle of "sovereignty, discipline and governmental management, which has [the] population as its main target and apparatuses of security as its essential mechanism." Moreover, Foucault recognised sexuality as a primary site through which relations of biopower now operate.

Foucault explored how biopower typically entails a shift away from repressive sovereign forms of state power to more complex forms of productive power or relations of discipline and governmentality. Under conditions of biopower, this consists of a spectrum between the poles of anatomo-politics (discipline over individualised bodies) and biopolitics (governmentality over aggregated populations). These productive forms of political rule, increasingly subtle in their rationalities, techniques and effects, were compared and contrasted by Foucault to the comparatively archaic forms of sovereign power, "in the form of the state, public law, prohibitions and compulsion." However, sovereign rule – the state, law – does not simply dissolve, but under conditions of biopower is directed increasingly to improving the population's health and well-being.

Stefan Elbe, among others, has identified the human response to HIV/AIDS as an example par excellence of Foucauldian biopower, in which sovereign, disciplinary and governmental rationalities and techniques are employed in international mobilisations to address the effect of the global pandemic on public health.\textsuperscript{86} Public health expertise elevates the biological characteristics of populations to “high” politics; demands an institutional apparatus for the close statistical monitoring and surveillance of those populations; and shapes the interventions of formal and informal actors directed towards optimising health and well-being.\textsuperscript{87} This expertise has grown in influence as a direct consequence of HIV/AIDS. Elbe describes the epidemic as “an instance in which the medical professions are now beginning to assert the political primacy of their own public health ambitions.”\textsuperscript{88} Under these conditions of biopower, clinicians, epidemiologists and social workers, “authorized by the rhetoric and institutions of ‘public health’,\textsuperscript{89} govern individual bodies (those deemed as being “at risk” of HIV infection or who are actually HIV positive) and through populations (using the techniques of surveillance and intervention across statistical HIV risk groups). Moreover, as Foucault forewarned, sexuality forms the focus of these developing rationalities and technologies of rule.

The rise of biopower in response to HIV/AIDS has had further important effects on state sovereignty, which has been co-opted to advance public health objectives. This is apparent especially in relation to state sexual regulation; increasingly, as Kaplan suggests, public health expertise and intervention “is deployed by state agencies to define and enforce public policy regarding intimate sexual behaviour.”\textsuperscript{90} Moreover, the public health rationale for the repeal of sodomy laws illustrates the influence of public health governance on the shape of sovereign law. In its attempt to persuade the state to withdraw its coercive power over sexuality where this interferes with the efforts of public health experts to manage risky queer subjects, the productive disciplinary/governmental techniques of HIV prevention and education are used. In the words of Ghosh, the “surveillance that marks their bodies as domains of sexual health and social discipline”\textsuperscript{91} comes into play. In the same way, use of

\textsuperscript{86} Id.
\textsuperscript{88} Elbe, supra note 85, at 11.
\textsuperscript{90} Id. at 236.
the rationale by UNAIDS to encourage states to enact anti-discrimination laws and other legal measures to address stigma and discrimination against vulnerable groups is designed, under conditions of biopower, to create a social environment in which queer subjects are better able to exercise care over themselves and ameliorate their own infection risk. In other words, biopower operates through the public health rationale by encouraging what Foucault termed the “governmentalized state,” which can govern HIV/AIDS more effectively by intervening less or at least in more subtle, less repressive ways.

There is considerable value in conceiving of the public health rationale as a product of Foucauldian biopower. Typically, liberal explanations of rights claims— including the repeal of sodomy laws—represent these claims as demands for absolute freedom for queer subjects from sexual regulation. The objectives of the public health rationale reveal the limitation of this liberal conception of freedom through rights because the underlying aim and effect of advocacy for the repeal of sodomy laws under the rationale is not freedom from regulation for queer subjects in the traditional liberal sense, but rather an effort to enable the state to “govern through freedom,” by improving the indirect control over queer subjects according to public health goals. Indeed, the state’s aim in repealing sodomy laws in line with the rationale is to increase the power exercised over the queer subject with the aim of reducing the onward transmission of HIV. Put another way, conceptualising the public health rationale as a form of biopower draws our attention to how the freedom from state sodomy laws and other legal measures the rationale demands are designed to encourage the shift from one regime of power exercised over queer subjects (the coercion of sovereign law) to another (the knowledge production, surveillance and interventions demanded by public health expertise).

Contagion Politics and the Queer Subject as Anti-Citizen

There are four apparent strategic benefits for advocates in harnessing the public health rationale as the basis for queer rights claims and especially the repeal of sodomy laws. First, as Petchesky observes,

“[b]iomedical discourses and methods may be irresistible not only to
government and international agencies but also to advocacy groups,
for whom they create an aura of technical expertise rather than political
and social resistance.”94 Unlike the globalised LGBT identity politics
that have developed typically in the West, it might be argued that public
health experts enjoy legitimacy, authority and a claim to neutrality that
can be useful in the face of the moral and religious conservatism that
exists across many of the states which have retained their sodomy laws.
Second, and relatedly, Katyal suggests that the public health rationale
allows queer rights advocates “to avoid some of the accusations of
Westernisation, and foreign influence, [which] often plague gay rights
strategies,”95 by avoiding the deployment of Western-inspired LGBT
identity categories in favour of behaviour-based labels like MSM. Third,
Katyal also contends that this behaviour-based approach ensures a more
inclusive model for queer rights advocacy that does not exclude so easily
those who do not self-identify with established sexual identity categories
(as one finds especially in India96):

The public health debates surrounding global efforts at AIDS
prevention have provided a fascinating and largely overlooked arena in
which dominant Western paradigms of gay identity have been soundly
rejected in favour of broader, more inclusive strategies of public health
intervention that focus on behaviour and conduct.97

Fourth, as Tellis explains, the rationale: “[articulates] itself necessarily
in the languages of crisis, violence and remedial action, not pleasure.”98
This seems to enable advocates, like those in India, to side-step the
difficult task of persuading states of the value in queer identities, meanings
and practices, in favour of a more instrumental rhetoric, grounded in
biopower, which foregrounds instead the practical role the repeal of
sodomy laws can play in ameliorating the destructive effects of HIV/
AIDS.

Nevertheless, the influence of the public health rationale on queer rights
advocacy should also give us pause for thought. From the earliest years

94. Rosalind Petchesky, Sexual Rights Policies across Countries and Culture: Conceptual
Frameworks and Minefields, in Sex/Politics: Reports from the Front Lines, (Richard Parker,


96. Jeremy Seabrook, Love in a Different Climate: Men who have Sex with Men in India (1999).


98. Tellis, supra note 68, at 152.
of the emerging global HIV/AIDS pandemic, queer scholarship and activism has been keenly attuned to the potentially negative implications for queer subjects of the human response to HIV/AIDS,\(^9\) the possible "perverse effects" arising from "the intersection of [...] public health and sexuality", and especially the "remedicalization of homosexuality, just when it seemed the battle against this had been won."\(^10\) Roseman and Miller explain well the dilemma that has faced queer subjects, gay men in particular, as a consequence of the pandemic:

HIV/AIDS and the attention it both allowed and demanded to non-heteronormative sexuality ('silence equals death') has played a critical role in simultaneously enabling and constraining gay (male) 'rights talk', opening up space for queer sexuality (especially funding spaces), while marking them as disease-ridden.\(^11\)

In much the same way, the public health rationale for the repeal of sodomy laws depends for its strategic power on reproducing once again, in global and local forums, the discursive connection between queer subjects and HIV/AIDS. It is imperative therefore that any evaluation of the rationale and its implications considers carefully the consequences of marking queer subjects in this way.

In its 2009 *Universal Access for MSM and Transgender* strategic framework UNAIDS repeats its commitment to reduce by half the number of countries with sodomy laws by 2015, on the ground that such laws undermine prevention efforts aimed at the MSM and male to female (MtF) transgender risk populations. Significantly, the document opens with a quotation of the UN Secretary-General Ban Ki-Moon, in which he affirms the need for states to guarantee the human rights of vulnerable groups on the following basis: "Not only is it unethical not to protect these groups; it makes no sense from a health perspective. *It hurts all of us.*"\(^12\) Though Ki-Moon couches his defence in terms of ethics too, his deployment of the public health rationale is revealing. The "us" is important here. Implicitly, it indicates that the rationale depends on the exploitation of the heteronormative state's fear of contagion by the queer subject. At its core, as Kotiswaran recognises, the rationale legitimises queer rights claims not because they can reduce the vulnerability of

---


\(^12\) UNAIDS, *supra* note 50, at 1 (emphasis added).
queer subjects to HIV/ AIDS but “only to the extent necessary to prevent the spread of HIV to the general population, really, ‘innocent’ wives and children in heterosexual marital families.” The message that underpins this rhetorical formulation is clear; queer rights will serve to strengthen the heteronormative order.

Exploiting the state’s fear of contagion by the queer subject seems to hold out the possibility of persuading recalcitrant nations, otherwise resistant to rights claims framed in normative terms, to meet the demands of rights advocates without them needing to acknowledge or accept that there might be value in queer lives. However, as Kotiswaran observes, this strategic approach to queer rights advocacy may yet prove to be a “slippery slope.” The problem with the politics of contagion it deploys is that, in the process of articulating rights claims on behalf of queer subjects, it repositions those subjects not simply as “disease-ridden” but as serious threats to the security of the heteronormative family and nation. As such, while the logic of securitisation may encourage some state institutions to afford new rights to queer subjects, it does so on highly unstable terms because it compounds simultaneously the construction of the queer subject as the enemy within; as an anti-citizen. In this respect, the location of the public health rationale within regimes of power is instructive. Biopower “operates as a technology of power that both privileges and marginalises, empowers and disciplines.” In its concern with governing a population’s life forces it relies on exclusions that divide and hierarchise the “normal” from the “abnormal” and the “risky” from those “at risk.”

It might still be argued that to secure repeal of sodomy laws from otherwise recalcitrant states is worth the wider constitution of queer subjects as threats to the heteronormative body politic. One should consider first though the practical limitations of the rationale for effecting such legal change. The success of this strategy depends on the state’s responsiveness to expert-led assertions that the most effective way to prevent the onward transmission of HIV is to protect queer rights. It is far from certain though that this responsiveness will follow from the utilitarian calculus by states that the politics of contagion encourages. As Nadasan notes, the exercise of biopower need not necessarily accord with the demands of progressive rights claims; indeed, where they conflict “individual notions of citizen rights tend to be outweighed by the epidemiological construction of public security risk.”

103. Halley et al., supra note 67, at 371.
104. Id. at 371.
Moreover, the assumption that criminal laws are counterproductive in relation to HIV prevention continues to be resisted by states on competing public health grounds. The recent proposal in Uganda to constitute same-sex sexual activity by people living with HIV or AIDS as an offence of “aggravated homosexuality,” attracting a capital punishment, illustrates not only the continuing dangers entailed by the discursive association between MSM and HIV but also the residual potency of the perception, asserted by the Tasmanian government in *Toonen v Australia*, that criminal sanctions against sexual activity between men can operate effectively as public health measures by using the state’s own formal powers of coercion to control and contain risky sex. This form of resistance indicates that any expansion of regimes of biopower in this area can and does work both ways. It may legitimate the withdrawal of sovereign power to make way for the disciplinary-governmental rationalities and technologies of biomedical expertise, as India demonstrates. However, nothing intrinsic to this logic prevents states in which biomedical expertise may carry less influence from promoting atavistic forms of sovereign coercion as acceptable alternative techniques of biopower.

There remains one further problem with the public health rationale. Queer rights advocacy using the rationale may also work to weaken or preclude entirely those rights claims made on behalf of queer subjects that are less easily understood through the lens of public health. In particular, as Rambassun notes, the focus of public health on statistical risk populations like MSM and MtF transgender people, “carries with it

---

106. *Id.* at 205.
108. Indeed, neither is this state investment under conditions of biopower in criminal liability as a public health technique restricted to struggles over sodomy laws. States in the Global North and South continue to justify the extension of sanctions to people living with HIV and AIDS who transmit or expose others to HIV using a modified public health rationale based on sovereign rather than disciplinary-governmental rationalities. See for example, the judgement of Cory J. (Major, Bastarache and Binnie JJ. concurring) in *R v Cuerrier* [1998] 2 S.C.R. 371, ¶ 140-142 (Supreme Court of Canada): “Interveners submitted that the criminal law is not the most effective tool for dealing with HIV transmission. They argued that public health initiatives are more appropriately employed to control the spread of HIV and AIDS [...] However, the criminal law does have a role to play both in deterring those infected with HIV from putting the lives of others at risk and in protecting the public from irresponsible individuals who refuse to comply with public health orders to abstain from high-risk activities. This case provides a classic example of the ineffectiveness of the health scheme. The respondent was advised that he was HIV-positive and on three occasions he was instructed to advise his partner of this and not to have unprotected sex. Nevertheless, he blithely ignored these instructions and endangered the lives of two partners [...] Where public health endeavours fail to provide adequate protection to individuals like the complainants, the criminal law can be effective.” (my emphasis; see also judgement of McLachlin J. (Gonthier J. concurring), para 74).
the potential loss of some aspects of women's sexual rights, most notably lesbian rights." It is of course possible for rights claims articulated on behalf of MSM or MtF transgender people to benefit other queer subjects indirectly. For instance, the reading down of Section 377 in India guaranteed protection to all same-sex behaviour between consenting adults, and not simply the risk populations MSM and MtF transgender. Nevertheless, the politics of contagion and its irresistible logic of securitisation seems to create new hierarchies that favour some queer subjects over others with implications for the shape of rights claims articulated in public health terms. This may have exclusionary consequences for those subjects not classified by biomedical expertise as being at heightened risk of infection, such as lesbian women. Indeed, it may leave some queer subjects unprotected not only in relation to struggles over sodomy laws but where advocates deploy the public health rationale to support other right claims, such as legal relationship recognition, hate crime protection or anti-discrimination laws, by asserting the need for these rights only in order to reduce the stigma and discrimination that increases the vulnerability of “risky” queer bodies and populations.

_Beyond the Public Health Rationale: A Life Lived Differently; as a Sustainable Life?_

Geeta Patel, in her wide-ranging analysis of risk, insurance and sexuality in India, reflects in passing on the progress of the *Naz Foundation* litigation and notes that in their concern with the management of risk, the litigants worked to foreground the loss entailed by HIV/AIDS in order to justify the reading down of Section 377. Evaluating the apparent success of this strategy, she asks: “What seems so compelling about loss?” She concludes: “Loss seems to carry a valence that feels more powerful, more immediate than that of a life lived differently, as a sustainable life.” While the valence of loss may well have strategic potential as a basis from which to encourage action to grant rights to sexual subjects, it also shores up an image of that subject as an outsider and threat to the (human, national and international) heteronormative order that has wider implications for queer subjects. Conceiving of the public health rationale as a form of biopower reminds us that the rationale imposes its own regimes of knowledge/power over queer subjects which can have

negative consequences for queer rights claims. However, what Patel's observation also evokes is a glimpse of what the public health rationale displaces in its resort to contagion politics and the logic of securitisation: an understanding of the queer subject not merely as a source of riskiness to be managed, but as "a life lived differently, as a sustainable life." The concern expressed in this paper is that the logic of securitisation implicit in the public health rationale will be unable to support a sufficiently progressive rights agenda as it depends on manipulation of the state's fear of contagion by queer sexualities rather than a value-driven conception of different and sustainable queer lives.

It is because of these concerns that I remain especially cautious about the approach to the repeal of Commonwealth sodomy laws adopted by the Eminent Persons Group report which couches its own criticism almost entirely in public health terms.111 There may well be some potential in its strategy insofar as it helps to avoid the problems inherent in a value-driven justification for queer rights claims in the face of endemic heterosexism (although the refusal by the Commonwealth Heads of Government to accept the recommendation suggests the rationale will not inevitably overcome the resistance of some conservative states). Nevertheless, by presenting its case for repeal using the rationale the report encourages Heads of Government to engage with and satisfy queer rights claims solely in terms of contagion politics, and its securitising logic. In turn it seems to contribute to the wider production of queer subjects primarily as anti-citizens to be defended against to protect the health and welfare of the heteronormative family and nation (by protecting rights or otherwise). It is not my claim that the rationale should be rejected necessarily outright in this context. However, without also elaborating properly the value of queer lives, the report's approach may simply embed queer subjects further within the circuits of exclusion on which regimes of biopower rely.

Of course, this paper's apparently straightforward recommendation to rights advocates to ensure the parallel development of a value-driven conception of the queer subject raises its own dilemmas. Can more established forms of globalised LGBT identity politics provide the

111. EMINENT PERSONS GROUP, supra note 3, at 100 (I say almost entirely because while the report develops only the public health rationale in any detail, it does state once in passing that sodomy laws can "call into question the commitment of member states to the Commonwealth's fundamental values and principles including fundamental human rights and non-discrimination." While this observation draws attention to the significance of a value-driven, inclusive approach to the issue, its relative brevity and obscurity compared to the prominence of the public health rationale indicates that it carries far less significance as an approach overall.).
basis for this value-driven approach? As critical queer and postcolonial scholars recognise, this politics creates its own difficulties because it assumes the universality of a global LGBT community. These claims have faced persuasive critique, which shows that purportedly global identity categories are fluid, incoherent, and exclusionary, especially when applied in local settings where they can work to obscure and even displace prior indigenous sexual and gender meanings and practices. Such criticisms levelled at the value-driven approach of identity politics need to be taken seriously not only to ensure a sufficiently inclusive conception of the value of queer lives but to counter allegations by moral and religious conservatives of Westernisation and foreign influence. Furthermore, demands by queer subjects for citizenship grounded in the value of queer lives can quickly reduce to a lurch towards assimilation which can encourage homonormativity in thrall to the logic of the market or even dangerous homonationalism, in which queer subjects are defined in opposition to perceived new threats to the state. For these reasons, care must be taken to ensure that any value-driven approach which might address the problematic implications of the politics of contagion, while avoiding the dangers of mainstream identity politics, must be both locally-grounded and transformative in its aims.

Identifying exactly what that approach might entail is more difficult, not least because it must be specific and sensitive to local contexts. However, an initial point of departure may be found in the judgement in Naz Foundation. After drawing on both the LGBT rights jurisprudence of comparative case law and the public health rationale, the judgement finally locates its reasoning in the history of the Indian Constitution, noting first that the notion of equality in the Constitution derived originally from the Objectives Resolution submitted by Nehru to the Constituent Assembly in 1946 before adding: “[i]f there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of 'inclusiveness.'” For me, it is when the Delhi High Court connects the repeal of sodomy laws and queer rights more generally to this aspect


113. Katyal, supra note 15; See also Katyal, supra note 95.


116. Naz Foundation v Delhi and Others, 2009 4 L.R.C. 838 (Del.), ¶ 130-133.
of “constitutional morality” that it meets most effectively the demands for a localised, value-driven jurisprudence of sustainability and difference. Perhaps the judgement could have done more: for instance, it might have drawn out explicitly the connection between the plight of queer subjects in India and the Constitution’s historic concern with addressing the inequalities faced by women, dalits and ethnic and religious minority groups. It might also have considered more clearly the concept of swaraj that Khaitan argues lies at the heart of the special attention given by the judgement to protection of personal autonomy. But in its return to Indian originalism, it does seem to begin to chart a more productive route between the unreflective assertion of homogenised global LGBT identity politics and the public health rationale.

IV. CONCLUSIONS

In their recent overview of global advocacy around sexual rights claims, Roseman and Miller conclude that while there has been “an explosion in discourse and normative acts on sexual rights,” especially within global forums such as the UN, which together “represent a definable and historically specific project of consolidating and centralising sexual rights norms,” the articulation of these rights claims is “still evolving and fractured.” They add that “health continues to be the dominant site of norms evolution around sexuality in the United Nations, with both liberating and constraining effects.” In particular, Roseman and Miller draw attention to how, over time,

HIV/AIDS – hailed as a threat to global order and security, as well as to public health and development, particularly in the absence of accessible treatment – compelled a public and global discussion of sex as it actually happens, including homosexual sex, framed as ‘prevention’.

The public health rationale for the repeal of sodomy laws and other rights claims on behalf of queer subjects, both globally and locally

117. Tarunabh Khaitan, Reading Swaraj into Article 15: A New Deal for All Minorities, 2 (3) NUS L. REV. 419 (2009).
118. Katyal, supra note 15, at 1464-1467 (for similar support for this creative deployment of Indian originalism); Compare Kapur, supra note 81, at 388 (who sees Naz Foundation as “a call to tolerate consensual sexual conduct between homosexuals, rather than to confer the right to full, substantive equality” which in turn amounts to “a device for social and political control, rather than empowering the groups being tolerated.”).
119. Roseman & Miller, supra note 101, at 317.
120. Id. at 318.
121. Id. at 317.
122. Id. at 322.
123. Id. at 326.
inspired and applied, is one as yet un-interrogated illustration of the evolving and fractured approach to queer rights claims. While globalised LGBT identity politics continues to face resistance before the UN, there are signs that the public health rationale for queer rights claims has had greater success as part of its international drive to combat HIV/AIDS. In India, the recent litigation before the Delhi High Court in Naz Foundation also indicates the strategic potential of the rationale in local settings, at least under certain cultural, political and legal conditions. The Commonwealth Eminent Persons Group report submitted to the Commonwealth Heads of Government Meeting in 2011 draws strength from these national and supranational developments and in doing so illustrates the increasing strategic investment in the rationale as part of the wider recent reinvigoration of global struggles over sodomy laws. This paper has begun to unravel the wider implications of these shifts in strategy in an effort to evaluate, in the words of Roseman and Miller, whether “rights speak” grounded in the rationale will be liberating, constraining, or indeed both.

There can be little doubt that the public health rationale, forming one rationality of the wider biopower that operates at the intersection of public health, sexuality and HIV/AIDS, has opened up new spaces for, and ways of knowing and speaking about, queer subjects and their rights claims. Strategically, the rationale offers an alternative to globalised LGBT identity politics, by drawing on the powerful knowledge claims of biomedical expertise around HIV/AIDS; by side-stepping the resistance of many states to perceived Westernisation and foreign influence associated with more traditional value-driven queer rights claims; by providing a model for rights claims grounded in behaviour rather than identity categorisation; and by replacing conceptions of queer lives couched in terms of pleasure with those that foreground queer rights claims as crisis management, to respond to the devastating effects of HIV/AIDS. It has not been this paper’s aim to demand that this strategic manoeuvre be abandoned entirely when it has been evidently successful in countries like India in achieving law reform goals. It seeks instead to highlight the possible negative consequences of over-reliance on this strategy for a progressive rights advocacy that might support a suitably inclusive, sustainable and comprehensive framework for contemporary queer struggles in politics and law.

The public health rationale depends for its discursive power on the exploitation of the heteronormative state’s fear of contagion by the risky queer subject. While this fear may lead to meaningful change, the rights
granted to subjects under the rationale are not so much indications of their inclusion within circuits of citizenship but rather reproduce their status as anti-citizens who are seen to threaten the security of the nation and family. This supports in turn an underpinning to queer rights claims based on the logic of securitisation rather than acceptance and inclusion. Investing too much in advocacy of this kind may encourage states to decriminalise but it may also reinforce state justifications for sodomy laws as public health measures. Moreover, it imposes new hierarchies on queer lives that prioritise the rights claims of those perceived to pose the greatest threat to the heteronormative state. Roseman and Miller observe that “[m]any advocates of sexual rights seek cover under 'health' to avoid the politics of sex and sexuality; the cover, however, is impossible to sustain.” Efforts by advocates to overcome the continued resistance to queer rights claims articulated in terms of pleasure, life, agency and sustainability, by exploiting the biopower of contagion, loss, crisis and securitisation, cannot transform alone the response of states to queer subjects when transformation depends ultimately upon an acknowledgment of the value of queer life.

\[124. \textit{Id. at 333.}\]