

H V EVATT: LIBERTARIAN WARRIOR

INAUGURAL HERBERT VERE EVATT MEMORIAL ADDRESS

PARLIAMENT HOUSE, SYDNEY, 30 AUGUST 1991

EVATT FOUNDATION

Parliament House, Sydney

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The Hon Justice Michael Kirby AC CMG*

EVATT ON THE WORLD STAGE

We are living through a most extraordinary moment of human history. It is a moment which will be written of, and taught, in centuries to come as the Russian Revolution of 1991. We are living in the midst of it. It is not complete. But it is clear that it has mighty implications for the politics of the century ahead of us. It affects the future of the political theory which has largely set the agenda, and provided the major challenge to the liberal democracies, during most of this century. But also at stake, beyond the philosophy or State religion which will activate humanity in the 21st century, is the fierce contest about the rights of peoples. The peoples' right to self-determination has been a constant theme of the 20th century. It has seen the demolition of the great empires which coloured the world

maps pink, blue and yellow in the lives of most of us here. Yet now we are coming to a true crisis point. Who is a "people" to enjoy the right of self-determination which President Wilson insisted upon? The Estonians, Latvians and Lithuanians surely are. Are the Croats? Are the Azerbaijanis? Are the Zulus in South Africa? Are the Aborigines in Australia?¹

These are not new questions. But they are deep and lasting ones. We should see the issues which activated the life of Herbert Vere Evatt against the stormy background of contemporary events. Evatt must be seen, in context, as an Australian who struggled upon the national and international stage, wrestling with the abiding issues of the twentieth century. His legacy is a nation, diverse in opinion and, in the main, accepting differences. It is an international legal and political order which, in the opening words of the United Nations Charter he did so much to shape, provides protection:

"To succeeding generations from the scourge of war."²

and reaffirms:

"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."³

And it does all this not in the name of the sovereign states which have dominated the exercise of power in the world. But in the name of:

"The peoples of the United Nations."⁴

For it is in their name that the Charter is established and

the promises given to base a new world order:

*"On respect for the principle of equal rights and self-determination of peoples."*⁵

In the opening words of the Charter, upon which Evatt laboured with Herculean resolve at San Francisco on behalf of the smaller nations⁶, are the seeds of the real new world order. It began in San Francisco; not in Kuwait.

It is not a century since Herbert Vere Evatt was born in East Maitland in 1894.⁷ In another two years we will have yet a further opportunity to reflect, in his centenary, upon the life of this remarkable man. It is not my purpose to sing a panegyric. I cannot speak of him as a man and as a person. It is not my object to present him to you as a saint, nor even as an ever-consistent guardian of civil rights. I know that during this conference, it will be suggested that Evatt's commitment to civil liberties was fragile and his pursuit of their protection problematical and at times inconsistent.⁸ I am also aware that, in many ways, Evatt was a difficult man. Those who worked with him were sometimes soured by the experience such that, forty years later, they could write:

*"I found him quite simply evil ... I found working for him debasing."*⁹

Historians have commented upon the range and depth of the hostility felt towards Evatt describing it as remarkable.¹⁰ Yet even critics, such as Sir Paul Hasluck, who worked with him at San Francisco, could describe him as "strangely loveable" with a character at times "tender and touching".¹¹ Relevant to events of recent weeks,

Evatt was said to be fascinated by the avowed attempt of the Russians to produce a new "Soviet man", aiming to lift humanity, by the state religion of communism, to a higher plane of aspiration and behaviour.¹²

In this very hall, five days ago I sat with Paul Hasluck. For him, Evatt's greatest strength was his sheer tenacity of purpose. When something gripped him, he could not be stopped. Truly, he was a product of the mid-century fired with the hopes borne in the ashes of the Second War. Those hopes were that, as Manning Clark put it:

*The great dreams of humanity were about to come true.*¹³

It is not my aim tonight to display for you Evatt's prodigious intellectual gifts. They won him so many prizes from Fort Street and the University. They dazzled colleagues and foes alike in the United Nations. His grasp of every detailed clause of the United Nations Charter was truly breathtaking to those who watched his performance as it was negotiated.¹⁴ His work as a barrister and twice as a judge need no words from me. I acknowledge at the outset - so that it can be put to one side - that this man of gigantic intellect, courageous and tenacious, was a flawed human being. Inconsistent. Impetuous. Often suspicious. Sometimes lacking in balance and judgment. Clinging to office when he should have gone. Accepting new office when his health did not permit. We know all this:

*"These are grievous faults
And grievously hath Caesar answered them."*

But in two particular brilliant respects, Herbert Vere Evatt

did battle for the cause of human right which earn for him the accolade of libertarian warrior. The first was on the world stage; the second closer to home.

In the battle of the Charter of the United Nations, H V Evatt stood firm for the small nations. He supported the reaffirmation of faith in human rights on the global scale.¹⁵ He gave strength to the United States and the United Kingdom to resist the Soviet efforts, then and later, to consign human rights to be a strictly national concern. From the moment the Charter was adopted, international peace and security and human rights were inextricably intertwined. We live in the post-Charter world. If we live in a world of universal human rights, a part of the credit must go to Evatt. Not only did he help put it in the Charter. But he supported the establishment of the Human Rights Commission to which Mrs Roosevelt was elected as Chairman. He supported the prodigious work of that body which produced the Universal Declaration of Human Rights. He was elected the President of the General Assembly of the United Nations. He was in that office on 10 December 1948 when the Universal Declaration was adopted. Thus began the long journey towards the International Bill of Rights¹⁶ Evatt, the jurist and common lawyer, assisted at the birth of these statements of basic individual rights which express the aspirations of humanity. If we can look to the twenty-first century as one promising peace and human rights it is because of people like Evatt. They established the institutions which, however imperfect, give us hope. They expressed the aspirations of humanity and set running a movement whose expression this past fortnight in the Soviet Union is wonderful in its

potentiality. Of one step of the present Federal Government Evatt would be intensively proud. On 31 July 1991 three Federal Ministers announced for the Labor Government of Australia that this country would at last ratify the Optional Protocol to the International Covenant on Civil and Political Rights.¹⁷ This instrument will give individuals in Australia the opportunity to bring their complaints to an international agency (the Human Rights Committee) where domestic redress has failed. It is a furtherance of the international Magna Carta which Evatt, the internationalist, sought to achieve. I can think of no more fitting libertarian memorial to the events of forty years ago than accession by Australia to the Optional Protocol. Let it not be an oft repeated promise of press releases. But the formal acceptance by Australia, in company with more than fifty other States, of the international jurisdiction of the Human Rights Committee. It's time for this to be done.

COMES A MOMENT TO DECIDE

The occasion of this meeting is the fortieth anniversary of the campaign against the referendum to dissolve the Communist Party of Australia and to "declare" its adherents. Defeating this measure was Evatt's greatest contribution to liberty in his own country. It called upon his most outstanding qualities. Adherence to basic freedoms, when it was not always easy to stand firm. Protection of an unpopular minority, howled at by the mob. Appealing to the rationality of fellow citizens and their sense of justice and constitutionalism. Perseverance in the face of seemingly impossible odds. A willingness to put high principle even above obvious political advantage. The sacrifice of personal

ambition to the defence of basic constitutional rights.

At the Morpeth Church of England where Evatt's parents were married in 1882, or at St Peter's Church of England in East Maitland where his mother sang in the choir, I feel sure that the young Evatt heard and attended to the words of the splendid Protestant hymn of J Russell Lowell:

*"Once to every man and nation
Comes the moment to decide,
In the strife of truth with falsehood,
For the good or evil side;
Some great cause, God's new Messiah,
Offering each the bloom or blight -
And the choice goes by forever
, 'Twixt that darkness and that light."*

Forty years ago Evatt's moment had come. He stood resolute for liberty in this country. He did so in the face of severe opposition in his own party. He knew the political risks. But he had to decide for the good or evil side - as all of us do at various times in our lives. It was a blessing for our country that this gifted man chose the light and not the darkness. And that, by ferocious tenacity of purpose, he led the Australian people to a decision which was as wise as it was unexpected.

Come back with me therefore forty years to the perils and controversies of 1951. Trace once again the heroism of Dr Evatt's titanic struggle against the forces which apparently democratic and liberal politicians in this country, out of fear or ambition, sought to unleash on the Australian people.

THE COMMUNIST PARTY DISSOLUTION ACT 1950

Evatt was no friend of Communists. He was a democratic socialist with a great faith in the institutions which

Australia had inherited from Britain: elected Parliaments; an uncorrupted Executive Government; and an independent judiciary in which he had already given notable service. In his time as a Justice of the High Court, Evatt had frequently shown a libertarian persuasion.¹⁸ But as Attorney General during the perils of the Second World War, he had not hesitated to use the sometimes Draconian powers of the Commonwealth *Crimes Act*. He had authorised the prosecution of Lance Sharkey, the General Secretary of the Communist Party.¹⁹ He had authorised the use of the *Crimes Act* against striking coal miners on the brink of the Federal election of 1949 which swept the Labor Government from office, not to be restored for twenty-three long years.²⁰

In fairness to Menzies and his followers, it is necessary to judge the communism legislation, and referendum in the light of the perceived perils of the time. Out of the alliances of the Second War had emerged a Soviet Union apparently bent on the conquest of Eastern Europe in the name of the official State religion: communism. The Berlin Blockade, the perils presented by the Soviet atom tests, the known cruelty of Stalin's despotism and then the advance of the communists in China under Mao, all contributed to a fear in Australia that the dominoes were falling. Perhaps we would be the next victims of the "dictatorship of the proletariat". In the sunny days of post-War reconstruction in Australia, this was far from an attractive prospect. The fears were fuelled by notions of racial superiority sustained behind the walls of the White Australia Policy. If China was on the march who would be next? In 1950 these fears seemed

confirmed by the advance of North Korea into the South in June of that year.

In the election of December 1949, Robert Menzies, with a rebuilt Liberal Party, returned to office. His promises were simple. Value back in the pound. An end to the post-War petrol rationing. And firm treatment of local communists. Menzies warned that some civil liberties may have to be sacrificed.

Within days of the election two of the Justices of the High Court of Australia who had served for long years retired. Menzies seized the chance to appoint two fine, conservative lawyers Wilfred Fullagar from Melbourne and Frank Kitto from Sydney. They took office from May 1950. They sat in the challenge to the communism legislation and Menzies would have had hopes that they would favour his side.

The *Communist Party Dissolution Act* 1950 was one of the first Bills the coalition government introduced after its election. Only twenty six pages precede it in the statutes of that year. It contained a number of very novel provisions. One of the most novel was the series of preambular recitals. By these provisions, the government sought to recite the Act into the Federal power to pass laws with respect to defence of the Commonwealth.²¹

INSERT EXTRACT TAPE 1

The recital asserted that the Australian Communist Party, in accordance with the basic theory of communism, engaged in:

"Activities or operations designed to assist or accelerate the coming of a revolutionary situation in which the Australian Communist

party, acting as a revolutionary minority, would be able to seize power and establish a dictatorship of the proletariat."

The Act also recited that:

"It is necessary for the security and defence of Australia and for the execution and maintenance of the Constitution and of the laws of the Commonwealth that the Australian Communist Party and bodies and persons affiliated with that Party should be dissolved and their property forfeited to the Commonwealth."

The machinery of the Act was particularly severe. It provided that the Communist Party was an unlawful association and, by the force of the Act, dissolved.²² It provided for "declarations" to be made that a person was a member of the Party or a Communist.²³ Any person so declared was incapable of holding office or being employed by the Commonwealth or an authority of the Commonwealth, specifically a trade union. No contracts with the Commonwealth were permitted. Various other civil penalties were imposed.

The machinery for "declaration" must have been designed by someone with a knowledge of efficient juntas. A small committee of officials was to decide whether a person should be so designated by the Governor General. A "declared" person had twenty-eight days to apply to a court to set the declaration aside. But the Act introduced a reverse onus of proof. The burden was on the person so declared to prove that he or she was not a person to whom the section applied.²⁴ Otherwise the declaration was *prima facie* evidence of that fact.²⁵ Numerous other provisions of the Act made easier the proof that a person was a communist by reference to speeches made, inclusion on lists

and otherwise. Wide search warrant powers were granted.²⁶ A decision of a single judge confirming a "declaration" was said by the Act to be "final and conclusive".²⁷

Unlike even the Draconian provisions of the *Crimes Act*, this statute punished Australian people not for what they had done but for what they thought; not for their actions but for their philosophy, ideas, their associates and their opinions. It invoked the means of totalitarianism to fight in Australia the perceived threat of a totalitarian party.

There are distinct parallels between the Australian legislation and the *Suppression of Communism Act* 1950 of South Africa. That Act was later renamed the *Internal Security Act*. Until very recently it poisoned the polity of that unhappy country. It had the same scheme: outlawry, declarations, reverse onuses, intolerance. Each of these Acts was derived, in turn, from the so-called *Smith Act* of 1946 in the United States.²⁸ An early harbinger of the McCarthy-ite intolerance, the *Smith Act* made it unlawful for a person to advocate the overthrow of the government of the United States by force or violence. It was challenged in the Supreme Court of the United States. In an ignoble decision, that Court upheld the validity of the *Smith Act* even in the face of the First Amendment. So much for written Bills of Rights put under the pressure of war or internal threat. Justice Douglas' ringing dissent in that Court was cited over and over again by Evatt, as it had earlier been by the Lowe Royal Commission in Victoria which rejected the idea of banning the Communist Party in that

state. William Douglas said:

*"Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party. It is inconceivable that those who went up and down this country preaching the doctrine of revolution ... would have any success. In days of trouble and confusion, when breadlines were long, when the unemployed walked the streets, when people were starving, the advocates of a short-cut by revolution might have a chance to gain adherents. But today, there are no such conditions. The country is not in despair. The people know Soviet communism. The doctrine of Soviet revolution is exposed in all of its ugliness and the American people want none of it."*²⁹

It is astonishing in retrospect that Menzies, a distinguished lawyer, did not heed his words but opted for the populist politics of outlawry. On the contrary, Menzies asserted the need for severe measures.

INSERT EXTRACT TAPE 2

Almost equally astonishing was Evatt's advice to Chifley that the Labor Opposition should allow the Bill to go through Parliament without testing divisions. The Bill was, of course, debated. In the debates, Evatt criticized it roundly.

INSERT EXTRACT TAPE 3

But Evatt was confident that the High Court would hold the Act unconstitutional. His opinion was borne out by events. It nevertheless shows something of a want of appreciation of the rôle of the democratic legislature that he was prepared

to allow the Bill to pass through without divisions. At the time, Labor had other fish to fry. It was seeking to stall the banking legislation by which Menzies was reversing the powers of the Commonwealth Bank inherited from Chifley's time. How ironical it is that we have lived to see a Labor Government complete the process of Menzies' privatisation of that Labor inspired institution.

THE HIGH COURT FACES A TEST

As soon as the Bill had been given assent, urgent application was made to the High Court in Melbourne to prevent its implementation. Assurances were given to Justice Dixon that nobody would be "declared" until the Federal Supreme Court had passed on the constitutionality of the Act. The test came before the Full High Court sitting in Sydney on 14 November 1950. To support the validity of the Act was Mr G E Barwick KC. With him were nine of the most distinguished lawyers of the country. Two of them (Alan Taylor and Victor Windeyer) were later appointed by Menzies to be Judges of the High Court. Barwick later still became Chief Justice. For the defendants, F W Patterson and E A Laurie acted for the Communist Party of Australia. But most attention was on Dr H V Evatt KC who appeared with Simon Isaacs KC and Mr Greg Sullivan for the Waterside Workers' Federation and the Federated Ironworkers' Association. It was an outstanding lineup of legal talent. In the rarified atmosphere of the old Court at Darlinghurst the legal arguments droned on. Across the water in Korea, Australian troops were in action. China had entered the Korean War on 1 November 1950.

The Court reserved its decision. On 9 March 1951 it

came down. All of the Justices, save for Chief Justice Latham, held the *Communist Party Dissolution Act* unconstitutional. In their judgments they rejected constitutionality by recital. They reflected the sharp remark of Justice Kitto during argument:

*"You cannot have punishment that is preventive. You can't remove his tongue to stop him speaking against you. That is wide open to a totalitarian State."*³⁰

The majority condemned the measure as unacceptably vague and indefinite to be truly one for the defence of the Commonwealth. Justice Dixon said:

*"History and not only ancient history shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within institutions to be protected. In point of constitutional theory the power to legislate for the protection of the existing forms of government ought not to be based on a conception ... adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend."*³¹

The judgments are a marvellous exposition of the constitutional theory of a pluralist democracy. Evatt, the lawyer, was vindicated.

THE REFERENDUM CAMPAIGN

Ten days after this shock decision, Mr Menzies secured from Governor General McKell a double dissolution of both Houses of Federal Parliament. He did so on the basis of the failure of the Senate to pass the *Commonwealth Bank Bill*. Chifley fought his last Federal election. The ALP won back five House of Representative seats. But it remained

in Opposition. Significantly, Menzies won control of the Senate. Dr Evatt, in the Seat of Barton, only just scraped home. Nancy Wake, a truly distinguished war heroine, battered Evatt's majority with ceaseless criticism of his appearance in the High Court. He was a defender of Communism. The label stuck, although most unfairly. Evatt's hold on Barton was always flimsy. How many elections as a boy I recall: listening on the edge of my seat to see if Evatt would be returned. This was a cruel humiliation for a man who, in the decade, had excelled on the world stage. Australia generally rejects its prophets. It reserves its special humiliations for intellectuals and men of women of learning and idealism.

Chifley continued for a time to lead the battered Labor Party, with Evatt as his junior. The message of Chifley's death arrested the merry dancing at the Jubilee Ball of June 1951 which celebrated the fiftieth year of the Federal Constitution. Evatt's time to lead the Labor Party had at last come. Now he had the chance to reach the aspiration to which his intellect, his training, his past high office, his international standing and his urgent ambitions prepared him. The moment had also arrived for his greatest test. It was, in the words of Lowell's hymn, the moment to decide.

Buoyed up by the electoral victory, Mr Menzies decided to proceed to a proposal for an amendment of the Australian Constitution. He proposed the insertion of a new section 51A into the Constitution. The austere language of that imperial document, drafted largely by Sir Samuel Griffith, was to have grafted upon it a provision empowering the Federal Parliament to make laws with respect to communists and communism. And

just in case the High Court did mischief to any future measure, the proposal included the express constitutional validation of the very Act of 1950 which the High Court had struck down.

The debates in Federal Parliament were ferocious. Menzies explained that the High Court, with entire legal accuracy, had shown that the powers of the Constitution were defective. Now the people must give Parliament the constitutional powers to fight communists.

Evatt rose to respond. W C Wentworth took a point of order that he could not speak, having once been counsel in a case for a party affected. The move was designed to throw Evatt off his guard. But Evatt inevitably had the floor. He reminded Parliament of the actions which had been taken by the Labor Party in Government against individuals for proved subversive acts. He reminded his listeners of the resolutions of the ALP against communist disruption of unions. He appealed to the wisdom of the High Court decision. He described the communists as a hopelessly weak political party. He condemned the resort to totalitarian methods to fight totalitarianism. He urged the people to refuse to put this "totalitarian blot" on the face of the Constitution which he held in reverence. Harold Holt called on to follow, said that the Parliament had just heard a speech from the "most notable defender of communism". This was to be Evatt's burden thereafter.

Within his own Party, there were many who were luke warm in their support for Evatt's crusade. Many privately supported the Menzies proposals. The Labor Party's strength, built largely upon the support of Catholic working men and

women, was conservative at its core. Menzies skilfully played upon public fear of those citizens for the communists. The menace to the North was readily invoked to touch the ever-present xenophobia of white Australia.

Menzies opened his campaign in Melbourne on 5 September 1951. He rejoiced in the hecklers whom he skilfully and wittily put down as "just another one of Dr Evatt's Reds". At one stage, the young Senator John Gordon shaped up to an interjector. It set the tone for what was to be lively campaign. Menzies, the urbane protector of British freedoms, was buoyed up by the opinion polls. They showed an initial 80% support for the proposal. It looked sure to pass. Those feint of heart in the Labor Party urged caution upon Evatt. Many fled from his colours. But he was tireless. He too defended British freedoms. The Lord Chancellor of England was in Australia for a Legal Convention. Injudiciously, he answered questions to the effect that Britain would never enact such a Bill. Under pressure from Menzies he later backed away from this hot local controversy.

Evatt opened his campaign at the Eveleigh Railway Workshops, Sydney on 7 September 1951.

Thereafter Evatt lurched from one side of Australia to another, travelling nine thousand miles. He made many broadcasts. He addressed countless small meetings. In some parts of the country, he had little or no assistance from the local Labor officials. In Tasmania, they refused to appear with him. If politics had been the sole guiding star of Evatt's life he would never have embarked upon this crusade.

Perhaps it took the blinkers of a lawyer or of an international humanitarian, imbued with the words of the

Common law and the Universal Declaration of Human Rights, to press on against all odds. The choice for Evatt on this issue was between darkness and the light. The clarity of the right side gave Evatt an increasing fervour and conviction. He was never an accomplished public speaker. It has recently been said that Australia's gift to the victorious allies after two World Wars was the presentation of two short men, causing a great deal of trouble, each with horrible voices: Billy Hughes and Bert Evatt.³² But Evatt seemed to rise to new heights in this campaign. Slowly he gathered around him many unexpected supporters. Many in the churches were fearful of how idealistic causes might fall within the vague words of the proposed power. Even the rebel J T Lang came to his side. Dr Mannix, later to be a foe, voiced quiet opinions against the referendum. There were few voices of dissent in the conservative parties. According to Hasluck a number expressed particular reservations about the reverse onus of proof. Yet in the branches, the Liberal Party political successor to the tradition of Alfred Deakin, was caught up in the mood of populist solutions. Barwick and Taylor in the last moment of the campaign produced an opinion suggesting that there was nothing to be afraid of. Evatt rebutted this. The media headlines became evermore frantic as the tide seemed to be turning. The *Sydney Morning Herald* played on the angry audiences which Menzies had to face. It asserted a noble call to something above party politics:

"The referendum is essentially a non-Party - a non-sectarian matter. The question should be answered on its merits which have nothing to do with the political complexion of the government proposing it. It is a simple question: should

*the elected Government of Australia, which is at all times answerable to Parliament and to the Australian people, have the power it now lacks to deal with the Red Fifth Column in our midst.*³³

In his last campaign speech at Bondi Beach Evatt called for a resolute defence of pluralist democracy. He was tired. But he was growing in confidence. He invoked the spirit of the much loved Chifley.

INSERT TAPE EXTRACT 5

And he finished his arduous campaign on a note of optimism of victory.

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PAST, PASSING & TO COME

On 22 September 1951 the votes were counted. Three of the six States rejected the proposal (New South Wales, Victoria and Western Australia). In the popular vote, Menzies secured the support of 49.44% of the people. The majority voted "No". In accordance with the Constitution, the referendum amendment was defeated.³⁴

Evatt told the subsequent meeting of the Labor Caucus that it had been more important to defeat the referendum than to win a series of Federal elections.³⁵ Given what might have followed, I agree. The result was undoubtedly fatal for Evatt's political ambitions. The label "defender of communists" stuck to Evatt. It was reinforced during the Petrov affair and the Royal Commission on Espionage which

followed it. It precipitated the bitter split in the Labor Party, partly along sectarian lines. Evatt's erratic behaviour and declining health ultimately required his removal. Even this was only achieved by his passage to the highest judicial seat in New South Wales. There his infirmities of health were all too clear to his conservative colleagues. They nonetheless carried him for two years for the sake of the institution. In my youth as an articled clerk, I was surrounded by well groomed young men who mocked this mental giant in his closing months. He was like Lear, disconsolate. The contributions to humanity and the law of the insignificant mockers is forgotten now. Evatt died on 2 November 1965. His country, typically enough, was distracted by the Melbourne Cup.

*"Once out of nature I shall never take
My bodily form from any natural thing
But such a form as Grecian goldsmiths make
Of hammered gold and gold enamelling
To keep a drowsy Emperor awake;
Or set upon a golden bough to sing
To lords and ladies of Byzantium
Of what is past, or passing, or to come."*

We have had enough of what is past: of the turbulent days of the 1950s. But it is right to tell again, and once again, the tale of the small band of idealists and true liberals who gathered round Evatt to help build a new world order founded on human rights and to defend them in Australia against assault. We can see about us today a world that is passing. Not for a minute in September 1951 would we have imagined the events of this past fortnight. There is a grim humour in the coincidence. But there are lessons as well.

What is to come? That is surely what Evatt would be asking himself at this critical moment of world history and

Australian history.

On the world stage he would surely be concerned that the evil genie of State communism would be replaced by philosophies equally discredited. By populist politicians, whose affinity to the corporate state can skilfully tap the passions of the crowd. All too often the crowd longs for a leader who will provide simple solutions to the complexities of life. We can already see glimpses of this danger as the Soviet Union breaks up amidst peremptory decrees dissolving the Communist Party, a tragedy if one autocracy is replaced by another.

Evatt would also have been concerned at the revival of old nationalisms.

He would be concerned with the revival of extremist religions: of intolerant Christianity, fundamentalist Islam, uncompromising Judaism and intransigent Hinduism. State communism, as practised in the Soviet Union, was an official religion. Humanity, it seems, still craves, obstinately, that abiding, "opiate of the people".

Would Evatt have cause to revise his assessment of the importance of his struggle in 1951, forty years on? Now he could see Labor installed in most of the governments of Australia and in Federal office which he longed to attain. Indeed, he would see Labor confirmed in Federal office in a series of elections. But he would know that, in March 1990, Labor won fewer than 40% of the national vote and was returned on the preferences of Democrats, Greens and Independents. Necessarily he would be concerned lest this change reflect a widespread cynicism amongst the people, a rejection of the Party a hundred years old and a defection to

new ideas which the Party was slow to embrace.³⁶ He would certainly be surprised at the declining membership of the Party, particularly amongst young people; the high unemployment; the fire sale of the "people's assets" and the contempt in many quarters in the Party for idealism. He would surely ask himself repeatedly whether he would ever have bothered to fight the referendum if his had been the approach of short-term expediency rather than long-term principle.³⁷ Yet he would know that, without a cluster of unifying principles his Party would lose its mission: offering no more to the people than other parties, though with messages expressed in gentler words by people ever so well intentioned.

In a landscape barren of ideology, Evatt today would seek out the issues of the 21st century: environmentalism; truly participatory democracy; feminism; multiculturalism; equal opportunity; Aboriginal rights and universal human rights. I feel sure that the stubborn Evatt, if he had thought it right, would not have declined to act on gun laws for fear of a vociferous minority. He would not have declined to object to mandatory testing of prisoners for HIV and AIDS because there are "no votes in it".³⁸ He would not have abandoned efforts of constitutional education and reform to update the "horse and buggy constitution", a century after its adoption.³⁹ And he would seize the opportunity of the end of the Cold War to establish the new world order in the United Nations and to redefine Australia's part in that order. He would realise what an historical anachronism this European country in the South Seas is and how urgent is our realignment with the advancing economies of

Asia which now overtake us. For him, the brilliant boy from Maitland, the aspirations of a "clever country" would be more than an electoral slogan.

To the question "Is idealism dead?", the answer comes back only for those cold of heart and those lacking in vision. A hundred years ago Queen Victoria ruled. The Australian Federalists had just had their first conference in the Legislative Council of this Parliament: the oldest democratic Chamber in the nation. The Labor Party had just been established in the form of the Labor Leagues. Up in Maitland the young Evatt family was about to produce a boy who would go on to do famous things on the world stage and in his own country.

At about this time, Henry Lawson wrote his ironical poem *Australian Engineers*:

*"A new generation has arisen under Australian skies
Boys with the light of genius deep in their dreamy eyes
Not as of artists and poets with the vain imaginings,
But born to be thinkers and doers and makers of
wonderful things*

Evatt had the defects to which all humans are heir. But we are not here tonight to belabour his faults. We are here to reflect on his dazzling achievements in critical moments for this country and for the world. He had the vain imagining of an international legal order of human and peoples' rights safeguarded in a world of peace. He was born to be thinker and doer. And the wonderful thing he safeguarded for us, by a most courageous exhibition of practical idealism was the pluralist, liberal democracy we live in: accepting diverse opinion. He knew that human rights matter most when small unpopular minorities are threatened. That is when populism

must give way to protection. That is when expediency must give way to principle. We can take inspiration from his efforts. But we cannot escape the vexing question which his crusade leaves for us. It is whether, in this generation, we are equal to similar tests of our resolve and to our idealism.

FOOTNOTES

- * President of the Australian Section of the International Commission of Jurists and Member of the Executive Committee of the International Commission of Jurists, Geneva. Personal views.
 - * This paper draws upon a more detailed history of the Communism Referendum contained in the author's H V Evatt, The Anti-Communist Referendum and Liberty in Australia (1991) 7 *Aust Bar Rev* 93.
1. J Crawford,
 2. Preamble to the Charter of the United Nations in I Brownlie, *Basic Documents in International Law*, 3rd ed, Clarendon, Oxford, 1983, 1 at 2.
 3. *Ibid*, 3.
 4. *Id.*
 5. *Id.*
 6. W J Hudson, Dr H V Evatt at San Francisco in (1991) *The Monthly Record (DFAT)* 161.
 7. K Tenant, *Evatt, Politics and Justice*, Angus and Robertson, Sydney, 1970, 5.
 8. See R P Meagher, unpublished paper on Dr Evatt prepared for the conference, Sydney, 30-31 August 1991.
 9. Francis Stuart, quoted Hudson 162.
 10. Hudson, 162.

11. Hasluck quoted Hudson 163.
12. *Ibid.*
13. Manning Clark, quoted Hudson, 164.
14. *Ibid*, 165.
15. See R P Claude and B H Weston, *Human Rights in the World Community - Issues and Action*, Uni Pennsylvania, Philadelphia, 1989, 196.
16. See D McGoldrick, *The Human Rights Committee - Its Role in the Development of the International Covenant on Civil and Political Rights*, Clarendon, Oxford, 1991, 4ff.
17. See joint media release by the Hon Robert Tichner, the Hon Neal Blewett and the Hon Michael Duffy, *Australia to Give Right to International Appeal*, 31 July 1991.
18. *The King v Husch; ex parte Devanny* (1932) 48 CLR 487, 510.
19. *The King v Sharkey* (1949) 70 CLR 121.
20. Tenant, 249ff.
21. See Australian Constitution, s 51(vi). See now *Polyukhovich v The Commonwealth of Australia & Anor*, unreported, High Court, 14 August 1991.
22. *Communist Party Dissolution Act* 1950, s 4.
23. *Ibid*, s 9.
24. *Id*, s 9(5).
25. *Id*, s 9(6).
26. *Id*, s 22.
27. *Id*, s 23(5).
28. 18 USC par 2385. See also *Subversive Activities Control Act* 1950 (US) and *Communist Control Act* 1954 (US). The similarities between the Australian and

South African statutes and the Smith Act suggest that the drafters of the former had the Smith Act before them. However, the Australian Act also appears to have drawn upon the *Unlawful Associations Act* 1916 (Cth). The lastmentioned Act was considered by the High Court in *Pankhurst v Keirnan* (1917) 24 CLR 120. Its constitutional validity was upheld under the defence power. By s 4 of the Act, the encouragement of the destruction of or injury to property was proscribed. Its specific target was an "association known as the Industrial Workers of the World" (IWW). Section 2 of the Act declared the IWW (and other associations) to be "unlawful associations".

29. *Dennis et al v United States* 341 US 494, 588 (1951).
30. Cited Tenant, 267.
31. *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 187.
32. *Hudson*, above n 6, 165.
33. *Sydney Morning Herald*, 14 September 1951, 2.
34. Australian Constitution, s 128.
35. Tenant, above n 7, 276.
36. S McIntyre, "Decline and Fall" in D Burchell and R Mathews, *Labor's Troubled Times*, Pluto, 1991.
37. *Ibid*, 25.
38. This was the excuse reportedly given in the Labor Caucus by a senior member of the State Labor Party for refusing to press the issue.
39. See Evatt, (1942) 16 *ALJ* 160, 161.