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UNIVERSITY OF TECHNOLOGY,
JAMAICA

FACULTY OF LAW

COMPARATIVE CONSTITUTIONAL
LAW - LEARNING FROM EACH
OTHER

A VIEW FROM AUSTRALIA

The Hon. Michael Kirby AC CMG

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A VIEW FROM AUSTRALIA*

THE HON MICHAEL KIRBY AC CMG**

LESSONS OF YOUTH – A 50 YEAR PERSPECTIVE

I pay my respects to the judiciary and legal profession of Jamaica. I honour the Norman Manley School of Law, its Dean, Oswald Harding O.J., QC, its teachers and students.

In my youth I grew up in ‘White’ Australia. That was something our constitution envisaged¹ and our laws provided for only by learning from others did we change. I want to start by telling how change came to me. It is a very ordinary tale. But it has lessons for today.

I had been a late entrant into organised student affairs at the University of Sydney. But in 1962 I was elected president of the Students’ Representative Council. In that capacity, I engaged with the activities of the National Union of Australian University Students. That body was beginning to show an interest in the newly emerging nations of Africa

* Derived in part from an address to Justices of the Supreme Court of Nigeria, Abuja, Nigeria, 12 June 2012. The author’s visit to Jamaica was arranged by the United Nations Development Programme (UNDP).

** Commissioner of the UNDP Global Commission on HIV and the Law (2011-2012); Justice of the High Court of Australia (1996-2009); President of the Court of Appeal of New South Wales (1984-96); Judge of the Federal Court of Australia (1983-4); Chairman of the Australian Law Reform Commission (1975-84); Deputy President of the Australian Conciliation and Arbitration Commission (1975-83). President of the International Commission of Jurists (1996-8).

¹ *Australian Constitution* (1900), Sections 25, 51(xxiv), 127.

and Asia. It selected me to lead a student delegation to Nigeria and Ghana and, on the way home, to Malaya and Singapore. I was not sent to Jamaica or the Caribbean. But I was suddenly confronted by people who were not 'white' like me – in large numbers.

I arrived in Lagos, Nigeria after a brief stop in England. At Lagos Airport I was met by the president of the National Union of Nigerian Students, Razak Solaja and the vice-president, David Obi. The following day, the Australian delegation travelled by train to Ibadan. There we were hosted for several days. We met many students, male and female. For someone who's life had been spent in country of white Anglo-Celts, the vivid colours, noises, music and food of Nigerian student life was almost unbearably exciting.

At the time of our visit, Nigeria was still celebrating its independence from Britain, won in October 1960. The Prime Minister of Nigeria was Sir Abubakar Tafawa Balewa. The Premier of the Northern Region was Sir Ahmadu Bello who, memorably, possessed a green Rolls Royce. The great independence leader Dr Nnamdi Azikwe was waiting the time to assume the mantle of President when Nigeria shortly became a republic. In those days, the country was full of enthusiasm and optimism. I think that Ibadan was still then a college of the University of London. I think that the vice-chancellor was British. Every morning and evening, everyone still listened to the BBC radio news. Things were probably not so different at the time in Jamaica. Although it had been a British colony since 1655, it too had only won its independence in August 1962 – a few weeks before I landed in Nigeria.

Having been welcomed generously by Nigerian students in Ibadan, our delegation of five male university students set out upon a journey of discovery, planned for us by our Nigerian hosts.

We travelled by third class rail overnight to Zaria in Northern Nigeria, as the region was then known. We took up residence in student accommodation at the Sir Ahmadu Bello University. I will never forget the beauty of the flowers that decorated the campus and the brilliant colours of the local markets to which we were taken. And the friendliness of the people.

After Zaria, we travelled to Kano and then to the province of Eastern Nigeria. In Enugu, our delegation was received there by the Governor, Sir Francis Ibean, a distinguished medical doctor. Whereas our student hosts had been unfailingly polite to us, Sir Francis did not beat around the bush. He interrogated me and my colleagues about the reports of the mistreatment of indigenous Australians. He asked how we could possibly justify Australian's 'white Australia' policy². This was the first time I had engaged in such a way with a person from Africa. At the time, the interrogation left me somewhat shaken.

Encouraged by the vigour of Sir Francis's questions, the student leaders also began to raise awkward issues. How many Australian Aboriginals had graduated? Were there any lawyers amongst them? Had any of them become judges or leaders of their profession? The answers to all of these questions were in the negative. Although everything was perfectly correct, I was left feeling unsettled.

² A.J. Brown, *Michael Kirby: Paradoxes-Principles* (Federation, Sydney, 2011), 59.

The delegation then travelled to Port Harcourt, where it was taken to the petroleum installations. We returned to Lagos where we spent time at the University. Then we were driven to Abeokuta, near the border of Western Nigeria with its French speaking neighbour, then known as Dahomey. At the border, we were detained for two days. The barriers were down and the border was closed because of a *coup d'état* that had just taken place in Cotonou. The military leader who won power at that time was to remain in office for decades and even later to return at a popular election. So it was a big change in that country, soon to be renamed Benin.

Our delegation travelled along the coast of West Africa, through Togo, to Ghana. There we were guests of the National Union of Ghana Students. Their campus, at the University of Accra, was palatial, being an early example of the financial support of the Peoples Republic of China to their independence leader, Dr Kwame Nkrumah, called by the students *Osagyefo* (the Redeemer). Like their Nigerian equivalents, they too examined all members of the Australian student delegation about our country's racial policies. Naively, most of us had never really questioned those policies ourselves. We grew up believing that we were a 'white' country of British settlers, recreating English institutions and society in the Antipodes. For me, the visit in Nigeria in early 1963 became a kind of epiphany. I have always regarded it as such.

My visit in 1963 was not only an intellectual challenge for me. It was also an emotional one. Essentially, Nigeria has remained fixed in my mind as the country, other than my own, that I got to know first. It was noticeably different from my own rather staid and self-contented society. It was so vibrant, energetic and exciting. And it was because of the very

contrast from the world with which I was familiar that Nigeria has always been for me a very special place. It was here that I learned the rhythms of *High Life* and the optimism and confidence of a newly independent people. It is here that I learn that law is not always just or conformable with human dignity. And that men and women everywhere thirst for independence, democracy, order, freedom, justice and human rights.

I will always be grateful for the invitation to come to Nigeria in 1963 and to return to it now, to witness the enormous changes that have been brought in the intervening decades. Not all of those decades have been good times. But through the good and difficult years, my mind would often travel back to Nigeria. And I would sing to myself, or to astonished Nigerian visitors, the joyous anthem that I learned during my first visit in 1963:

*Nigeria we hail Thee!
Our own dear native land.
Though tribe and tongue may differ,
In brotherhood we stand.
Nigerians all,
And proud to serve,
Our sovereign Mother land.*

With newly won independence, a homegrown democracy and stirring national anthem Nigeria, like Jamaica soon after, became a full member of the Commonwealth – independent and fiercely combating racism throughout the world.

RETURN TO AUSTRALIA

Back to 1963. Having completed my tour of West Africa and the later visits to universities in Singapore and Malaya, the Australian student delegation returned to Australia. But we were not the same. I was not the same. In my mind were the uncomfortable questions that Sir Francis Ibian and the Nigerian students had asked me.

I immediately arranged for a return invitation to be extended to the National Union of Nigerian Students. And so, Razak Solaja, David Obi and Patience Onuwatu came to Australia in 1963. They come bearing gifts, but also with searching questions, as I knew they would. They repeated the enquiries they had directed at me. They had a large impact on the student and general audiences that they met in Australia. After their departure, Australian university students became much more involved with racial injustice. I would not say that the Nigerian student delegation was instrumental in this. But it certainly contributed. Thus, several programs were initiated by Australian student bodies:

- * The Abscol project: to raise funds to provide scholarships for Aboriginal students to permit them to attend university;
- * The repeal of 'White Australia' project: this became active and noisy in the 1960s. In 1966, the Holt Government in Australia began the steps to repeal the laws that underpinned the migration regime that confined immigrants to Australia to white people of caucasian race. The repeal of those laws was completed by the Whitlam Government in 1973;

- * The freedom rides project: imitating developments that were occurring at that time in the United States of America, university students in Australia became engaged in visits to outback townships which practised various forms of racial discrimination. One 'freedom ride' to Moree was led by a law student, James Spigelman, who was later to become the Chief Justice of New South Wales. Another involved the 'liberation' of the cinema at Walgett, in Western New South Wales. At that cinema, Aboriginals were barred from viewing films from the dress circle. When a group of university students with Aboriginal friends, challenged this barrier they were arrested for trespass. With leading counsel, I travelled to Walgett to defend the students. A wise magistrate released them on bonds. The discrimination in Walgett was dropped soon after.

From these engagements and others, I was able to pay back, and partly to answer, the questions I had been asked on my visit to Nigeria. Those questions remained a backdrop to larger events that happened in Australasia in the decades that followed. The protests against the visits of sporting teams from South Africa. The challenges to apartheid. The support for independence movements of colonial peoples. Truly, my visit to Nigeria was an epiphany for me. This is how human beings in Jamaica, Nigeria and Australia learn from each other. We familiarise ourselves with each others' lives and concerns.

COMPARATIVE CONSTITUTIONALISM: A BENEFICIAL STUDY

In a sense, judges in common law countries, who share the English language and similar ways of deciding and expressing legal conclusions, have always been engaged in forms of comparative legal analysis.

All of us Australia, Jamaica and Nigeria included, have been linked through the imperial court of the British Empire, the Judicial Committee of the Privy Council. The Privy Council was a court of distinguished (mostly) English judges. They offered a little of their time to resolve legal problems in the far-away dominions and colonies. Their integrity, intelligence and efficiency set a very high standard for the performance of judicial duties by judges far from London. Sometimes, Their Lordships did not have a full appreciation of the local conditions that made it difficult for them to reflect all of the factors necessary to a lawful and just resolution of the cases. Some critics suggested that they were occasionally unduly protective of British commercial interests in the Empire. For all this, the role of the Privy Council was mainly benign and highly useful. However, one by one, most of the newly independent nations of the Commonwealth terminated this imperial link. Today, only a majority of the Caribbean countries, Mauritius and a few colonial outposts maintain the role of this expositor of comparative constitutionalism.

Back in the days of Empire, it was not only courts that looked to other jurisdictions. Legislators did so too. Thus, in the Second World War, the United Kingdom Parliament enacted the harsh provisions of the *Defence of the Realm Act 1914* (UK) (DORA). Aspects of that Act were copied in the terrorism legislation enacted in countries such as Malaya and South

Africa. Indeed, the apartheid system in South Africa was derived from, and built upon, such legislation. Even the United States Congress copied aspects of the legislation in the enactment of the *Smith Act*. That statute imposed severe legal restrictions on communists. It was upheld by the Supreme Court of the United States in *Dennis v United States*³, despite the strong constitutional provisions protecting freedom of expression and freedom of association in that country.

CONSTITUTIONALISM: CLOSE AND PERSONAL

My first encounter with constitutionalism was a personal one. By 1950, my Grandmother had remarried. Her new husband was the national treasurer of the Australian Communist Party, Jack Simpson. As a boy and teenager, I got to know this man and found him to be an idealist and a decent citizen. Then, in 1950, the Parliament of Australia enacted the *Communist Party Dissolution Act 1950 (Aust)*. That Act, in its terms, set out to ban the Communist Party; confiscate its assets; and impose severe restrictions on members and sympathisers. Its constitutional validity was challenged in the High Court of Australia.

That court, by majority⁴, found that the Act was constitutionally invalid. In effect, the judges concluded, that whilst there was abundant power under the Australian Constitution to deal with any anti-social actions by communists, their beliefs and political manifestations of those beliefs, were beyond the legislative power of the Federal Parliament⁵. It was a brave and surprising decision of the Court. It helped to protect Australia

³ *Dennis v United States* 341 US 494 (1951), the Supreme Court of the United States upheld the validity of the *Smith Act*.

⁴ Dixon, McTiernan, Williams, Fullagar and Kitto JJ.: Latham C.J. dissenting.

⁵ *Australian Communist Party v The Commonwealth* (1951) 83CLR 1.

from the intolerable excesses that were seen at the same time in South Africa and the United States. It was a clear example of the importance of the rule of law. And of the role of a final court to protect the citizens from transient political passions that sometimes occur in any democracy.

An attempt, by referendum, to amend the Australian Constitution to overcome the decision in the case was held in September 1951. It did not gather the double majority required by s128 of the Australian Constitution: a majority of the total electors voting and a majority of the States in favour⁶. That vote demonstrated the wisdom of the Australian people. And their sense of tolerance and acceptance of diversity. It set the foundations for the building of the Australian Commonwealth as a more diverse, multi-racial and multi-cultural community. Upholding such values is an important feature of a democratic society. Courts play a vital role in safeguarding such values. Although I was only twelve years of age when the events of this litigation concluded, they had a profound effect on me and on my values. What was a personal and family crisis was also a national test for my country. Happily, on this occasion, Australia came through to a good outcome.

Judges, particularly in constitutional litigation, constantly face similar tests. Sometimes those tests are presented in the form of anti-terrorism legislation. Maintaining essential freedoms and upholding the letter and spirit of the constitution is an abiding duty of judges in constitutional cases. Governments and officials will often urge the need for exceptional measures and harsh regulations. However, Judges, who march to a different drum, must be faithful to the Constitution and to the

⁶ A. Blackshield and G . Williams, *Australian Constitutional Law and Theory* (Federation, Sydney, 2002), 1305-6. The total affirmative vote was 48.75%. The total negative vote was 49.85%. Voting by citizens is compulsory in Australia.

abiding values that it enshrines. Fortunately, this is what the High Court of Australia did in 1951. Judges in other countries (including the United States of America) were not so defensive of traditional liberties at that time.

Knowing about the challenges and controversies that happen elsewhere, can sometimes provide strength and resolution to judges, in their own jurisdictions, faced by similar crises. The law and the constitution will of course be different. But the challenges may be similar. We can draw strength and determination from knowing how judges in other countries face, and resolve, similar controversies.

INTER-COMMONWEALTH JURISPRUDENCE

Nigeria terminated Privy Council appeals soon after independence. Australia's legal independence was basically secured with the adoption of the *Commonwealth of Australia Constitution Act 1900 (Imp)*. However, because our independence came earlier, and was granted by a country from which most of the Australian settlers themselves derived, provisions in the Australian Constitution acknowledged the continuing role of the Privy Council⁷. That role was to remain until, in the 1970s and 1980s, appeals to Their Lordships were gradually terminated⁸. By chance, the very last appeal to the Privy Council from an Australian Court, came from a decision of my own, when sitting in the Court of Appeal of New South Wales. Happily, the appeal was dismissed⁹.

⁷ *Australian Constitution*, s.74.

⁸ *Privy Council (Limitation of Appeals) Act 1968 (Aust)*; *Privy Council (Appeals from the High Court) Act 1975 (Aust.)* and *Australia Act 1986 (Aust. and U.K.)*, s.11.

⁹ *Austin v Keele* (1987) 10 NSWLR 283 (PC).

The end of such appeals in most commonwealth countries outside the Caribbean has deprived Commonwealth countries of a stream of cases in which comparative constitutionalism could have been made available for our guidance and assistance. Had those with the power created a true Commonwealth appellate court in the 1940s and '50s, with judges from all Commonwealth countries, it might have been possible to continue this global exercise in institutional comparativism. However, that was not done. The opportunity passed and will not be revived.

In the Caribbean, the Caribbean Court of Justice has been established, with the objective of replacing the Privy Council with a regional court of distinction. I pay respects to Justice Adrian Saunders who has come to Jamaica for the judicial dialogue on HIV/AIDS, that is the primary reason for my visit to Jamaica at this time.

Instead of creating a true Commonwealth wide appellate court, three developments have occurred which promote comparative constitutionalism in all Commonwealth countries:

- * First, the British courts themselves, particularly under the wise leadership of Lord Bingham and Lord Phillips, began to insist upon the use of Commonwealth judicial authority. In its last days, the House of Lords, as the final court of the United Kingdom, instructed counsel, coming to argue British cases, to bring with them relevant authorities from other English speaking courts from which the British judges could secure wisdom;
- * Secondly, the advent of the internet has removed one of the major impediments to access to Commonwealth judicial authorities.

Whereas the case books once were virtually unobtainable, now they are often replaced by digital systems that render comparative constitutional authority available to a diligent researcher, interested to explore common themes; and

- * Thirdly, in proof of this, a significant series of Commonwealth judicial decisions has been initiated in the *Law Reports of the Commonwealth*. This series, beginning in 1985 and published by Butterworths/LexisNexis in London, brings to judges of all Commonwealth countries the major decisions made elsewhere in the Commonwealth. The series is efficient, up-to-date and broad ranging in its coverage. Its headnotes are excellent. It is very well served by cumulative indexes that facilitate the search for cases of possible comparative utility. Moreover, each year, the general editors, Professor James Read and Mr Peter Slinn, provide an *Editorial Review*. This review paints the large picture of Commonwealth judicial authority in the year past, as captured in the pages of the *Law Reports of the Commonwealth*. It is a wonderful service. Even busy appellate judges who do not have time to read all the cases themselves, can familiarise their minds with the broad contours of judicial developments. This will plant thoughts and ideas for retrieval at a later time when a case comes before them raising the same or similar problems. I am one of the advisers to the series but I have no financial interest in it. I have been glad to see the familiar black volumes on the shelves of judicial chambers in all parts of the Commonwealth. It is a wonderful resource. I commend it to the judges of Jamaica and the Caribbean.

The variety and importance of the reported cases is undoubted. It is essential to integrate natural jurisprudence with relevant developments in other countries of similar legal tradition. Doing so not only provides useful analogies to lawyers in other countries. It encourages techniques of comparativism and the avoidance of parochialism. As nations turn inward and concern themselves only with their own legal materials, their jurisprudence tends to shrink. And their access to the corrective force of international examples and broad legal thinking is diminished.

COMPARATIVE LAW THEMES

Each nation's national constitution emerges from its peculiar history. Yet there are common themes such as:

- * The separation of the judiciary;
- * The independence of the courts;
- * The powers of the legislature;
- * The powers and modes of government of the executive;
- * The meaning of a charter of rights; and
- * [at least in countries such as Canada, Australia, India and Nigeria] the issues of federalism.

A review of recent decisions covered in the *Law Reports of the Commonwealth* shows the high relevance, and possible analogous utility, of decisions of Commonwealth courts on subjects that commonly present themselves across multiple jurisdictions. Just to read through the *Editorial Review 2011*¹⁰, published in conjunction with the *Law*

¹⁰ J.S. Read and P.E. Slinn (Eds) *Law Reports of the Commonwealth Editorial Review* (LexisNexis, London, 2011). Each of the cases that follow is cited and described in the *Editorial Review*.

Reports of the Commonwealth series show the wide range of cases which would often afford wisdom and learning, available to later Commonwealth judges who address constitutional puzzles of their own. The 2011 Review provides good examples and a cornucopia of relevant decisions of general significance:

- * *Executive Powers:* A decision of the Barbados Court of Appeal concerning whether the Governor-General had wrongly exercised a judicial function in determining a constitutional pardon. A decision from India which related to the power of a state government to exercise a pardon and whether that power was open to judicial review. A case from the South African Supreme Court of Appeal concerning whether a judge had the legal power to order the provision by the executive government of legal aid in a particular case. A decision of the Supreme Court of the United Kingdom on whether the implementation of a United Nations Security Council resolution by the executive government was amenable to judicial review;

- * *High Officials:* A decision in Vanuatu on whether the appointment of a Prime Minister was invalid. And a decision of the National Court of Papua New Guinea concerning the unconstitutionality and invalidity of the appointment of the Governor-General;

- * *Judicial Powers:* A decision in Kenya concerning the invalidity of the exclusion of prisoners from participating in a constitutional referendum. And a rejection of a challenge to the appointment of male rather than female lawyers to the bench of the Supreme Court. In Australia a decision concerning the bias rule in the

disqualification of judges and a rejection of a challenge to orders of a superior court;

- * *Parliament:* From the United Kingdom, a case is included that examines contested claims by members of parliament to expenses and whether such matters are exclusively within the purview of parliament and outside the jurisdiction of the courts. From New Zealand a case concerning the limits and boundaries of the traditional absolute privilege of the legislature and whether it extends to the protection of materials prepared by officials for use by a minister in Question Time;
- * *Aboriginal Title:* Such cases are appearing in many jurisdictions of the Commonwealth. In Canada, a decision concerning the “honour of the Crown” and its duty to consult indigenous people over a hydro-electric development. In Botswana, the issue of customary law and the use of a borehole. And in Kenya, the validity under customary law of a traditional woman to woman marriage in the Nandi community; and
- * *Fundamental Rights:* Countless cases concern the limits and meaning of fundamental rights expressed in constitutional provisions. For example, in Singapore a debate in the Court of Appeal concerned the applicability of the Privy Council jurisprudence on whether the mandatory death penalty is invalid because ‘inhuman’. And whether that line of authority could have application in Singapore. A case in Kenya following the Privy Council jurisprudence on death sentence cases. A decision from New Zealand relating to the legal rights of an unborn child. A case

in India concerning the validity of the law against attempted suicide. Cases on the right to vote; the right to liberty; the right to be free from torture; the right to freedom of expression; the right to recognition to gender identity; and the right to amend the national constitution, including in fundamental respects. All of these questions have been addressed in the past year. They are collected in the series of the *Law Reports of the Commonwealth*.

Of course, every constitutional court must enjoy and exercise its own powers. Today, such courts are not subject to the coercive power of the orders of foreign judges or decisions. Nonetheless, it is a lesson of this important series of cases that similar problems tend to arise in different jurisdictions at much the same time. Access to comparative constitutional law does not bind the local judges. Sometimes foreign authority can be distinguished because of differences in the text, context or constitutional culture and national history. Just the same, when experienced and learned judges have examined problems in the past, it is frequently of great assistance for those who come later to have access to their decisions. They do not bind the local judges. But they at least provide guidance that ensures that, when they come to a similar problem, national judges will not be forced to reinvent the wheel. They will have the stimulation and assistance of earlier writings. They will be able to 'tick the boxes' to make sure that they have considered all relevant considerations of law, principle and policy¹¹. It is this facility that is the main benefit of comparative constitutionalism in the world today. Naturally, we are all loyal to our own constitutions and local doctrine. But we can be assisted, supported, stimulated and sometimes corrected

¹¹ For discussion, including contrary views, see M.D. Kirby, "International Law – the Impact on National Constitutions" 21 *American University International Law Review* 327 (2005).

by the insights offered by judges, examining like problems in other jurisdictions that are sufficiently similar in their legal traditions to our own.

A decision of the High Court of Australia, shortly before I retired from office is a case in point: *Roach v Electoral Commission*¹² There the Australian Federal Parliament in 2006 had enacted a law depriving all prisoners of the right to vote. Until that time, prisoners in Australia serving sentences of less than 2 (later 3) years imprisonment were entitled to cast their vote. Because voting at federal and State elections is compulsory in Australia, this meant not only a privilege, but a duty to vote. Arrangements had been made in Australian prisons for a century, to permit short-term prisoners to vote.

Sensing an electoral advantage and a close election, the federal government in 2006 moved to deprive all prisoners of that vote. A law to that effect was enacted where minority rights are concerned; there is sometimes a need for special vigilance by the courts. The High Court of Australia, by majority, concluded that the legislation was disproportionate and constitutionally invalid. The minority judges (Justices Hayne and Heydon) dissented and concluded that, for default of any express constitutional protection, such matters had to be left to Parliament to decide. The majority judges (Chief Justice Gleeson, Justices Gummow and Crennan and myself) concluded that removing the vote from prisoners serving sentences of shorter than 3 years was constitutionally invalid. Their right (and duty) to vote was re-affirmed.

¹² [2007] 233 CLR 162; [2007] HCA 43.

In reaching that conclusion, reference was made by the High Court of Australia to comparative constitutional law sources in the Supreme Court of Canada in *Sauvé v the Queen*¹³ and the decision of the European Court of Human Rights in *Hirst v United Kingdom [No. 2]*¹⁴. No judge considered either of these cases, or any other foreign decision or legal authority, binding the Australian court to a particular outcome. However, having access to such decisions, reading and reflecting on the common problems they addressed and the issues they grappled with, was of help to the majority, despite the significant distinctions of the Australian constitutional context.

CONSTITUTIONAL WISDOM: ABIDING VALUES

This reflection and the foregoing illustrations, bring me back to the issue of the value, even in constitutional adjudication, of learning from each other. Constitutional cases often concern the deep values of a society and its people. Such values, where they address fundamental human rights and human dignity, are often shared across jurisdictions. Sometimes, as well, legal norms are shared across jurisdictions, or are sufficiently similar to warrant examination of the way others have resolved a common problem.

An instance of this type of question can be seen in several areas of the law, where in imperial times, particular statutes were shared in countries in several parts of the British Empire. The 19th Century was a time when codification of the law was being developed in England and its colonies. Thus, statutes with common features were copied in many jurisdictions

¹³ [2002] 3SCR 519 at 585 [119].

¹⁴ (2005) 42 EHRR41.

concerned with subjects as diverse as the law of evidence; the law of marriage and divorce; the law of pleading and court jurisdiction; the law of extra territorial recognition of judgments and orders; the law on the sale of goods; the law of cheques and negotiable instruments; and the criminal law. To this day, in many Commonwealth countries, the basic principles established by those 19th Century codes continue to operate in their original, or revised, form. They constitute a kind of shared tradition and corpus of law that makes the use of comparative material helpful to many judicial decisions.

A prime example of this inter-jurisdictional comparison is the penal code that was exported by the British colonial administrators to most parts of their Empire. Whereas the advocacy for codification of the criminal law, advanced by Jeremy Bentham and John Stuart Mill, did not bear fruit in England, it proved most successful in the Empire. There were four models on offer, all with common themes: Thomas Macaulay's code of 1837 - the Penal Code for India; James Fitzjames Stephen's adaptation of 1870; Robert Wright's Jamaica Criminal Code of 1877; and Samuel Griffith's Queensland Criminal Code of 1899¹⁵. Wright's Jamaica Code was not given force in Jamaica itself. However, in the manner of those times it was picked up and used in the Gold Coast (now Ghana) and elsewhere in the Empire.

The similarities of the underlying concepts appearing in each of these codes was not surprising, given that each was an endeavour to express in the form of a statutory code, the criminal law of England which had developed over 6 centuries and which comprised an unruly mixture of

¹⁵ Barry Wright, "Macaulay's Indian Penal Code and Codification in the 19th Century British Empire [2012] *Journal of Commonwealth Criminal Law* 25.

common law, ecclesiastical law, early statutory law with some reform of the laws of evidence and procedure.

Each of the foregoing criminal codes has proved highly influential in different jurisdictions of the contemporary Commonwealth. Possibly the most successful has been the Macaulay code, drafted by Thomas Babington Macaulay in 1837 and enacted for the Indian territories of the Crown in 1860.

In providing these codes for colonial peoples, the British administrators had neither the time, nor the resources, nor the inclination to adapt them for local conditions, pre-existing law, culture and traditions. They simply imposed the criminal law throughout their Empire as one of the key provisions which every government had to secure: the public law of crime and the ordering of the conduct of those in those present in their jurisdiction. It was in this way that the offence of sodomy came to apply throughout the British Empire.

It was not originally a crime in England. But it came to be adopted in early days through ecclesiastical law, on the basis of understandings of the Bible. It was then enacted by statute of Henry VIII, arguably to assist in his endeavour to take over the property of the Roman Catholic Church when the monasteries were closed in retaliation against the Pope's refusal to recognise the King's divorce from Queen Catherine.

An equivalent provision in the French criminal law, dating from before the Revolution of 1789, was repealed in 1793. Thus, the offence was never part of the modern penal law of France. It did not appear in the French *Penal Code* of 1810. It was not exported to the French colonies

nor to the countries of Europe where the French *Penal Code* was taken up by Napoleon. Thus, the offence was never part of the bequest of the European colonies from France, Belgium, The Netherlands, Scandinavia, Germany, Austria or Russia. It was not adopted in the laws of China or Japan. Because it was not part of the Netherlands law. It did not become a criminal offence, it was not imposed in what is now the largest Islamic nation in the world, Indonesia. It is substantially confined to former British colonies and to a number of Arab and Islamic jurisdictions¹⁶.

Arguably, the offence of sodomy involves an excessive intrusion of the criminal law into private, adult, 'self-regarding' conduct which is not normally the subject of criminal sanctions. In the contemporary world, experts have also repeatedly concluded that such crimes seriously impede the outreach of measures designed to contain the HIV/AIDS epidemic¹⁷. On this ground the Eminent Persons Group of the Commonwealth of Nations (of which I was a member), chaired by Tun Abdullah Badawi, former Prime Minister of Malaysia, unanimously recommended that steps be initiated to procure repeal of such laws. If anything, they are matters for private morality, not the public criminal law¹⁸.

In India, in July 2009, the High Court of Delhi unanimously upheld a challenge to the constitutional validity of the sodomy provisions in s377 of the *Indian Penal Code* 1860 (India) in *Naz Foundation v Delhi and*

¹⁶ M.D. Kirby "The Sodomy Offence: England's Least Lovely Criminal Law Export?" [2011] *Journal of Commonwealth Criminal Law* 22.

¹⁷ United Nations Development Programme, Global Commission on HIV and the Law, Report *Risks, Rights & Health*, July 9, 2012.

¹⁸ Commonwealth of Nations, Eminent Persons Group, Report, *A Commonwealth of the People: Time for Urgent Reform* (Commonwealth Secretariat, London, 2011), CHOGM, Perth, October 2011, 98-102.

*Ors*¹⁹. In that case, Chief Justice A.P. Shah and Justice Muralidhar measured the provision of the *Indian Penal Code* and found that it was inconsistent with at least two important provisions of the *Indian Constitution* of 1950, namely article 14 providing for the right to equality of citizens and articles 19 and 21, which have been interpreted to provide a right to privacy and to live with dignity.

The Government of India accepted the decision of the Delhi High Court and did not appeal against the orders made in *Naz*. In particular, the references by the judges of the Delhi Court to the impediment provided by the law to successful strategies to combat the spread of HIV/AIDS had a broad resonance in India. India, like Jamaica, faces a significant challenge from the spread of HIV/AIDS and great cost and grave personal and economic consequences from the ongoing infection of its inhabitants with HIV.

Although the Government did not appeal against the decision, a number of religious groups did so. A hearing of their appeal was concluded before the Supreme Court of India in recent months. The decision of that court is awaited.

The opinion of the Delhi High Court has been published in the *Law Reports of the Commonwealth*. It can be viewed there and on the internet and considered by judges and lawyers in the many countries where similar or identical penal provisions were adopted in colonial times. Those countries include Jamaica.

¹⁹ [2009] 4 LRC 838.

The fact that a court in India has held criminal offences addressed to homosexual men are incompatible with the local national constitution does not, of course, mean that it is necessarily incompatible with other constitutional requirements. Nonetheless, the similarities between the criminal laws derived from colonial times and human rights provisions in national constitutions adopted more recently, mean that the Indian decision will be read and considered for its local relevance. At least this will occur where a challenge is brought to the constitutional validity of provisions such as s377, however expressed in the various criminal codes derived from colonial days.

In reaching its decision, the Delhi High Court drew substantially upon decisions of the constitutional courts of other common law countries which had earlier faced similar challenges and like legal questions. These courts have included the decisions of the Supreme Court of the United States in *Bowers v Hardwick*²⁰ reversed in *Lawrence v Texas*²¹; the decision of the Supreme Court of Canada in *Vriend v Alberta*²²; of the South African Constitutional Court in *National Coalition v Minister of Justice*²³; the decisions of the European Court of Human Rights in *Dudgeon v United Kingdom*²⁴; *Norris v Ireland*²⁵; and *Modinos v Cyprus*²⁶; and of the UN Human Rights Committee in *Toonen v Australia*²⁷. Many other decisions on like questions were examined, although the final conclusions were based squarely on Indian local jurisprudence. The Indian judges concluded that to criminalise a group

²⁰ 478 US 186 (1986) (USSC).

²¹ 539 US 558 (2009) (USSC).

²² [1998] 3 LRC 483.

²³ [1998] 3 LRC 648; 1999 (1) SA6 (SACC)

²⁴ [1982] 4 EHRR 149.

²⁵ [1991] 13 EHRR 186.

²⁶ [1994] 16 EHRR 485.

²⁷ UNHRC DOC. CCPR/C/50/D/488 (1992).

of persons for aspects of their being that was private, adult and consensual, was similar to attempts during colonial times to oppress particular groups in the Indian community. Against such attempts, the Constitution of India had set its face²⁸.

“If there is one constitutional tenet that can be said to be an underlying theme of the Indian Constitution, it is that of ‘inclusiveness’. This court believes that Indian Constitution reflects this value deeply engrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as ‘deviants’ or ‘different’ are not on that score excluded or ostracised.

Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination. This was the spirit ... of which Nehru spoke so passionately. In our view, Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the [sexual minorities] are. It cannot be forgotten that discrimination is the antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.”

I realise, of course, that cultural and religious norms are different in Jamaica from India, and again, from Canada, New Zealand, Nigeria and South Africa. Just the same, the notions expressed in the Indian decision are deserving of attention and careful thought for their application in other parts of Africa and in the world. This is the way the

²⁸ [2009] 4 LRC 895.

law is in the 21st Century. The technology of travel that has brought me to Nigeria once again and the technology of informatics mean that we are linked together on our blue planet, as never before. We can learn from each other, including in the matters of constitutional law, the purpose of law, the limits of law and the basic principles of human rights and human dignity.

REPAYING THE DEBT

It is a great honour to be invited to come to Jamaica at this time and to speak of comparative constitutionalisms and learning from each other. I could have remained silent about the issue of sexuality, out of reticence or politeness. As the Nigerian students were at first, after my arrival 50 years ago. But reticence and politeness, correctly, did not eventually prevent my Nigerian hosts in 1963 from raising with me the injustice of apartheid and the errors of Australia's racial laws and policies. Their voices gave me insights which, living in my own society, I did not have or had avoided or failed adequately to consider. On this visit to Jamaica, I owe it to endeavour to repay my debt to the student leaders of 50 years ago who spoke so plainly to me and, later to Australians in their own land.

A person's race, ethnicity and skin colour is something indelible in them. It is not chosen. It cannot easily or successfully or at all be changed. Similarly, a person's sexual orientation. I know this from my own experience. To endeavour to change a person's sexuality is as impossible as to try and change their race. And it should not be attempted. This is what is unnatural. And disrespecting a portion of humanity on the basis of their gender or sexuality is no better than

disrespecting people because of their race. In Australia, we have belatedly come to recognise this. And it has been given the strongest affirmation by the nation's highest court²⁹. To say that there is a difference between race and sexuality, because one's race is not dangerous to health, is a misleading assertion. Recent reports of the Commonwealth and of the United Nations show that, in Africa and in the Caribbean one's race is intimately connected with infection with HIV/AIDS and with stigma and lack of access to means of prevention, health care and therapy³⁰. With race come personal economic, cultural and religious barriers to effective strategies that help to prevent the spread of HIV and to facilitate its treatment and control.

I now ask the generation of Razak Solaja, David Obi and Patience Onuwatu in Nigeria – speaking 50 years ago about racism, to bear witness that I have repaid the debt I owe to them. It is the debt of sharing human experience. This is what racism, genocide, sexism and homophobia seek to prevent. And that is why judges and lawyers, as civilised leaders of thought and wisdom in their societies, must, so far as the law permits, be voices for our shared humanity. This is the end to which comparative constitutionalism and the force of international human rights law direct our species. A realisation that we are one, together, on a small planet, circling a minor star, in a tiny galaxy, surrounded by billions of stars and millions of galaxies. In that context it behoves judges and lawyers to be voices for justice for all, with hatred for none. This should be possible. But it will require leadership and

²⁹ *Mabo v Queensland [No.2]* (1992) 175CLR 1 at 42 per Brennan J. (Mason CJ and McHugh J. concurring) (Aboriginal rights); *Appellant s395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 (homosexuals).

³⁰ See report of the Commonwealth Eminent Persons Group (above n.18) and report of the UNDP Global Commission on HIV and the Law (above n.17)

awareness on the part of the law-makers of Jamaica – and, in appropriate cases, that includes the judges.
