

ATTAINING UNIVERSAL JUSTICE: REALITIES BEYOND DREAMS

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This article starts with a demonstration of the importance attached to universal human rights and justice following the adoption of the Charter of the United Nations, the Universal Declaration of Human Rights, and subsequent treaties. Instead of focusing on national concerns, it turns to address the even greater difficulties of securing human rights and justice at a global level. It does so by reference to particular challenges presented to two bodies on which the author serves: the Eminent Persons Group on the Future of the Commonwealth of Nations, and the UNDP Global Commission on HIV and the Law. Whilst securing advances are difficult and sometimes messy, the article concludes on a positive note in relation to the role of lawyers in advancing universal global human rights and justice.

WITH THANKS AND PRAISE

Victoria Law School has inaugurated a lecture series on justice, bearing my name. I am honoured that the Vice Chancellor Professor Elizabeth Harman, nearing the end of her distinguished service to the University, and the Hon. Frank Vincent AO QC, until recently the Chancellor and a Judge of Appeal in Victoria, have attended to mark this occasion. I acknowledge the presence of the Chief Justice of Victoria (the Hon. Marilyn Warren AC), the President of the Court of Appeal (the Hon. Chris Maxwell) and other distinguished judges, practitioners and academics. The Dean of School (Professor Andrew Clarke), other members of the Faculty and students do me honour by attending.

I INTRODUCTION

Justice is an elusive concept upon which it is possible for rational and informed observers to disagree, yet it is one of the core principles of every national legal system. Its pursuit was made a basic objective of the United Nations Organisation when it was established by the *Charter of the United Nations*.¹

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¹ *Charter of the United Nations* Preamble para 3. See *Charter of the United Nations Act 1945* (Cth).

In 1945, as a schoolboy in Australia, I was conscious of the closing days of the Second World War and the heroic struggle to defeat tyranny, oppression and genocide, and to establish a new world order. Later, I became aware of the efforts to attain an end to war and the suffering of humanity. And to achieve the intertwined notions of universal human rights and of justice expressed in the opening words of the *Charter*:

We the peoples of the United Nations, Determined
 To save succeeding generations from the scourge of war ..., and
 To re-affirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and
 To establish conditions under which *justice* and respect for the obligations arising from treaties and other sources of international law can be maintained, and
 To promote social progress and better standards of life in larger freedom
 ... have agreed to the present Charter of the United Nations and do hereby establish an international organisation to be known as the United Nations.²

Originally, it had been hoped that the *Charter* would include within it the text of an International Bill of Rights, however, time ran out for the preparation of this instrument.³ Instead, the *Universal Declaration of Human Rights* was drafted by a committee chaired by Eleanor Roosevelt and was brought into operation by the General Assembly of the United Nations on 10 December 1948.⁴ At the time of its acceptance, the President of the General Assembly was an Australian, Dr Herbert V Evatt, a man who had been a Justice of the High Court of Australia in the 1930s.

The *Preamble* to the *Universal Declaration of Human Rights (UDHR)*, in turn, asserted the necessary inter-connection between the concept of universal human rights and the aspirations of justice and peace:

Whereas recognition of the inherent dignity and of the *equal and inalienable rights* of all members of the human family is the foundation of freedom, *justice* and peace in the world. Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.
 Whereas it is essential, if man is not to be compelled to have recourse, as a last resource, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.
 ...
 Now, Therefore, the General Assembly proclaims the *Universal Declaration of Human Rights* as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by

² *Charter of the United Nations* Preamble. Emphasis added.

³ A M Devereaux, *Australia and the Birth of the International Bill of Human Rights 1946-66* (Federation Press, 2005) 28. See M D Kirby, 'Herbert Vere Evatt, The United Nations and the Universal Declaration of Human Rights After 60 Years' (2009) 34 *UWA Law Review* 238, 246.

⁴ *Universal Declaration of Human Rights (UDHR)*. See A Renouf, *Let Justice Be Done: The Foreign Policy of Dr H V Evatt* (University Qld Press, 1983) 259.

progressive measures, national and international, to secure their universal and effective recognition and observance ...

It would have been entirely appropriate for me, on this auspicious occasion, to deliver this inaugural lecture on a subject close to home: such as justice to indigenous Australians;⁵ justice to various categories of women;⁶ justice to refugees;⁷ justice to homosexuals;⁸ justice to prisoners;⁹ and justice to would-be voters in elections that deliver the democratic system of government envisaged by the federal Constitution.¹⁰ A reflection on aspects of justice (especially where this has a local constitutional flavour) would have been an appropriate, and quite possibly interesting, contribution for a speaker such as me to provide.

However, I usually feel uneasy about predictable things. And in any case, Australian lawyers today—as indeed professionals in every discipline—sometimes need to lift their sights from local concerns to a broader horizon. Contemporary lawyers live in a world of increased legal interaction. Indeed, this was envisaged sixty years ago by the *Charter of the United Nations* and the *UDHR*. They each laid the ground for the global perspective that was to follow in the pursuit of the trinity of stated global objectives: fundamental human rights; justice; and observance of the rule of law.

Each of these objectives, and the domestic and international legal order alike, is inter-related and inter-dependent. Consistent observance of fundamental human rights is impossible without the rule of law. Justice is impossible if fundamental human rights are denied. Yet the *UDHR* recognised that neither universal human rights nor justice would be attained overnight. They would require measures of education and promotion. Such measures would be needed both in national and international settings. By inference, they would not at first be ‘secure’ or ‘effective’. Their achievement would take time.

To attain the goals of the new world legal order, much striving, education and promotion would be necessary. Still, the goal is clearly stated, expressed in the name of ‘all peoples and all nations’. The setting for national endeavours to attain justice was henceforth to be a global and universal one. It was to be species-wide, relating to ‘all human beings’¹¹ and ‘everyone’.¹² Universal rights were to extend beyond the traditional civil and political ones so well known to legal systems such as that of Australia. They were to include economic and social rights including the right to work;¹³ to rest and leisure;¹⁴ to adequate

⁵ *Mabo v Queensland [No.2]* (1992) 175 CLR 1 at 42; *Wik Peoples v Queensland* (1996) 187 CLR 1; *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 393 [210].

⁶ *Garcia v National Australia Bank Ltd* (1998) 194 CLR 295 at 395 to 424 [2]; *U v U* (2002) 211 CLR 238 at 227 [141].

⁷ *Al-Kateb v Godwin* (2004) 219 CLR 562. See also *Plaintiff 61/2010 and Plaintiff M69 v Commonwealth* [2010] HCA 41.

⁸ *Appellant S395/2001 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

⁹ *Roach v Electoral Commissioner* (2007) 233 CLR 162.

¹⁰ *Rowe v Electoral Commissioner* [2010] HCA 46; (2011) 85 ALJR 213.

¹¹ *UDHR*, art 1.

¹² *UDHR*, art 7.

¹³ *UDHR*, art 23.

health care, food, clothing, shelter and medical care;¹⁵ to education;¹⁶ to participate in cultural life;¹⁷ and to observe duties to the community consistent with the ‘purposes and principles of the United Nations’.¹⁸

In 1949, as a schoolboy in Sydney, I received a pocket-sized copy of the *UDHR*. My class was taught its contents. We were told how the rights proclaimed in the *UDHR* were vital to building the defences of peace and security and to avoiding the terrifying but real risk of nuclear catastrophe. These lessons have always remained with me. They are the prism through which I have always viewed the rules of my own legal system in Australia.

Occasionally, there has been conflict between the local and the global law. Where that happens, the local law must generally be given effect by national judges and lawyers.¹⁹ Yet normally Australian law conforms to the basic principles of international law. Certainly, it usually strives to give them expression. This is because of the temperate, democratic rights-respecting system of governance established by our history, our laws and our Constitution, and upheld by our people. Conformity was generally unsurprising because the *Charter* and the *UDHR*, together with the great treaties of the United Nations that followed, were usually written (or at least highly influenced) by authors trained in the Anglo-American legal tradition. That tradition ordinarily cherishes—even where it does not always deliver—individual liberty, accountable government and justice for all. We must repeatedly say and re-affirm this, so that by such re-affirmations, we remind ourselves and encourage others to approach our often mundane daily tasks as judges and lawyers in the right way. And reach wherever we can, just and rights-respecting outcomes.

It is thus fairly inevitable that I have chosen to address this lecture on justice to the challenges that are presented when demands are made in an international context for fundamental human rights, justice and the rule of law.²⁰ It is when this happens that one sees the international order and its institutions engage with the messy and often contentious business of upholding the rights of minorities. In the real world, the attainment of the principles expressed in the United Nations *Charter* and the *UDHR* (as well as in the treaties, declarations, guidelines and other instruments that have followed) is not an ethereal topic of intellectual discourse alone. It is not one that only engages us in a rational or academic discourse. It is not one reserved to the whispered arguments of the highest courts and the mutually respectful exchanges of learned judges and advocates. In practice, the business of human rights can often be highly contentious. It can frequently inflame

¹⁴ *UDHR*, art 24.

¹⁵ *UDHR*, art 25.

¹⁶ *UDHR*, art 26.

¹⁷ *UDHR*, art 27.

¹⁸ *UDHR*, art 29(3).

¹⁹ *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 420-427 [156]-[178].

²⁰ Conformity with international law was referred to by O'Connor J in *Jumbunna Coal Mine No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 308 at 362. Cf M D Kirby, 'A Century of *Jumbunna*—Interpretative Principles and International Law' (2010) 31 *Adelaide Law Review* 143, 148.

passions. It can give rise to the sharpest of differences. Highly intelligent, well-trained people can clash passionately over it and they can sometimes denounce each other, declare each other to be heretics, or suggest that no well-informed person of sensibility could possibly hold the opinions expressed.²¹

II INTERNATIONAL AGENCIES OF HUMAN RIGHTS

This is where the business of universal human rights gets tricky. It is where securing agreement is often extremely difficult. It is where the invocation of different cultures, historical experiences, religious convictions and social attitudes can result in an impasse, making progress difficult or impossible to attain.

I have had experience in agencies of the United Nations where divisions of such a kind have arisen in the pursuit and application of fundamental human rights. For example, in 1991–92, I was appointed to the Fact-Finding and Conciliation Commission on Freedom of Association of the International Labour Organisation (ILO). I took part in a three-person mission to South Africa (with Sir William Douglas, Chief Justice of Barbados and Justice Rajsoomer Lallah, Justice and later Chief Justice of Mauritius) on the non-conformity of the then South African laws with ILO Conventions. The mission took place just before the constitutional change in South Africa occurred, involving the abandonment of the apartheid state. At the time, it was still difficult for the South African Ministers—locked into their apartheid laws and perspectives—to offer concessions that would be essential for that nation to return to compliance with the basic principles of the ILO. Eventually this was done, but only after the change of the Constitution, the election of President Nelson Mandela, and the abandonment of the principles of racial segregation.²²

Similarly, in 1993–96, I witnessed many sharp differences that arose during my service as Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia. My duty in that role was to offer advice and technical assistance to the government of Cambodia which had then only recently emerged from the genocidal regime of the Khmer Rouge. This had been followed by the intermediate phase of the United Nations Transitional Authority for Cambodia and the establishment of a new polity and its elected government. While that government of Cambodia was prepared to accept advice on non-contentious matters, it sometimes balked at proffered opinions and recommendations where they touched upon politically sensitive issues, such as the autocratic way in which political opponents were dealt with.²³ On such matters, the Cambodian government declined to co-operate with me and successive representatives of the United Nations. It even refused to discuss these issues, claiming a sovereign right to act without interference

²¹ See *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589 [63] per McHugh J; cf Kirby J at 615 [152].

²² International Labour Organisation, Fact Finding and Conciliation Commission on Freedom of Association, *Report Concerning the Republic of South Africa: Prelude to Change: Industrial Relations Reforms in South Africa* (ILO Official Bulletin (Special Supplement), Vol LXXV, 1982, Series B, Geneva, 1992).

²³ M D Kirby, 'UN Special Procedures: Reflections on the Office of UN Special Representative for Human Rights in Cambodia' (2010) 11 *Melbourne Journal of International Law* 491, 501.

from the United Nations or its office-holders. Such conduct provoked discussion about whether the United Nations would do better to withdraw from the dialogue or whether it should persist, with its ‘special procedures’ notwithstanding the resistance of the local politicians to advice tendered, based on the international law of human rights.²⁴

Conflicts between universal principles of human rights and assertions of national ‘sovereignty’ are not uncommon. However, two other bodies to which I have recently been appointed sharply illustrate the difficulty. As an antidote to unrealistic expectations and as an illustration of the difficulties that usually face the practical attainment of universal human rights, I will describe these two appointments and the problems they present. They show the kinds of impediments that often stand in the way of the practical attainment of basic rights. Yet unless the impediments can somehow be overcome, the goals of the *Charter*, of the *UDHR*, and of the international standards that have followed, will not be attained. This will endanger the peace of the world as much as it will inflict injustice and suffering on many members of the human family. By descending to these very particular and specific challenges, I hope to illustrate the challenge presented by the interaction between the dream of global human rights and the reality of their attainment.

III COMMONWEALTH EMINENT PERSONS GROUP

In July 2010, following a nomination by the Australian Government, I was appointed by the Secretary-General of the Commonwealth of Nations (Mr. Kamallesh Sharma) to be a member of the Eminent Persons Group (EPG) investigating the future structures of the Commonwealth. The Chair of the EPG is Tun Abullah Badawi, former Prime Minister of Malaysia and the Group comprises twelve members from different continents, professions and backgrounds. It was created in fulfilment of a resolution adopted at the last Commonwealth Heads of Government Meeting (CHOGM), held in Port of Spain, Trinidad, in November 2009.²⁵

Some of the matters referred to the EPG are technical, including the provision of advice on ways in which a greater level of co-ordination and co-operation within the Commonwealth could better ‘bring together our citizens, academia and others’. However, the central focus of the EPG’s work is upon the core institutions of the Commonwealth. These include the Commonwealth Ministerial Action Group (CMAG), which is declared by earlier CHOGM declarations to be ‘the custodian of the Commonwealth’s fundamental political principles’. CMAG itself was asked to ‘explore ways in which it could more effectively deal with the full range of serious or persistent violations by such member states

²⁴ H Charlesworth, ‘Swimming to Cambodia: Justice and Ritual in Human Rights After Conflict’ (Speech delivered at the Centre for International and Public Law, Melbourne, 26–27 February 2009).

²⁵ Commonwealth Heads of Government, *Affirmation of Commonwealth Values and Principles* (29 November 2009) <http://www.thecommonwealth.org/files/216908/FileName/TrinidadandTobagoAffirmationonCommonwealthValuesandPrinciples.pdf>.

and to pronounce upon them as appropriate'.²⁶ CMAG's investigation is proceeding in parallel with the work of the EPG.

The Commonwealth of Nations is an evolution from the former British Empire and the former British Commonwealth of Nations. Those bodies developed as the British colonies and dominions (beginning with Canada in 1867) secured political independence from the United Kingdom. The first manifestation of the Commonwealth was recognised in the *Statute of Westminster* of 1931.²⁷

Unlike the United Nations, the Commonwealth is not established by a treaty or even by domestic statute. It is a voluntary association of member states. Admission requires the consensus of all other members. Save for three cases (Cameroon, Mozambique and most recently Rwanda), the common element in membership of the Commonwealth is the shared experience of one-time allegiance to the British Crown, either directly in the case of most colonies or indirectly, as in the case of the former Australian territories of Papua New Guinea.

Not all the countries that once owed such allegiance to the British Crown are members of the Commonwealth. Thus, Burma at its independence as a republic in 1948 did not seek continued membership. Two former members are currently effectively excluded or suspended, namely Zimbabwe (1994) and the Fiji Islands (2009). Other countries (such as the United States of America) have never joined. Ireland was a British dominion and thus a member of the Commonwealth between 1931 and 1949, but left on becoming a republic. Several other countries once governed by Britain (Palestine, the lands of Israel, Aden, and Yemen) have reportedly applied for or explored the possibility of membership of the Commonwealth but so far this has not been granted.

The formula permitting India to remain a member of the Commonwealth of Nations when it became a republic in 1950, was agreed in the *London Declaration* of 1949. It accepted that republics could become members of the Commonwealth despite termination of allegiance to the Crown on the basis of 'free association' and 'equality', accepting the monarch of the United Kingdom as the Head of the Commonwealth and 'a symbol of the free association of independent ... member nations'.

Queen Elizabeth II has been dutiful in her observance of her duties as Head of the Commonwealth. She attends CHOGM meetings every second year where she meets all of the Commonwealth Heads of Government. To some extent, the Commonwealth 'family' has been a club led by mostly elderly male politicians, who have seemingly found their meetings useful and congenial. The meetings are especially helpful to small nations. More than 30 of the [present] 54 member states are small nations., many of them islands in the developing world. However, five member states are also members of the G20 group of nations (United Kingdom, Canada, Australia, South Africa and India). The G20 is now probably the most important meeting of national political leaders. One hope of the smaller,

²⁶ Ibid [8].

²⁷ *Statute of Westminster 1931* (UK).

poorer countries of the Commonwealth is that their G20 colleagues will enable them to engage with the economically powerful countries of the G20 concerning the very important economic development issues present in lands affected by poverty and denials of universal human rights.

The challenges before the EPG are difficult and numerous, and this is not the occasion to review them all. However, high on the list is the perception, and reality, that the Commonwealth has not effectively responded to cases of human rights abuses affecting its citizens. All too often, the Commonwealth has been passive, inert and silent, despite the widespread evidence of abuses of human rights, contrary to the repeated declarations agreed upon at Commonwealth Heads of Government Meetings.²⁸ Protecting human rights and securing justice for all people of the Commonwealth is a legitimate concern of the EPG. Its challenge is to recognise and preserve the 'voluntary' character of the association while at the same time improving its effectiveness by sanctioning serious and persistent breaches, and assisting those in breach to repair the wrongs and bring human rights and justice to their people and to those for whom they have responsibility.

This is not the occasion to examine all of the abuses of human rights that are in urgent need of attention within the Commonwealth of Nations. However, two inter-related categories stand out as being in need of steady improvement. One is ensuring access by Commonwealth citizens to essential health care.²⁹ Another is to respect the civic equality of particular groups at special risk of infection with the Human Immuno-Deficiency Virus (HIV), the virus that causes the usually fatal condition of Acquired Immuno-Deficiency Syndrome (AIDS).

Since its first identification in the 1980s, AIDS has resulted in the deaths of 32 million people in the world. Approximately another 33.3 million are now living with the virus. The United Nations Development Programme (UNDP) had suggested that the presence of AIDS is a specific Commonwealth problem. Infections in Commonwealth countries comprise over 60% of those living with HIV in the world, even though these countries comprise only about 30% of the world's population.³⁰ In this sense, HIV/AIDS is a particular and especially urgent Commonwealth problem. Recognition of this fact demands that we give attention to ensuring that those who are infected have access to the anti-retroviral drugs now available as therapy to treat (but not to cure) the infection. Given the costs of such drugs and the recent global financial crisis, there is an equally urgent challenge to prevent new infections from occurring. At the moment, new infections with HIV affect about 2.6

²⁸ For example, *Singapore Declaration of Commonwealth Principles* (1971); *Harare Commonwealth Declaration* (1991); *Millbrook Commonwealth Action Programme on the Harare Declaration* (1995); *The Coolom Communiqué* (2002) all published by Commonwealth Secretariat, London.

²⁹ Provided for in *Universal Declaration of Human Rights*, art 25.1; *International Covenant on Economic, Social and Cultural Rights*, art 12.

³⁰ UNAIDS, *Global Report: UNAIDS Report on the Global Aids Epidemic* (2010) <http://www.unaids.org/documents/20101123_GlobalReport_em.pdf>.

million people each year.³¹ Inferentially, more than half of them live in Commonwealth countries.

Reducing infections of HIV necessitates strategies to increase awareness and self-protection among the groups particularly vulnerable to the virus. These groups include sex workers, drug users, men who have sex with men (homosexuals) and disempowered women. Legal barriers sometimes exist to empowering populations in these groups and this fact has attracted special attention on the part of the EPG.

A particular feature of the criminal law in Commonwealth countries has been the penalisation and other stigmas addressed to sexual minorities, particularly homosexuals. In France in 1806, Napoleon's codifiers omitted such criminal offences from the French *Penal Code*. In consequence of this reform, anti-sodomy offences have generally not existed in countries colonised by civil law powers, including France, The Netherlands, Spain, Portugal, Germany and Russia. Such offences have been a special legacy of British rule and they are still found in the laws of most Commonwealth countries.

In the last half century—following the Wolfenden Report in the United Kingdom³²—these kinds of criminal offences have generally been repealed in developed countries of the Commonwealth, including Australia,³³ but the same is not true of developing member states. In 42 of the 54 member countries of the Commonwealth, adult, private, sexual conduct involving participants of the same sex is still a serious criminal offence. Advocacy of reform has so far fallen on deaf ears.

Although the reasons for resistance to reform of these criminal laws are complex and involve considerations of religion, culture and lack of political leadership, the presence of the inherited criminal laws throughout the Commonwealth has proved a major source of division and been a serious cause of violence towards members of sexual minorities. According to international human rights law, such violence is forbidden by basic principles of equality and non-discrimination on the grounds of sex or other suspect causes. It constitutes, as well, the denial of respect for privacy.³⁴

Many examples exist—some of them highly publicised—of such violence and unequal treatment:

- In Belize in 2009, the principal of a school denied access to the school to a student, Jose Garcia, because of his sexual orientation and gender identity;
- In Uganda in 2010, a bill was introduced into parliament proposing imposition of the death penalty for certain homosexual acts. The bill still awaits consideration;

³¹ UNAIDS, *Outlook Report: State of the Aids Response* (July, 2010) <http://data.unaids.org/pub/Outlook/2010/20100713_outlook_report_web_en.pdf>.

³² United Kingdom, Royal Commission Report on *Homosexual Offences and Prostitution*, Command Paper 247, Cmnd 247 (1957).

³³ *Sexual Offences Act 1967* (UK). Cf *Croome v Tasmania* (1998) 191 CLR 119 where the *Criminal Code (Tas)*, ss 122 (a) and (c) and 123 were the last remaining such provisions in Australia (since repealed).

³⁴ United Nations Human Rights Committee, *Views: Communication No. 488/1992, 1 Int Human Rights Reports* 97, UN Doc CCPR/c/50/D/488/1992 (14 April 1994) (*Nicholas Toonen v Australia*) This decision was followed by the *Human Rights (Sexual Conduct) Act 1994* (Cth).

- In Malawi also in 2010, a male couple were sentenced to 14 years imprisonment and only released following the intervention of the Secretary-General of the United Nations;
- Also in Uganda in 2010, a newspaper published an alleged list of gay citizens, suggesting a need for civic retaliation against them. A short time after, a civil society advocate of law reform, David Kato, who was named in the newspaper, was brutally murdered in his home; and
- Many countries of the Commonwealth even voted for deletion of sexual orientation and gender identity from forbidden grounds on extra-judicial violence, inferentially on the basis that they considered this to be tolerable in their case.³⁵

How can an international body such as the EPG persuade or influence a country to change its laws, policies and attitudes on such matters? How can such change be achieved when justification of the applicable laws is often supported on the footing that they are required by the Bible or as part of Shariah law in Islam? How can law reform be rendered persuasive when even an advanced, developed, Commonwealth member state like Singapore, has maintained the provisions of the *Penal Code* inherited from colonial times? Although an enquiry by the Law Society of Singapore recommended deletion of this law from the *Singapore Penal Code* in conformity with modern knowledge about human sexual variations in nature, and although the population of Singapore is not predominantly Christian or Islamic, an appeal to ‘social conservatism’ led to rejection of the proposed reform in Parliament, albeit with a promise that the law would not be vigorously enforced.³⁶

Upon all of these questions, the EPG will report to the CHOGM meeting to be held in Perth, Western Australia, in October 2011.

IV UNDP COMMISSION ON HIV AND THE LAW

In June 2010, the Administrator of the United Nations Development Programme (UNDP), Helen Clark (past Prime Minister of New Zealand), appointed me a Commissioner of a new Global Commission created by that body, with a mandate to investigate and report on legal impediments to the present global response to HIV. The President of the new Commission is Mr Henrique Fernando Cardoso, past President of Brazil. In addition to the 15-member Commission comprising political leaders, judges, scientists and civil-society personnel, UNDP has also established a Technical Advisory Group (TAG) of which I am co-chair. TAG’s task is to provide scientific, legal and other technical advice to the Global Commission, so as to afford it a strong empirical and evidence-based foundation for its conclusions and recommendations.

³⁵ *United Nations Decision on Broad Range of Human Rights, Social, Cultural Issues*, GA Res 65/229, UN GAOR, 65th sess, 70th and 71st plen mtg, Supp No 53A, UN Doc A/RES/64/203 (21 December 2010). Vote on the United States amendment to add sexual orientation to the UN Resolution on extra-judicial summary and arbitrary executions.

³⁶ Report of the Council of the Law Society of Singapore on the Amendment to the Penal Code proposed by the Minister of Home Affairs (30 March 2007). See also M D Kirby, ‘The Sodomy Offence: England’s Least Lovely Criminal Law Export?’ [2011] *Journal of Commonwealth Criminal Law* 22, 37.

In contrast to the EPG of the Commonwealth of Nations, the UNDP Global Commission has a mandate which is at once narrower and wider. It is narrower in the sense that it is focused exclusively on HIV/AIDS and the considerations that add to its spread or impede its containment. But it is broader in that the UNDP Global Commission addresses the whole world. It is not confined to nations of any particular constitutional or historical experience or linguistic tradition. Of about 200 nations admitted to membership of the United Nations, approximately 80 have laws criminalising homosexual conduct. More than half of these (42) are Commonwealth countries. Many of the others are Islamic states that have derived these laws from different historical sources.

The UNDP Commission has a more explicit function to address the suggested defects in the law rather than organisational, institutional and representative issues of the kind presently before the EPG. Thus, while discrimination against sexual minorities is mainly raised in the Commonwealth enquiry as it concerns an inadequate response to human rights abuses, within the Global Commission it is central because it is vital to the legal obstacles that impede the global struggle against the spread of HIV.

Other law reform issues on the agenda of the UNDP Global Commission include:

1. An improvement in the legal and social disempowerment of women as relevant to the vulnerability to HIV. A majority of those infected with HIV have been women;
2. A response to a number of groups especially vulnerable to pertinent discrimination: men who have sex with men; sex workers; injecting drug users and children; and
3. The impediments caused by global intellectual property law affecting the costs of anti-retroviral drugs; the duration of patent protections; restrictions on the manufacture of generic drugs; and the influence of bilateral free trade agreements.

Each of the foregoing categories, as identified for the Global Commission by the TAG, presents major difficulties for securing reform. Religious, historical and cultural barriers stand in the path of reforms of the laws concerning women, sexual and other vulnerable groups. Economic forces and the inertia concerning new and rational global regimes for intellectual property law stand in the way of progress on that topic.

International attempts to persuade member states to change their laws and policies on these subjects mostly fall on deaf ears. However, this fact has resulted in an increasing number of appeals to the courts, seeking to secure relevant changes that have not been forthcoming from elected legislatures. An instance of this development involves the invalidation of laws criminalising homosexual acts. In some cases, court decisions have led to subsequent legal reforms either because of treaty obligations;³⁷ or because of the influence of such treaties on political resistance.³⁸ Sometimes, by invoking constitutional

³⁷ *Dudgeon v United Kingdom* (1982) 4 EHRR 149; *Norris v Ireland* (1991) 13 EHRR 186; *Modinos v Cyprus* (1993) 16 EHRR 485. Contrast *Romer v Evans* 517 US 620 (1996).

³⁸ *Croome v Tasmania*, above n 33.

norms of equality, privacy or otherwise, court decisions have had a direct effect, by invalidating the offending criminal legislation, either in whole,³⁹ or in part.⁴⁰

The 2009 decision in the *Naz Foundation* case by the Delhi High Court, although still under appeal to the Supreme Court of India, derived its chief importance from the fact that the judges invalidated the legislation as it applied to consenting adults in private and did so in constitutional terms that might find reflections or parallels in many other Commonwealth countries. The provision so affected (the Indian *Penal Code* 1860, s377) are reproduced in virtually the exact same way in the 42 jurisdictions of the Commonwealth that still maintain these offences. In due course, the Indian court decision may therefore influence judicial opinions in many other countries.

The Government of India did not appeal against the ruling in the Delhi High Court. In the High Court, representatives of the government appearing for the Ministry of Home Affairs defended the validity of the legislation, and the Ministry of Health opposed it. Unsurprisingly, it resulted in comment on the adverse affect on the struggle against HIV/AIDS, a point picked up in the Court's reasons.⁴¹ The Delhi High Court drew on a line of authority in India holding that the right to health inhered in the fundamental right to life provided for in the Indian Constitution.⁴²

Securing progress for sometimes unpopular and stigmatised minorities will frequently take time if it is necessary to gather the support of nervous, elected politicians. This is where appeals to fundamental human rights and the justice of equal treatment of all persons in such respects can occasionally expedite the pace of change. To those who then complain about a lack of democratic legitimacy involved in such court rulings, it needs to be pointed out that similar complaints were earlier advanced in respect of every major change designed to introduce notions of human equality: including, in Australia, the notions of female electoral suffrage; the removal of the legal entrenchment of White Australia; the abolition of the constitutional and other legal burdens on Aboriginals;⁴³ and the deletion of unsentenced impediments to prisoner rights.⁴⁴

³⁹ *Lawrence v Texas* 539 US 558 (2003). See also *Nadan v State* (2006) 3 LRC 166; decision of Nepalese Supreme Court, unreported, 21 December 2007; *Leung v Secretary of Justice* [2006] 4 HKLRD 211.

⁴⁰ *Naz Foundation v Delhi* [2009] 4 LRC 838.

⁴¹ [2009] 4 LRC 838 per A.P. Shah CJ and Muraldhar J.

⁴² [2009] 4 LRC 838 at 868-872 [60]-[71].

⁴³ Article 21. See *Paschim Banga Khet Mazdoor Samit v State of West Bengal* (1996) 4 SCC 37. See also MD Kirby, 'H.V.Evatt and the Universal Declaration of Human Rights' (2009) 34, *University of Western Australia Law Review* 238, 256 and cases cited.

⁴⁴ *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 406 [142] referring to the 1967 amendment to the Australian Constitution, s 51(xxvi).

V CONCLUSION

THE CHALLENGES AND OPPORTUNITIES FOR LAWYERS

It is too early to say whether either the Commonwealth EPG or the UNDP Commission will succeed in responding worthily to their challenging mandates. In both cases, the resistance to any recommendations may prove overwhelming, at least for the immediate future. The forces of religious opposition; social conservatism; cultural distaste; and political fragility may stand resolutely in the way of change and equal justice for all. They may defend the current laws and policies. They may prove indifferent to complaints that such laws and policies offend fundamental principles of human rights and equal justice. Formalists will then doubtless declare that the will of the majority of the people has prevailed and that those who want change must give up their efforts as futile, or work harder and longer until their causes are seen as a political ‘priority’. Such responses may be viewed as tolerable unless seen through the eyes of a person already infected with HIV or AIDS, or seriously disadvantaged because she is a vulnerable woman, or because he is a member of a vulnerable sexual group, deprived of dignity and equal justice under law.

The urgencies of the HIV epidemic can be empirically demonstrated, as can the serious obstacles that the present laws occasion. Thus, one report provided by UNDP to its Global Commission indicates that much higher levels of HIV infection exist in those Caribbean countries that continue to criminalise homosexual conduct when compared to other countries in that region which do not.⁴⁵ Being a picture, the graph told a vivid story. It is now before both the UNDP Commission and the EPG on the Commonwealth.⁴⁶

Australia’s national experience in the 1980s showed that the law can be a help in the struggle against HIV. It can support access to essential health care as a fundamental human right. But, equally, the law can be an obstacle. My purpose in devoting this inaugural lecture to the challenges addressed by the two bodies mentioned has been threefold. First, to demonstrate that life continues for me after the High Court of Australia, that the challenges I now face are different and in some ways greater because they are less amenable to rational argument, evidentiary persuasion and conclusive determinance.

Secondly, I have sought to evidence difficulties that arise in the real world of international agencies and international human rights law and policy.

Thirdly, I have attempted to show that the struggle for global human rights and justice is often messy and very frustrating. But when the new world order was established in 1945, nothing less was contemplated. The new body of international human rights law presented novel demands as well as brave expectations. In the six decades since 1945, there have been many failures but also a number of successes. Lawyers have played an increasingly important part helping the world to build effective scaffolding for universal human rights.

⁴⁵ *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [8] per Gleeson CJ, referring to the legislative repeal of disenfranchisement of Roman Catholics, by the *Roman Catholic Relief Act 1829* (10 Geo. IV, Ch7).

⁴⁶ ‘HIV Prevalence Against MSM in Caribbean Countries’, UNAIDS, 2008. See chart on page 20.

Given the injustice and inequality that preceded the present age and the human resistance to change, the achievements have been substantial. Nowadays, individuals and civil society organisations know that fundamental human rights exist. Human beings are not condemned to unending injustice. They can look in hope and expectation to greater justice in a more equal world. All of us have a part to play in securing improvement and in ensuring that the discipline of law becomes an instrument for equality, human rights and justice. Not only in Australia. Worldwide.

